DOES THE CHARTER MANDATE "ONE PERSON, ONE VOTE"?

F.L. MORTON* and RAINER KNOPFF**

Since the inception of the Constitution Act, 1982, *a myriad of issues and challenges have been evolving, one of which has been the recent "one person, one vote" challenges to the existing electoral distribution laws. This paper presents background evidence prepared for the recent legal challenge to Alberta's electoral law, and entered into evidence in the Supreme Court's consideration of Saskatchewan's law. Together with the accompanying response by Allan Tupper, which also arises out of the Alberta litigation, it makes more widely available the full scope of the debate our courts were asked to arbitrate. The authors explore the policies which shaped the principles embodied in the electoral distribution laws existing in Canada today. They compare the Canadian situation to both the British and the American experiences. The authors then discuss factors inherent in Canadian society, such as the Crown, bicameralism, federalism, Constitutional supremacy, and the Charter, which tend towards rejection of the "pure democratic" model. They conclude that the Charter does not prevent legislatures from relying on non-population factors to protect "communities of interest" in constructing electoral systems. The Charter does not, in short, mandate "one person, one vote."*

La Loi constitutionnelle de 1982 a donné lieu à une myriade de questions et de revendications. «Une personne, une voix» est une des contestations qui remet en question les lois de distribution électorale en vigueur. Le présent article présente le dossier qui a été préparé à ce sujet contre la loi électorale de l'Alberta, et qui a été soumis à la Cour suprême, laquelle examine la loi de la Saskatchewan. Avec la réponse d'Allan Tupper, qui résulte également du litige albertain, il donne plus largement accès au débat que nos Cours doivent arbitrer. Les auteurs examinent les politiques qui sont à l'origine des principes incarnés dans les lois électorales canadiennes présentes. Ils comparent la situation canadienne aux expériences britanniques et américaines. Les auteurs discutent ensuite des notions inhérentes à la société canadienne — la Couronne, le bicaméralisme, le fédéralisme, la suprématie constitutionnelle et la Charte, lesquelles tendent au rejet du modèle de «démocratie pure». Ils concluent que la Charte n'empêche pas les législatures d'invoquer des facteurs de non-population pour protéger les «communautés d'intérêts» dans l'élaboration des systèmes électoraux. La Charte n'entraîne pas, en bref, «une personne, une voix».

TABLE OF CONTENTS

* F.L. Morton is an Associate Professor of Political Science and Co-Director of the Research Unit for Socio-Legal Studies at the University of Calgary.

** Rainer Knopff is a Professor of Political Science at the University of Calgary.

I. INTRODUCTION

> Whether there will be a Canadian equivalent to *Baker* v. *Carr* in the future challenging the tolerance limits of the failure to apply a strict "one man-one vote" doctrine and employing sections 3 and 15(1) of the Charter of Rights and Freedoms in support of the challenge, remains an open, and at this point a doubtful question.[1]

This opinion was expressed in 1984 by Professor John Courtney, past president of the Canadian Political Science Association and a leading authority on electoral redistribution. As Courtney and others[2] had shown, the electoral boundary reform movement that began in Canada in 1964 had substantially increased the degree of voter equality at both federal and provincial levels. As a result, Courtney found, there was not "any sizeable body of opinion (either in Parliament or not) to argue for the acceptance of a Canadian equivalent to the 'one man-one vote' principle."[3] These facts suggested that a Charter challenge was unlikely, and if one did arise, it seemed equally unlikely that the Canadian judiciary would be receptive. The legislatures had reformed themselves on this issue and recent experience suggested that Canadian judges were reluctant to review or reverse legislative policy choices.

The recent decisions of *Dixon* v. *Attorney-General of British Columbia*[4] (1989) and *Reference re the Constitutional Validity of Provincial Electoral Boundaries (Saskatchewan)*[5] (1991) have proven Professor Courtney only partially correct. Groups of dissatisfied urban voters (backed directly or indirectly by political parties) have brought the "one person, one vote" issue squarely before the courts. In both cases judges have struck down provincial electoral representation laws for allowing excessive voter inequality, although neither court accepted the "one person, one vote" rule.

Professor Courtney, of course, spoke on the eve of the Charter revolution. Like almost everyone else, he failed to anticipate the new era of judicial activism that was about to unfold under the leadership of the Supreme Court of Canada.[6] In the new political

---

1. J.C. Courtney, "Theories Masquerading as Principles: Canadian Electoral Boundary Commissions and the Australian Model" in J.C. Courtney, ed., *The Canadian House of Commons: Essays in Honour of Norman Ward* (Calgary: University of Calgary Press, 1985) 135 at 166.
2. See H.E. Pasis, "The Inequality of Distribution in the Canadian Provincial Assemblies" (1972) V Canadian Journal of Political Science 433; and Pasis, "Achieving Population Equality Among the Constituencies of the Canadian House of Commons, 1903-1976" (1983) 7 *Legislative Studies Quarterly* 111; R.K. Carty, "The Electoral Boundary Revolution in Canada" (1985) 15 *American Review of Canadian Studies* 273.
3. Courtney, *supra*, note 1 at 166.
4. *Dixon* v. *A.G. B.C.*, [1989] 4 W.W.R. 393.
5. *Reference re the Constitutional Validity of Provincial Electoral Boundaries (Saskatchewan)* (March 6, 1991) (Sask. C.A.) [unreported].
6. F.L. Morton, P.H. Russell and M.J. Withey, "Judging the Judges: The Supreme Court's First One Hundred Charter Decisions" in P.W. Fox and G. White, eds., *Politics Canada*, 7th ed. (Toronto: McGraw Hill Ryerson, 1991) at 59-78.

environment created by the Charter, "one person, one vote" challenges to existing electoral distribution laws became inevitable. Less clear is how this issue should be decided.

The 1989 decision of the B.C. Supreme Court in *Dixon* interpreted the right to vote in section 3 of the Charter as requiring "relative equality of voting power."[7] By this Justice McLachlin meant that electoral divisions must be relatively equal in population size. Using this criterion she found that British Columbia's existing electoral divisions violated the Charter. Although Justice McLachlin did not define or impose a precisely numerical definition of "relative equality," she indirectly endorsed the Fischer Commission's recommendation of a maximum permissible deviation from the provincial average of no more than plus or minus 25 percent.

More recently the Saskatchewan Court of Appeal issued its decision striking down the new electoral boundaries map for that province. The Court of Appeal reformulated the interpretation of the section 3 "right to vote" from Justice McLachlin's definition of "relative equality" to "relative or substantial equality of voting power."[8] This reformulation may represent an expansion of the voter equality concept, as the court proceeded to declare unacceptable Saskatchewan's new plus or minus 25 percent maximum deviation rule.

The conflict between the British Columbia and Saskatchewan decisions leaves the meaning of section 3 confused. These decisions also raise several fundamental questions whose answers are hardly self-evident. There is no explicit requirement of voter equality in section 3 or any other Charter section. Nor is there any legislative history to suggest that the framers of the Charter intended section 3 to include an implied voter equality principle. Its existence rests solely on judicial construction of "the right to vote." Justice McLachlin wrote that this right, like all Charter rights, "must be defined against the wider historical and philosophic tradition of Canadian society."[9] But does this tradition require "rep by pop," and if so, how much? The question of what constitutes "reasonable limitations" on the "rep by pop" principle inevitably arises, which prompts investigation into electoral distribution practices in other "free and democratic societies" such as the United Kingdom and the United States.

In the shadow of this uncertainty over the proper interpretation of section 3, similar Charter challenges to electoral distribution acts are pending in Alberta and the Northwest Territories. An appeal to the Supreme Court seems imminent. These cases clearly raise an issue at the core of Canadian democracy. The answer ultimately provided by the courts could affect the operations of every legislative assembly in the country, including the House of Commons. It is in light of the importance of this subject that this study strives to provide a timely examination of those issues pertinent to the "right to vote" in s.3 of the Charter. Our investigation proceeds by addressing the following questions.

---

7. *Dixon*, *supra*, note 4 at 413.
8. *Supra*, note 5 at 41.
9. *Dixon*, *supra*, note 4 at 405.

1. What norms have been historically developed in Canada regarding the appropriate balance between strict equality and non-population-based considerations in drawing constituency boundaries?

2. What are the relevant norms embodied in British experience?

3. What is the relevance of the American reapportionment revolution to the Canadian situation?

4. What do non-population factors in electoral systems contribute to the "majority rule, minority rights" problem?

We conclude by summarizing the "people vs. community of interest" issue.

II. PEOPLE VS. COMMUNITIES OF INTEREST IN CANADIAN ELECTORAL PRACTICE

In *Dixon*, Justice McLachlin, following the lead of the Supreme Court of Canada, wrote that "[t]he rights and freedoms guaranteed by the Charter, must be defined against the wider historical and philosophic tradition of Canadian society."[10] Accordingly, she placed considerable emphasis on federal practice in determining the permissible deviation from the norm of equality:

> Federal ridings in Canada are based on a permitted deviation of plus or minus 25 percent, although in a few cases, due to extraordinary circumstances, the actual deviation exceeds this limit.[11]

In fact, the extent of voter inequality in the House of Commons is considerably greater than this. The more accurate comparison is between the electoral divisions in a given province and all 295 federal constituencies, not just the federal constituencies within the same province. The Saskatchewan Court of Appeal appears to have been confused by this comparison as well. It criticized the new Saskatchewan Act for allowing a *de jure* 25% deviation from the provincial average when the Federal Electoral Boundaries Commission for Saskatchewan (which also worked under a *de jure* plus or minus 25% rule) had achieved a *de facto* deviation of less than plus or minus 5%. This comparison is unfair inasmuch as the *de facto* average deviation achieved under the impugned Act for the 66 Saskatchewan constituencies (approximately 11%) is less than the comparable figure (14.4%)[12] for federal House-of-Commons constituencies as a whole. In other words, the

10. *Ibid.*

11. *Ibid.* at 401.

12. This calculation is based on the statistics presented in Table 4 of the Revised Appendices of the "Report of the Chief Electoral Officer: Thirty-Fourth General Election, 1988." Here we use the "true" average, which is the total population of Canada divided by 295, or 85,794. This is smaller than the "official" quotient of 87,005, which is calculated by dividing the total population of Canada, less the population of the Territories, by 279 (282 less the 3 seats allocated to the Territories).

66 Saskatchewan constituencies are more equal vis-á-vis each other than are the 295 federal constituencies. The Court of Appeal's comparison of the provincial apportionment with the federal apportionment *within the province* also ignores the difference between the federal task of dividing Saskatchewan into 14 electoral districts for purposes of voting on national policy issues and the task of dividing the same province into 66 constituencies for more local purposes.

The federal 25% rule is applied only *within each province* — i.e., there is a maximum deviation of 25% from the *provincial* average for federal ridings within a province. There is no maximum deviation rule for the allocation of federal ridings *between* provinces. Thus the average population in the four federal ridings in P.E.I. is 30,627, while the averages for Ontario, Quebec, British Columbia, and Alberta are all over 85,000. The average voter population in the three federal ridings in the northern territories is less than 23,000. Of the 295 federal ridings represented in House of Commons, 70, or 24%, deviate by more than 20% from the average.[13] This is not new or atypical. Systematic studies show that voter inequality is consistently greater for the House of Commons collectively than for the federal ridings within each province.[14]

It should also be noted that the federal 25% rule is not absolute even within the provinces. 1986 amendments allow a commission to exceed 25% deviation from the intra-provincial average in "extraordinary circumstances." Some provinces immediately took advantage of this exception. In 1987 the Newfoundland Commission created one constituency that was 61% less than the provincial norm and another that was 29% above. Since both the amendments and the changes they authorized took place after 1982, Parliament presumably judged that they did not compromise or violate the section 3 right to vote.

Why has Canadian electoral policy always balanced people and places in drawing constituency boundaries? The policy considerations behind the province-based allocation of seats in the House of Commons can be traced back to the politics that led to Confederation. "Rep. by pop." was the guiding principle of George Brown and the reformers of Canada West. They wanted a new constitution that would replace the equality of representation established by the *Act of Union* (1840) with representation based on population. Self-interest played its role in English Canadians' new enthusiasm for "rep. by pop." Support was rooted in the knowledge that "rep. by pop." would favour the now more populous Canada West.[15] In 1840, when the population of Upper Canada was less than that of Lower Canada, it was the English who demanded an equal allotment of seats. As Confederation approached, concern for a constitutional arrangement that would protect minority rights became a concern for French Canadian leaders.

---

13. *Ibid.* We also use the "true" average to arrive at this figure.
14. See Tables 17 and 19 in *Courtney, supra*, note 1 at 163 and 165.
15. J.C. Courtney, "Parliament and Representation: The Unfinished Agenda of Electoral Redistributions" (1988) 21 *Canadian Journal of Political Science* 674 at 675.

In 1867 the Canadian founders wanted to ensure "that every person in the four founding provinces was equally represented in the federal parliament, *while at the same time guaranteeing that each region of the country would have a fair say in the daily workings of the new federation.*"[16] This balance was to be achieved in part through the House of Commons and in part through the Senate. As George Brown declared during the Confederation debates:

> The very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step.[17]

In the House of Commons, Quebec was guaranteed 65 seats, and the number of seats for the other three provinces was calculated in proportion to Quebec's "average." Quebec was thus protected from any absolute loss of MPs regardless of its future population. To protect other provinces from a sudden loss of seats, the founders also specified that no province could lose any seats unless its population, considered as a fraction of the Dominion total, declined by one-twentieth between censuses.[18] "Representation by population" was not a rule but rather a "basic working principle."[19]

As the Senate subsequently failed to achieve even the modest political status envisioned for it by the Canadian founders, subsequent attempts to balance the representation of people and places shifted to the House of Commons. In 1915 the "senatorial floor" clause was added, guaranteeing that no province should have fewer MPs than senators. Its practical effect was to guarantee that P.E.I.'s representation in the Commons would not be less than four, even though its population no longer justified it. In 1951, responding to relative population declines in Nova Scotia, Saskatchewan, and Manitoba, a new amendment stipulated that no province could lose more than 15% of the seats that it had held under the previous adjustment.

Responding to the same trends, the *1974 Representation Act* provided that no province could lose seats, created a special status for Quebec and three separate categories of provinces. In 1985 a "grandfather clause" was added guaranteeing each province's 1976 allocation of seats as a minimum. The result is that six provinces have 12 more seats than they are entitled to by their population. In 1988 John Courtney projected that by 1991 (the current year), these figures will grow to seven provinces and 17 more seats.[20]

---

16. Government of Canada, Minister of Supply and Services, *Representation in the Federal Parliament*, 1986 at 4 (emphasis added).
17. Quoted in R. MacGregor Dawson, *The Government of Canada*, 4th ed. (Toronto: University of Toronto Press, 1963) at 304.
18. N. Ward, "A Century of Constituencies" in J.P. Johnston and H.E. Pasis, eds., *Representation and Electoral Systems: Canadian Perspectives* (Scarborough, Ont.: Prentice Hall Canada, 1990) at 207.
19. *Ibid.*
20. Courtney, "Parliament and Representation" *supra*, note 15 at 687.

Courtney described these reforms as providing "*special protection of a non-population kind... to two-thirds of the provinces*" (emphasis added).

Concern for non-population factors has also characterized the admission of new provinces to Canada. "From 1870 to 1949, every new province received more seats (sometimes by a factor of 3) than it would have been awarded on a strict application of a population-based formula."[21] Manitoba was entitled to 1 but received 4; British Columbia was entitled to 2 and received 6; P.E.I. five and received 6; Alberta 3 and received 4; Saskatchewan 4 and received 6; Newfoundland 6 and received 7.

Courtney has summarized the Canadian approach to redistribution as follows:

> In Canada, the question invariably comes down to the relative weight to be attached to territory as opposed to population and the perceived need to protect those provinces with smaller or declining populations or with large sparsely-populated regions.[22]

In striking this balance, Courtney concludes that from Confederation to the most recent reforms, "it was clear that Parliament never accepted the principle of 'rep. by pop.' as applying to the distribution of Commons seats among the various provinces."[23]

Significantly, this balanced approach to representation in the House of Commons recently received constitutional protection and sanction in the *Constitution Act, 1982*. In the new amending provisions in Part V, section 41(b) protects the "Senate floor" guarantee against any amendment save by unanimous consent of all eleven governments, while s.42 lists "the principle of proportionate representation of the provinces in the House of Commons" as changeable only through the general amending formula.[24] As this balance of people and places received constitutional status in the same Act as the section 3 right to vote, it suggests that the latter should be interpreted in a manner consistent with the former.

The new constitutional amending formula itself confirms the importance of regional communities of interest and the legitimacy of non-egalitarian distributions of voting power in the Canadian state. Formal changes to the written constitution under the general amending formula (section 38) are hardly a matter of "one person, one vote" and majority rule. Rather, constitutional amendment requires the very undemocratic process of gaining the consent of Parliament plus two-thirds of the provincial governments of the provinces

---

21. J.C. Courtney, "Federalism and Representation: Voter Equality and Electoral Reapportionment in Canada and the United States" (Paper prepared for Conference on "Comparative Federalism: Changing Theory and Practice in the Adaptive Canadian and American Federal Systems," Nelson A. Rockefeller Center for the Social Sciences, Dartmouth College, Hanover, New Hampshire, 22-25 June 1989) [unpublished] at 14.
22. Ibid. at 13.
23. Courtney, "Parliament and Representation" *supra*, note 15 at 687.
24. Previously Parliament was considered to have the authority to change this unilaterally. See P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 63.

with more than fifty percent of the total population. As Professor Kilgour has shown, this formula represents:

> ...a compromise between two competing and irreconcilable principles: that each *province* should have equal voice, and that each *voter* should have equal voice.[25]

Kilgour proceeds to demonstrate that while the 50% requirement confers a slight advantage on Ontario and Quebec qua provinces, this difference is small compared to the significantly greater influence enjoyed by individual voters in the smaller provinces. As each province, regardless of population, has one vote in the amending process, the four smallest (least populous) provinces with only 9.2% of the Canadian population can block a constitutional amendment. A subsequent study mathematically demonstrated that voters in P.E.I. (40.7) have more than six times more "amending power" than voters in Ontario (6.4). Similarly, voters in Quebec (7.5) have less than half the "amending power" of voters in Newfoundland (18.9), Nova Scotia (15.9) or New Brunswick (17.1).[26] The relevant point here is that the constitutional amending formula, adopted at the same time as section 3 of the Charter, allocates political power according to a variety of criteria, of which voter equality is one but not the most important.

Parliament has shown a similar regard for accommodating "community interests" in its approach to the creation of federal ridings within the respective provinces. The seminal 1964 *Electoral Boundaries Reform Act* put an end to the vast population disparities between federal ridings (within provinces) by mandating the 25% maximum deviation rule.[27] The 25% rule was the product of extended debate between advocates of a stricter rule and those who favoured still greater flexibility. Predictably, the debate cut across party lines and reflected the urban and rural character of the members' constituencies. Significantly, however, there were virtually no advocates of the "one person, one vote" rule, despite the then recent U.S. Supreme Court decision embracing that principle.[28] Courtney has characterized the 25% rule as a thoughtful compromise "befitting a geographically large, sparsely populated and federally structured country with a multitude of competing interests."[29]

The newly authorized independent commissions were instructed to design the new electoral divisions "as closely as is reasonably possible" to the average population ("quotient") for their respective provinces or territories. But they were also instructed to take into consideration "the community of interest or community of identity in or the

---

25. D.M. Kilgour, "A Formal Analysis of the Amending Formula of Canada's Constitution Act, 1982" (1983) 16 *Canadian Journal of Political Science* at 769.
26. T.J. Levesque and J.W. Moore, "Citizen and Provincial Power Under Alternative Amending Formulae: An Extension of Kilgour's Analysis" (1984) 17 *Canadian Journal of Political Science* 157 at 163.
27. See generally, N. Ward, "A Century of Constituencies" *supra*, note 18 at 207.
28. Courtney, "Theories Masquerading as Principles" in Courtney, ed., *supra*, note 1 at 136.
29. *Ibid.*

historical pattern of an electoral district... and a manageable geographic size for districts in sparsely populated, rural or northern regions."

In effect, the new Act still allowed for federal ridings within the same province to vary by as much as 23,000 voters, and for urban ridings to be consistently larger (in population) than rural seats.[30] Both of these facts, wrote Professor Norman Ward, were "clearly acceptable to Parliament." Indeed, MPs have subsequently complained that the provincial commissions have placed too much emphasis on population equality and not enough on non-population factors.[31]

Recent provincial practice has largely followed the new federal model. Most of the provinces have promoted increased voter equality by adopting independent electoral boundary commissions and specifying a maximum permissible deviation from the provincial average.[32] Six have adopted the 25% maximum deviation rule and one a 10% rule. But six of these seven provinces allow deviations above their rule for "exceptional circumstances."[33] And all of these same provinces direct their boundary adjustment commissions to give due consideration to a variety of non-population factors. Among the latter, the principle of "community of interest" (or its equivalent) appears in five of the seven provincial acts.[34]

To conclude, while "rep. by pop." has always been a guiding principle of Canadian practice, it has never been consistently followed or considered binding. Both federal and provincial practice have sought to balance "rep by pop" with representation of places. Provincial legislation directing Electoral Boundaries Commissions to take into account such non-population factors as "communities of interest" falls squarely within this Canadian tradition.

III. THE BRITISH EXPERIENCE AND RELEVANCE TO CANADA

In 1983 the English Court of Appeal upheld the recommendations of the English Electoral Boundary Commission despite what it acknowledged as "substantial" differences in voter populations between electoral divisions.[35] According to one British

30. Ward, "A Century of Constituencies" in Johnston & Pasis, eds., *supra*, note 18 at 219.

31. *Ibid.* at 217-18.

32. See H.E. Pasis, "Electoral Distribution in the Canadian Provincial Legislatures" in J.P. Johnston and H.E. Pasis, eds., *Representation and Electoral Systems: Canadian Perspectives* (Scarborough, Ont.: Prentice Hall Canada, 1990) at 251-53.

33. The 25% rule has been adopted by the following six provinces: Alberta (1990), British Columbia (1989), Newfoundland (1973), Ontario (1986), Quebec (1987), and Saskatchewan (1990). Manitoba (1987) has adopted a lower limit of 10%. Nova Scotia, New Brunswick and P.E.I. do not have a formal limit.

34. Ontario, Manitoba, Saskatchewan, Alberta and Newfoundland.

35. *R.* v. *Boundary Comm. for England; ex parte Foot*; and *R.* v. *Boundary Comm. for England; ex parte Gateshead Borough Council*, [1983] 1 All E.R. 1099; [1983] Q.B. 600, (C.A.); [1983] 2.W.L.R. 458 (C.A.).

commentator, the court, in so doing, confirmed a widely held and long established British view that when it comes to electoral distribution, "'representation of places' (the major units of local government) takes priority over 'representation of people'."[36]

This litigation resulted from the Commission's third periodic review and report.[37] Two law suits were immediately filed challenging the report for not living up to rule 5's prescription for as much population equality "as is practicable" among constituencies. Both suits were backed by the Labour Party.[38] One, brought by Michael Foote, then leader of the opposition in Parliament, challenged the entire review for violating rule 5's putative requirement of "equality of representation of people." The second suit challenged the actual number of constituencies assigned in the county of Tyne and Wear as being less than they deserved based on their population. The explicit goal of both cases was to persuade the court to give a specific, quantifiable meaning to rule 5; that is, to set a maximum percentage deviation beyond which the commissions could not go.

Despite substantial population differences in constituencies in the same counties,[39] within London,[40] and between neighbouring constituencies,[41] unanimous judgments in the Divisional Court (Dec. 21, 1982) and the Court of Appeal (Jan. 25, 1983) rejected the plaintiffs' claims of excessive inequality. The position of the judges was pithily summarized by Lord Donaldson, Master of the Rolls, in the judgment of the Court of Appeal:

> Though the relevant disparities are substantial in some of the instances ruled on, they are in no case so large as to point per se to the conclusion that the Commission wholly failed to have regard to the provisions of Rule 5 relating to electoral equality.
>
> ...

36. R.J. Johnston, "Constituency Redistribution in Britain: Recent Issues" in B. Grofman and A. Lijphart, eds., *Electoral Laws and Their Consequences* (New York: Agathon Press, 1986) 277 at 283.

37. Their initial report was presented in 1949 and the first two periodic reviews occurred in 1955 and 1969.

38. Labour's ultimate motive was seen not as favouring greater population equality but simply to delay the redistribution of constituencies until after the next general election. Because of the constant post-war migration from the inner-cities (Labour strongholds) to the suburbs and small towns (areas of Tory strength), the Labour Party actually benefits from the over-representation of the boroughs (cities). Each post-war redistribution has cost them seats in the House of Commons. See Johnston, "Constituency Redistribution in Britain" in Grofman & Lijphart, *supra*, note 36 at 285-88.

39. In Lancashire county, the proposed constituency of Blackburn had a population of 76,628 (16.54% above quota) while the proposed constituency of Morecambe and Lunesdale had 52,154 electors (20.68% below quota).

40. The smallest proposed London constituency had a population of 46,493 (58% below quota) while the largest had a population of 84,401 (28.4% above quota).

41. The neighbouring constituencies of Barnet, Finchley and Haringey, Wood, Green had populations of 57,995 and 84,401, respectively.

> the framework of the Rules of 1949 itself make it plain that as a matter of general policy Rule 5 was to be regarded as subordinate to Rule 4 and not vice versa.[42]

In sum, representation of places trumps representation of people.[43]

The significance of this recent British experience for Canada lies in the similarity of the two parliamentary democracies. Neither Britain nor Canada (nor the Canadian provinces) have politically equal and active second legislative chambers like the American Senate to satisfy the natural demand for representation of regional interests. Thus the House of Commons in both Britain and Canada (and the legislatures in the provinces) must do double duty — that is, represent both people and places simultaneously. The American Supreme Court can demand "absolute population equality" for federal congressional districts only because the Senate has already accommodated regional representation.[44]

IV. THE AMERICAN EXPERIENCE AND RELEVANCE TO CANADA

While British practice supports the Canadian tradition of balancing non-population factors against the simple counting of heads, recent American experience appears to provide the basis for challenging our tradition. The "reapportionment revolution" initiated by the Warren Court's 1962 decision *Baker* v. *Carr* is widely recognized as one of that court's most important achievements. In effect, the U.S. Supreme Court has imposed a regime approximating zero deviation in constituency size. But appearances can be deceiving. The American reapportionment revolution turns out to be as controversial as it is important. On closer inspection its relevance for Canada is highly ambiguous.[45]

We have identified four differences between the historical and institutional contexts for the voter-equality issue in the two countries. First, the gross population differences and callous legislative neglect that prompted the court-led reapportionment revolution in post-war American society do not exist in Canada today. To the contrary, Parliament has led the reform of electoral distribution and boundary adjustment. Second, it turns out that non-population-based representation remains an important principle in the United States, especially through the equal representation of all states in the Senate regardless of population. The absence in Canadian governments of regionally representative second chambers like the U.S. Senate means that Canadian legislatures must represent both "places and people." Third, and in the same vein, it must be noted that the U.S. Court

---

42. *Supra*, note 35.

43. Johnston, "Constituency Redistribution in Britain" in Grofman & Lijphart, *supra*, note 36 at 283.

44. Courtney has also noted this. See, "Federalism and Representation: Voter Equality and Electoral Reapportionment in Canada and the United States," *supra*, note 21 at 16-17.

45. The Americans use different terms to describe the same processes. What we call "electoral distribution" they call "apportionment" or "reapportionment" — the allocation of a fixed number of representatives among a fixed number of political units. What we call "boundary adjustment" the Americans describe as "districting" or "redistricting" — the drawing of boundaries that define and separate legislative districts.

has limited strict application of the "zero deviation" approach to congressional districts, not state legislatures. It is these more generous standards applied to state legislatures that provide the relevant analogy to electoral distribution practices in the Canadian provinces. Like provincial legislatures, and unlike the U.S. Congress, the American states no longer have a second chamber that is regionally representative regardless of population. Fourth, when the consequences of the zero deviation approach come into view, it is not at all clear that it provides an attractive model for Canadians. Two decades after *Baker* v. *Carr*, there is extensive evidence that judicial insistence on abstract voter equality has facilitated a new and more pernicious form of political gerrymandering that is even more resistant to remedy, judicial or otherwise. We shall investigate each of these points in turn.

A. SCOPE AND DEGREE OF MALAPPORTIONMENT NOT COMPARABLE

The scope and magnitude of malapportionment prompting judicial intervention in the U.S. in the 1960s does not exist in Canada today. In *Colegrove* v. *Green*, the discrepancy between the largest and the smallest congressional districts in Illinois was 914,053 to 112,116. In *Reynolds* v. *Simms*,[46] the case that initiated the court's entry into state legislatures, the ratio between voter populations was as high as 46 to 1 in the state senate and 16 to 1 in the lower house.[47] When the court decided *Baker* v. *Carr* in 1963, "disparities between largest and smallest districts of ten to one or higher were common in most states for both congressional and state legislative districts."[48] In Tennessee, the source of *Baker*, districts for the lower house of the state legislature ranged from 42,298 to 2,340. The Tennessee Legislature had not authorized a reapportionment since 1901!

The quantitative aspect of post-war malapportionment in American politics does not capture its qualitative counterpart. In many states the representational imbalance was so lopsided in favour of rural interests that the legislature was no longer responsive to majority opinion. Robert G. Dixon's authoritative work on this topic conveys the sense of desperation of many responsible civic leaders.[49] There was a strong consensus that rurally-based legislators had a strangle-hold on the legislatures of the nation; that they would not willingly relinquish this power; and that until they did, "the staggering problems of metropolitan America" — transportation, public health and housing, race relations and education — could not be dealt with. A decade and half of political lobbying and organizing had gotten the reformers nowhere. In the words of C. Herman Pritchett, the then president of the American Political Science Association, "the Supreme Court was

46. *Reynolds* v. *Simms* 377 U.S. 533 (1964).

47. L.H. Tribe, *American Constitutional Law* (New York: Foundation Press, 1988) at 1065.

48. R.G. Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts" in B. Grofman, A. Lijphart, R.B. McKay, and H.A. Scarrow, eds., *Representation and Redistricting Issues* (Lexington, Mass. and Toronto: Lexington Books, 1982) 7 at 12.

49. R.G. Dixon, *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford Press Inc., 1968).

justified in taking the lead on reapportionment in state legislatures because no other channels of protest were open."[50] This view was echoed by Robert Dixon.[51]

In sharp contrast to this American experience, Canadian legislatures have taken the lead in addressing the reapportionment issue. The very year (1964) that the U.S. Supreme Court was forcing American states to deal with the malapportionment problem, Parliament set maximum permissible limits (25%) of population deviation for federal constituencies and turned the boundary adjustment process over to independent commissions. Most of the provinces soon followed the federal example.[52] The result was measurable increases in voter equality at both levels of government. It was within this context that Professor Courtney speculated that a Canadian version of *Baker* v. *Carr* was unlikely as the problem was already being addressed.

As a result, the malapportionment problem in Canada is nowhere near as serious as that faced by the United States in the 1960s. At the federal level, the division of seats in the House of Commons has not been a major political issue.[53] While there has been some academic criticism of the trend away from "rep. by pop.,"[54] the more politically significant criticism has been that representation in the House of Commons is too responsive to population; and this has led to the corollary demand for a more regionally responsive and accountable Senate.

In sum, contemporary Canada has neither the objective gross inequalities nor the subjective sense of emergency that prompted the U.S. Supreme Court to reverse its own previous law and plunge into the "political thicket" of reapportionment. There is no evidence that voter inequality in any province is so pronounced as to impair the responsiveness of the government to changes in public opinion. To the contrary, the last decade of provincial elections has witnessed changes of government in almost every province, a normally reliable indicator of a healthy and fair electoral system.

---

50. C.H. Pritchett, "Representation and the Rule of Equality," in R.A. Goldwin, ed., *Representation and Misrepresentation* (Chicago: Rand McNally and Co., 1966) at 1-20.

51. "*Baker* v. *Carr* was responsive to the fact that political avenues for redress had become dead-end streets." Dixon, *supra*, note 48.

52. See section II. above.

53. "On the whole the division of seats among the provinces has occasioned less partisan controversy than any other major aspect of redistribution." N. Ward, "A Century of Constituencies," in Johnston & Pasis, eds., *supra*, note 18 at 207.

54. Scholarly concerns have focused on the inability of the Commons to cap its growth in membership and the diminishing correlation between a province's population and the number of seats it receives. For conflicting views on how best to deal with these related problems, see M. Coulson, "Reforming Electoral Distribution" (1983) 4 *Policy Options* at 30-32. Both articles are reprinted in J.P. Johnston and H.E. Pasis, eds., *Representations and Electoral Systems: Canadian Perspectives* (Scarborough, Ont.: Prentice Hall Canada, 1990).

B. EQUALITY RULE NOT APPLIED TO U.S. SENATE

American use of "rep. by pop." for representation in legislative assemblies was, until 1964, always balanced by a second legislative chamber where representation was assigned to the regional subunit of government — states for the federal Senate and counties for state senates — regardless of population. (In 1964 the Supreme Court ended this practice for the states by requiring the equal population rule for both houses of bicameral state legislatures.)[55] At the Philadelphia convention in 1787, it was only after the so-called "Connecticut Compromise" established equal representation of the States in the Senate that the American founders were free to establish a pure population standard for the House of Representatives. Subsequently 49 of the 50 states adopted the same bicameral solution to their own problems of diversity. One hundred and seventy five years later the Supreme Court could afford to require congressional districts to adhere strictly to the "one person, one vote" rule because the Senate already satisfied the demand for effective and equal representation of regional interests irrespective of population.

In this respect, it is wrong to think that in the U.S. "the ideals of equality can be seen as having been embraced from the outset in an absolute fashion," and that the "rationalist ideals embodied in the French Revolutionary slogan 'liberty, equality, and fraternity' dominated the thinking of the founding fathers of the American nations."[56] The American founders are famous (infamous in some quarters) for their outspoken distrust of "pure democracy" and its chronic and fatal weakness, "majority faction."[57] Their own understanding of the complex edifice of "checks and balances" they created was that it provided "a republican remedy for the diseases most incident to republican government."[58] The U.S. Senate, a written constitution, judicial review, separation of executive and legislative institutions, and federalism all attest to the American founders' distrust of the radical egalitarianism that drove the French Revolution just several years later.[59]

C. EQUALITY RULE NOT STRICTLY APPLIED TO STATE LEGISLATURES

The equality standard established in the *Wesberry* and *Reynolds* decisions has been much more strictly applied to congressional districts than to state legislatures. Justice McLachlin notes this fact in passing, attributes it to the American "political questions" doctrine (which she later dismisses as irrelevant to Canada), and tends to concentrate on the "absolute equality" standard imposed on congressional districts. Such emphasis on

---

55. *Maryland Committee for Fair Representation* v. *Tawes* (1964), 377 U.S. 656.

56. *Dixon, supra*, note 4 at 409-10. Indeed, a generation of American historical scholarship attacked the Framers of the Constitution of 1787 for being anti-democratic and betraying the "true democracy" of 1776. See C. Beard, *An Economic Interpretation of the Constitution* (New York: MacMillan, 1961).

57. James Madison, Federalist No. 10.

58. *Ibid.* See M. Diamond, "The Declaration and the Constitution: Liberty, Democracy, and the Founders" (1975) 41 *The Public Interest* 39.

59. See H. Arendt, *On Revolution* (New York: Viking, 1963).

congressional districts is misplaced. This is significant because in the post-1964 environment it is the state legislatures that provide the relevant analogy to electoral distribution practices in the Canadian provinces. In 1964, the Supreme Court ruled that both houses of bicameral state legislatures must conform to the equal population rule.[60] Like provincial legislatures in Canada, and unlike the U.S. Congress, American state legislatures no longer have a second chamber that provides equal representation for regional government subunits regardless of population.

In *Reynolds*, the Supreme Court did not mandate precise mathematical equality but only that districts be "as nearly of equal population as is practicable." It also recognized certain legislative objectives as justifying some departure from the equal population standard. These included maintaining the integrity of political subdivisions and providing for compact districts of contiguous territory.[61] What the court did not specify was how much departure from the equal population rule was permissible.[62]

Tribe speculates that the court's failure to articulate a precise objective standard stemmed from the judges' reluctance to interfere with what they recognized as *normally* a legislative choice.[63] In these initial reapportionment cases, however, the malapportionment was so gross as to overcome the judges' reluctance. They intervened to strike down the gross malapportionments before them, but without giving a precise rule for doing so. In effect, the court said: "The Constitution requires a relative degree of voter equality; how much we are not sure, but certainly more than this." They thus postponed the central issue: how much equality is enough?[64]

This question could only be postponed, not avoided. In subsequent cases, the Supreme Court articulated an increasingly strict standard of equality for congressional districting. In its 1969 decision of *Kirkpatrick* v. *Preisler*,[65] the Court struck down a Missouri reapportionment plan which allowed a maximum 6% deviation from the average. Justice Brennan said the Constitution "requires a State to make a good-faith effort to achieve precise mathematical equality," and discounted the legitimacy of the countervailing legislative goals identified by Chief Justice Warren in *Reynolds*.[66] Significantly, four justices dissented from Brennan's reasoning, stressing that it opened the door to political gerrymandering by failing to respect county and municipal boundaries. The threshold set in *Kirkpatrick* was further lowered in the 1973 case of *White* v. *Weiser*, which invalidated

60. *Supra*, note 55.

61. However it also identified certain other objectives as impermissible, including "history ... economic or other sorts of group interests ... keeping districts a manageable size ... and balancing urban and rural interests in the state legislature." See *supra*, note 47 at 1072.

62. *Ibid.* at 1069.

63. *Ibid.*

64. In a certain sense the majority's failure to give a precise rule vindicates Frankfurter's dissent. Notice that Justice McLachlin did almost the same thing in *Dixon*.

65. *Kirkpatrick* v. *Preisler* (1969), 394 U.S. 526.

66. *Ibid.* at 530-31.

a Texas plan allowing 5% variation.[67] This reaffirmation was quixotic in that a majority of the judges were on record as opposing the "precise mathematical equality" rule.[68] Notwithstanding the lukewarm "support," in 1983 Justice Brennan again led the way in a 5-4 decision that invalidated a congressional districting plan for New Jersey with less than 1% deviation![69]

But while the court was imposing stricter equality criteria on congressional districting, it was more lenient for state legislatures. Such a double standard was hinted at from the start. In *Reynolds* v. *Simms* (1964), the Court stated that somewhat "more flexibility may... be constitutionally permissible with respect to state legislative apportionment than in congressional districting."[70] In its 1973 decision of *Mahan* v. *Howell*,[71] the court "held that the rigid standards enunciated in *Kirkpatrick* were inapplicable to problems concerning state legislative apportionment."[72] A decade later *Karcher* v. *Dagett*[73] reaffirmed strict equality for congressional districts, while *Brown* v. *Thompson*, released the same day, held that "in state legislative districts, population disparities of up to 10% were *de minimis* and did not require justification by the state."[74]

The most recent, and for Canadian provinces the most relevant, affirmation of a more permissive standard for state legislatures is the 1983 decision in *Brown* v. *Thomson*.[75] The Supreme Court held that Wyoming's substantial deviation from the equal population rule was permissible given "the state's longstanding and neutrally-applied policy of using counties as the basic units of representation."[76] The Wyoming plan resulted in a maximum deviation of 89% from the state-wide average because the legislature chose to grant one representative to the least populous county. From the perspective of other Western states and Canadian provinces, the Wyoming "facts," large, sparsely populated territories with only several urban centres, seem quite familiar.

The explanation for the court's double standard is not difficult to discern. It lies in the fact that the ubiquitous "people versus places" balancing is different for the U.S. Congress and the state legislatures. With "places" already represented in the U.S. Senate — where Wyoming, with fewer people than Calgary, has the same number of senators as California, a state with more people than all of Canada — it is hardly unreasonable to demand strict

67. *White* v. *Weiser* (1973), 412 U.S. 783.
68. The three new Nixon-appointees (Burger, Rehnquist, and Powell) said they would not have supported it if they had been on the court in 1969, while two veterans (White and Stewart) had dissented from Brennan's reasoning in *Kirkpatrick*. See Dixon, "Fair Criteria and Procedures," in Grofman, et al, eds., *supra*, note 48 at 12.
69. *Karcher* v. *Daggett* (1983), 462 U.S. 725.
70. *Reynolds* v. *Simms* (1964), 377 U.S. 533, 578.
71. *Mahon* v. *Howell* (1973), 410 U.S. 315.
72. Tribe, *supra*, note 47 at 1070.
73. *Supra*, note 69.
74. *Supra*, note 47 at 1071.
75. *Brown* v. *Thomson* (1983), 462 U.S. 835.
76. *Supra*, note 47 at 1072.

equality of population for the House of Representatives. State legislatures, which now must apportion seats according to population for both chambers, are not comparable.

Canadian legislatures, both national and provincial, must also simultaneously represent "places and people" in a single elected chamber, and are thus in an analogous situation to the American states. Courtney has made this point with respect to the federal Parliament: "The absence of a politically-salient upper house composed from the outset of equal numbers of members from each province has had the effect of transferring part of the *federal* representational task to the House of Commons."[77]

D. EQUALITY RULE HAS FACILITATED POLITICAL GERRYMANDERS

The final aspect of the American "one person, one vote" experience that Canadians should assess has been its unintended consequence of facilitating a new and sophisticated form of political gerrymanding, one just as pernicious in its effects as the old malapportionment and even more resistant to remedy.

A "political" gerrymander is the drawing of electoral boundaries to intentionally advance the partisan interest of the map-drawer by reducing the effective voting strength of the political opposition. By 1969, the American Court's single-minded pursuit of mathematical equality of population in Congressional districts "had paradoxically encouraged the potential for widespread gerrymandering."[78] In the pursuit of equality, map-makers were now free to disregard county and municipal boundary lines. The result, observed one expert, was that "[i]n state after state, grotesquely shaped districts completely ignoring local subdivision lines or communities of interest are justified by politicians and approved by judges with the solemn chant, 'one person, one vote'."[79] As one New York state legislator candidly admitted, "[t]he Supreme Court is making it easier to gerrymander than before."[80]

Twenty-five years after it decided to enter the "political thicket," the American Court is still in a prickly situation. Its egalitarian cure for the original disease has produced a new and equally virulent strain of misrepresentation. The court has worked itself into a dilemma. If it refuses to hear the political gerrymander cases, it will leave in place many state gerrymanders that undermine the fairness of representation just as much as the old malapportionment problem.[81] Yet if the court does try to tackle the political gerrymander issue, it will face a flood of new litigation, posing issues and evidentiary

77. Courtney, "Federalism and Representation" *supra*, note 44 at 17.

78. G. Baker, "What ever happened to the Reapportionment Revolution in the U.S.," in B. Grofman and A. Lijphart, eds., *Electoral Laws and Their Political Consequences* (New York: Agathon Press, 1986) 257 at 269.

79. Baker, *ibid.* at 271.

80. *Ibid.* at 270.

81. *Ibid.* at 271-74.

problems of unprecedented complexity.[82] A critic of the court's reasoning in *Bandemer*[83] has characterized partisan gerrymandering as "a political problem without a judicial solution."[84] Even Professor Tribe, who rarely doubts the judiciary's capacity to solve complex problems, has written that when it comes to political gerrymandering, "the Court may well come to regret involving the judiciary so deeply in this delicate judicial sphere."[85]

E. SUMMARY

Surveying the mixed record of post-*Baker* v. *Carr* experience in the United States, Robert G. Dixon stressed four "key facts" that should guide future attempts to achieve "fair and meaningful representation." First, there are no such things as "politically neutral" district lines. Any boundary change will have some partisan effect. Thus partisan effect, by itself, does not discredit the integrity of a reapportionment plan. Second, "any numerical range of population equality can encompass countless alternate boundary plans." There is no such thing as the perfect or even the "most fair" plan. There may be many "fair" plans, but with very different consequences. Third, "equal population stringency cannot guarantee (and may even undermine) meaningful equality and majority rule." The pursuit of voter equality should not be allowed to automatically trump other legitimate objectives of representation. He concludes:

> The fourth key fact, and the saddest of all because seventeen years have passed since *Baker* v. *Carr*, is that the first three key facts are not understood by judges who rule on these matters, many journalists who report these matters, and many members of the general public.[86]

As Canada faces the new challenge of measuring its electoral representation practices against the principles mandated by the Charter of Rights, we have the advantage of

---

82. The basic issues raised by *Badham* v. *Eu* have been summarized as follows: "What is a gerrymander? (Is it defined by intent or effect?) Are there manageable standards through which political gerrymandering can be detected and measured? Is there (prima facie) evidence giving rise to a (rebuttable) presumption that the California congressional plans in 1981 and 1983 were political gerrymandering? Ought political gerrymandering to be justiciable? If so, on whom should the burden of proof of gerrymandering rest?" Methodological issues include such questions as: "Is it possible to tell when a California congressional district is politically competitive? Are the 1981 and 1983 plans substantively identical in their partisan impact?" See "Political Gerrymandering: *Badham* v. *Eu*, Political Science Goes to Court" (1985) 18 *P.S.* 539.

83. *Davis* v. *Bandemer* (1986), 106 S.Ct. 2797.

84. P. Schuck, "Partisan Gerrymandering: A Political Problem without Judicial Solution" in Grofman, ed., *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990) 240.

85. *American Constitutional Law*, *supra*, note 47 at 1084. Curiously, Tribe's call for self-restraint in this field does not extend to racial gerrymanders, where he advocates judicial intervention and even "affirmative gerrymandering" to guarantee representation for racial minorities. (p.1080) These different prescriptions seem to rest more on Tribe's political sympathies than on constitutional text or concerns about the court's institutional capacity.

86. R.G. Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts" in Grofman et al, eds., *supra*, note 48 at 8.

hindsight. We can learn from the American experience that the quantitative aspects of fair and meaningful representation do not exhaust the qualitative aspects. In a liberal democracy, the principle of "one person, one vote" is far from the only criteria for constructing a system of representation. There is no evidence that the Charter ties the hands of legislatures in this respect, preventing them from tempering the strict numerical practice of majority rule with respect for minority rights, if they are so inclined.

V. MAJORITY RULE VS. MINORITY RIGHTS

The view that electoral divisions be distributed and drawn so as to have equal populations is based on the proposition that the vote of each citizen must have a statistically equal value. This position implies that the only legitimate source of political authority is the majority constructed by such equally weighted votes. This line of reasoning is evident in the Saskatchewan Court of Appeal's argument that, "Our democracy is now based on a political system in which the will of the people is sovereign," and that the right to vote "is every man's portion of sovereign power."[87] From these premises the Court then reasoned that any electoral system with divisions of unequal population would "dilute" or "debase" the value of votes from "overpopulated" districts.[88] A variation on this position is that extreme malapportionment could allow a minority of voters to elect a government opposed by the majority. Justice McLachlin, for example, criticized the British Columbia system because "it may take only 38.4% of the population to elect a majority of the legislative members."[89] The tacit assumption in both criticisms is that any "artificial dilution" of the will of the majority is "undemocratic" and thus unjust.

This criticism is problematic in two senses. First, it falsely assumes that with constituencies of equal numbers of voters the party with a majority of seats will necessarily have received a majority of the votes. In fact, there is no such guarantee. The ability of a minority of voters to elect a majority of representatives is primarily a function of the single-member, first-past-the-post electoral system used in England, Canada and the United States. In Canada, for example, in 18 out of the past 21 federal elections (i.e., since 1921), the winning party has received *less* than 50% of the popular vote.[90] In 1988, Prime Minister Mulroney and the Conservatives received only 43% of the popular vote but still captured 57% of the seats in the House of Commons. Even more lopsided results have occurred at the provincial level. In the 1987 New Brunswick elections, opposition parties received 40% of the vote but did not win a single seat![91] Court-ordered reapportionment has not prevented similar outcomes in the United States. In the 1970 Connecticut elections, one party received a majority of the votes cast for both

87. *Supra*, note 5 at 16-17.
88. *Ibid.* at 19-20.
89. *Dixon, supra*, note 4 at 393.
90. The Liberals won 51.5% in 1940; the Conservatives 53.6% in 1958 and 50% in 1984.
91. See generally, P. Fox, "Should Canada adopt proportional representation?" in P.W. Fox & G. White, eds., *Politics Canada*, 7th ed. (Toronto: McGraw Hill Ryerson, 1991) at 343-50.

houses of the legislature but the other party still won majorities in each chamber. In short, unequally populated electoral divisions are not the cause of this syndrome, and requiring them to be equal will not eliminate it.

Secondly and more importantly, it is incorrect to assume that simple majoritarianism is the proper constitutional measure of Canadian political institutions. While some Western democracies are modelled after such a pure or unrestrained majoritarianism, France is the closest, Canada is not. The "vox populi, vox dei" mentality that drove the French Revolution has always been viewed with distrust in Canada. Sensitive to the historical and demographic idiosyncrasies that shape the country, both French and English leaders have known that dogmatic adherence to pure majority rule could easily translate into the mistreatment of minority rights and interests. The result has been an enduring and ongoing attempt to balance the competing claims of majority rule and minority rights. This balancing, with its rejection of unrestrained majoritarianism, is evident in every major institution of Canadian politics; the representation of places as well as people is just one part of a much wider institutional tradition that includes the Crown, bicameralism, federalism, a written constitution and the Charter of Rights.

A. THE CROWN

The retention of the authority of the Crown in the Constitution Act, 1867 attests to the founders' rejection of either the Jacobin or Jeffersonian version of democracy for Canada. The practice of constitutional monarchy separates the head of government from the head of state, and recognizes the latter as a source of political authority independent of political factions, either minority or majority, one that represents the public good amidst the welter of private interests. As Frank MacKinnon has written, because it is "above politics and ambition," the monarchy "represents the state as a whole," something no party or politician can do.[92]

The effect of the Crown is both symbolic and real. The monarchy can still place some important limitations on the practice of politics in contemporary Canadian society. For example, Manitoba's attempt to adopt an initiative and referendum procedure, a way to operationalize direct democracy, was ruled unconstitutional because it bypassed the required approval of the Lieutenant-Governor.[93] The Crown's symbolic functions are less tangible but perhaps more important. According to MacKinnon, "the separation of pomp and power... serves democracy [by keeping] the ministers in second place as servants of the state — electable, responsible, accountable, criticizable and defeatable — a position necessary to the operation of parliamentary government." More generally,

92. F. MacKinnon, "The Value of the Monarchy" (1969) 49 Dalhousie L. Rev. Reprinted in P.W. Fox and G. White, eds., *Politics Canada*, 7th ed. (Toronto: McGraw Hill Ryerson, 1991) at 373.

93. *Re Initiative and Referendum Act*, [1919] A.C. 935. Discussed in P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 290-91.

MacKinnon concludes, the "constitutional monarch provides a symbol of continuity, order, and authority,"[94] independent of majority support for this party or that.

B. BICAMERALISM

The constitution of the Canadian Parliament also manifests the rejection of the "pure democracy" model. Bicameralism itself reflects a distrust of simple majoritarianism by placing a second legislative chamber as a check on the first, providing the opportunity for "sober second thought." This distrust is made explicit when, as with the Canadian Senate, members of the second chamber are appointed not elected, and enjoy tenure virtually for life. The 1867 allocation of 24 Senators to each of the three different regions of the new country, Quebec, Ontario, and the Maritimes, also reflected concerns other than "rep. by pop." R. MacGregor Dawson confirms that this non-proportional distribution of Senators was intended to protect the interests of the smaller provinces, and that it was viewed as indispensable by Quebec.[95] This pattern of non-population-based, regional representation was extended to the West in 1915.

As previously noted, even seats in the House of Commons were not, and still are not, distributed in strict proportion to population. The deviation from a strict application of the "rep. by pop." principle was intended to guarantee that each region of the country would have a fair say in the daily workings of the new federation.[96] Under the present rules, six provinces receive twelve more seats than they are entitled to by population alone. These provisions have been appropriately described as providing "special protection of a non-population kind... to two-thirds of the provinces."[97]

C. FEDERALISM

Federalism is another aspect of the Canadian state that attests to the importance of regional and group representation in the functioning of government. The founders' rejection of a unitary state represented the most significant departure from their stated intention to create a constitution "similar in principle to that of the United Kingdom." They rejected the unitary model because they believed that given the unique geographic and demographic characteristics of British North America, a "national majority" could not and would not be sensitive to the local needs and interests of regional minorities. Federalism attempts to solve this problem by allocating legislative responsibility and powers for matters of a local concern to the provinces while conferring the powers necessary to deal with issues of national concern to Ottawa. In this sense, federalism is an attempt to protect minority rights. Quebecers have always been quite clear on the fact

94. MacKinnon, "The Value of the Monarchy" in Fox & White, eds., *supra*, note 92 at 374-76.
95. Cf. R. MacGregor Dawson, *The Government of Canada* fourth edition. Revised by N. Ward (Toronto: University of Toronto Press, 1963) at 304.
96. *Representation in the Federal Parliament*, at 4.
97. Courtney, "Parliament and Representation" at 687.

that provincial rights are a form of minority rights.[98] This applies with equal logic to the other provinces as well, but especially to the sparsely populated, hinterland provinces, who fear being "swallowed whole" by national majorities situated in central Canada.

D. CONSTITUTIONAL SUPREMACY AND THE CHARTER

The Constitution Act, 1982, and the Charter of Rights and Freedoms in particular, are further examples of Canada's rejection of pure democracy and the idea that "the will of the people is sovereign." The principle of constitutional supremacy, as it is declared in section 52 of the Constitution Act, 1982, is intended to prevent political majorities from doing what they please, at least directly. Government policies or acts that contradict constitutional requirements are to be declared invalid by the courts, the least democratic and accountable institutions of government other than the Crown. Only through the very inegalitarian process of constitutional amendment, a process that can be blocked by a minority of the population under the section 38 procedure or by a single province under section 42, or in certain cases through the use of the section 33 "legislative override" clause, can political majorities have their way in post-1982 Canada.

The Charter of Rights and Freedoms is the most explicit and most direct restraint on Canadian democracy. The Charter makes legally explicit what has long been implicit in the "unwritten constitution" of Canada: that individuals and minorities have certain rights and interests that must be respected despite what governments (i.e., political majorities) may think is good public policy. The entire Charter enterprise rests on the assumption that there are sources of political authority other than the consent of the governed (that is, what the majority wants).

Entrenching the rights of individuals and groups is one way, but not the only way, of guarding against misrule by the majority. Another and equally legitimate way is to construct the majority in such a way as to make it less likely that it will ignore legitimate minority concerns and interests. The so-called "over-representation" of regional interests in legislative assemblies, that is, representation based on considerations other than just population, is just such a safeguard.

E. SUMMARY

The Western experience in the federal Parliament suggests that the under-representation of less populous regions in legislative assemblies can just as easily destroy the meaningfulness of casting a vote as can their over-representation. At the extreme (the "rotten borough" syndrome) gross over-representation of sparsely populated districts (rural

98. Cf. Gordon Robertson: "The rights and powers of the government of Quebec become a very important instrument of protection for the entire French-speaking minority in Canada." See F.L. Morton, "Group Rights versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois" in N. Nevitte & A. Kornberg, eds., *Minorities and the Canadian State* (Oakville, Ont.: Mosaic Press, 1985) at 71-85.

or otherwise) can destroy the integrity of the voting process. It becomes statistically possible for a minority of voters to rule the majority. What is less obvious but no less true is that in certain geographic and demographic circumstances, adhering too strictly to the equality principle can also destroy the meaningfulness of the vote for citizens in sparsely populated regions.

The solution at the federal level has not been to abandon "rep. by pop," that is, majority rule, but to moderate the character of the majority by using a "mixed" system of representation. While the "principle of proportionate representation" still dominates, it is balanced by generous allowances for the less populous provinces and the equally generous 25% deviation rule within each province. This "mixed" system of representation thus constructs a parliamentary majority that is more inclined to be sensitive to rural and small-province concerns without abandoning the majority-rule principle.

Bicameralism is an obvious way of achieving the ubiquitous balance between people and places in a system of representation. Where bicameralism is not available, parliamentary systems have achieved this balance within a single legislative assembly. Thus the decline of the Senate as a significant political institution capable of representing the regions has led to non-population-based considerations being blended with "rep. by pop." in apportioning seats in the House of Commons. Having no upper houses, the provincial legislatures are even more dramatically faced with the necessity of balancing both considerations in a single assembly. Their solution to the difficulty is quite consistent with the solution adopted by the House of Commons.

VI. CONCLUSION: PEOPLE VS. COMMUNITIES OF INTEREST

We have shown that the liberal democratic tradition is hospitable to the incorporation of non-population factors into systems of electoral distribution. The central non-population-based factor in most provincial legislation is community of interests. Six of the eight electoral boundary acts in Canada refer directly or indirectly to the importance of representing diverse communities of interests in the legislature. In 1986, the federal government explained amendments to the *Electoral Boundaries Readjustment Act* which allowed deviations in excess of 25% in "exceptional circumstances" as giving commissions the flexibility "to protect an historical community of interest or to limit constituencies to a manageable geographic size."[99] The protection of community interest is frequently advanced indirectly by the requirement of "honouring political subdivision boundaries," a practice that "responds to a traditional and even instinctive sense of community as a significant basis for representation."[100] The British Parliament sought to protect community by instructing its boundary commissions to be sensitive to "local ties."

99. "Parliament and Representation" *supra*, note 15 at 681.

100. Dixon, *supra*, note 48.

As frequently as "community" and "community of interests" appear in the statutes and literature dealing with representation and electoral distribution, actual definitions are elusive. Geographer Richard Morrill has provided the following definition:

> Communities are revealed through patterns of work, of residence, and of social, religious, and political participation. At the broadest scale there is a strong historic divergence of identity between an urban core (central city), suburbs, and rural small town areas, because they are usually different jurisdictions, because they have different needs and problems, and because they attract people with different values and preferences.[101]

Respecting communities of interest matters in electoral map-drawing, Morrill explains, because "one of the... bases of representation in our culture is territorial – not of arbitrary aggregations of geography for the purpose of conducting elections, but as meaningful entities that have legitimate collective interests arising from the identity of citizens with real places and areas."[102] Failure to respect community of interest, declares Morrill, contributes to "a sense of disenfranchisement and futility," which in turn can result in reduced voter participation, reduced support for government, and poorer quality of governance.[103]

As connotative definitions often seem abstract and artificial, it may be more constructive to proceed by means of example. American Justice White's quip about pornography seems applicable to community interest: it's difficult to define, but I know it when I see it.

Community of interest is not restricted to race, ethnicity and religion. The dialectic that mutually shapes the individual's perception of his or her interests and the community's sense of common interest is also animated by economic and political interests. Rural voters are more interested in such issues as secondary road improvement, irrigation policy, and crop insurance than property tax rates, public transit, and rising crime rates. The opposite is of course true for urban votes. Not unnaturally, most individuals are most concerned about the local problems that touch their everyday work and leisure. These concerns may vary dramatically from one part of a province to another, even in districts that are adjacent to one another. This is the logic behind political scientist Peter McCormick's observation that "individuals have political significance according to their *territories* as well as their *numbers*."[104]

Indeed, the very use of a geographically delimited constituency system (as opposed to proportional representation) as the means for "representing" the people is premised on the

---

101. R. Morrill, "A Geographer's Perspective" in B. Grofman, ed., *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990) 212 at 216.

102. *Ibid.*

103. *Ibid.* at 213.

104. P. McCormick, E.C. Manning & G. Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981) at 9.

assumption "that place of residence is the correct indicator of community of interest."[105] This explains, for example, the use of the provinces as the basis for the distribution of seats in the House of Commons and the Senate. The Canadian people have never been represented in a manner that simply focused on equal numbers of individuals and ignored the provinces.

Wherever social diversity is territorially distributed, the response has been to build institutional structures that respond to this fact. As Professor McCormick has explained:

> The more a country is possessed, not just of social diversity, but of significantly different groups that occupy different geographic areas, the more it will be necessary to operate the formal governmental structures in a fashion which acknowledges and responds to these diversities.[106]

McCormick of course was speaking of countries not provinces, but the same principles apply if the same conditions arise. The ways in which geography reflects and creates diversities at the national level are replicated at the provincial level. The distribution of resources changes from region to region, generating different patterns of industrial development and occupational opportunity (e.g., agricultural vs. industrial development; service vs. manufacturing; net energy exporters vs. energy importers, etc.). The regionally skewed social diversities based on such factors enjoy political significance in their own right. These differences can be further overlaid by patterns of ethnicity, language and religion. Finally there is what McCormick labels "neighbourhood effects": the cumulative and self-reinforcing sense of shared interests and identity, in short, "communities of interests." McCormick concludes:

> The point must be that representation by population provides only one dimension of representation for individuals, albeit a very important one. In any federal system (and arguably in any system, federal or otherwise, exhibiting significant and persistent diversities organized on a territorial basis), this dimension

---

105. Johnston & Pasis, eds., *Representation and Electoral Systems* (Scarborough, Ont.: Prentice Hall Canada, 1990) at 178. This assumption is central to the Anglo-Canadian-American practice of anchoring legislative representation in defined geographic constituencies, but it is not shared by all liberal democracies. It is only one possible answer to the central question of which social groups/interests are sufficiently important to deserve "representation" — that is, reproduction — in a nation's governing legislature. For example, if partisan political affiliation is judged to be the most politically relevant characteristic, then a proportional system of representation is the most rational choice. Alternately, if representation of gender or racial minorities is deemed to be sufficiently relevant to require representation, then the traditional single-member constituency should be abandoned and replaced by multi-member constituencies. Studies indicate that systems using multi-member constituencies average five times as many women representatives as those based on single-member constituencies. See M. Steed, "The Constituency" in Johnston & Pasis, eds., *Representation and Electoral Systems* (Scarborough, Ont.: Prentice Hall Canada, 1990) 186 at 198. The more general point here is that "qualitative" questions of what constitutes "fair and effective representation" are complex if not bottomless. They cannot be resolved by appeals to principle or "fairness" without begging the very question they pretend to answer. It was for these reasons that Frankfurter and others have cautioned against too much judicial involvement.

106. *Regional Representation: The Canadian Partnership*, *supra*, note 104 at 6.

> of representation must be supplemented by a second which recognizes the regional aspects of the impact of national policies. Not simple majoritarianism, but a regionally sensitive consensus, must lie behind effective national action on many issues.[107]

While McCormick is again speaking of Canada, not the provinces, he notes that the argument applies wherever the conditions arise. His last point is the essential one. In a territorially large and economically and socially diverse society, which many Canadian provinces certainly are, "not simple majoritarianism, but a regionally sensitive consensus" is the key to a just and effective system of electoral representation. The section 3 "right to vote," at any rate, does not in any obvious way prevent Canadian legislatures from continuing to strike the kinds of balances between population and non-population factors McCormick has in mind. Whether and how to strike this kind of balance remains a matter for legislative judgment. It has not been settled by the Charter.

107. *Ibid.* at 9.