

The Gerrymander and the Commission: Drawing Electoral Districts in the United States and Canada

CHARLES PAUL HOFFMAN*

"[C]ompactness is a bit like pornography—although we know it when we see it, individual sensitivities and community standards vary widely."¹

I. INTRODUCTION

The political systems of the United States and Canada differ substantially — the United States uses a presidential system with a bicameral legislature and Canada uses a prime ministerial model dominated by the House of Commons. However, both states rely on a first-past-the-post plurality electoral system wherein candidates face off in single-member districts with the largest vote-getter winning. As such, each nation must use some procedure to draw legislative maps so that politicians and voters may know where district boundaries end.

The two nations, however, have settled upon fundamentally different models for drawing districts and for judging the validity of those districts. While political actors dominate districting in the United States, Canadian districts are drawn by independent commissions. Likewise, while American districts must be practically equal in population, Canadian districts may differ substantially to advance the interests of effective representation.

This essay analyzes the differences between American and Canadian models of districting and seeks to explain the origin of those differences. Part II looks at

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¹ Mark Monmonier, *Bushmanders and Bullwinkles: How Politicians Manipulate Electronic Maps and Census Data to Win Elections*, (Chicago: University of Chicago Press, 2001) at 64.

the American model of districting and the high levels of judicial scrutiny imposed on American districts. Part III looks at Canadian districting, the rise of independent reapportionment commissions, and the broad deference Canadian courts give to them. Finally, Part IV argues that the differences between the United States and Canada are path dependent, based primarily on minor decisions made early in the two nations' histories, incidental variations that have made reform easier at different times in the two countries, and differences in settlement patterns and demographics.

II. DRAWING ELECTORAL DISTRICTS IN THE UNITED STATES

With few exceptions, the mapping of legislative districts in the United States is highly politicized. The decennial reapportionment of congressional and legislative districts required by the Constitution² is frequently used as an excuse to redraw electoral maps to the advantage of a particular party, most notoriously with the Massachusetts "gerrymander" of 1812. In order to decimate the political power of the opposition Federalist party, Federalist voters were packed into a single, salamander-shaped district. A political cartoonist named the district the "Gerrymander" for then Massachusetts governor Elbridge Gerry, a name attached to partisan redistricting to this day.³ At other times, the dominant parties use the required reapportionment as an excuse to protect incumbents from opposition, effectively keeping small parties out of the legislature.⁴ Thus even when Democrats and Republicans come together to endorse a plan, it is not because the plan is non-partisan, but because it reinforces the dominance of the two parties.

Although states and the federal government have implemented various reforms to make the process less overtly political, most reforms have failed to improve the situation; some have in fact made it worse. The Supreme Court's "one-person, one-vote" doctrine, for instance, has made remapping more frequent while simultaneously eliminating most non-political considerations. The *Voting Rights Act*,⁵ while instrumental in electing minorities to Congress and state legislatures, has been used as an excuse by politicians to pack Democratic

² U.S. Const. art. I, § 2, cl. 3. ("The actual Enumeration [of congressional representation] shall be made . . . within every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person in its jurisdiction the equal protection of the laws."). See also *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

³ Monmonier, *Supra* note 1, at 1–2.

⁴ See, e.g., Monmonier, *Supra* note 1, at 53, 55, 80.

⁵ *Voting Rights Act*, Pub. L. 89–110, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973 (2000)). See *infra* Part II.A.

voters into oddly-shaped districts. Even where states have adopted semi-autonomous districting commissions, the commissions often remain partisan and can make matters worse, as in Illinois, where control of commissions is determined by a random coin toss.⁶ A few jurisdictions, notably Iowa, have adopted reforms that have been successful in depoliticizing the apportionment process. But for the vast majority of states, the remapping process remains deeply political.

A. Who Draws the Districts?

In the United States, it is generally left to the state legislatures to draw all electoral districts. Although Congress has power under the Constitution to alter state regulations on the manner of electing federal representatives,⁷ early practice deferred to states the power of drawing federal districts, and states have generally been allowed to do so as they please. It has thus been left up to the state legislatures to draw federal as well as state districts; unless the state's constitutional structure places this power elsewhere.⁸

Where Congress has acted, it has been to prescribe general guidelines for districts, rather than to take upon itself the burden of drawing maps. The *Apportionment Act of 1842*, for example, required that congressional districts be contiguous single-member districts.⁹ Although few states had used multi-member districts or at-large voting for Representatives, the practice was popular in states with large urban areas.¹⁰ A provision added in 1872 required that the districts, "as near as practicable, [include] an equal number of inhabitants."¹¹ Finally, the 1901 *Apportionment Act* required that districts be compact.¹² These

⁶ I.L. Const. art. IV, § 3(b). ("If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State . . . [T]he Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission."); See also Jeff Greco, *The Power of Redistricting Seen in its Effects on 2002 Elections*, (Stateline, Midwest, June 2002), at 5, available at <http://www.csgmidwest.org/MemberServices/Publications/SLMW/2002/0602/June2002.pdf>.

⁷ U.S. Const. art. I, § 4, cl. 1 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.").

⁸ See *infra* Part II.C.

⁹ *Apportionment Act of 1842*, c. 14, 5 Stat. 491.

¹⁰ See *infra* Part II.B.

¹¹ *Apportionment Act of 1872*, 17 Stat. 28.

¹² *Apportionment Act of 1901*, 31 Stat. 733–734.

requirements were maintained until the *Reapportionment Act of 1929*,¹³ which repealed *The 1911 Apportionment Act*.¹⁴ Although the 1929 Act did not expressly repeal the equal population or multi-member district provisions, the Supreme Court interpreted the act as abolishing all federal controls of state districting.¹⁵ While states generally followed the proscription of multi-member districts and the guidelines concerning contiguity and compactness, they neglected the equal population requirements and Congress failed to enforce them.¹⁶ Faced with a situation in which they had to choose between traditional political boundaries and districts with substantially equal populations, the state consistently opted for traditional boundaries.

Beginning in the mid-1960s, however, Congress began to assert a role in the redistricting process. Finally fed up with the exclusionary tactics of southern states that had systematically denied African Americans the right to vote, Congress passed the *Voting Rights Act* in 1965.¹⁷ Along with implying a private right of action where a standard, practice or procedure restricted an individual's right to vote,¹⁸ the *Voting Rights Act* subjected most southern states (and later some northern and western states) to the Department of Justice's pre-clearance procedure.¹⁹ Under the pre-clearance procedure, a state or county subject to the *Voting Rights Act* must submit any proposed changes to its election law to the Department of Justice for approval. Only if the Attorney General fails to object to the change within sixty days may it be implemented. Because the *Voting Rights Act* applies to redistricting as well as procedural changes to election law, changes to the electoral map require the approval of the Department of Justice.²⁰ Justice Department practice has been to maximize the number of minority-majority districts in covered states.²¹ Where minorities do not make up a majority in a traditionally compact district, strangely shaped districts have been

¹³ *The Reapportionment Act of 1929*, Pub. L. No. 71-13, 46 Stat. 21.

¹⁴ *The 1911 Apportionment Act*, Pub. L. No. 62-5, 37 Stat. 13. The 1911 Act had set the size of the House of Representatives at 435.

¹⁵ *Wood v. Broom*, 287 U.S. 1 (1932).

¹⁶ By the time individuals brought suit in federal court to enjoin unequal districts, Congress had vetoed by implication the requirement for substantially equal populations. See *Wood v. Broom*, 287 U.S. 1 (1932).

¹⁷ *Voting Rights Act*, Pub. L. No. 89-110, 79 Stat. 439, (codified as amended at 42 U.S.C. § 1973 (2000)).

¹⁸ *Ibid.* at § 2.

¹⁹ *Ibid.* at § 5.

²⁰ See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

²¹ See *Monmonier Supra* note 1, at 24-25.

encouraged. The *Voting Rights Act* can thus be seen as a reversal of the older congressional policy that encouraged compact districts.²² Without other legislation requiring that districts be compact, the *Voting Rights Act* serves as a congressional green light to the gerrymanders of today.²³

Despite the passage of the *Voting Rights Act*, however, the American perception is that the states are responsible for drawing federal electoral boundaries. A century and a half of neglect and lax standards reinforced early decisions deferring this power to the states. Thus, federal interventions such as the *Voting Rights Act* and similar legislation are still seen by many not as a legitimate use of congressional power or an assumption of a neglected duty, but rather as an infringement of federalism, best undone when it is no longer necessary. Indeed, opposition to the Texas congressional redistricting in 2003 focused as much on the role of federal House of Representatives majority leader Tom DeLay as on the plan itself.²⁴ For better or for worse, electoral districting in the United States lies firmly in the hands of the states.

B. Rise of Judicial Review of American Electoral Districts

Until the 1960s, the construction of electoral districts remained a purely political question, not subject to judicial oversight. Despite this lack of outside control, however, the process remained generally apolitical, decisions being made on the basis of geography rather than partisan politics. Although some notable exceptions exist (notably the infamous Massachusetts gerrymander), districts were largely drawn to conform to county lines and natural boundaries.²⁵ Where large urban populations made it impossible to draw single-member districts without breaking up counties, state legislatures generally opted to create multi-member districts encompassing the entire county.²⁶ Although representation in

²² Such districts, however, must still be contiguous and contain as near as equal populations as possible.

²³ Although the minority-majority districts drawn to comply with the *Voting Rights Act* are rarely compact or particularly slightly, the white-majority districts surrounding them are rarely better. Even where districts do not border on a minority-majority district, it is rare for the district to follow existing political boundaries. See Monmonier, *Supra* note 1, at 51–76, 84–85.

²⁴ See *infra* Part II.D.

²⁵ See generally Monmonier, *Supra* note 1.

²⁶ *Ibid.* at 137–138. This procedure was used in New York City, Philadelphia, and several smaller urban areas.

the state legislatures and in Congress was not equal in the “one-person, one-vote” sense, the method of apportionment was apolitical.²⁷

As time passed, however, this focus on the county became grossly unfair to urban residents. Population growth in urban areas was generally much higher than in rural counties. Between 1850 and 1900, the percentage of Americans living in urban areas increased from 15% to 40%,²⁸ making districts that had been roughly equal in size grossly unequal. Many states, however, maintained their old electoral maps.²⁹ By the 1960s, disparities between the largest and smallest legislative districts in a state were immense, ranging from 2.2 times in Hawaii and 1,081.3 times in New Hampshire.³⁰

Reapportionment was more frequent, however, in the context of congressional representation. Because a state’s representation in the House of Representatives could rise or fall with each decennial census, congressional maps had to be updated more frequently than state legislature maps, which could remain unchanged so long as the size of the legislative chambers remained static. The increased rate of remapping, however, did not change the underlying principles of apportionment, and districts continued to be drawn on the basis of county boundaries, without substantial consideration of population differences.³¹ Thus while the disparity between congressional districts never approached the astronomical New Hampshire state legislature differential, urban districts were often two to three times more populous than their rural counterparts.³²

It was in this environment that the Supreme Court finally became involved in redistricting in the groundbreaking *Baker v. Carr*.³³ Breaking with prece-

²⁷ Some states, however, adopted at large elections designed to maximize the power of the majority party in the state. New Jersey, for instance, elected all of its representatives to the House of Representatives in a statewide at-large election. *Id.* at 137. The practice is analogous to the oft-complained-of winner-take-all rule in presidential elections, where a candidate with a slim plurality of the popular vote in a state can carry all of its electoral votes.

²⁸ Michael L. Balinski & H. Peyton Young, *Fair Representation: Meeting the Ideal of One Man One Vote* (Yale University Press: New Haven, 1982) at 36.

²⁹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Colgrove v. Green*, 328 U.S. 549 (1946).

³⁰ *Supra* note 1, at 22–23.

³¹ See, e.g., *Wood v. Broom*, 287 U.S. 1 (1932) (finding that Mississippi’s reapportionment following the 1930 census, which had reduced the state’s representation in the House of Representatives from nine to eight, did not violate Article I or the Equal Protection Clause because of unequal population distribution among the remaining districts).

³² *Supra* note 1, at 21–22.

³³ 369 U.S. 186 (1962).

dent,³⁴ the Court found justiciable claims that Tennessee had not provided equal votes to the residents of different districts in selecting legislators. At the time, the largest districts were eleven times the size of the smallest;³⁵ about 40% of the state's voters could elect nearly two-thirds of both the Tennessee House and Senate.³⁶ Despite repeated efforts at reform, the system had become broken, as a majority of legislators would have to vote against their own personal interests (and the interests of their constituents, who were overrepresented in the legislature) to distribute power evenly on the basis of population. As Tennessee had no popular initiative procedure, the people of the state had no recourse other than suit in federal court.³⁷ Thus, without some action on the part of the Court, the grossly unfair Tennessee map would never have been redrawn in favor of urban voters.

The Court's decision in *Baker*, however, failed to establish guidelines for judging the legality of legislative districts.³⁸ Such guidelines appeared in 1964, when the Court issued opinions in the landmark cases of *Wesberry v. Sanders*,³⁹ *Reynolds v. Sims*,⁴⁰ and *Lucas v. Forty-Fourth General Assembly of Colorado*.⁴¹ Together, this trio of cases established the "one-person, one-vote" principle in the United States and applied it to congressional⁴² and state legislative districts,⁴³ even when a majority of the state in a popular referendum preferred otherwise.⁴⁴

³⁴ *Colgrove v. Green*, 328 U.S. 549 (1946) (holding that challenge to reapportioning was a non-justiciable political question).

³⁵ *Supra* note 31, at 254 (Clark, J., concurring).

³⁶ *Supra* note 31, at 253 (Clark, J., concurring).

³⁷ *Supra* note 31, at 258–259 (Clark, J., concurring). Congress had no jurisdiction to act under Article I because the districts were for the state legislature rather than Congress, as in *Colgrove*.

³⁸ This is unsurprising, considering the procedural history. The issue before the Court in *Baker* was whether claims concerning electoral districts were justiciable at all. Although the Court could have gone on to develop concrete rules for districts, it was almost certainly more prudent to simply remand the case to the district court, as the Court did. *Supra* note 31, at 237.

³⁹ 376 U.S. 1 (1964).

⁴⁰ 377 U.S. 533 (1964)

⁴¹ 377 U.S. 713 (1964).

⁴² *Supra* note 37.

⁴³ *Supra* note 38.

⁴⁴ *Supra* note 39 (invalidating Colorado's electoral scheme, approved by a majority of voters in all counties, that would have apportioned seats in lower house by population and seats in upper house by population and other considerations such as geography).

Because voting was a fundamental right protected by the Constitution,⁴⁵ the diminution of one person's vote vis-à-vis the votes of others is a violation of the Fourteenth Amendment's Equal Protection Clause⁴⁶ and the Article I guarantee that "the People"⁴⁷ elect members of the House of Representatives.⁴⁸ District boundaries for congressional seats as well as seats in both houses of a state legislature were thus required to be apportioned with substantially equal populations.

Although the 1964 opinions suggested that some mild deviation from the average may be permissible in drawing districts,⁴⁹ later decisions have strictly limited even mild deviation. Congressional districts have been subject to especially strict scrutiny. When New Jersey reapportioned its congressional districts following the 1980 census, the differential between the largest and smallest districts was less than seven-tenths of a percent.⁵⁰ Even so, the Supreme Court invalidated the reapportionment because the New Jersey legislature had rejected other plans with smaller deviations between the smallest and largest districts.⁵¹ However, state legislative districts have been upheld with deviations as large as 16%.⁵² While geographic and other considerations may thus have some impact on the apportionment of state electoral districts, congressional districts must be as near to equal as possible.⁵³

⁴⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356, at 370 (1886) ("[T]he political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights.").

⁴⁶ *Supra* note 38, at 561-562.

⁴⁷ U.S. Const. art. I, § 2, cl. 1.

⁴⁸ *Supra* note 37.

⁴⁹ *Supra* note 38, at 577 ("[W]e mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.").

⁵⁰ *Karcher v. Daggett*, 462 U.S. 725, at 728 (1983). The largest district was about 0.23% larger than the average, while the smallest district was about 0.47% below average.

⁵¹ *Ibid.*

⁵² See *Mahan v. Howell*, 410 U.S. 315 (1973) (upholding reapportionment where largest district deviated from average by 6.8 percent and smallest by 9.6 percent).

⁵³ Indeed, the Court in *Karcher* dismissed the notion that New Jersey should be able to deviate minimally from the norm so as to maintain political boundaries within the state. *Supra* note 48, at 733 n.5 ("Note that many of the problems that the New Jersey Legislature encountered in drawing districts with equal population stemmed from the decision . . . not to divide any municipalities between two congressional districts . . . Preserving political subdi-

The Supreme Court's review of electoral districts did not, however, focus entirely on equality of population. Since the passage of the *Voting Rights Act* and the proliferation of minority-majority districts, the Court has developed criteria to judge the most-awkwardly shaped districts.⁵⁴ But while minority-majority districts were treated with suspicion, equally awkward white-majority districts were ignored despite the fact that they were the result of intentional gerrymanders.⁵⁵ Although the Court has recently shown signs that it might prohibit the most egregious partisan gerrymanders, it has yet to actually do so⁵⁶ and four justices remain opposed to any review of gerrymander cases.⁵⁷ It is thus unlikely that many (if any at all) partisan gerrymanders would be invalidated by the Court, as the remaining five justices would all have to agree.

Although the Supreme Court has become involved in reviewing reapportionment since the 1960s, its involvement has done little to resolve the problem of partisan gerrymandering. In fact, the "one-person, one-vote" principle established by *Reynolds* and its progeny has actually contributed to gerrymandering because of the frequency of reapportionment (at least every ten years) and the very strict numerical equality insisted upon by the Court. Because the Court has been unwilling to permit even slight variances in population in order to follow traditional political boundaries, state legislators have felt free to draw oddly shaped districts for partisan purposes. Thus while the Court in *Baker* and *Reynolds* had believed that its involvement would solve the problem of partisan gerrymanders, it has, in actuality, made the situation worse.⁵⁸

visions intact, however, while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality . . .").

⁵⁴ See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that minority-majority districts are subject to strict-scrutiny when district boundaries explainable only as racial gerrymander).

⁵⁵ See *Bush v. Vera*, 517 U.S. 952, 1020 (1996) (Stevens, J., dissenting) ("For every geographic atrocity committed by [Black-majority] District 30, [white-majority] District 6 commits its own and more."); *Supra* note 1, at 58–71.

⁵⁶ See *Jackson v. Perry*, 125 S. Ct. 351 (2004) (remanding Texas redistricting in light of *Vieth*); *Cox v. Larios*, 124 S. Ct. 2806 (2004) (Stevens, J., concurring) (invalidating Georgia legislative districting in part because of partisan objectives); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Kennedy, J., concurring) (leaving open future claims of impermissible partisan gerrymanders); *Davis v. Bandemar*, 478 U.S. 109 (1986).

⁵⁷ *Vieth*, 541 U.S. 267 (2004) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, and Thomas, J.J.).

⁵⁸ This is not to suggest that the Court's "one-person, one-vote" and *Voting Rights Act* decisions were wrong. Rather, it is an acknowledgment that strict numerical equality and maximization of minority-majority districts on their own will not prevent political actors from stacking the deck.

C. Independent Redistricting Commissions

Although most states and municipalities draw electoral districts through a combination of legislative mapping and judicial oversight, some jurisdictions have developed alternative means of drawing districts or holding elections. One solution—the independent redistricting commission, takes control of reapportionment from legislatures and places it in the hands of nonpartisan commissioners. But while those jurisdictions that have adopted independent commissions have generally been happy with them, other jurisdictions have been slow to reform.

One of the easiest ways to prevent political gerrymanders has been to take the decisions regarding political boundaries out of the hands of the legislature. By placing the power to draw districts in an independent commission, the worst excesses of the political process can be avoided. This is, however, easier said than done, as it can be extremely difficult to actually form such a commission. Although seventeen states have some form of redistricting commission, few states have given the commission's real power or guaranteed their independence. Illinois, for example, has a commission that may act whenever the legislature is unable to agree to a map.⁵⁹ First priority thus remains in the legislature to draw electoral boundaries.⁶⁰ When the commission is called on to act, however, it is far from independent, as it is made up of an equal number of Democrats and Republicans.⁶¹ If the commission cannot agree to a map, the two political parties may nominate a person to serve as the tie-breaking chairman of the commission. The Secretary of State is then to select the name of one of these individuals from a hat; in practice, the matter is decided by a coin toss.⁶² The prevailing party is then able to force through its own redistricting plan over the objections of the minority.

When Illinois adopted this system, it was expected to reduce bipartisanship because no party would ever be willing to risk the coin toss. Instead, the system has never worked as intended: the 1980 redistricting (the first under the current Illinois constitution) ended in deadlock and the coin toss was won by the Democrats, the 1990 redistricting was won by the Republicans, and the 2000 by the Democrats again. Rather than facilitating compromise, the coin toss has encouraged each side to demand far more than the other side would be willing to give because there was an equal chance they could get it.

In contrast, the system adopted by Iowa grants all decision-making to a fully independent, non-partisan Legislative Service Bureau (LSB),⁶³ a bureaucratic

⁵⁹ I.L. Const. art. IV, § 3(b).

⁶⁰ In practice, however, the legislature never agrees to a remapping for reasons set out below.

⁶¹ *Supra* note 56.

⁶² *Ibid.*

⁶³ Iowa Code § 42.1–42.6 (2003).

agency that assists with legislation. The LSB is instructed to draw districts so that they are as near to equal in population as possible, while keeping districts compact and without splitting political subdivisions more than necessary.⁶⁴ In addition, the LSB must not consider where incumbents live, the political affiliation of voters or the results of prior elections, or even demographics.⁶⁵ Although the LSB's maps are then submitted to legislature for approval,⁶⁶ the legislature has thus far accepted the LSB's apportionment.⁶⁷ Most politicians and the Iowa public have been generally happy with the procedure.⁶⁸

By contrast, the implementation of independent election commissions has not been entirely successful in Arizona, which is subject to Department of Justice pre-clearance under the *Voting Rights Act*. Arizona's independent redistricting commission, created in 2000 by an amendment to the Arizona constitution,⁶⁹ is assigned the duty of drawing congressional and state legislative districts.⁷⁰ The commission is made up of two Democrats and two Republicans, as well as a chair who may not be a registered member of either party.⁷¹ The commission is instructed to draw districts of equal population following a grid pattern.⁷² Changes to these districts are then made to comply with the U.S. Constitution and the Voting Rights Act, to create compact and contiguous districts, to respect communities of interest, to respect natural and municipal boundaries, and, interestingly, to create competitive districts.⁷³ Although the commission may not look at party registration or voting history when drawing maps, it may review such materials after the fact to ensure that the maps drawn comply with these goals.⁷⁴ Like the Iowa LSB, the commission cannot consider where in-

⁶⁴ *Iowa Code* § 42.4 (2003).

⁶⁵ *Iowa Code* § 42.4(5) (2003).

⁶⁶ *Iowa Code* § 42.3 (2003). The three maps (congressional, state house, and state senate) must be approved together without amendment. If they are rejected, they are sent back to the LSB to redraw. Only after three such maps may the legislature draw the maps itself.

⁶⁷ *Supra* note 1, at 101.

⁶⁸ *Ibid.*

⁶⁹ See Rhonda L. Barnes, Comment, "Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation, and Regret" (2003) 35 *Ariz. St. L.J.* 575, for general background on the adoption of the amendment.

⁷⁰ A.Z. Const. art. 4, pt. 2, § 1(3) (2000).

⁷¹ A.Z. Const. art. 4, pt. 2, § 1(3)-(9) (2000).

⁷² A.Z. Const. art. 4, pt. 2, § 1(14) (2000).

⁷³ A.Z. Const. art. 4, pt. 2, § 1(14) (2000).

⁷⁴ A.Z. Const. art. 4, pt. 2, § 1(15) (2000).

cumbents or candidates live.⁷⁵ But unlike the LSB, the Arizona commission is required to pre-clear its maps with the Department of Justice. When the commission submitted its maps to the Department of Justice in 2002, five of its districts were found to have the effect of retrogression for minority voters.⁷⁶ The commission amended its maps to the satisfaction of the Department of Justice and they were used in the 2002 election.⁷⁷ However, the added burden of pre-clearance prevented the procedure from working as effectively as in Iowa.

D. The Current State of Reapportionment in the United States and the Prospects for Future Reform

Following the 2000 presidential election, electoral reform has resurfaced as a minor theme in American politics. Although national schemes have focused on ensuring individuals the right to vote and to have their votes counted,⁷⁸ some states have considered reforms to the districting process. But, in the current hyper-partisan state of American politics, electoral reform is seen as a zero-sum game, leading many to oppose sensible reforms that might locally help one's opponents. At the same time, politicians have relied on this increased partisanship to force through questionable gerrymanders, including the infamous 2003 Texas redistricting. Thus, while proponents of electoral reform since 2000, gerrymandering continues unabated.

In 2005, both California and Ohio voted on the adoption of a commission-style reapportionment scheme. In the end, both initiatives failed. Surprisingly, most pundits surmised that the commission schemes had appeared too partisan, a sad side-effect of contemporary American politics.⁷⁹ In California, the redistricting proposal was an integral part in Governor Schwarzenegger's reform agenda;⁸⁰ the decline in Schwarzenegger's political fortunes thus helped to doom an otherwise sensible reform. Furthermore, in both California and Ohio, the commissions were to redraw electoral maps before the 2006 federal and state elections, rather than following the 2010 census. Opponents of the initiatives could thus easily tie the commission scheme to parties out of power seek-

⁷⁵ A.Z. Const. art. 4, pt. 2, § 1(15) (2000).

⁷⁶ *Supra* note 67, at 582–586.

⁷⁷ *Ibid.* at 588–594.

⁷⁸ See, e.g., *Help America Vote Act of 2002*

⁷⁹ See, e.g., Dean E. Murphy, "Idea Lab: Who Should Redistrict," *N.Y. Times Magazine*, Oct. 23, 2005.

⁸⁰ "Schwarzenegger's California: Blowing Up the Boxes," *The Economist* 377:8451 (Nov. 3, 2005) 28.

ing to change the rules mid-game.⁸¹ It is thus ultimately unsurprising that voters opted for a system they were used to instead of one with which they were uncertain.

Like California and Ohio, Texas also recently found itself the center of districting controversy. Although a large majority of Texans had voted for George W. Bush in 2000 and both of Texas' senators were Republican, a slim majority of Texas' representatives to the federal House of Representatives were Democrats.⁸² While this could largely be attributed to the continued popularity of conservative Democrats who had been in Congress for decades, a legacy that would eventually fade as they retired, Republicans feared that these few seats were needed to prevent the loss of the House of Representatives to the Democrats in 2004 or 2006. Facilitated by House Majority Leader Tom DeLay and the Bush administration, the Republican dominated Texas legislature took up the redistricting plan in earnest.

It is remarkable how far the parties involved were willing to go to pass or defeat the Texas redistricting. After Texas Senate leaders realized they would not have the requisite two-thirds support to consider the redistricting bill because of the opposition of Democrats, Lieutenant Governor David Dewhurst, who served as the Senate's presiding officer, broke with precedent to sidestep the supermajority requirement.⁸³ Faced with defeat, Democratic legislators fled the state twice to deprive first the Texas House and then the Senate of the required quorum,⁸⁴ prompting Tom DeLay to pressure the Federal Aviation Administration, on the grounds of national security, to track the plane used by Democrats to leave the state.⁸⁵ When the final redistricting bill was submitted to the Department of

⁸¹ Schwarzenegger made it clear that he hoped a more friendly (i.e. Republican) legislature would be elected under the reform for his second term, while the Ohio measure was associated with progressive group MoveOn.org, known more for its hatred of George W. Bush than for its policy positions. John M. Broder, "In a Rebuke of Governor, California Voters Reject Spending Cap," *N.Y. Times*, Nov. 9, 2005.

⁸² "Tom DeLay's Chef d'oeuvre," *The Economist* 369:8346 (Oct. 18, 2003) 54.

⁸³ Time Mellett et al, *Section 5 Recommendation Memorandum* (Dec. 12, 2003), at 4, available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>. Legislative sessions generally began with the introduction of a so-called "blocker bill," which would be placed at the top of the Senate's agenda. Since Senate rules prohibited changing the legislative order of business without a two-thirds vote, the bill, which was not intended to be considered or passed, effectively required that a supermajority of senators supported the legislation generally. *Ibid.* The blocker bill thus serves a similar purpose to the filibuster, but in reverse: while the filibuster prevents passage of a final amended bill of which a minority disapproves, the blocker bill prevents any consideration of the bill to begin with when opposed by a sizable minority.

⁸⁴ *Ibid.* at 3-4.

⁸⁵ "Tom DeLay's Chef d'oeuvre," *Supra* note 82.

Justice for pre-clearance under the *Voting Rights Act*, the staff attorneys who reviewed the Texas plan unanimously voted to reject it, as it reduced by two the number of minority influence districts.⁸⁶ The Bush administration officials in control of the Department overruled their decision and allowed the Texas plan to stand.⁸⁷ The plan was firmly in place by the beginning of 2004, in plenty of time for Republicans to benefit in November. Suits to invalidate the plan have thus far been unsuccessful.

Hopes that the Texas redistricting would provoke a backlash against gerrymandering have thus far proven unfounded. Rather, the closely divided state of American politics has discouraged reforms: voters in California and Ohio voted against districting reform at least in part because they worried that it would change the balance of power in Washington. As such, it is unlikely that serious reforms will take place until the 2010 census, if not later. Even then, any reforms will likely be limited to only a few states. The United States has missed this opportunity for reform and it will require either a major scandal or a decisive change in the political environment for another chance to arise.

III. DRAWING DISTRICTS IN CANADA

In comparison to the American system, the Canadian system of drawing electoral districts is simultaneously less partisan and more flexible. By the 1990s, every Canadian province and territory, as well as the federal Parliament, drew its districts (called ridings) by independent commission.⁸⁸ The population variance permitted Canadian ridings however, is significantly larger than that in the United States, with most provinces having settled on +/- 25% variance from the average⁸⁹ and northern ridings in some provinces permitted to be as much as 50% smaller than the average.⁹⁰ Furthermore, the reapportionment process has not been significantly judicialized, as it has in the United States. Since the adoption of the Canadian Charter of Rights and Freedoms, however, Canadian courts have been willing to intervene in egregious circumstances.

⁸⁶ *Supra* note 83.

⁸⁷ Dan Eggen, "Justice Staff Saw Texas Districting as Illegal" *Washington Post*, Dec. 2 2005, online: [Washingtonpost.com](http://www.washingtonpost.com) <<http://www.washingtonpost.com/wpdyn/content/article/2005/12/01/AR2005120101927.html>.>

⁸⁸ Ontario is something of an exception in that it does not appoint its own commission, but rather adopts identically the map of parliamentary ridings for its legislative assembly. John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts*, (Montreal: McGill University Press, 2001).

⁸⁹ *Ibid.* at 107–110.

⁹⁰ See *Ref. re Electoral Boundaries Commission Act*, ss. 14, 20, [1991] 81 D.L.R. (4th) 16, at 40.

A. Who Draws the Maps in Canada?

In contrast to the United States, Canada's provincial legislative assemblies do not dominate the reapportionment process. Under Canada's constitution, each chamber draws its own electoral maps.⁹¹ That is, Parliament may draw parliamentary districts, while the provincial assemblies may draw their own districts.⁹² As such, a gerrymander by Parliament could have substantially greater impact than the gerrymander of a single U.S. state.⁹³

Although modern Canadian reapportionment is controlled by independent commissions, this has not always been the case. In fact, Canadian reapportionment was highly partisan from the beginning through the 1960s. Early reapportionments were blatant gerrymanders micromanaged by the Prime Minister.⁹⁴ The first three apportionments (1872, 1882, and 1892), dominated by John Macdonald's Conservative Party, were intentionally designed to benefit the Conservatives while hurting the opposition Liberals.⁹⁵ The gerrymanders of the time, however, were crude at best and often worked to the benefit of the opposition.⁹⁶

Beginning in the early twentieth century, the reapportionment process became decentralized within the ruling party.⁹⁷ The rise of regionalism and of small parties made it less practical for the Prime Minister to dominate reapportionment as he had in the past. Instead, parliamentary committees containing representatives of all parties were given the task of drawing the electoral maps, although in practice the job was further delegated to regional sub-committees.⁹⁸

⁹¹ See *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, s. 51. Although the Constitution Act does not expressly assign the ability to draw parliamentary ridings to Parliament, this has been inferred. See also *Supra* note 75, at 22.

⁹² As stated above, *Supra* Part II.A, Congress could take upon itself the duty of drawing its own districts but has never done so, though it has from time to time instituted various requirements on the congressional districts that state legislatures draw. Admittedly, Parliament could defer the drawing of federal ridings to the provinces, but this has not been seriously contemplated.

⁹³ That is, although a state legislature may do everything in its power to support the dominant party, even gross gerrymanders are unlikely to significantly change the overall makeup of Congress because there are forty-nine other states, approximately half of which will be controlled by the other party. The ruling party in Parliament, however, could change ridings in every province, making the effects of a successful partisan gerrymander in Canada significantly greater than in the United States.

⁹⁴ *Supra* note 75, at 11, 21.

⁹⁵ *Ibid.* at 11.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at 21.

⁹⁸ *Ibid.*

Although minority parties were represented in the committees, the ruling party could generally force through its own maps over their objections. It was not until the period of repeated minority governments during the 1950s and 1960s that minority parties could make serious demands of the government.⁹⁹ Minority parties also came to enjoy some protection under a series of de facto principles that became established over time: county and municipal lines would be used for ridings where possible, the seats of party leaders would be left alone, new ridings would be placed in areas of greatest population growth, urban ridings would contain more residents (often by a factor of two to one) than rural ridings, and, where practical, ridings would be drawn according to population.¹⁰⁰

The highly partisan nature of Canadian reapportionment led to frequent denunciations by the media and opposition parties. Every ten years, editorial writers would condemn the crass gerrymanders that had resulted.¹⁰¹ Although opposition parties would predictably also condemn the practice (until they were in power at the time of a reapportionment), opposition parties actually went further than promising not to do the same were they to be elected: they recommended that the whole system be replaced.¹⁰² In 1903, the minority Conservative Party recommended that reapportionment be handed over to independent commissioners.¹⁰³ While no party actually followed up on its promises, in part because of electoral defeats, the idea of nonpartisan commissions remained a part of the Canadian debate.

In this context it was inevitable that a province would eventually adopt independent commissions. In stepped Manitoba, which in the mid-1950s had grown unhappy with its electoral system.¹⁰⁴ Unlike most of the provinces at the time, Manitoba did not elect its MLAs in single-member districts under a first-past-the-post system. Rather, Manitoba had been using a single-transferable voting (STV) system in Winnipeg since 1920 and the alternative vote in the rest of the province since 1927.¹⁰⁵ Although the STV had succeeded in granting

⁹⁹ See *ibid.* at 22.

¹⁰⁰ *Ibid.* at 21. The method for drawing legislative districts within provinces was substantially similar.

¹⁰¹ *Ibid.* at 20.

¹⁰² *Ibid.* at 59.

¹⁰³ *Ibid.* The Liberals took up the call in 1919.

¹⁰⁴ *Ibid.* at 39–41.

¹⁰⁵ *Ibid.* at 39. The other provinces using alternative voting methods were Alberta (1926–56) and British Columbia (1952–53). Under an STV system, voters rank their choices of candidates on the ballot. A formula is then applied whereby the candidates with the lowest number of top ranked votes are slowly removed from the pile, with their votes transferred to the number two (or subsequent) candidates. In multi-member districts (such as Winni-

a political voice to small parties and breaking the control of party bosses, it had also prevented the formation of a majority government in Manitoba.¹⁰⁶ Dissatisfied with perpetual coalition governments, politicians lobbied for some alternative system of election. Surprisingly, the public was open to the call for change, largely because the multi-member districts used in STV had prevented voters from being able to call any politician their own.¹⁰⁷ However, the abolishment of STV on its own was seen as unpalatable by the public and the political elites at the time, as it would signal a return to the partisan gerrymanders of the past. In this context, independent reapportionment commissions were seen as the crucial ingredient in a return to single-member first-past-the-post districts.

The eventual legislation, the *Electoral Divisions Amendment Act of 1955*,¹⁰⁸ provided for the creation of an independent commission comprised of the Chief Justice of Manitoba, the province's chief electoral officer, and the president of the University of Manitoba. The commission was instructed to draw single-member districts on the basis of community of interests, means of communication (and transportation), the natural features of the province, municipal boundaries, and other similar factors.¹⁰⁹ However, the commission was instructed to distinguish between urban and rural districts, with urban districts to contain seven voters for every four rural voters. Districts in each classification could only differ by +/- 5%.¹¹⁰ This provision was changed in 1968, when the urban/rural distinction was abolished and replaced with a permissible variation of +/- 25%.¹¹¹ Currently, the permissible variance is +/- 10%, although districts north of the 53rd parallel may vary by as much as 25%.¹¹²

peg during this time), once a candidate receives enough votes to be elected, remaining votes for her are transferred to the voters' second (or subsequent) preferences. Thus if 2,500 votes were required to win office in a five-member district, the 2,501st vote for the candidate would be applied to the voter's second choice. See Samuel Issacharoff et. al., *The Law of Democracy: Legal Structure of the Political Process*, (Westbury: Foundation Press, 1998) at 748-56. This system is called the "alternative vote" when used in single-member districts.

¹⁰⁶ *Supra* note 75, at 39.

¹⁰⁷ *Ibid.* at 39-40. Voters were also unhappy with the unequal populations between the multi-member districts.

¹⁰⁸ *Electoral Divisions Amendment Act RSM 1955*, c. 17.

¹⁰⁹ This is the current list of considerations, enacted in the *Electoral Divisions Act*, RSM 1987, C. E.40, SS. 11(1). The list was substantially based on the language of Australia's act creating independent reapportionment commissions. *Supra* note 75, at 43.

¹¹⁰ *Electoral Divisions Amendment Act R.S.M. 1955*, c. 17.

¹¹¹ *Electoral Divisions Amendment Act*, R.S.M. 1968, c. 21.

¹¹² *Electoral Divisions Act*, R.S.M. 1987, c. E.40.

The experiment with an independent commission was widely seen as successful, with favorable reviews in the press and in scholarly literature.¹¹³ Without a congruence of other unrelated factors, however, it is unclear whether other provinces would have followed Manitoba en masse. At precisely this time, however, the federal Parliament was locked in a series of elections returning minority governments.¹¹⁴ As reapportionment pursuant to the 1961 census would be one of the first acts of the new Parliament, then-Prime Minister John Diefenbaker (who ruled over the only majority government of the period) promised that if the Conservatives were reelected, they would establish independent commissions.¹¹⁵ Although Diefenbaker's government returned to power, it did not have a majority of the House of Commons and soon lost a confidence vote, bringing on a new election.¹¹⁶ The new Liberal government (again, a minority) realized that a partisan gerrymander would be impossible, so reform became a surprisingly easy alternative. Because Diefenbaker, who was now the opposition leader, had previously endorsed independent commissions, it was not difficult for the Liberal government to forge a nonpartisan consensus on electoral reform.¹¹⁷ Moreover, the success in Manitoba served as a model for the federal legislation.¹¹⁸

The resulting legislation, the *Electoral Boundaries Readjustment Act* of 1964 (EBRA) followed its Manitoba predecessor closely. Like the Manitoba legislation, it did not require strict numerical equality between ridings. Instead, ridings could vary by +/- 25%.¹¹⁹ The federal legislation did not distinguish between urban and rural districts, as did the original Manitoba Act. Instead of creating a single commission for the entire nation, however, EBRA created a separate four (now three) person commission for each province.¹²⁰ When drawing maps, the commissions could consider geography, demographics, community interests, and

¹¹³ *Supra* note 75, at 43.

¹¹⁴ *See Ibid.* at 22, 58.

¹¹⁵ *Supra* note 75, at 58.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 59.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 60-61. This number has now been adopted by most Canadian provinces and has been constitutionalized in the *Carter* decision, *infra* Part III.B.

¹²⁰ *Ibid.* at 65. The chief justice of the province selected the chair of the commission from the province's superior court judges and the Speaker of the Commons named two members, generally academics, lawyers, or bureaucrats. Initially, the Representation Commissioner also served on the commissions, but the role was eventually abolished as unnecessary.

social and economic concerns.¹²¹ Once the maps were completed, they were presented to the House of Commons for an opportunity to comment on, but not change, the maps.¹²²

The commissions have been largely successful since their implementation. In fact, by the 1990s, every province and territory had adopted some form of commission.¹²³ Although not all commissions were fully independent of the legislature (Prince Edward Island's commission was made up of legislators)¹²⁴ and some provinces have limited the abilities of their commissions to change the maps,¹²⁵ the view that districting should be done outside of the political process is now taken for granted in Canada. It is doubtful that this could have happened so quickly without the adoption of the federal legislation.

B. Judicial Review of Canadian Electoral Districts

While the job of drawing electoral districts had been handed over to independent commissions in nearly all provinces by the 1980s, not everyone in Canada was happy with the results. Whether provinces limited the power of their commissions, failed to adopt commissions at all, or simply weighted rural votes vis-à-vis urban votes, it was inevitable that some losers would appear after the development of the commissions. Because Canada had no constitutionally protected right to vote until the adoption of the Charter of Rights and Freedoms, no cause of action existed to contest the validity of electoral districts until 1982. Since the adoption of the Charter, however, several suits have been brought alleging deprivation of the right to vote because of vote dilution.¹²⁶ Although Canadian courts have recognized a justiciable right of action under section 3 of the Charter, they have been more willing than American courts to recognize interests other than strict equality in population.

The first case heard by a Canadian court claiming a violation of s. 3, *Dixon v. British Columbia*,¹²⁷ arose because of the failure of British Columbia to modify its electoral boundaries to reflect changing demographics. Although British Co-

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.* at 107–110.

¹²⁴ *Ibid.* at 163.

¹²⁵ See *infra* Part III.B.

¹²⁶ Claims are generally based on violations of s. 3 of the Charter "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." See *Constitution. Act 1982* (U.K.), 1982, s. 3.

¹²⁷ *Dixon v. British Columbia* [1989] 59 D.L.R. (4th) 247.

lumbia had placed the duty to set electoral boundaries in the hands of an independent commission, the commission was forbidden to change those districts in later reapportionments. Instead, it could grant districts additional seats when they were 60% larger than their relevant population quota.¹²⁸ However, there was no provision in place whereby the commission could eliminate districts or even reduce representation of a district significantly smaller than their population quota.¹²⁹ Because of this, the variance between the smallest district (86.8% below quota) and the largest district (63.2% above quota) was 149.7%, significantly larger than the 50% range generally accepted in Canada.¹³⁰ British Columbia's Attorney General defended the differential between districts as necessary to preserve the interests of rural citizens.¹³¹

The British Columbia Supreme Court, in an opinion written by then-Chief Justice McLachlin (now Chief Justice of the Supreme Court of Canada), found that the right to vote under s. 3 extended beyond "the bare right to place a ballot in a box."¹³² Instead, the court gave a "generous interpretation" to s. 3 of the Charter.¹³³ Finding that a notion of equality in having one's vote counted was implicit in s. 3,¹³⁴ the court invalidated the British Columbia reapportionment.¹³⁵ However, the court did not adopt an American-style one-person, one-vote standard.¹³⁶ Instead, it recommended that variances must be within a reasonable limit, such as the 25% variance adopted by the Canadian Parliament.¹³⁷

¹²⁸ *Ibid.*, at 253. Population quotas differed by whether a district was on Vancouver Island or the mainland and whether it was urban, suburban, urban-rural, interior-coastal, or remote.

¹²⁹ *Ibid.*, at 253.

¹³⁰ *Ibid.*, at 254–255.

¹³¹ *Ibid.*, at 255. The Attorney-General specifically pointed to the special interests of rural residents (e.g. environment, conservation, transportation and resources); the difficulty in communicating with electors over a large territory; lack of media access in rural areas; the limited availability of resources and advisors to rural legislators; and "[the wider range of problems with which rural members are required to deal." *Ibid.*

¹³² *Ibid.*, at 256.

¹³³ *Ibid.*, at 256. The court relied especially on the fact that voting held a special place in democratic society. "[W]ithout the right to vote in free and fair elections all other rights would be in jeopardy." *Ibid.* Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights.").

¹³⁴ *Supra* note 114, at 260.

¹³⁵ *Ibid.* at 267.

¹³⁶ *Ibid.* at 265.

¹³⁷ *Ibid.* at 267.

The British Columbia system, however, was far outside of these bounds and the court could find no reasonable justification for it.¹³⁸

Two years later, McLachlin J., as she then was, having been appointed to the Supreme Court of Canada, was able to expand on her opinion when the Saskatchewan Court of Appeal invalidated the map drawn by the Saskatchewan Electoral Boundaries Commission.¹³⁹ In *Ref. re Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*,¹⁴⁰ generally referred to as the *Carter* decision after the name of the court-appointed advocate,¹⁴¹ the Court reversed the Saskatchewan's appellate court's ruling that the province's districts were substantially unequal.¹⁴² Finding claims of vote dilution justiciable,¹⁴³ the Court found that the right to vote in s. 3 guaranteed not absolute equality of votes, but rather "effective representation."¹⁴⁴ Indeed, McLachlin J. went as far as suggesting that strict equality may actually detract from effective representation because it prevents communities of interest from sharing a single representative.¹⁴⁵ Relying on this principle, the Court found that the Saskatchewan map did not violate s. 3.¹⁴⁶ Indeed, the Court was so sure of the legality of the Saskatchewan districts that it did not even apply § 1 and the *Oakes* test.¹⁴⁷

¹³⁸ Applying the *Oakes* test, the court found that while the goal of representing rural districts was "'pressing and substantial' in a free and democratic society," *Ibid.*, at 270–71, the means used by British Columbia were not proportional to the goal. *Ibid.* at 271–72.

¹³⁹ *Supra* note 77.

¹⁴⁰ *Ibid.*

¹⁴¹ *Supra* note 75, at 157.

¹⁴² The *Electoral Boundaries Commission Act* had called for the drawing of 29 urban, 35 rural, and two northern districts in the province. The urban and rural districts were to follow the standard Canadian +/- 25% model and were judged against the average population of all districts (i.e. the urban and rural districts were not each apportioned their own quotas). By contrast, the two northern districts could deviate by 50% from the average population. *Supra* note 77 at 40.

¹⁴³ *Ibid.*, at 31 (rejecting claim that provincial legislative boundaries were a non-justiciable political convention).

¹⁴⁴ *Ibid.*, at 35. Justice McLachlin specifically cited her opinion in *Dixon* as support for her opinion here.

¹⁴⁵ *Supra* note 77, at 36 ("[S]uch relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.") *Ibid.*

¹⁴⁶ *Ibid.*, at 45.

¹⁴⁷ *Ibid.*, at 45.

Following the *Carter* decision, it can be said with some confidence that the +/- 25% variance permitted by the federal and most provincial legislation is within the bounds of s. 3. Furthermore, variance greater than +/- 25% is still permissible where the commission can show that a group would not otherwise be effectively represented. This exception is most notable in northern districts, where a strict equality requirement would make northern representation negligible or non-existent. In addition to applying to northern districts, this exception would very likely extend to minority-majority districts, such as Nova Scotia's Acadian, Black, and Mi'kmaq districts.¹⁴⁸ Yet where variance was especially egregious, as in Prince Edward Island, which did not implement commission reapportioning until 1994 and had not reapportioned its seats in thirty years before that,¹⁴⁹ courts have been willing to find violations of § 3.¹⁵⁰ Canadian courts, while greatly deferential to the districts drawn by the reapportionment commissions, are thus willing to step in when a map is grossly unfair.

IV. WHY DO THE UNITED STATES AND CANADA DIFFER?

As demonstrated above, significant differences exist between the United States and Canada in the way in which electoral districts are drawn and judged. While districting remains heavily partisan in most American states, in Canada it has been dominated by independent reapportionment commissions since the 1960s. Moreover, while American courts are highly suspect of any deviation in population between districts, Canadian courts have given broad deference to commissions in establishing the size of districts. Thus while the two states share substantially similar cultures and history, their approaches to electoral districting are substantially different, largely due to the results of path dependencies in the two states.

A. Path Dependency Theory

Path dependency theory posits that the market (whether economic or political) sometimes chooses suboptimal results in the long term because a decision may be more efficient in the short term. These inefficient decisions then become locked-in, as they become increasingly costly to change as time passes. The classic examples are the adoption of the relatively inefficient QWERTY keyboard

¹⁴⁸ *Supra* note 75, at 170.

¹⁴⁹ *Supra* note 75, at 162–163.

¹⁵⁰ See, e.g., *MacKinnon v. Prince Edward Island*, [1993] 101 D.L.R. (4th) 362 (P.E.I. Sup. Ct. Trial Div.).

and the VHS videocassette format over better alternatives.¹⁵¹ Path dependency is most common where the value of a good is determined by network effects— the VHS recorder, for example, became increasingly valuable with each new user, as it was easier to share tapes and rental and retail stores did not have to allocate shelf space to multiple formats.

Path dependency is also applicable to political systems, as early decisions on how government is structured impact what later decisions can be made. An early decision that appears merely expedient can become ossified as constituencies, not least of all the politicians themselves, come to rely more and more on the model.¹⁵² A prime example is the European Common Agricultural Policy, (CAP) which has become increasingly difficult to reform because it is now seen as an integral part of European government and policy. Any effort to reform the CAP would come at great political cost, as decades of consistent policy has created a large constituency of farmers and their allies that would oppose any significant (and many insignificant) changes.

Electoral districting is, if anything, even more susceptible to path dependency, as the power to change the system has, unfortunately, been placed in the hands of those who would be required to act to reform the system. Like the situation in Tennessee before *Baker v. Carr*, where rural counties dominated the redistricting process, it is counterintuitive to believe that politicians would willingly cede this power barring exceptional circumstances. Canada was only able to break the cycle of partisan gerrymandering because it had made slightly different decisions early on and it was faced with a series of minority governments incapable of pushing gerrymanders through.

B. Application of Path Dependency to American and Canadian Reapportionment

Path dependency can be seen in play in the most shocking difference between the two nations' districting policy: reapportionment by politicians in the United States, versus reapportionment by independent commissions in Canada. Although it would be easy to blame this on Canada's generally less partisan environment, it is unlikely that this is the true cause. Indeed, the early 1960s, when Canada adopted its commission legislation, was a time of bitter partisan conflict characterized by the inability of either side to form a sustainable majority.¹⁵³ Moreover, one would predict that the strong party system in Canada would en-

¹⁵¹ See, e.g., William Barnes et al, "Old Habits Die Hard: Path Dependency and Behavioural Lock-in" (2004) 38 J. Econ. Issues 371.

¹⁵² See B. Guy Peters et al, "The Politics of Path Dependency: Political Conflict in Historical Institutionalism," (2005) 67 J. of Politics 1275.

¹⁵³ *Supra* note 75, at 58–59.

courage gerrymanders, while the very weak party system in the United States¹⁵⁴ would discourage them (except, perhaps, for bipartisan gerrymanders designed to protect incumbents).

Instead, it is likely that the key to the difference between the two nations is that Canada's House of Commons is given the responsibility of drawing its own ridings. Because of this, parliamentary gerrymanders will be simultaneously more pervasive and more obvious on a national scale. In contrast, gerrymanders in the United States are done by state legislatures far from Washington. Although districting is usually done with an eye to keeping favored incumbents in power, the incumbents themselves are always able to point to someone else who actually drew the map. And, because it is not Congress that draws the grossly gerrymandered congressional maps, there is no single place to target for reform.

Piece-meal gerrymandering at the state level is also somehow more easily ignored. For example, if Tom DeLay had tried his infamous Texas gerrymander across the entire country, there is little doubt that the outrage would have been so great as to force Republicans in Congress to back down. For some reason, the public seems to view dirty politics as somehow different when it is done at home rather than in Washington.¹⁵⁵

Furthermore, without congressionally dominated reapportionment, politicians have little incentive to demand reform. Although Congress could pass legislation requiring the use of independent commissions, politicians simply do not see this as Congress's job,¹⁵⁶ and it is certain that state legislatures would resist. There is thus never an opportunity for a national party to declare its allegiance to the cause of commissions, as there was in Canada before their adoption. While a state party could promise the implementation of a commission system upon election, state legislators are rarely as accountable to the public as are members of Congress.¹⁵⁷ Moreover, many state legislators see their offices as stepping-stones to better things and are thus unwilling to risk political capital on something that may not catch on. Thus, an early decision on the part of

¹⁵⁴ That is, Canadian parties generally have much greater control over the votes of their representatives than do American parties. Notably, the concept of the free vote is entirely absent in the American system; in essence, all votes are free. Furthermore, there is relatively little switching of parties in the United States, as politicians are free to oppose the initiatives of their own party. Indeed, outgoing Democratic Senator Zell Miller of Georgia famously supported President Bush in his 2004 bid for re-election and publicly attacked Democrats, without ever switching parties.

¹⁵⁵ Indeed, much of the criticism of the Texas redistricting plan focused on Tom DeLay's role, which was seen as improper for a federal legislator.

¹⁵⁶ There is, in essence, an American convention that districting is left up to the states despite Congress's power over its own elections.

¹⁵⁷ Few know the names of their state representatives and many vote simply on a party basis.

Congress to delegate authority to draw districts to the states has resulted in a path dependency, where it has become increasingly difficult to federalize district-drawing authority. Although some escape may be available in the initiative process (where it exists), as seen in Arizona, it does not solve the ultimate problem of path dependency.

Another explanation for the continuance of partisan gerrymandering in the United States is the presidential system which creates a strong executive independent of the legislature. In Canada, by contrast, the Prime Minister is the head of the majority party in the House of Commons. It is possible that this separation between executive and legislature in the United States has contributed to the American public's willingness to put up with gerrymandering. That is, while gerrymandering may have an effect on the makeup of the legislature, it does not change (for the most part) who is president.¹⁵⁸ Moreover, the existence of an effective Senate may diffuse the harm of partisan gerrymandering. Thus even the most successful gerrymanders in the United States are insufficient to guarantee a party a lock on power—the party must still win races for President, Senate, or state executive office. Again, this is an example of path dependency, where the early decision to create a President and a strong Senate has resulted in a situation in which gerrymandering is not seen as decisive, and is thus not a central concern in developing a system of good government.

Moreover, the adoption of independent reapportionment commissions by the federal Parliament in Canada appears to have acted as a catalyst in the adoption of commissions by the provinces. In contrast, without a central reapportionment authority to look to in the United States, the states have been left to themselves to develop methods of apportionment. Although the commission method has been adopted by a number of states, the commissions vary greatly in authority and composition, from the highly partisan Illinois commission to the fully independent Iowa Legislative Service Bureau. By contrast, the parliamentary model in Canada has been adopted by most of the provinces with minimal changes. While the media has focused increasingly on Iowa as a model for redistricting, especially since the 2000 census, it may take decades before commissions are used in even a majority of states. Regardless of how effective and attractive Iowa's solution to the reapportionment problem may be, it does not have the same influence as would a federal program. Again, the early decision to decentralize districting has resulted in a situation wherein it is difficult for any reform to gain a foothold in the American system.

The United States and Canada also differ significantly on the level of scrutiny applied to districts by reviewing courts. While American electoral districts may differ by no more than about 15% (and by less than 1% for congressional

¹⁵⁸ Although not gerrymandering *per se*, the method of apportioning congressional seats was decisive in the contested 1876 presidential election. *Supra* note 26, at 37–38, 180 n.3.

districts), Canadian districts are permitted far greater variance. Indeed, northern districts may be as much as 50% smaller than the average district size, while urban districts may be as much as 25% larger.¹⁵⁹ Although the two nations have similar cultures, federal systems, and histories, the standards by which their judiciaries review their electoral districts could hardly be more different.¹⁶⁰

Chief Justice McLachlin attributes this difference to the greater focus on equality in the United States.¹⁶¹ According to Chief Justice McLachlin, while the American framers were concerned with the ideals of the French Revolution (liberty, equality, and fraternity), the Canadian tradition has been one of gradually evolving democracy.¹⁶² This, however, cannot actually be the cause of the distinction. Indeed, Chief Justice McLachlin's arguments seem flawed in that they emphasize the egalitarian aspects of the United States' system while deemphasizing its gross deviations from that ideal. While some of the framers of the U.S. Constitution, notably the Virginia delegation, may have insisted on strict numerical equality in apportioning congressional districts, it is overly optimistic to say that the framers as a whole were inspired by the ideals of liberty, equality, and fraternity. Indeed, the compromise made by the framers, a House apportioned by population and a Senate apportioned by states, was distinctly anti-egalitarian in that it provided equal representation in the Senate to states widely divergent in population. Moreover, the text of the 1787 Constitution did not instruct states that congressional districts must be of equal population and no federal law required this until 1842. Furthermore, the United States has for the most part experienced the same ever-expanding democracy as Canada. Initially, only white property owners were permitted to vote. African Americans were not given the vote until 1868, 1870, or 1965; women not until 1920. The United States' reaction to judicial districts thus cannot result from having traditionally been more dedicated to the principle of equality, as this is simply not the case.

Instead, it seems that the key difference between the two nations lies in the fact that Canada had no constitutional provision protecting the right to vote until 1982, while Article I and the Fourteenth Amendment were interpreted as applying to electoral districts as early as 1962. While this amounts to a mere twenty year difference between the two nations, it was a key period that

¹⁵⁹ With a hypothetical average district size of 10,000, this would permit northern districts of 5,000 and urban districts of 12,500. The urban district in this example would be 150% larger than the northern district, but each would be granted a single representative.

¹⁶⁰ Admittedly, Canadian courts could refuse to review the validity of electoral districts.

¹⁶¹ *Supra* note 114. Chief Justice McLachlin's reasons in *Dixon* were later adopted by the majority in the *Carter* decision. *Ref. re Electoral Boundaries Commission Act*, ss. 14, 20 *Supra* note 77 at, 37.

¹⁶² *Supra* note 114 at 262-263.

changed the way districts were treated in Canada. Before the 1960s, districting in the two nations was quite similar: while federal maps were drawn by political actors largely interested in increasing their party's power, state and provincial maps were left to benign neglect. Maps that had once been fair (whether in Tennessee or in Quebec) had by the early 1960s become so grossly unfair as to shock the conscience, yet there existed no grounds on which voters in Quebec could file suit to allege a deprivation of the right to vote. The Quebec voter was required to seek redress in the legislature. An early decision in favor of legislative supremacy thus focused criticism onto the legislature, making it more difficult for politicians to defend the status quo.

The Tennessee voter, on the other hand, could bring suit in federal court alleging a violation of the right to vote. When the tidal wave of suits was brought in the 1960s, it appeared that the political process was completely broken in many states. The largest district in a state was often ten, twenty, or forty times larger than the smallest district. More importantly, this was the situation in almost every state—there was no example for the Court to look to of a state that had used geographic considerations for anything but gross deviations from the principles of equality. As geography appeared at the time to merely be an excuse for gerrymanders by neglect, the U.S. Supreme Court sought to forestall this by requiring strict equality between districts.

By the time Canadian voters could raise a claim under the Charter, however, districts had been largely equalized by the reapportionment commissions. Thus, when the first Canadian courts reviewed questions of district equality, there was a national model to which they could point. Although some provinces had delayed in implementing commissions or had limited the power of their commissions, most had settled on a deviation of no more than $\pm 25\%$. Wary of the United States' one-person, one-vote rule, Canadian courts could instead point to the 25% variance as a settled compromise. That is, because the district size problem had been resolved by the legislature to the satisfaction of most of the Canadian public, there was no pressing need for Canadian courts to get involved.

Similarly, it is likely that had American states favorably resolved the problem by themselves, the Supreme Court would never have involved itself to the degree it did. Indeed, the Court refused to hear redistricting cases for decades before *Baker v. Carr*¹⁶³. It was only when the problem had become exceptionally severe that the Court became willing to step in. If a majority of states had resolved the problem favorably, the Court would perhaps have pointed to the models used by those states. The absence of any political solution forced the Supreme Court to get entangled in redistricting. Unfortunately, the involve-

¹⁶³ *Supra*, note 2.

ment of the judiciary provided the legislature a chance to duck criticism by pointing to its compliance with the courts' mandates.

Early decisions in the United States and Canada have proven decisive in the methods used by the two states in drawing electoral districts. Because reapportionment was ceded to the states, Senators were elected by the state at large, power remained divided between the legislatures and the executive (whether the President or the state governor), and the judiciary exercised some review of reapportionment, it became increasingly difficult to change the manner of drawing districts. On the other hand, because federal reapportionment was handled directly by Parliament, there was no separate election of the prime minister, and the Canadian judiciary exercised no jurisdiction over reapportionment, partisan gerrymandering ultimately became unsustainable—it simply provided too much power to those who exercised it, with too little oversight. The rise of small parties and the inability of Canada's original two parties to form majority governments merely accelerated the inevitable extinction of the Canadian gerrymander.

IV. CONCLUSION

Significant differences exist between the United States and Canada in their methods of reapportionment and the judicial review of electoral mappings. While reapportionment in the United States remains highly partisan, in Canada reapportionment is done by independent commissions. However, the maps drawn by political actors in the United States are subject to a level of judicial scrutiny far beyond that in Canada, with even minor deviations in population between districts seen as reason to invalidate entire maps. These differences are largely the result of minor differences in structure and timing in the two nations. Because the House of Commons could be blamed for its own gerrymanders, it was eventually forced to adopt independent reapportionment commissions. By the time the first suits were brought alleging deprivations of the right to vote on theories of vote dilution, Canadian courts could point to the commissions as a political solution to the crisis. By contrast, no political solution to gerrymandering had arisen in the United States by the early 1960s when the first redistricting cases were heard. The Supreme Court was thus left to itself to develop a remedy for the gross inequities between districts.

Although substantial differences exist between the United States and Canada, it must be remembered that merely forty years ago the two states used substantially similar models for reapportionment. That the Canadian model proved unsustainable earlier is merely a result of structural elements that raised the societal costs of gerrymandering without creating any public benefit. In contrast, the costs of American gerrymandering are substantially less, as even the most partisan gerrymander could only affect a portion of the seats in the House of Representatives. That is not to say that the American model will not ultimately

fall under its own weight—the California and Ohio initiatives did draw significant support and the Texas redistricting brought to the fore the partisan nature of gerrymandering. While the American gerrymander is not yet endangered, it is certainly threatened. It is only a time before it joins its northern cousin in extinction. When it does disappear, it can only be hoped that American politicians consider the decades of Canadian experience with electoral commissions.

