Drawing Boundaries
Legislatures, Courts, and Electoral Values

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LESSONS FROM THE AMERICAN EXPERIENCE

What Happens After One Person–One Vote? Implications of the United States Experience for Canada*

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ABSTRACT

An important part of the history of representation is the ongoing struggle between those who argue for representation of persons and those who argue for representation of interests. In the U.S., as in most democracies, the principles of representation embedded in both the federal Constitution (the "Connecticut compromise") and in the majority of state constitutions prior to 1962 reflect a compromise between these two concepts of representation. At stake is whether voters ought to be regarded as faceless and interchangeable (one person–one vote carried to its most mindless extreme) or, whether, instead (or, more plausibly, in addition) they should be seen as appropriately distinguishable on the basis of key characteristics such as place of residence, ethnicity, race, or political beliefs or affiliations.

The initial concern of this paper is to review the history of the post-*Baker* debate over districting standards. I argue that, in the 1970s and the 1980s, the focus has been primarily on fair representation of racial and linguistic minorities, as defined by the aim of avoiding "minority vote dilution." At the same time, a numerically strict one person–one vote standard has come to be taken for granted–with the standards for Congress far harsher than those for state and local redistricting. Moreover, with *Bandemer v. Davis*, a remarkably ambiguous 1986 decision without a majority decision, the issue of political (i.e., partisan) fairness has been declared by the Supreme Court to be, in principle, justifiable. But as yet, no legislative plan has been held unconstitutional, and the two lower court cases subsequent to *Bandemer* suggest that partisan gerrymandering challenges may be impossible to win.

I conclude my essay with a look at the relevance of U.S. redistricting

practices and constitutional jurisprudence to the Canadian debate over one person–one vote. In the debate over representation in the United States, the pendulum swung away from territorially based representation and toward voter interchangeability in the 1960s, with *Baker v. Carr* and subsequent cases. However, on the one hand, it did not swing nearly as far as toward perfect equality across districts as some Canadian jurists seem to believe and, on the other hand, the discontinuity with previous practices created by the emphasis of the post-*Baker* Supreme Court decisions on population equality was much greater than Canadian jurists seem to recognize. Indeed, the parallels between U.S. and Canadian redistricting practices in the early history of these countries are far greater than recent Canadian court cases have recognized. Also, as we look to the future, given the language of the Charter of Rights,we can anticipate Canadian courts confronting the same types of challenges to boundary redistributions as U.S. courts have seen in the 1970s and 1980s based on the 14th Amendment—to wit, challenges based on claims of racial, linguistic, and partisan vote dilution. In the U.S., many of those challenges have been successful, especially challenges to at-large elections at the local level.

Types of Vote Dilution

Roughly speaking, we can divide voting rights litigation into two types: the first has to do with issues directly concerning the right to vote (e.g., barriers to registration or practices of voter intimidation); the second has to do with broader questions that fall under the rubric of what is commonly called "vote dilution." Vote dilution has been defined as the minimizing or cancelling out of the voting strength of a given group through practices such as submergence in multimember districts or by practices of electoral gerrymandering that unduly fragment or unnecessarily concentrate that group's voting strength.[1] In the United States, issues of the first type often arise under the 15th Amendment; issues of the second type customarily are brought under the 14th Amendment's "equal protection" clause.

In the United States, most of the legal issues dealing with denial of access to the ballot have long since been resolved, so we shall focus on vote-dilution cases, where there remain important controversies, especially with respect to defining and measuring partisan gerrymandering.[2] For purposes of discussion, and because there are important differences that make the tripartite distinction a sensible one, we may usefully divide recent vote-dilution litigation into three major subareas: one person–one vote issues, issues having to do with racial vote dilution, and issues having to do with partisan vote dilution.

I will characterize an area of law as mature if there are few outstanding legal issues (and these mostly minor ones). I will characterize case law as mechanical to the extent that the determination of which party will prevail can be determined more or less routinely by the application of a well-defined algorithm to a set of objectively definable case characteristics. One index of the maturity and mechanicity of an area of the law is a lopsided pattern of victories

and defeats in the cases that are brought. When the case law is both clear and relatively mechanical, almost all challenges that are brought will be successful, since cases likely to be unsuccessful will be screened out in advance. The only exceptions will be cases seeking to extend the frontiers of the case law and mistakes. Nonetheless, even in mature areas of the case law, until issues of operationalization of standards have been fully resolved, there may be a great deal of disputation. Moreover, if the stakes are high, litigants who can project near-certain defeat have an incentive to be ingenious in trying to find ways to recast the case law or "interpret away" case facts that, on their face, appear to be irredeemably damaging.

One Person–One Vote: From Reynolds v. Sims *to* Karcher v. Daggett, *The Mechanistic Jurisprudence of Simple-minded Quantitativism*

In the United States, the original impetus for federal courts to involve themselves with reapportionment was what has been called the "silent gerrymander," i.e., the failure of states to redraw legislative and/or congressional district lines when new census data became available. In the early and middle part of this century, the decision not to reapportion was used as a means to maintain rural dominance of state legislatures in the face of dramatic population growth in the nation's urban areas. *Baker v. Carr*[3] held that the failure to periodically reapportion gave rise to a violation of the 14th Amendment's equal protection clause. However, subsequent cases held that periodic reapportionment was not sufficient; equal protection (and the constitutional provisions specifying population-based apportionment of Congress) also required that attention be paid to the degree of population equality. Beginning with *Reynolds v. Sims,*[4] the United States Supreme Court considered when deviations from strict population equality would exceed permissible limits. In *Reynolds,* the Court was very reluctant to set any strict numerical threshold; rather it identified a variety of factors that a jurisdiction might use to legitimate population deviations. "A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory, in designing a legislative apportionment scheme... Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering... [But] the overriding objective must be substantial equality among the various districts... [D]ivergences from a strict population standard... based on legitimate considerations incident to the effectuation of a rational state policy... are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature."[5] However, in subsequent cases, each of these reasons (e.g., maintenance of the integrity of county borders) was held to be inadequate to justify more than minimal population deviation.

The evolving one person–one vote standard drew on statistical concepts such as total deviation[6] introduced to the courts in the form of expert witness

testimony by social scientists. Over the course of three decades of redistricting litigation beginning with *Reynolds,* the Supreme Court has evolved a dual standard for legislative and congressional cases. For Congress, deviations were to be as low as "practicable";[7] for state legislative redistricting,[8] total population deviations below 10% were held to be "prima facie constitutional,"[9] but, except for the aberrant decision in *Brown v. Thompson,* no total deviation above 16.4% has ever been accepted by the Supreme Court.[10] Thus, while *Reynolds v. Sims* invited courts to consider rational state purposes and to balance off competing interests, subsequent cases developed along the lines of strictly numerical standards–the very model of mechanical jurisprudence.

Because the basis for deciding one person-one vote challenges is now so well established in the United States, few jurisdictions draw plans that could successfully be challenged on one person-one vote grounds, and one person-one vote challenges occur (as a procedural device to obtain standing) mostly in jurisdictions that have been unable to agree on a new plan and are being sued to compel a timely redistricting.[11] Hence, we can certainly characterize one person-one vote case law in the United States as a mature area of the law. Indeed, if we look at the one person-one vote case law, we might characterize this area of vote-dilution case law as well past maturity. In fact, to characterize it as in an advanced stage of senility would not be far off. That is to say it repeats itself endlessly and mindlessly with no particular point,[12] and having largely lost track of whatever it was that motivated courts to get into the business in the first place.[13] The limits on acceptable deviations that have been imposed are *far* stricter than what was either foreseen (or advocated) by the early supporters of *Baker v. Carr,*[14] especially when we look at congressional districting.

Racial Vote Dilution: From White v. Regester *to* Thornburg v. Gingles, *From Gestaltism to Number-crunching*

The 1970s and 1980s have seen minority vote dilution replace one person-one vote as the principal basis of redistricting litigation in the United States. Preliminary evidence from the 1990s suggests that vote-dilution cases will be even more important than ever before as a result of two important recent changes in the voting-rights case law standard of proof for minority vote dilution: (1) the shift from the purpose test, required in *City of Mobile v. Bolden,*[15] to the effects-based standard embodied in section 2 of the Voting Rights Act of 1965 as amended in 1982;[16] and (2) the shift from a "totality of circumstances" approach to proving effects to one based on the three prongs of *Thornburg v. Gingles,* enunciated in 1986.

Drawing on the standard of proof outlined in *White v. Regester,*[17] until 1980, when *City of Mobile* enunciated a purpose test, federal courts had looked at a number of factors (e.g., lingering effects of past discrimination, racial campaign appeals, patterns of racially polarized voting, usual absence of minority success, presence of election methods such as runoffs or unusually large election districts held to depreciate the likelihood of minority electoral

success) that, in the "totality of the circumstances," were used to determine whether or not there was vote dilution.[18] In seeking to reverse the impact of *City of Mobile,* as part of the 1982 extension of the Voting Rights Act of 1965,[19] Congress passed revised language in section 2 of the act designed to create an effects-based statutory standard for vote dilution based on the "totality of circumstances" approach that *City of Mobile* had rejected as an inappropriate constitutional test. When this "totality of circumstances" approach was codified in a report of the Senate Committee on the Judiciary on the proposed 1982 extension of the act, the Judiciary Committee report asserted that no single factor was necessary for a finding of dilution, and that "point-counting" methods were to be discouraged. Moreover, the report downplayed the importance of certain factors (e.g., proof of responsiveness of elected officials to minority concerns) that some earlier cases had held to be important.[20]

The first case before the Supreme Court involving the proper interpretation of the new section 2 provisions was *Thornburg v. Gingles,* a challenge to a number of multimember legislative districts in North Carolina.[21] In *Gingles,* Justice Brennan set forth a new and considerably simplified effects-based test of vote dilution in the context of challenges to multimember or at-large elections. There are three prongs of the *Gingles* test. First, plaintiffs must show that minority population is sufficiently large and geographically concentrated so as to constitute a majority in at least one district of a potential single-member-district remedy plan. Second, they must show that voting is racially polarized, with the minority community politically cohesive. Third, they must show that minority candidates of choice usually lose. With respect to each of these factors, especially the first two, quantitative analysis and expert witness testimony has proved to be critical. Both the "totality of the circumstances" approach that once characterized voting-rights case law and the *Gingles* three-pronged test look for objectively identifiable indicators of vote dilution. However, while the former approach can be characterized as holistic, eschewing precise directions to lower courts as to either necessary or sufficient conditions for a finding of vote dilution,[22] by contrast, Justice Brennan's approach in *Gingles* is far more tightly reasoned, based on what he refers to as a "functional" analysis of the electoral process.

When we look at the vote-dilution case law with respect to racial questions, at least if we confine ourselves to challenges to at-large or multimember district plans,[23] I would characterize the case law as mature. While there is dispute in the lower courts about whether the three prongs of *Gingles* provide either necessary or sufficient evidence for a finding of vote dilution in an at-large or multimember plan, as of July 1991, every case that has been decided since *Gingles* in which the three prongs of the *Gingles* test were held to be satisfied has been decided in favour of plaintiffs.[24] Moreover, even courts that have not treated the *Gingles* factors as in and of themselves determinative have generally begun with the three-pronged test before going on to consider other aspects of the totality of the circumstances.[25] Most importantly, the Supreme Court has

repeatedly refused to revisit *Gingles,* and has dealt with subsequent section 2 challenges to at-large or multimember district elections either by refusing to hear them or by summary affirmance.[26]

Thus, in my view, at present, the question of whether a jurisdiction's use of multimember district or at-large elections can withstand challenge can be relatively straightforwardly ascertained by looking closely at a delimited number of objectively discernible case facts. In the case of at-large or multimember district elections taking place in jurisdictions with a minority population sufficiently large and concentrated enough to satisfy the first prong of *Gingles,* challenges brought by minority plaintiffs almost never lose.[27] The maturity of the U.S. case law in this area is further shown by the fact that the plaintiffs' bar is consolidating its gains in looking for those relatively few places that have not yet been sued (e.g., in California, where plaintiffs are likely to be Hispanic) in order to mop them up,[28] and looking for new frontiers to conquer (e.g., racial gerrymandering in single-member-district plans)[29] while the defendants' bar is primarily looking for loopholes and, by and large, not finding them. Of course, given recent changes on the Supreme Court, this rosy picture of a settled voting-rights case law may be subject to change without notice.

Partisan Gerrymandering: From Bandemer v. Davis *to Who Knows What, An Idea in Search of an Operationalization*

If section 2 challenges to at-large or multimember district elections are in a mature (i.e., fully developed) stage of case law, and case law in the one person-one vote area might be characterized as so mature as to be almost senile, how do we characterize the case law with respect to partisan gerrymandering? My answer to that question is straightforward. Partisan gerrymandering case law is in the toddler phase. How do we characterize the toddler phase? What do toddlers do? They make mudpies. They throw things. What has happened in the political gerrymandering cases heard so far, and what will continue to happen until the Supreme Court provides a resolution to partisan gerrymandering questions more definitive than the plethora of opinions in *Bandemer v. Davis*[30] or the denial of certiorari in *Badham v. Eu,*[31] is that lawyers and expert witnesses are throwing legal theories and statistical models "up against the wall" in the hopes that some of them will stick and make a pretty picture that judges will believe. Let me be clear, however, that this characterization is not meant to be pejorative. It is a necessary part of the evolution of case law that what had been an inchoate area be developed through the active competition of ideas.[32]

Continuing and Emerging Controversies in Minority Vote Dilution: A Look to U.S. Jurisprudence in the 1990s

One Person-One Vote

While one person-one vote issues of the type that had concerned courts in the

immediate aftermath of *Baker v. Carr* are no longer of great moment now that population-equality standards are so precisely defined, two interlinked issues related to but yet distinct from the old population-equality standards disputes remain matters of dispute. On the one hand, there is the question of what is an appropriate population base for reapportionment (e.g., total population versus total *citizen* population); on the other hand, there is the problem of how to cope with census undercount, especially insofar as that undercount differentially affects black, Hispanic, and Asian populations.

One Person–One Vote or One Citizen–One Vote?

Litigants concerned with changing the apportionment base to one that would exclude noncitizens unsuccessfully sued in the 1980s to compel the U.S. Census to enumerate only citizens.[33] With respect to congressional apportionment, it seems reasonably clear that the language of the U.S. Constitution (Article I) requires apportionment on the basis of persons.[34] At the state and local level there is some room for flexibility, but only to the extent that jurisdictions make use of what the Supreme Court in *Burns v. Richardson* referred to as a "permissible" apportionment base.[35] While two demographers have recently claimed that the one person–one vote standard must be interpreted as requiring districts that are equal in *citizen voting age* population,[36] that claim has never been accepted by any court and was specifically rejected in *Garza v. County of Los Angeles* at both the trial and the appellate level. As the Ninth Circuit majority opinion said with respect to this issue, basing districts on voting population rather than total population would "abridge the rights of aliens and minors to petition that representative. For over a century, the Supreme Court has recognized that aliens are 'persons' within the meaning of the 14th Amendment to the Constitution, entitled to equal protection. This equal protection right serves to allow political participation short of voting or holding a sensitive public office."[37] Moreover, virtually all jurisdictions at all levels of government use total population as the basis of reapportionment. If only citizens were to be counted for apportionment purposes, then the representation of Hispanics (and also Asians) would be dramatically diminished. The likely net consequences would be reduced Democratic representation.

What To Do About the Census Undercount?

Experts generally agree that the census is not perfectly accurate and that it tends to somewhat understate the total U.S. population. Moreover, there is little dispute that census errors are not evenly distributed. For example, on balance, the undercount is greater for minorities such as Hispanics, Asians, and blacks concentrated in urban areas of high poverty than it is for non-Hispanic whites. After both the 1980 and the 1990 census, there were numerous suits filed on behalf of various states and political subdivisions challenging the accuracy of census figures. The most important census-related case so far in the 1990s has been *Ridge v. Verity*.[38] As part of an out-of-court settlement of that case, the

Census Bureau agreed to convene a panel of experts to consider the question of whether statistical adjustment of the census to correct for undercount,[39] by making use of information about the magnitude of undercount among different population subsamples obtained from a Post-Enumeration Population Survey, was desirable.[40] This panel reported a positive recommendation for adjustment. However, Robert A. Mossbacher, U.S. Secretary of Commerce, while noting that "there are strong equity arguments both for and against adjustment," concluded that the evidence in support of an adjustment was "inconclusive and unconvincing,"[41] and opted against adjustment. That decision appears (as of October 1991) unlikely to be reversed by Congress.

Unfortunately, while the Secretary of Commerce has rejected adjustment, the bureau's advisory panel has indicated a preferred model for statistical adjustment, and the application of that model to the actual census data can, in principle, be duplicated by other experts. I foresaw a litigation nightmare when I wrote about the possibility of undercount adjustment in 1990.[42] What's happened so far is that some jurisdictions, where the claim can be made that adjustment improves accuracy, have been suing to demand that what will be referred to as "bureau-sanctioned" adjustments be done or at least that the adjusted data be made available to them to review. While district courts have required the census to release the adjustment data, the Supreme Court has vacated these writs.

Racial Vote Dilution

Definition and Measurement of Racial Bloc Voting

As noted above, the *Gingles* three-pronged test for vote dilution requires plaintiffs to establish that voting is polarized along racial lines, and cases even earlier than *Gingles*, such as *U.S. v. Marengo*,[43] had already made racial-bloc-voting analysis a "keystone" of any dilution claim. This has led to a great deal of controversy as to how racial bloc voting is to be defined.

Adapting the Gingles Standard to the Single-Member-District Context

Because *Gingles* dealt exclusively with vote dilution that occurred as a result of minority submergence in a multimember district system, there are questions not resolved by *Gingles* having to do with how to judge vote dilution in the context of single-member districts. If there are already single-member districts in place, some of these districts may be configured in a fashion that makes minority success likely, but there may also be concentration or dispersal of minority population so as to dilute minority voting strength. How do we judge whether a single-member-district plan that is being challenged (or one that is being proposed as a remedy) provides minorities an equal opportunity to participate in the political process and elect candidates of choice and thus satisfies the Voting Rights Act?

Relatively few cases involving racial gerrymandering claims in a single-

member-district plan have been decided and only a handful of these have been appealed all the way to the Supreme Court; as yet (October 1991) none have generated other than a denial of certiorari or a per curiam decision by the Supreme Court. Lower courts have differed in their approaches to single-member-district challenges, with some relying on the three-pronged *Gingles* test with only minimal modification (e.g., looking at whether an alternative plan exists that would provide at least one *additional* district in which the minority group would be a majority), and others looking to some variant of a "totality of circumstances" test. I have recently written at length on how to adapt *Gingles* to the single-member-district context.[44] In that essay, my co-authors and I assert:

> In the context of providing a full and effective remedy for vote dilution . . . , we begin with a district-specific analysis. In the liability phase we wish to know whether the group has a realistic potential to elect one or more (additional) candidates of choice (over the course of a decade) under an alternative plan, and we may take a 50 percent voting age share district as presumptive evidence (albeit not the only possible evidence) of such a potential. In contrast, in the remedy phase, we are concerned with whether the plan provides minorities an equal opportunity to elect candidates of choice. But before we can define "equal" opportunity in a plan, which requires us to compare both across groups and across districts, we must understand what it means to talk about a *given* group having a realistic opportunity to elect a candidate of its choice in a *given* district. Only after we have conducted a district-specific analysis are we then in a position to begin evaluating the overall fairness of a plan, i.e., whether or not it provides minorities an "equal opportunity to participate in the political process and to elect candidates of choice."
>
> In conducting our analyses [at the remedy phase] we must be attentive both (a) to differential levels of minority and non-minority eligibility, registration, and turnout, and, perhaps even more importantly, (b) to a realistic appraisal of the totality of local political circumstances, such as campaign finance, incumbency advantage, level of white crossover, etc.[45]

Because of space constraints and because I have recently reviewed the subject thoroughly elsewhere, I refer the reader to that work for a more detailed discussion of questions such as how to measure realistic potential to elect candidates of choice.[46]

Partisan Gerrymandering

I now turn to a discussion of the concept of political gerrymandering. One question is whether gerrymandering must be intended. In the racial context, because of the language in the 1982 amendments to section 2 of the Voting Rights Act, as noted above, the answer is no; although for there to be a constitutional violation, intent must still be proved. In the partisan context, where constitutional rather than statutory interpretation is at the basis of the court's judgment, *Davis v. Bandemer* requires that gerrymandering be shown to be intentional. But what is a gerrymander? A key distinction is between

definitions that focus on geographic characteristics of plans such as ill-compactness, and those that focus on a plan's actual or expected political/racial consequences.

One approach to defining a gerrymander relies solely on visual inspection, perhaps aided by some type of numerical analysis of compactness. Other approaches derive from different ways to operationalize the political consequences that the second type of definition of gerrymandering requires us to look at. One such approach uses statewide elections as a measure of partisan predispositions and then looks at the extent to which partisan voting strength has been packed (i.e., concentrated) or cracked (i.e., fragmented); another looks at what has been called *seats-votes relationships*[47] and then judges whether or not there is partisan *bias* (i.e., asymmetry in the way the voting strength of each party can be expected to translate into seat share in the legislature [see below]); yet another approach focuses on the extent to which there is a difference in the way that incumbents of each party have been treated in a given plan. These latter three approaches need not be mutually exclusive. Indeed, some scholars (e.g., Gordon Baker) advocate combining a variety of types of political analysis with "visual" analyses, giving rise to a fifth approach that is conceptually very similar to that of the "totality of circumstances" approach to measuring racial vote dilution.

Basically there are three lines of attack or counterattack with respect to claims of political gerrymandering. The first line of rebuttal to a partisan gerrymandering claim is to say: "That's not a gerrymander, that's just politics as usual." The second is to suggest that: "There is no such thing as a partisan gerrymander because there is no such thing as partisan identification in today's world of split-ticket voting." The third line of argument is to dismiss the evidence (e.g., about bias in seats-votes relationships) by saying that: "That's not proof, it's just statistics." With respect to the first point, my view is that courts should confine themselves to only the most egregious types of partisan gerrymanders. With respect to the second point, while who wins and who loses a particular election may vary and the margin of victory or defeat may vary, the *relative* levels of party support are remarkably consistent, i.e., there are certain precincts (certain areas of the state) where candidates of a given party do well and other areas where those same candidates do less well. Thus, I see no reasons to doubt that the probable partisan consequences of alternative districting schemes can be known with some degree of reliability, at least in the short run. Even over the course of a decade, especially if there are few competitive seats, which party can be expected to control a given branch of the legislature can often be anticipated. With respect to the third line of attack on claims of partisan gerrymandering, my own view, quite simply, is that the most powerful statistical test for partisan gerrymandering is (as it is in so many other areas) the interocular test, i.e., "Does the evidence for gerrymandering leap up and hit you between the eyeballs?" While the case law remains unclear (see below), I think it very unlikely that any plan that passes this interocular test will be overturned by the courts as an unconstitutional partisan gerrymander.[48]

Political Gerrymandering as the "Wild Card" of the 1990s Redistricting Game

The case law on partisan gerrymandering can best be described as opaque. No plan has yet been struck down as an unconstitutional gerrymander even though *Bandemer* now makes partisan gerrymandering justifiable. *Bandemer* upheld Indiana legislative plans that were pointed to by some scholars (but not by me)[49] as among the worst instances of 1990s gerrymandering. The first court decision subsequent to *Bandemer,* the challenge to California's congressional plan, *Badham v. Eu,* upheld what many (myself included) believed to be *the* most egregious gerrymander of the decade, and did so without even requiring a trial on the merits. The appeal of that three-judge panel's dismissal of the case for want of a substantial federal question was denied certiorari by the Supreme Court. In the second post-*Bandemer* case, *Republican Party of Virginia v. Wilder,*[50] the district court denied a motion for preliminary injunction against a plan that paired 14 Republicans and no (nonretiring) Democrats.[51] That decision rested in part on the grounds that paired incumbents could run in other districts or run for other office—and by the time the case was filed, many already had.

I believe you can make sense of the Supreme Court's decision in *Bandemer,* but as far as I am aware I am one of only two people who believe that *Bandemer* makes sense.[52] Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to *what* the plurality opinion means.[53] I do not believe you can make sense of the Supreme Court's refusal to consider the appeal of *Badham v. Eu,* especially the fact that Justice White did not vote to grant certiorari. I find the majority opinion in *Badham* totally unsatisfactory as to its standard for when gerrymandering is unconstitutional, since it seems to imply that successes of a party's candidates for statewide office rule out any challenge to a redistricting plan for Congress or a branch of the state legislature. By that line of reasoning, Douglas Wilder's election to the Virginia governorship would immunize the legislative plans in the state of Virginia from constitutional challenge as racial gerrymanders.[54] I also find the district court opinion in *Republican Party of Virginia v. Wilder* to be poorly reasoned. By its standards, the fact that an incumbent who had been paired chose to move or chose to run for other offices would vitiate any claim that incumbent pairing had had partisan consequences.

What is going to happen in the 1990s in the U.S. with respect to political gerrymandering is anybody's guess. Unfortunately, so far it appears that *Bandemer* has no teeth.[55]

The U.S. and Canada

I conclude my essay with a look at the relevance of U.S. redistricting practices and constitutional jurisprudence to the Canadian debate over one person-one vote.

In the debate over representation in the United States, the pendulum swung away from geographically based representation and toward voter

interchangeability in the 1960s, with *Baker v. Carr* and subsequent cases. However, on the one hand, it did not swing nearly as far toward perfect equality across districts as some Canadian jurists seem to believe and, on the other hand, the swing away from previous practices was much greater than Canadian jurists seem to recognize. I argue that Canadian judges who've written about U.S. redistricting experience and constitutional history, like most scholars in the U.S.: (a) take too seriously the views of the Supreme Court majorities in *Baker* and subsequent cases as to what the U.S. theory and practice of representation had actually been, and in so doing construe constitutional provisions such as Article I and the 14th Amendment in ways that have virtually no historical justification; (b) neglect the role of apportionment in constraining the population equality of congressional districts *across* states by looking at population equality only in terms of the equality among the congressional districts in a single state; (c) frequently conflate the very different standards of equal population applied to congressional as opposed to state and local redistricting in the U.S.; (d) are victims of the mistaken belief that, representation by population is, like being pregnant, something you either have or do not have, rather than a principle whose implementation ranges along a continuum with no obvious "bright lines"; and (e) appear to write in ignorance of the relevant U.S. case law on vote dilution and on partisan gerrymandering that makes a mockery of the claim that U.S. jurisprudence is fixated with one person-one vote to the exclusion of group-based concerns.

Turning to the first of these points, neither Supreme Court judges (nor their clerks) make very good historians, especially when they have incentives to read the record selectively to support a statutory or constitutional interpretation. For example, while the record certainly sustains the claim that the House is intended to be the seat of the popular principle, that does not mean that all (or even any) of the Founding Fathers advocated the standards of strict numerical population equality that the Court now regards as constitutionally compelled by Article I. Indeed, if we look at congressional redistricting in 1792 we find that, if we exclude the 6 states of the 16 that achieved equipopulous districting by the simple expedient of electing all members of Congress at large, while the ratio of largest to smallest district was 1.06 in Vermont, 1.07 in Kentucky, and 1.19 in Maryland, it was 1.33 in Virginia, 1.42 in New Hampshire, 1.46 in Pennsylvania, 1.68 in Massachusetts, 1.76 in North Carolina, 1.78 in South Carolina, and a whopping 2.71 in New York. In New York the total deviation was 88.2%! If this is population equality as close as practicable, somebody is confused. Similarly, if we look at equality among the congressional districts within each state in, say, 1872–a time when, presumably, it was as clear what the 14th Amendment was intended to achieve as one might hope, given that its proponents and opponents were all alive and active–we again find a striking range of variation in congressional district sizes within a given state.

In like manner, if the 14th Amendment forbids that state legislative districts should be apportioned on any basis other than population, it took over 80 years

after its passage before anybody noticed that fact. Even today, some 25 state constitutions still have provisions in them for some form of nonpopulation-based districting–provisions which are, of course, null and void insofar as they conflict with the Supreme Court's interpretation of what the 14th Amendment commands. Prior to *Reynolds v. Sims,* numerous states violated "rep by pop" in a drastic fashion. For example, the State of California has constitutional provisions capping potential representation from its urban centres which, by the 1960s, had created population discrepancies on the order of magnitude of 140 to 1 between the smallest and the largest legislative district.

Turning to the second point, even if we had perfect equality within the congressional districts of a given state, if we look across the U.S. as a whole we find striking variations in district size that are generated by the apportionment rule that guarantees each state at least one seat regardless of size and the vagaries of the "rounding" process required by the fact that congressional districts cannot overlap state lines. From the 1790s to the 1990s, the ratio of largest congressional district to smallest congressional district has averaged 2.65, with a range from 1.16 in 1810 to 6.77 (no, that's not a misprint) in 1900. The total deviation for the U.S. House of Representatives as a whole has averaged around 70% across the nation's history. The principal culprit was Nevada which was by a considerable margin the smallest state from its admittance in 1870 through 1950, and again won that distinction in 1980. (In 1960 and 1970, Alaska, newly admitted, was the smallest state; in 1990 that honour has fallen to Wyoming.)[56]

Turning to the third point, it is quite striking to me how the opinions in both *Dixon* and *Carter* neglect the very different standards of equal population applied to congressional as opposed to state and local redistricting in the U.S., despite the fact that the Factum submitted by the Province of Saskatchewan informed the *Carter* court about the use of *de minimis* standards in U.S. legislative districting as well as about the fact that U.S. congressional districts were not nearly as equal across states as they were within them. The absence of attention to the U.S. *de minimis* approach is particularly puzzling since it is the state-level one person-one vote standards, based on the 14th Amendment, rather than the standards for Congress, based on Article I of the U.S. Constitution, that would appear to be the most relevant basis of comparison with provincial boundary redistribution in Canada.[57]

With respect to the fourth point, it is useful to distinguish three approaches to application of criteria such as "rep by pop" that can be used to guide legal decision making. For mnemonic purposes I will refer to these approaches as defeasibility, de minimis, and Die Nothing. By *Die Nothing,* I mean the view that the only acceptable plan is one that *optimizes* some given criterion (such as one person-one vote) by creating the plan with the highest (or lowest) value on that criterion. By *defeasibility,* I mean the view that a particular criterion (such as one person-one vote) is the single most important criterion to be applied, but that other criteria can justify deviations from strict adherence to it, or otherwise

outweigh it.[58] By a *de minimis* approach, I mean one that says that outcomes on a criterion that are within a certain range are *ipso facto* constitutional unless the plan violates other constitutional or statutory standards.

As I read *Reynolds v. Sims,* it suggested that one person-one vote would be applied as a defeasible standard. However, in subsequent cases such as *Connor v. Finch,* the U.S. Supreme Court opted for a *de minimis* standard for state legislative districting;[59] while in *Kirkpatrick v. Preisler,* it opted for a "Die Nothing" standard for congressional redistricting. My view, quite simply, is that "rep by pop" is not an either-or proposition. How far from zero deviation one can get and still say that concern for one person-one vote is being observed is not a matter admitting of precise resolution on grounds of abstract principle. Rather it must reflect a realistic sense of historical practices, as well as commonsense appreciation of the inherent inaccuracies in census estimates and the fact that those estimates are a "snapshot" of a continually changing world.

Recognition that "rep by pop" is not an either-or principle allows us to save Chief Justice McLachlin from the accusation that she is schizophrenic in deciding *Carter* for the Province of Saskatchewan and *Dixon* against the Province of British Columbia, as well as from the accusation (made by several participants at the Saskatchewan conference) that in *Carter* she has repudiated the principle of "rep by pop." As J. Paul Johnston of the University of Alberta has argued,[60] the case facts are very different in the two jurisdictions. The total deviations in Saskatchewan, with the exception of the two northern districts, are only barely above the +/- 25% standard set down for federal ridings. The population deviations in BC, in contrast, are over twice as great. Thus, it is, I submit, not unreasonable for Chief Justice McLachlin to assert that the guiding principle of her opinion in *Dixon* is that "the *dominant consideration* in drawing electoral boundaries must be *population,*"[61] and to similarly assert that the guiding principle of her opinion in *Carter* is that "*relative or substantial equality* of the number of voters per representative *is essential.*"[62,63]

Turning to the fifth point, I was dismayed to see the U.S. case law on redistricting standards reviewed by Canadian courts without any mention of the relevant U.S. case law on vote dilution and on partisan gerrymandering–case law that makes a mockery of the claim that U.S. jurisprudence is fixated with one person-one vote to the exclusion of group-based concerns.[64]

More generally, the notion that the United States is a country whose entire history bespeaks a one person-one vote tradition, while Canada is just the opposite, distorts both U.S. and Canadian history. In trying to determine whether either Canada or the U.S. has a tradition of "rep by pop," it matters greatly whether one emphasizes asserted principles or actual practices. If by representation by population we mean the view that districts should be created that are, *literally, identical* in size, that notion has no historical support in American practice and can be thought of as purely an invention of the U.S. Supreme Court in *Kirkpatrick v. Preisler,*[65] which was then reaffirmed in

subsequent cases such as *Karcher v. Daggett*.[66] In the earliest period of U.S. history, there was a strong tradition of territorial representation, with an attempt to maintain townships or counties whole, although, as noted previously, some states opted for at-large representation in Congress.[67] Such a territorially based notion of representation persisted in state constitutional provisions for legislative apportionment.

The claim made in *Connor v. Finch* that a 10% total deviation (roughly a +/- 5% standard) is *de minimis* for state legislative districting in the United States has just as much historical support and textual support in the language of the 14th Amendment and the discussions surrounding its passage as the political compromise[68] that resulted in the +/- 25% standard for parliamentary ridings in Canada has in Canada's previous electoral practices and traditions. Both are practical compromises that seek to expediently reconcile the principle of one person-one vote with concern for other factors and with deference to legislative balancing of such concerns. Even now U.S. courts are unwilling to impose nonterritorially defined remedies for minority vote dilution and, absent intentional discrimination, have not yet definitively recognized voting-rights claims of groups not large enough to constitute the majority in a single-member district.[69]

There are, however, two differences between present practices and jurisprudence in the U.S. and Canada to which it is important to call attention. First, with the exceptions of the nine states that have some form of commission for legislative redistricting, the handful of states that refer redistricting to state courts in the event of the failure of the legislature to act in a timely fashion, the few states that assign the governor's office a prominent role, and a handful of other exceptions, the drafting of new legislative boundaries (whether these be congressional, legislative, or local) is in the hands of the legislature (or county board or city council) itself. In contrast, in recent years, Canada, at least at the federal level and increasingly at the provincial level, has opted for boundary commissions along the British model.[70] Second, Canadian case law permits a constitutional violation to be found without a determination that there has been intentional discrimination; arguably, U.S. case law does not, although the Supreme Court has held that Congress has statutory power to remedy discrimination under the 14th Amendment by passing legislation that relies on an effects test, and Congress has done so with respect to voting rights.[71]

Where Canadian boundary-distribution case law can be expected to proceed post-*Carter* is an intriguing question. With respect to one person-one vote issues, U.S. precedents do not have a clear answer. While hindsight might suggest that the eventual replacement of the vague guidelines in *Reynolds v. Sims* with more precise numerical standards was inevitable, and thus would likewise suggest that the comparably vague standards in the majority opinion in *Carter* will eventually be replaced by something like a +/- 25% *de minimis* approach, U.S. scholars at the time of *Reynolds* simply did not anticipate how far the Supreme Court would eventually carry the one person-one vote

doctrine, nor did they anticipate the evolution of the Supreme Court's double standard with respect to population equality at the state or local as opposed to at the congressional level. Given what I see as the relative arbitrariness of the U.S. Supreme Court's enunciation of constitutional standards for one person-one vote, I would be chary of predicting how Canada's courts will eventually come out with respect to this issue, although it does appear clear that they will not be as insanely insistent on absolute population equality as the U.S. Supreme Court has been with respect to congressional districting.[72] I can expect, however, that Canadian courts will eventually be forced to resolve the discrepancy between apportionments based on voters and those based on population suggested by the language in *Carter* that refers at some points to representation by population and at other points to representation of voters, in the same way that such issues have been confronted by U.S. courts in cases such as *Garza.*[73] I am also quite confident in predicting that Canada can look forward to a wave of future challenges to boundary distributions on the grounds that they discriminate against particular racial, linguistic, or political groups.[74, 75] Moreover, it is likely that these challenges will take place at the local as well as at the federal or provincial level. Because such vote-dilution challenges require much more intensive use of social science evidence than one person-one vote cases, Canadian political scientists can look forward to having their day in court.[76]

Notes

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1. Chandler Davidson, *Minority Vote Dilution* (Washington, DC: Howard University Press, 1984), 4. Similarly, Richard Engstrom, "Racial Vote Dilution: The Concept and the Court" in Lorn F. Foster, ed., *The Voting Rights Act: Consequences and Implications* (New York: Praeger, 1985), defines vote dilution as "the practice of limiting the ability of blacks [or other minorities] to convert their voting strength into the control of or at least influence with elected public officials."
2. In the United States, the seminal case for the latter type of dilution is *Bandemer v.*

Davis, 603 F. Supp. 1479 (S.D. Indiana, 1984); 478 U.S. 109 (1986). I was the sole expert witness for the State of Indiana in that case.

3. *Baker v. Carr*, 369 U.S. 186 (1962).
4. *Reynolds v. Sims*, 377 U.S. 533 (1964).
5. Ibid., 579.
6. The total deviation (which has a variety of other names in the literature, see Andrea J. Wollock, ed., *Reapportionment; Law and Technology* [Denver: National Conference of State Legislatures, June 1980]) can be defined as the sum of the absolute value of the difference between the largest district and ideal district size and the absolute value of the difference between the smallest district and ideal district size, as normalized by (i.e., divided by) ideal district size.
7. See e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, I 462 U.S. 725 (1983); II 466 U.S. 910 (1984).
8. One person-one vote districting standards at the local level are essentially the same as those applied to state legislative redistricting. See e.g., *Abate v. Mundt*, 403 U.S. 182 (1971).
9. See e.g., *Connor v. Finch*, 431 U.S. 407 (1977).
10. The Supreme Court accepted a total deviation of 16.4% in *Mahan v. Howell*, 410 U.S. 315; a total deviation of 16.5% for the Mississippi Senate and 19.3% for the Mississippi House was rejected in *Connor*. While the Supreme Court accepted a total deviation in excess of 80% in *Brown v. Thomson*, 536 F. Supp. 780 (D. Wyo. 1982) aff'd 103 S Ct. 2690; 462 U.S. 835 (1983), there are very special circumstances in that case that render it of little precedential value. First, the excessive deviation appeared to rest solely on the unequal treatment of one small county; second, Wyoming could argue that its state legislators had been given a unique role in the affairs of counties contained in their districts; third, it is arguable that the jurisdictional statement was so narrowly focused that the Supreme Court never actually reviewed the constitutionality of the entire plan. While federal courts have focused on the total deviation,which is a range, they have sometimes also paid attention to the average deviation as well. See my discussion in "Criteria for Districting: A Social Science Perspective," *UCLA Law Review* 33/1 (October 1985): 77-184.
11. See e.g., *Flateau v. Anderson*, 537 F. Supp. 257 (S. D. New York, 1982).
12. In particular, the strict standard of population equality across congressional districts insisted on by the Supreme Court considerably exceeds the limits of census accuracy and thus makes little sense from a statistical standpoint. (Grofman, "Criteria for Districting" [see n.10].)
13. Presumably that initial motivation was to assure "fair and effective representation." See Bernard Grofman, *Voting Rights, Voting Wrongs: The Legacy of Baker v. Carr*, "A Report of the Twentieth Century Fund" (New York: Priority Press [distributed through the Brookings Institution] 1991), 11. It is hard for me to believe that there would have been the same concern with lack of strict population equality if that inequality was randomized rather than giving rise to a predictable political "bias" in favour of certain groups within the society, e.g., rural interests and white voters. Moreover, while districts that are (within reason) equipopulous may be *necessary* to achieve fair representation, it is quite clear that equipopulous districts are not *sufficient* to assure either the fairness or the effectiveness of representation. The Supreme Court has failed to develop a general theory of equal protection with

respect to representation that would subsume decisions in areas such as one person-one vote, racial vote dilution, and partisan gerrymandering. Academics, however, have not been much better in this regard. See, however, Jonathan Still, "Political Equality and the Election System," *Ethics* 91/3 (April 1981): 375-95; Bernard Grofman, "Fair and Equal Representation," *Ethics* 91/3 (April 1981): 477-85; Charles R. Beitz, "Equal Opportunity in Political Representation," in Norman E. Bowie, ed., *Equal Opportunity* (Boulder: Westview Press, 1988), 155-76; Nancy Maveety, *Representation Rights and the Burger Years* (Michigan: University of Michigan Press, 1991); Bernard Grofman and Howard Scarrow, "The Riddle of Apportionment: Equality of What?" *National Civic Review* 70/5 (May 1981): 242-54; Bernard Grofman, "Toward a Coherent Theory of Gerrymandering: *Thornburg* and *Bandemer*," in B. Grofman, ed., *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990): 29-63.

14. For example, former Attorney General Nicholas Katzenbach only advocated that total deviations of greater than 30% be forbidden. Also see discussion in Twentieth Century Fund, *One Man, One Vote* (New York: the Twentieth Century Fund, 1962).
15. *City of Mobile v. Bolden,* 466 U.S. 55 (1980).
16. Of course, strictly speaking, *City of Mobile* set the standards for vote dilution for cases brought directly under the 14th (or 15th) Amendment while section 2 of the Voting Rights Act only specified a statutory standard. In practice, since section 2 was enacted in 1982, most plaintiffs bring their voting-rights challenges under the section 2 provisions, and even if constitutional questions are also raised, courts decide the case on statutory grounds without needing to consider the more-difficult-to-prove constitutional standard. Moreover, in *Rogers v. Lodge,* 458 U.S. 613 (1982) the Supreme Court backed away from its seeming insistence in *City of Mobile* that the only way to establish intent was by direct evidence that discrimination was purposeful. In *Rogers,* the Court accepted a variety of types of circumstantial evidence (including evidence of foreseeable effects) as proof of purpose. For a more detailed discussion, see Laughlin McDonald, "The Effects of the 1982 Amendments of Section 2 of the Voting Rights Act on Minority Representation," in B. Grofman and C. Davidson, eds., *Controversies in Minority Voting* (Washington, DC: The Brookings Institution, 1992 forthcoming).
17. *White v. Regester,* 412 U.S. 755.
18. See especially *Zimmer v. McKeithen,* 485 F. 2d 1297 (5th Cir 1973) (en banc) aff'd on other grounds *sub nom East Carroll Parrish School Board v. Marshall,* 424 U.S. 636 (1976).
19. The act had previously been renewed in 1970 and 1975. In 1975 persons of Asian ancestry, American Indians, and persons of Spanish heritage were added as groups specially protected by the act—whose coverage previously had extended only to blacks.
20. *Report of the U.S. Senate Committee on the Judiciary on S. 1992,* 1981.
21. I testified on behalf of the black plaintiffs in that case.
22. See more detailed discussion in Bernard Grofman, Michael Migalski, and Nicholas Noviello, "The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective," *Law and Policy,* 7/2 (April 1985): 209-23.
23. See below for discussion of vote-dilution standards in racial and political gerrymandering challenges to single-member-district plans.

24. See detailed discussion in Lisa Handley, "The Quest for Voting Rights: The Evolution of a Vote Dilution Standard and Its Impact on Minority Reporting," Ph.D. dissertation, George Washington University, 1991. Also see Bernard Grofman, and Lisa Handley, "Identifying and Remedying Racial Gerrymandering," *Journal of Law and Politics,* 1992 forthcoming.
25. For a detailed discussion of all appellate cases since *Gingles* involving section 2 issues, see references cited above.
26. We might also note that, in the United States, judges at various levels are elected officials. In 1991, in a case consolidating challenges to judicial elections in Texas and Louisiana, the U.S. Supreme Court affirmed that the *Gingles* vote-dilution test applied to judges who were elected at large. That case is the only section 2 litigation since Gingles that has led to a written Supreme Court opinion.
27. Analysis of data from the seven southern states originally covered by section 5 of the Voting Rights Act suggests that minorities prevail in over 90% of the cases that are brought. See Chandler Davidson, and Bernard Grofman, *Voting Rights in the South* (title tentative), 1992 forthcoming.
28. Case facts permitting, of course.
29. See Grofman and Handley, "Identifying and Remedying Racial Gerrymandering," (see n.24).
30. *Bandemer v. Davis,* 603 F. Supp. 1479 (1984), S.D. Indiana.
31. *Badham v. Eu* (N.D. California, No. C-83-1126, dismissed 21 April 1988).
32. See Editor's Introduction in Bernard Grofman, ed., *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990).
33. *Federation for American Immigration Reform (FAIR) et al. v. Philip M. Klutznick,* 486 F. Supp. 564 (1980).
34. See, however, my discussion of this point in *Voting Rights, Voting Wrongs* (see n.13).
35. Precedent in the Supreme Court is quite clear that, for state and local redistrictings, the decision to apportion on the basis of population or citizen population is a discretionary one. "The decision to include or exclude [aliens or other nonvoters] from the apportionment base involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere" [*Burns v. Richardson,* 348 U.S. 73 at 91 (1966)]. Nonetheless, were a jurisdiction to shift to apportioning on the basis of citizen population or citizen voting-age population rather than total population, it would seem to me to invite a lawsuit under the 14th Amendment, especially if there were the possibility that a claim could be made that the shift had taken place in order to reduce expected minority representation.
36. William A.V. Clark, and Peter A. Morrison, "Demographic Paradoxes in the Los Angeles Voting Rights Case," *Evaluation Review* 1991 forthcoming.
37. *Garza v. County of Los Angeles,* 9115 F. 2d. 763 (1990). At p. 8142, internal citations omitted.
38. *Ridge v. Verity,* Civ. No. 88-351 (W.D. Pennsylvania 1991).
39. The issue is far more complex than a simple choice of whether to adjust or not. Indeed, certain types of statistical adjustment already take place, e.g., imputation of missing values on incompletely filled-in census forms. Arguably, however, the extant nature of adjustment is qualitatively far different than what would be contemplated if PES data were used in the fashion contemplated by bureau statisticians.
40. The PES is an attempt to go back to selected areas of the country and, by blanketing each area, find out who had been missed.

41. Statement of Secretary of Commerce Robert A. Mosbacher on Adjustment of the 1990 Census, U.S. Department of Commerce Press Release, 15 July 1991.
42. See my discussion of census undercount in *Voting Rights, Voting Wrongs* (see n.13).
43. *U.S. v. Marengo County Commissioners,* 731 F. 2d 1546 (11th Cir. 1984).
44. Grofman and Handley, "Identifying and Remedying Racial Gerrymandering" (see n. 24).
45. Ibid.
46. Ibid.
47. See e.g., Edward R. Tufte, "The Relationship Between Seats and Votes in Two-Party Systems," *American Political Science Review* 67 (1973): 540–47; Graham Gudgin, and Peter Taylor, *Seats, Votes and the Spatial Organization of Elections* (London: Piori, 1979); Rein Taagepera, and Matthew Shugart, *Seats and Votes: The Effects of Determinants on Electoral Systems* (New Haven: Yale University Press, 1989).
48. For a more elaborated discussion of these three points see Bernard Grofman, "Continuing and Emerging Controversies in Voting Rights Case Law: From One Person, One Vote to Political Gerrymandering," *Stetson Law Review,* 1992 forthcoming. My own most important early work on redistricting ("Criteria for Districting" [see n.10]) is found in an October 1985 issue of the *UCLA Law Review* largely devoted to a symposium on political gerrymandering. The issue contains essays that I would call to the reader's attention by Bruce Cain, Richard Niemi, Daniel Lowenstein, and a number of other specialists. This set of essays is an excellent introduction to political gerrymandering issues as they were viewed by social scientists and lawyers just before the Supreme Court issued its decision in *Davis v. Bandemer.* Because partisan gerrymandering questions remain so open, much of what was said in 1985 remains relevant today. Another mini-symposium on political gerrymandering of continuing relevance is that on *Badham v. Eu* in the Summer 1985 issue of *PS.* It contains essays by Bruce Cain, myself, and others. Of course every reader interested in political gerrymandering should consult my edited book, *Political Gerrymandering and the Courts* (see n.13). That volume contains essays by most of the leading authorities on political gerrymandering, representing the complete spectrum of views on the topic. It is intended to be a comprehensive and self-contained source book of readings on political gerrymandering.
49. See my expert witness testimony in the case on behalf of the State of Indiana in *Bandemer.*
50. *Republican Party of Virginia v. Wilder,* Civ. No. 91-0424-R (W.D. Va., 1991).
51. The 1991 plan for the lower house of the Virginia legislature paired over a third of all 1990 Republican incumbents with other Republican incumbents.
52. In particular, I believe that it imposes a test that partisan gerrymandering be intentional, severe, and predictably long lasting before it can be held to be unconstitutional. See Bernard Grofman, "Toward A Coherent Theory" (see n.13).
53. See Daniel Hays Lowenstein, "*Bandemer*'s Gap: Gerrymandering and Equal Protection," in Grofman, *Political Gerrymandering and the Courts* (see n.13).
54. In fairness, of course, the *Bandemer* Court did distinguish between the appropriate standard in a racial claim and that in a partisan suit, with the latter having to meet a higher threshold.
55. This view has been most forcefully enunciated by UCLA Law Professor Daniel Lowenstein. See especially his essay in Grofman, *Political Gerrymandering and the Courts,* (see n.13).
56. This point was called to the Court's attention in the Factum submitted by the

Attorney General of Saskatchewan in *Carter*. I am indebted to Crown Solicitor John Thomson Irvine for providing me a copy of the factums submitted by Saskatchewan to the Court of Appeal and the Supreme Court of Canada in the Saskatchewan boundaries case.

57. As an outsider, I am struck by the general insistence among Canadians to distinguish their customs and practices from those in the U.S. This insistence may have led to a kind of cognitive distortion of U.S. case law by the jurists that emphasized its most extreme one person-one vote aspects. Alternatively, the jurists may not have been sensitive to the view that "rep by pop" could be thought of as a principle subject to "more or less" rather than as an absolute zero population deviation standard (see below).
58. At issue, still, would be whether the burden of proof would be on defendants to justify exceptions as necessary, or whether the burden would be on plaintiffs to show that such deviations were unreasonable. See Lawrence Tribe, *American Constitutional Law*, 2d ed. (Mineola: Foundation Press, 1988) for an excellent discussion of related issues in U.S. "equal protection" case law.
59. In some of the early one person-one vote cases in the United States, federal courts asserted that acceptability in a given instance of some given population tolerance could not be used in a talismanic fashion to validate any discrepancies below that range in other jurisdictions—rather, legislatures would have to *justify* deviations in terms of legitimate state purposes. However, in *Connor*, the principle of a *de minimis* standard seems rather clearly set forth.
60. Personal communication, November 1991.
61. *Dixon*, Slip opinion at p. 30, emphasis added.
62. *Carter*, Slip opinion at p. 22, emphasis added.
63. We may think of this approach, with its emphasis on relative equality within the primacy of "rep by pop" as Justice McLachlin's *Carter-Dixon* line—one that she claims separates Canada from its southern neighbour.
64. The developments in U.S. case law that I refer to having to do with racial and partisan vote dilution are, of course, relatively recent ones—some in place only since 1986; most post-1973 (see discussion earlier in my paper). There appears to be a certain time warp aspect to the discussions of U.S. case law in *Dixon* and *Carter*, as if Canadian judges learning about U.S. constitutional and statutory jurisprudence stopped about 20 years ago—perhaps when they were in law school taking courses in comparative law. In fairness, however, these recent developments are also little known and little understood in the U.S., and it takes a peculiar kind of U.S. parochialism to critique judicial decisions in another country for a failure to grasp the nuances of U.S. jurisprudence.
65. 89 S. Ct. 1225, 394 U.S. 526 (1969).
66. 103 S. Ct. 2653, 462 U.S. 725 (1983). Of course, now congressional plans do strive for almost perfect population equality. For example, the congressional plans (peculiarly, there were more than one) passed by the California legislature in 1991 had a total deviation of +/- five—*five persons, that is!*
67. See Rosemarie Zagarri, *The Politics of Size: Representation in the United States, 1776-1850* (New York: Cornell University Press, 1987).
68. In commentary remarks at the Saskatchewan conference, this is how John Courtney characterized the statutory provision of the +/- 25% standard.
69. A potential exception is a recent federal district court ruling, *Armour v. Ohio*, that

seems to permit an "influence" claim by a group not large enough to constitute the majority in a single district. However, this is both a confusing decision and one that seems certain to be appealed to the U.S. Supreme Court. See discussion of this case in Grofman and Handley, "Identifying and Remedying Racial Gerrymandering" (see n. 24).

70. It is at least conceivable that the composition of these commissions, themselves, may come under challenge. In the U.S., one commission was actually challenged for being too representative. In New York City, there was a challenge to the New York City Districting Commission on the grounds that the requirements for representation of minorities among its members set down in the statute that created it violated the ostensibly colour-blind standards of the U.S. Constitution. However, that statute had been precleared by the United States Department of Justice under section 5 of the Voting Rights Act.
71. The requirement that discrimination under the 14th Amendment's equal protection clause must be intentional to be unlawful, at least for a constitutional violation, is a controversial proposition. For example, the Supreme Court did not initially assert this doctrine when it first ruled on school desegregation, although it did so in subsequent cases. Similarly, it is quite controversial whether the earliest vote-dilution cases contained a requirement that discrimination be shown to be intentional, although recent cases such as *Mobile v. Bolden,* 446 U.S. 55 (1980) and *Rogers v. Lodge,* 458 U.S. 613 (1982) claim that they did. Moreover, at no time have the one person-one vote cases been held to require proof of intentional discrimination. Yet, at least for legislative and local cases, they too are decided under the 14th Amendment. For vote-dilution cases, the intent test is largely irrelevant in that the 1982 Amendments to the section of the Voting Rights Act of 1965 specified that a statutory violation required only evidence of dilutive effect given the "totality of the circumstances." As noted above, this statute was given its definitive interpretation by the U.S. Supreme Court in *Thornburg v. Gingles* in 1986.
72. Like many other U.S constitutional scholars, I am sceptical of the legal and historical support for the U.S. Supreme Court's "double standard" for state and congressional districting. Moreover, as one leading scholar, Lawrence Tribe, has put it, regardless of whether there is a justification for distinguishing between state and congressional districting when "considering how far a state may stray from exact equality in pursuit of a legitimate objective, no such rationale supports a distinction concerning the appropriateness or extent of the *de minimis* defense. An appropriately formulated standard of interdistrict equality, allowing minor deviations, could well be applied to both types of cases." Tribe, *American Constitutional Law* (see n.58), 1071, (footnote omitted).
73. Based on my conversations with Canadian political scientists at the Saskatchewan conference, it appears that one difference in likely sources of litigation between the U.S. and Canada is that in Canada there is not dissatisfaction with the accuracy of the census count of minorities.
74. Indeed, since it took the U.S. 90 years to go from the 14th Amendment to *Reynolds v. Sims,* but it has taken Canada only 9 years to go from Charter to *Carter,* it might seem plausible to expect Canada to do in 2 years what has taken the U.S. nearly two decades, namely replace concern for one person-one vote issues with concern for issues of minority vote dilution.
75. Whether the majority opinion in *Carter* was written to actively encourage such challenges is a matter about which I am more sceptical.

76. This can be a mixed blessing. See A. Wuffle, "Advice to the Expert Witness in Court," *PS* (Winter 1984): 60-61; Bernard Grofman, "The Role of Expert Witness Testimony in the Evolution of Voting Rights Case Law," in Bernard Grofman and Chandler Davidson eds., *Controversies in Minority Voting* (see n.16); Bernard Grofman, "A Critique of Freedman et al. and Clark and Morrison," *Evaluation Review* (1991 forthcoming); Bernard Grofman, "Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the use of Social Science by the Courts," *Social Science Quarterly* (1991 forthcoming); Bernard Grofman, "Straw Men and Stray Bullets, A Reply to Bullock," *Social Science Quarterly* 72/4 (December 1991), 838-43.