Comparative Electoral Law Canada/United States: **The Two Supreme Court Decisions that Differenciate the Canadian Electoral System**

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The Relative Diversity of Electoral Statutes

Canada has 14 electoral jurisdictions:

- 10 provinces
- 3 territories; and
- the federal level.

The US has at least 50 electoral jurisdictions

Electoral legislation is often technical (procedural statutes)

Therefore, it is easier to understand it through the lens of the principles at stake:

Equity, integrity, legitimacy, transparency, accountability, self-determination, peaceful transition of power, etc.

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The Right to Vote: an International Human Right

International Covenant on Civil and Political Rights, 1966

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

Ratified by Quebec and Canada in 1976 and by the United States in 1992

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Other Valuable International Instruments

- General comments no 25, UN-Human Rights Committee, 1996
- Human rights jurisprudence (ex. European Court of Human Rights)
- Soft law, guidelines, manuals, for example in the field of Electoral observation
  - Organization for Security and Co-operation in Europe (OSCE)
    US and Canada are members

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In the United States

Art. 1 of the Constitution (1789) :
"chosen … by the people"

+ equal protection clauses of the XIVth, XIXth and XXVIth amendments which extend the right to vote to African Americans (1870), to women (1920) and to above 18 years old (1971)

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In Canada

Constitutional Act of 1791
Constitutional Act of 1867 (implied *Bill of rights*)
Canadian Charter of Rights and Freedoms, 1982 (*Canadian Charter*):

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

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So what are the two Court decisions?

1. *Harper* v. *Canada (Attorney General)*, 2004 SCC 33 [***Harper***]; and

2. *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 [***Carter***]

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Corresponding Rulings in the United States

	SCC	SCOTUS
Control of electoral expenses	• *Harper* (2004)	• *Citizens United v. Federal Election Commission* , 558 U.S. 310 (2010)
Determination of electoral districts	• *Carter* (1991)	• *Karcher* v. *Daggett*, 462 U.S. 725 (1983) • *Rucho* v. *Common Cause*, 588 U.S. (2019)

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Stephen Joseph Harper

Image source: Radio-Canada

- 2004 to 2015: Leader of the Conservative Party of Canada and Prime Minister of Canada from 2006 to 2015;
- 2002: Return to the Parliament as leader of the Official Opposition and leader of the Canadian Alliance;
- 1997 to 2002: President of the National Citizens Coalition (NCC), a conservative lobby group;
- 1993 to 1997 : Reformist Member of Parliament in Ottawa.

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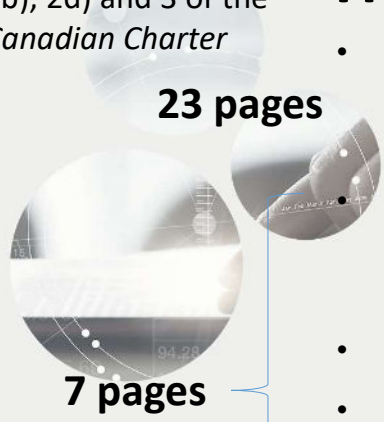
Based on sections 2b), 2d) and 3 of the *Canadian Charter*



The Contested Provisions

- S. 350 of the *Canada Elections Act* (CEA) which limits to $3000 the amount of electoral advertising expenses that may be incurred by a third party in a given electoral district ($150 000 accross Canada);
- S. 351 CEA which forbids individuals and groups from acting in collusion or by splitting up to circumvent the maximum amounts mentioned above;
- S. 323 CEA which forbids election advertising on polling day;
- Ss. 352-357, 359-360 and 362 CEA, which force third parties to include their name in any election advertising message they place and to register with the CEO immediately after having incurred expenses in an aggregate amount of $500.

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The Egalitarian Electoral Model

41. […] the objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.

Libman v. *Quebec (Attorney General)*, [1997] 3 S.C.R. 569, par. 41 [*Libman*].

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Regulation of Third Parties' Election Expenses

47 […] To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. […]

48 For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups […]

50 It is also important to limit independent spending more strictly than spending by candidates or political parties. [...] Otherwise, owing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate.

Libman, par. 47, 48 and 50, as quoted in *Harper*, par. 61 (1, 3 and 5)

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The Informational Aspect of Voting Rights (s. 3)

A right to express oneself without limits?

Harper (2004), par. 72, Justice Bastarache's reasons

[…] If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out; see *Libman*, supra; *Figueroa*, supra, at para. 49. Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent's submission, s. 3 does not guarantee a right to unlimited information or to unlimited participation.

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The Right to Vote in a Fair Election

48 […] Section 3 prevents Parliament from interfering with the right of each citizen to play a meaningful role in the electoral process; it does not impose upon Parliament an obligation to enact legislation that enhances the capacity of political parties to raise funds for the purpose of communicating the ideas and opinions of its members and supporters to the general public. However, legislation that bestows a benefit upon some political parties, but not others, requires scrutiny. In this instance, it is only because Parliament has extended these benefits to political parties that satisfy the 50-candidate threshold that its consequent failure to extend these benefits to political parties that do not satisfy the threshold constitutes an infringement of s. 3.

49 The premise underlying this conclusion is a fairly simple one. Owing to the **competitive nature of the electoral process**, the capacity of one citizen to participate in the electoral process is closely connected to the capacity of other citizens to participate in the electoral process. The reason for this is that there is only so much space for political discourse; **if one person "yells" or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse**. It is possible, in other words, that the voices of certain citizens will be drowned out by the voices of those with a greater capacity to communicate their ideas and opinions to the general public.

Figueroa v. *Canada (Attorney General)*, 2003 SCC 37 [*Figueroa*], par. 48-49, Justice Iacobucci's reasons.

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S. 3 justifies the infringement of subs. 2b)

50 At issue in this appeal is whether the third party spending provisions of the Canada Elections Act, S.C. 2000, c. 9, violate ss. 2(b), 2(d) and 3 of the Canadian Charter of Rights and Freedoms. To resolve this issue, the Court must reconcile the right to meaningfully participate in elections under s. 3 with the right to freedom of expression under s. 2(b). […]

Harper (2004), first paragraph of Justice Bastarache's reasons

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REAL EQUALITY > FORMAL EQUALITY

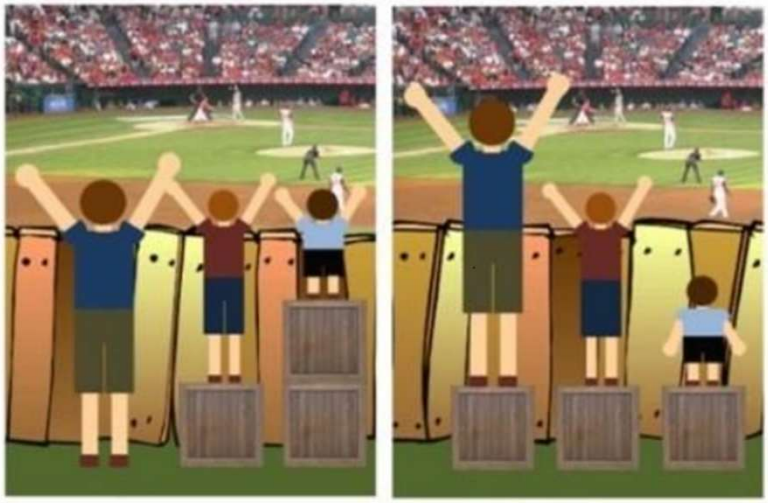

Image source: Gouvernment of Canada

62 […] wealth is the main obstacle to equal participation […]

113 […] Further, the reality in Canada is that regardless of the spending limits in the Act, the vast majority of Canadian citizens simply cannot spend $150,000 nationally or $3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech as defined by the Chief Justice and Major J. is a lack of means, not legislative restrictions. […]

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In the United States, the analytical framework is quite different…

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Freedom of Speech under the 1st Amendment

- Broad interpretation, especially in matters of political expression;
- May be subject to justified infringement under a "compelling state interest";
- Therefore, "preventing corruption or the apparence of corruption" made it possible to justify the contribution limits to parties and candidates.
  - *Buckley* v. *Valeo*, 424 U.S. 1 (1976) .

    Limits on third party expenditures generated more difficulties.

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Avoiding Election Distortion (1990-2010)

- Thus, in 1990, considering that "[c]orporate wealth can unfairly influence elections", the majority of the SCOTUS maintains provisions prohibiting legal persons from making expenditures directly supporting or disapproving a candidate.
  - *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990);
- This position was maintained in 2003:
  - *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003).

But in 2010?

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Citizens United v. FEC, 558 U.S. 310 (2010)

- Conservative lobby group that wanted to release a film criticizing Hilary Clinton during the 2008 Democratic primaries.
- The debate before the SCOTUS initially presented itself as a question of interpretation: Was the film directly opposing the candidate?
- However, during the deliberations, the Court requested a new hearing to address the constitutional questions and ultimately invalidate the precedents mentioned with a majority of 5 judges against 4.
- Very strong dissent from Justice John P. Stevens: “A democracy cannot function effectively when its constituent members believe laws are being bought and sold.” (p. 453)

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A Controversial Precedent

- The *Citizens United decision* has been the subject of much criticism both in the United States and internationally (OSCE);
- Even in Quebec, in the case *Pontiac* v. *McCann*, 2016 QCCS 3008, Justice Pierre Dallaire wrote :

> [80] We are not in the United States here. In the United States, their Supreme Court, in a very controversial decision, has removed all electoral expenditure limits. We will have the pleasure of seeing the result of this approach next November.
>
> [81] But we are lucky, as far as I am concerned, to live in a State where our law to limit election expenditures and election contributions has been upheld by our Supreme Court, where those limits have been recognized as reasonable limits on freedom of expression. *(translation)*

- Some have even called for a constitutional amendment;
- However, this decision led to the creation of Super PACs which now have considerable influence on American politics.

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Determination of electoral districts

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Regarding Electoral Division

- The United States have a long tradition of partisan political division.
- Until the 60s, this matter was considered a nonjusticiaible question:
  - *Colegrove* v. *Green*, 328 U.S. 549 (1946).
- Confronted to important disparities which had been going on for decades, the SCOTUS finally intervened through the 14th Amendment's equality guarantee: "one person, one vote":
  - *Baker* v. *Carr*, 369 U.S. 186 (1962); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); and *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

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Toward an absolute Quantitative Criterion

In the cases *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Karcher* v. *Daggett*, 462 U.S. 725 (1983), the SCOTUS invalidates the boundaries applicable for the election of representatives to the United States Congress from Missouri and New Jersey,

Which nevertheless provided for respective gaps of ± 3% of the voter quotient, and less than 1%, that is, less than the margin of error of the census from which the data in question was derived.

Despite everything, the majority of the SCOTUS considers that :

- we must aim for "absolute equality";
- it is not up to the Court to define an acceptable *de minimis* variance; and that
- any deviation "however small" requires justification.

Greater tolerance for the election of representatives to the State Congress:

Gaffney v. *Cummings*, 412 U.S. 735 (1973), validating variations of ± 7,83%.

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Racial or Partisan Gerrymandering ?

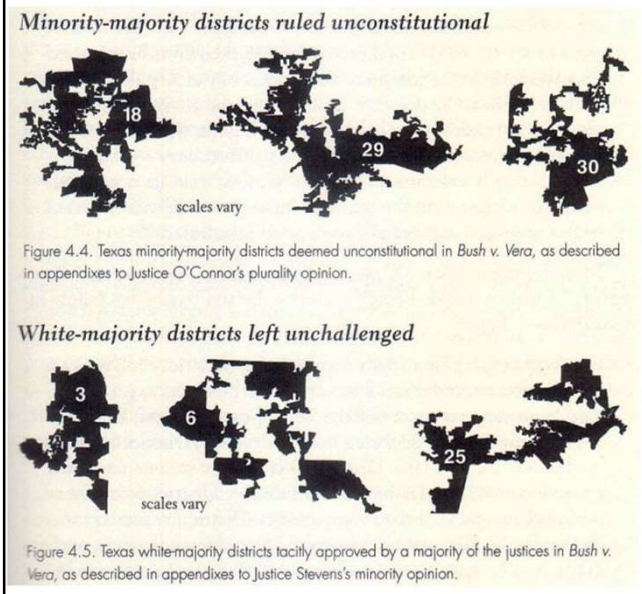

Figure 4.4. Texas minority-majority districts deemed unconstitutional in *Bush v. Vera*, as described in appendixes to Justice O'Connor's plurality opinion.

Figure 4.5. Texas white-majority districts tacitly approved by a majority of the justices in *Bush v. Vera*, as described in appendixes to Justice Stevens's minority opinion.

With absolute equality established on the quantitative level, the debate now moves to the qualitative level.

So, to what extent can we accept that a delimitation is retained to reduce the political power of an ethnic group?

To increase it (affirmative Gerrymandering)?

To maximize the representation of the political party that controls the levers in the relevant state?

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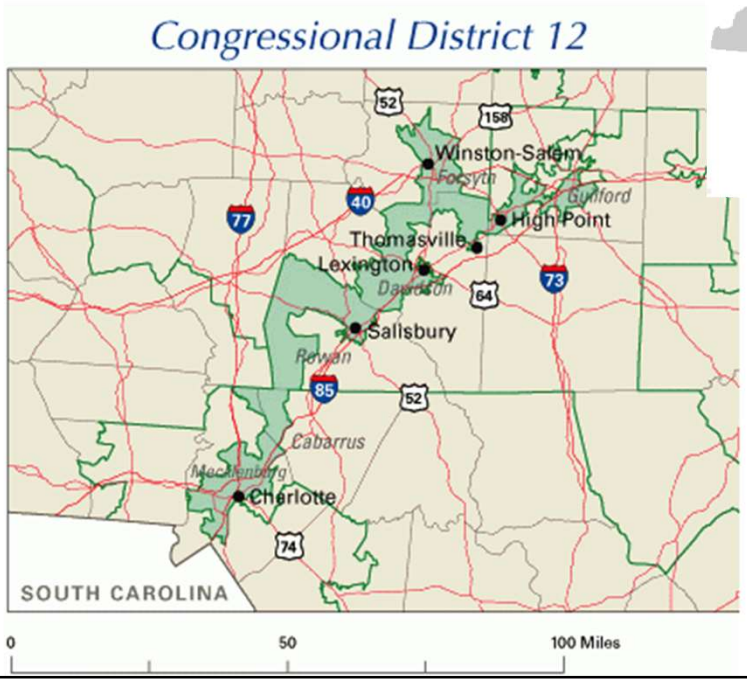
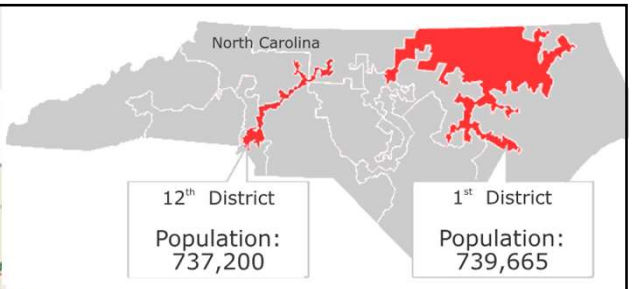
North Carolina





Five SCOTUS Decisions

- *Shaw* v. *Reno* (1993)
- *Hunt* v. *Cromartie* (1999)
- *Easley* v. *Cromartie* (2001)
- *Cooper* v. *Harris* (2017)
- *Rucho* v. *Common Cause* (2019)

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Back to Canada

Could we conceive of an electoral map being adopted with the <u>avowed objective</u> of maximizing the political gains of a particular party?

Would this not contravene the concept of electoral equality described in the *Figueroa* ruling?

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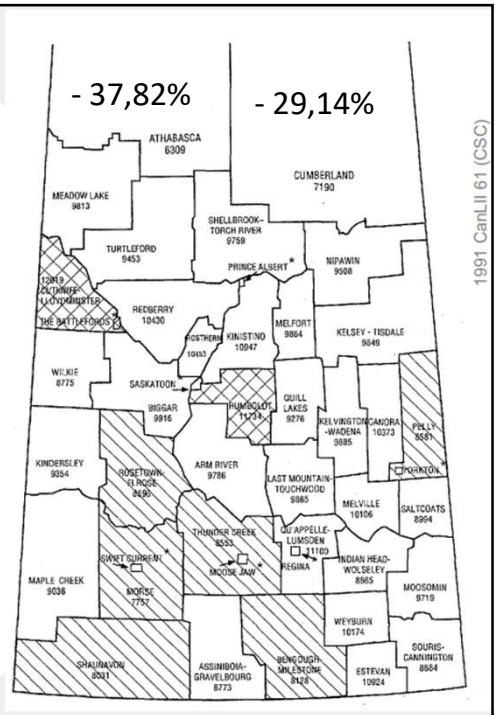
Saskatchewan

- 1989 map comprising of 66 constituencies, which is 2 more than the 1981 map adopted following the work of an independent commission.
- There was criticism of the under-representation of urban areas compared to rural areas, with differences varying by up to ± 25% of the quotient.
- The strict guidelines imposed by law on the Commission are particularly criticized.
- Two northern ridings are 29 to 37% below the provincial quotient, but this is not contested before the SCC.



± 25%

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The Right to Effective Representation Guaranteed by s. 3 of the *Canadian Charter*

- The provincial legislature has the power to draw its electoral boundaries, this falls under the province's constitution;
- The exercising of this power can however be controlled by the courts under a flexible criterion:

> It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. […]
>
> What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. […]

Carter (1991), p. 183, Justice McLachlin's reasons

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The importance of Qualitative Criteria

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

Carter (1991), p. 184.

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A Solution Justified by "Canadian Pragmatism"

As I noted in *Dixon [*v. *B.C. (A.G.)* (1989), 59 D.L.R. (4th) 247 (BCSC)], at p. 409, democracy in Canada is rooted in a different history than in the United States:

> Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs. […] Pragmatism, rather than conformity to a philosophical ideal, has been its watchword.
>
> *Carter* (1991), p. 186,

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The Intervention Criterion

[…] "the courts ought not to interfere with the legislature's electoral map under s. 3 of the Charter unless it appears that reasonable persons applying the appropriate principles ... could not have set the electoral boundaries as they exist."

Dixon (1989) as quoted in *Carter* (1991), p. 189.

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Discussion

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