

**A Theory of Judicial Behavior in Non-Monopolistic Policy Domains:  
A Cross-Institutional, Cross-National Study of the Judicialization of Representation**

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## **A Theory of Judicial Behavior in Non-Monopolistic Policy Domains: A Cross-Institutional, Cross-National Study of the Judicialization of Representation**

The creation and maintenance of electoral institutions (especially of institutions related to legislative apportionment and redistricting) have long been considered the domain of legislatures, not of courts.<sup>1</sup> Indeed, prior to the U.S. Supreme Court's articulation of its "one person, one vote" remedial policy in the early 1960s, courts generally deferred to what, in fact, were legislative monopolies over the making and implementation of apportionment and redistricting policies. Over the past thirty-five years, however, judicial policymaking on these elemental questions of political order has become institutionalized in the United States. Other national judiciaries also have become active policymakers as well, although remedial policymaking still is exercised almost exclusively by U.S. courts.<sup>2</sup> This paper examines the environmental conditions which are necessary for this political development by comparing the conditions under which and the extent to which judiciaries have become apportionment policymakers in four advanced industrial democracies: United States, Japan, Great Britain and Canada.

Traditional theories of judicial behavior are too underdeveloped at present to offer fully-

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<sup>1</sup> Of course, prior to legislative seizure of institutions of representative government, executives held monopolistic powers over the design of these institutions. See, for example, George Haskins, The Growth of English Representative Government, (1948); and J. Russell Major, Representative Government in Early Modern France, (1980).

<sup>2</sup> In 1962, the highest Swiss appellate court (the Tribunal Federal) declared that the statutory requirement of a 15% party vote for legislative representation (enacted by the Swiss Grand Conseil in 1921) violated the Swiss federal constitution. The Grand Conseil subsequently adjusted its apportionment of representation, although it did not alter the 1921 law.

The former republic of West Germany offers another example of judicial policymaking on apportionment. A 1956 law required the West German President to appoint a nonpartisan commission to review and to recommend changes in the electoral boundaries of the Bundestag, the lower legislative house. The commission's recommendations, however, were ignored after the 1957 and the 1961 elections. In 1963, West Germany's highest constitutional court (Bundesverfassungsgericht) declared the existing apportionment unconstitutional and commanded a new apportionment before the next elections. The Bundestag responded by enacting a new (but slightly amended) apportionment. (See Vivian Vale, "Reynolds v. Sims Abroad: A Briton Compares Apportionment Criteria," Western Political Quarterly, (1969), 22: 85-86).

articulated answers to this study's particular research foci. Conventional public law wisdom, however, suggests that judicial intervention into new policy domains is likely when there are: 1) violations of explicit constitutional procedures or rights; 2) partisan political motivations; or 3) normative considerations for general legal principles like equality or fairness. This study, by contrast, proposes a different hypothesis of judicial behavior which contends that judicial policymaking is likely only where and when a legislature is not an active policymaker.

The theoretical underpinnings of our hypothesis are adapted, in part, from transaction cost economics.<sup>3</sup> Simply put, we assume that institutional change—including judicial intervention into a new policy domain—is not a costless process. Indeed, costs are associated not only with entry into a new policy domain and with policy formulation and implementation, but also with the protection of an institution's policies from invasion by other institutions. The calculus for making credible institutional commitments to particular policymaking domains is determined by an institution's policymaking resources and the expected costs of domain entry, policy formulation, policy implementation and policy protection. Where and when expected policymaking costs exceed subjectively-measured institutional resources, credible long-term institutional commitments become problematic and, therefore, less likely.

This study also is informed by an acute sensitivity to the data limitations and research costs of comparative cross-national study of long-term patterns of political development. At the same time, we also recognize that all forms of political development—including apportionment policy development—are (at their core) highly unique, nation-specific phenomena. We, therefore, presume

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<sup>3</sup> See Douglass C. North, *Institutions, Institutional Change and Economic Performance*, (1991); and Oliver E. Williamson, *The Mechanisms of Governance*, (1996).

that comparative study of this particular class of political phenomena requires a research design which exposes both the unique and the common elements of the cases under examination. In brief, we accomplish this by combining the method of structured, focused comparison with Mill's methods of agreement and difference.<sup>4</sup> Finally, this study is informed by our understanding that the selected national cases are enclosed within the universe of modern constitutionalism. More specifically, we posit that each case reflects the most significant element (and long-term legacy) of the development of modern constitutionalism: namely, the shift of state policymaking authority from executive to legislative institutions. As such, the judicial institutions examined in this study (although constitutionally independent) are embedded within a common set of constitutional characteristics in which they have less privileged policymaking positions and far fewer natural (or constitutional) policymaking monopolies than their cohort legislatures. Nevertheless, the conditions of long-term political stability, judicial review, judicial life tenure and judicial agenda control empower courts with a legislative-like discretion and competency to become engaged almost anywhere within the universe of possible policy domains. Although free to move into new policy domains and prompted to do so by a multiplicity of exogenous social and economic interests, judiciaries act as if they are rational actors self-conscious of the fact that their institutional resources are markedly smaller than those available to legislatures. As a consequence, judicial institutions generally engage in new policymaking only (or most profitably) when a specific policy domain is not actively occupied by a legislative institution.

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<sup>4</sup> Alexander L. George, "Case Studies and Theory Development: The Method of Structured, Focused Comparison," in Paul G. Louren, ed., *Diplomacy: New Approaches in History, Theory, and Policy*, (1979), pp. 43-68; and Alexander L. George and Timothy J. McKeown, "Case Studies and Theories of Organizational Decision Making," *Advances in Information Processing in Organizations*, (1985), 2: 21-58.

Table 1 offers an ideal typology of a set of possible policymaking relationships between legislatures and courts. We assume, all things being equal, that modern constitutions prompt and sustain "active" legislatures over the entire universe of policy domains. Like courts, legislatures also acknowledge that their limited institutional resources preclude continuously "active" policymaking over this universe. As a consequence, legislatures become (either through neglect or by intent) less active or "deferential" policymakers over certain policy domains.<sup>5</sup> Although courts retain the freedom to become engaged policymakers, they generally tend to be "deferential" in order to avoid bearing the costs of engaging legislatures in competitive (that is, conflictual) policymaking. As a consequence, courts are expected to become active policymakers only where and when a legislature becomes a more deferential (that is, an irregular or passive) policymaker.

**Table 1:**  
**Legislatures and Courts--A Cross-Institutional Policymaking Typology**

		<b>LEGISLATURE:</b>	
		<b>Deferential</b>	<b>Active</b>
<b>COURT:</b>	<b>Deferential</b>	Cooperation Policymaking	Legislative Policy Monopoly
	<b>Active</b>	Judicial Policy Monopoly	Competitive Policymaking

<sup>5</sup> John R. Schmidhauser and Larry L. Berg argue that the partisan and ideological preferences of legislatures remain generally unchanged by judicial policymaking. This finding suggests that legislative responses to judiciaries who become "active" policymakers are determined by another type of calculus than the interest-aggregation dynamic driving the normal legislative policymaking process. Although we cannot explore this question here, we presently assume that legislative decisions to "re-enter" a particular policy domain captured by the courts turn upon the same type of expected costs-institutional resources calculus that is proposed for judiciaries. (See John R. Schmidhauser and Larry L. Berg, *The Supreme Court and Congress: Conflict and Interaction, 1945-1968*, (1972).

## **RESEARCH DESIGN**

This paper consists of two parts. In Part I, we complete detailed historical case studies of apportionment policymaking in four countries. In Part II, we use the methods of agreement and difference to test four rival hypotheses aimed at explaining the conditions which prompt judicial policymaking on the issue of legislative apportionment.<sup>6</sup>

### **Hypotheses**

The first hypothesis, the *institutional competition* hypothesis, presumes that courts become active on apportionment policy only when legislatures are not active policymakers.<sup>7</sup> Moreover, this hypothesis further presumes that the intensity of judicial policymaking varies with the intensity of legislative policymaking.

The second hypothesis, the *constitutional violation* hypothesis, presumes the conventional wisdom that judicial policymaking occurs only when there are legislative violations of constitutionally-explicit procedures or rights. Accordingly, we should expect judicial policymaking only if there are constitutionally-prescribed procedures or rights concerning legislative apportionment.

The third hypothesis, the *partisan conflict* hypothesis, presumes that courts intervene only in response to long-term partisan domination of the legislature. The logic underlying this hypothesis

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<sup>6</sup> See John Stuart Mill, A System of Logic, (1884, 8th ed.), pp. 606-613.

<sup>7</sup> This study's formalized model of judicial behavior, to be sure, extends and generalizes a relationship between courts and legislatures that has been recognized by others in single case studies. Mary Volcansek, for one, examines the political influence of the Italian Constitutional Court and concludes: "The Courts uses its power of judicial review, but its decisions are typically not controversial for a number of reasons." "The Court, wherever possible, avoids simply declaring a law unconstitutional (a rejecting decision). It will use, instead, a so-called 'accommodating judgment' that recognizes the divisibility of acts of Parliament and limits the negative effects and that permits the Court to distinguish between a law's being 'illegitimate' and being 'unconstitutional'." "The Court also makes use of 'substituting' judgments, in which it substitutes an acceptable version of a law 'rather than' the original wording." "As a result the Court appears not to be invading the powers of the government and Parliament." [citations omitted] (Mary Volcansek, "Political Power and Judicial Review in Italy," Comparative Political Studies, (1994), 26: 505-06).

reflects Schattschneider's classic thesis that policy "losers" continuously seek preference legitimization in alternative political forums.<sup>8</sup> Thus, if party affiliation functions as an adequate proxy for policy preference, then we should expect levels of judicial intervention on apportionment policy to vary with the presence of perennial "loser" parties in the legislative branch.

The fourth hypothesis, the *normative principle* hypothesis, presumes that courts become active policymakers on apportionment only when legislative policies violate the principle of equality. To ground this final hypothesis within a less subjective and more observable and testable form, we use population variance among legislative districts as a proxy for gauging the relative "inequality" of apportionment policies over time. Thus, we should expect judicial policymaking on apportionment when district population variances are rising and not declining.

### Case Selection

A two-step selection process was used to identify the four cases described and compared in this study. The first step limited the universe of national legislature-court relationships to countries sharing the political and economic characteristics of stable, industrialized democracies. Limitation to this subset of "most similar" nations was necessary because we assumed that only in stable democratic systems are courts consistent and credible policymaking rivals to legislatures.<sup>9</sup> The political freedoms and the heterogenous social and economic interests which exist in these countries

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<sup>8</sup> E.E. Schattschneider, *The Semi-Sovereign People*. (1960).

<sup>9</sup> See Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry*. (1970).

Thus, in the four national cases selected the Supreme Courts of the United States, Japan, and Canada and the highest appellate court in Great Britain, the House of Lords, exercise similar core political functions: namely, the resolution of public policy disputes and the maintenance of national legal systems. For specification of these judicial characteristics see C. Neal Tate and Tobjorn Vallinder, eds., *The Global Expansion of Judicial Power*. (1995); Diana Woodhouse, "Politicians and the Judiciary: a Changing Relationship," *Parliamentary Affairs*, (1995), Vol. 48: 401-417; Burton Atkins, "Intervention and Power in Judicial Hierarchies: Appellate Courts in England and the United States," *Law and Society Review*, (1990), Vol. 24, 81.

further ensure that there are multiple interests capable of pursuing political legitimization of their policy preferences within both legislative and judicial branches of government.

Our second case selection step ensured variation in levels of judicial policymaking on the issue of apportionment--this study's dependent variable (D). An ordered set of values ultimately are assigned to four types of judicial policymaking: non-intervention (D=0), justiciability intervention (D=1), declaratory intervention (D=2), and remedial intervention (D=3).<sup>10</sup> For much of this study, however, the two lowest levels of policymaking (non-intervention and justiciability intervention) are combined and referred to as the "absence" of judicial policymaking. The two highest levels of policymaking (declaratory and remedial intervention) also are combined and referred to as the "presence" of judicial policymaking. Of the four national cases selected, the U.S. and Japan cases have "presence" dependent variable values, whereas the cases of Great Britain and Canada have "absence" dependent variable values.

This two-step selection process yields two notable benefits. In accord with the logic of the method of difference, our first case selection decision effectively controls for the systemic characteristics of advanced industrialized nations, thus eliminating them as possible explanations for the observed variances in judicial behavior across the four selected cases.<sup>11</sup> Our second selection decision overcomes the causal inference problems that invariably arise from small-n comparative case

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<sup>10</sup> "Non-intervention" is the condition in which courts refuse to consider apportionment policy claims. "Justiciability" intervention is the condition in which courts accept cases involving apportionment policy but in which no action is taken by the court. "Declaratory" intervention is the condition in which courts accept cases involving apportionment policy and declare the challenged policy unconstitutional. Finally, "Remedial" intervention is the condition in which courts accept cases, declare a policy unconstitutional and propose a remedial policy.

<sup>11</sup> See Arend Lipjhart, "Comparative Politics and the Comparative Method," *APSR*, (1971), 65: 682-93.

studies without variation on the dependent variable.<sup>12</sup>

### **Methodology**

The method of structured, focused comparison forms part of the methodological undercarriage which frames this study. This method, as developed by Alexander George, is a qualitative, non-experimental approach to the comparison of a small number of cases. In brief, this method aims at theory formation (and testing) from the controlled comparison of systematically-conducted case studies. The latter requires "detailed and discriminating explanations of single historical outcomes," employment of "general variables for purposes of description and explanation," and the clinical (or, standardized) treatment of each case under review in order "to assure acquisition of comparable data."<sup>13</sup> Operationalization of these requirements, according to George, necessitates the formulation of "theoretically relevant general questions to guide the examination of each case" in accord with "the research objectives and theoretical focus of the study."<sup>14</sup> Given this study's objective of testing four competing hypotheses of judicial behavior, four sets of general questions were devised to guide our inquiry of the four selected cases. These sets of questions (and the hypothesis they represent) are listed below.

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<sup>12</sup> See Barbara Geddes, "How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics," Political Analysis, (1990), 2: 131-50; Gary King, Robert Keohane, and Sidney Verba, Designing Social Inquiry, (1994).

<sup>13</sup> Alexander L. George, "Case Studies and Theory Development: The Method of Structured, Focused Comparison," in Paul G. Louren, ed., Diplomacy: New Approaches in History, Theory, and Policy, (1979), pp. 44, 50, 62.

<sup>14</sup> Alexander L. George and Timothy J. McKeown, "Case Studies and Theories of Organizational Decision Making," Advances in Information Processing in Organizations, (1985), 2: 41, 43.

*A) Constitutional Provisions (Constitutional Violation Hypothesis)*

- i) Are there explicit constitutional standards for the legislative apportionment and districting?
- ii) Is judicial action explicitly barred?
- iii) What institution or institutions are constitutionally responsible for designing and implementing apportionment policies?
- iv) Is there a relationship between judicial policymaking on apportionment and specific violations of constitutional provisions or traditions?

*B) Legislative Legacies (Institutional Competition Hypothesis)*

- i) What institution historically has devised and implemented electoral districting standards?
- ii) How often have new apportionment and/or redistricting policies been enacted?
- iii) How often does reapportionment and redistricting occur?
- iv) Is there a relationship between legislative policymaking and judicial intervention?

*C) District Ratios (Normative Claim Hypothesis)*

- i) What is the variance among legislative districts over time?
- ii) Is there a relationship between changes in district variance and court decisions to intervene?

*D) Party Competitiveness (Partisan Conflict Hypothesis)*

- i) What is the electoral success relationship among parties?
- ii) Is there a relationship between party competition and court intervention?

## **PART I: THE CASES**

Before attempting to confirm or to infirm the generalizability of the four stated hypotheses of court-legislative relations, the specific historical trajectories of apportionment policymaking in the four cases must be described. For as Alexander George encourages and the recent trio of Gary King, Robert Keohane and Sidney Verba admit: when conditions permit "social science research should be both general and specific: it should tell us something about classes of events as well as about specific events at particular places."<sup>15</sup>

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<sup>15</sup> King, Keohane and Verba continue: "We want to be timeless and timebound at the same time. The emphasis on either goals may vary from research endeavor to research endeavor, but both are likely to be present. Furthermore, rather than the two goals being opposed to each other, they are mutually supportive. Indeed, *the best way to understand a particular event may be by using the methods of scientific inference also to study systematic patterns in similar*

## CASE 1: UNITED STATES

The history of U.S. Supreme Court adjudication of questions of electoral design is long, complex, and inextricably intertwined with the historical legacies that define the development of the American constitutional order over time. As such, a full account of the history of Supreme Court action cannot be completed here.<sup>16</sup> On the specific policy of electoral apportionment, the history of the Court's intervention into this policy domain begins after 1932, for prior to this the issue of apportionment was discussed only indirectly by the Court.<sup>17</sup> Between 1932 and 1960, the Supreme Court received numerous appeals but decided repeatedly against more definitive forms of policy intervention.<sup>18</sup> In 1960, the Court became a more active policymaker when it declared a *local* redistricting-annexation case invalid in Gomillion v. Lightfoot, (1960). Two years later, the Court handed down its landmark Baker v. Carr (1962) decision in which it formally declared that electoral districting cases systems were justiciable.<sup>19</sup>

In 1963, the Court intervened more actively on the issue of apportionment. In Gray v. Sanders (1963), the Court struck down a *state* primary system because of its failure to account for extreme population disparities among districts. In 1964, the Court imposed an equal population standard--the so-called principle of "one person, one vote"--upon *congressional* and *state legislative*

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*parallel events.*" (Gary King, Robert O. Keohane, and Sidney Verba, Designing Social Inquiry, (1994), p. 43).

<sup>16</sup> See Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation, (1965); Robert G. Dixon, Democratic Representation: Reapportionment in Law and Politics, (1968); and Ward E. Y. Elliott, The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969, (1972).

<sup>17</sup> See Prigg v. Pennsylvania, 16 Pet. 539 (1842); Luther v. Borden, 7 How. 1 (1849).

<sup>18</sup> See, for example, Colegrove v. Green (1946) and South v. Peters (1950).

<sup>19</sup> Because the Supreme Court already had accepted and decided numerous apportionment-related cases between 1946 and 1950, justiciability was not technically an issue. The Court's declaration in Baker, thus, formalized what informally already was a well-established practice.

districts. Since 1964, the Court has addressed additional issues including not only district equality, but also multi-member versus single-member districts, district compactness, the size of legislatures, and the mathematical formulae used to reapportion the U.S. House of Representatives.

### **Qualifying Study of the U.S. Case**

Before closely examining the conditions associated with the Supreme Court's intervention into the apportionment policy domain, two qualifications are necessary. The first qualification is the recognition that the United States has a dual constitutional system in which both a national Constitution and individual state constitutions contain provisions related to the design and maintenance of a representative form of government. Accurate description of individual cases, as a consequence, must include description of this dual constitutional framework. However, at the more general level of analysis required by this paper's stated research goals, the relationship between these two constitutional levels need not be explored.

The second qualification is related to the fact that this case study centers upon a national judiciary (the U.S. Supreme Court) adjudicating cases involving not only national legislative districts, but state and local legislative districts as well. Although these different case types define unique trajectories of political development, at a more general level all legal challenges concerning apportionment and redistricting raise similar issues concerning the conditions prompting judicial intervention. Moreover, as revealed in Table 2, there seems to be no direct relationship between case type and the U.S. Supreme Court's decisions to intervene. This paper, consequently, assumes that variances by district type and policy issue are not directly related to a court's decision to intervene.

**TABLE 2: DISTRICT TYPE, DISTRICTING POLICIES, AND JUDICIAL OUTCOMES**

<b><u>COURT CASES</u></b>	<b><u>DISTRICT TYPE</u></b>	<b><u>SUBSTANTIVE POLICY</u></b>	<b><u>COURT ACTION</u></b>
1932 <u>Wood v. Broom</u>	<i>Congressional</i>	District Equality	NON-INTERVENTION
1932 <u>Smiley v. Holm</u>	<i>State</i>	Reapportionment legislation	NON-INTERVENTION
1946 <u>Colegrove v. Green</u>	<i>Congressional</i>	District Equality	NON-INTERVENTION
1950 <u>South v. Peters</u>	<i>State Primary System</i>	District Equality	NON-INTERVENTION
1952 <u>Remmey v. Smith</u>	<i>State</i>	Reapportionment Mandate	
		District Equality	NON-INTERVENTION
1957 <u>Radford v. Gary</u>	<i>State</i>	District Equality	NON-INTERVENTION
1960 <u>Gomillion</u>	<i>Local</i>	Annexation, District Compactness	INTERVENTION
1962 <u>Baker</u>	<i>State</i>	District Equality Reapportionment Mandate	INTERVENTION
1963 <u>Gray v. Sanders</u>	<i>State Primary system</i>	District Equality	INTERVENTION
1964 <u>Wesberry v. Sanders</u>	<i>Congressional</i>	District Equality	INTERVENTION
1964 <u>Reynolds v. Sims</u>	<i>State</i>	District Equality	INTERVENTION

### **A. Constitutional Provisions**

The U.S. Constitution includes several provisions related to the apportionment of representation in the U.S. Congress. Article I guarantees equal apportionment of representation among the states in the U.S. Senate. For the U.S. House of Representatives, Article I, Sec. 2 establishes a decennial census and an interstate division of representation on the basis of state population. Article I, Section 4 empowers the state legislatures and U.S. Congress with the authority to set the "Times, Places and Manner of holding Elections for Senators and Representatives" and Article I, Section 7 includes an implicit requirement that the House apportionment be completed through the legislative process.

The Constitution includes few provisions directly related to institutions of representation within the state legislatures. Article IV, Sec. 4 provides that the national government "shall guarantee to every State in this Union a Republican Form of Government." The Fifteenth Amendment prohibits

states from denying or abridging suffrage rights based upon "race, color, or previous condition of servitude." Less directly, the Fourteenth Amendment guarantees individuals the protections accorded to "due process" and "equal protection of the laws."

## **B. Legislative Legacy**

Within these constitutional parameters, Congress (with the President's approval) established four basic types of apportionment and districting policies between 1790 and 1911. These policies were defined in federal statutes, although elements of several also developed as non-statutory political customs. The first policy was the practice of decennially reapportioning the House of Representatives after each decennial census. The Constitution includes no explicit mandate requiring reapportionment each decade, however between 1790 and 1911 Congress enacted new apportionment legislation within two years after each decennial census.

A second policy type defined the specific mathematical formula to be used for assigning specific numbers of representatives to each state. Between 1790 and 1911, Congress adopted four different mathematical formulae.<sup>20</sup>

A third policy type was established from the practice of increasing the House size to account for population growth. The initial House size was fixed by the original Constitution at 65 members.<sup>21</sup>

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<sup>20</sup> A fifth formula, known as the method of equal proportions, was included for the first time in the 1929 Census Act. This formula is the one used to complete the modern-day decennial reapportionment of the House. See Lawrence F. Schmeckebier, Congressional Apportionment, (1941); and Michael L. Balinski and H. Peyton Young, Fair Representation, (1982).

<sup>21</sup> Most ratifiers of the Constitution initially agreed that this number was too small, with many accepting it only because they expected regular growth in the House after each decennial census. James Madison, for one, expected the House would grow to at least 400 members within fifty years, and other framers predicted this number to grow eventually to 600 or 900 members. Federalist Nos. 54 and 56 (James Madison). See also Farrand, ed., Records, III: 156-60 (James Wilson); III: 143 (Oliver Ellsworth).

Between 1792 and 1911, the House size increased after each decennial census except the 1840 Census when it was decreased by seventeen members.<sup>22</sup> Increases, although decennial, varied from just one member after the 1850 Census to fifty members after the 1870 Census.<sup>23</sup>

In 1850, Congress attempted to establish a radically different kind of apportionment process. Under this provision, the House size was to be fixed at 233 members and future reapportionments were to be made automatically by the Secretary of the Interior.<sup>24</sup> This "automatic" device, however, was rejected by subsequent Congresses.<sup>25</sup> Moreover, Section 5 of the Fourteenth Amendment, ratified in 1868, explicitly recommitted completion of each new apportionment of the House to the bicameral legislative process defined in Article I, Section 7.<sup>26</sup>

The fourth type of apportionment policy established national standards for the redistricting of congressional districts. In 1842, Congress enacted legislation requiring *single-member* congressional districts consisting of *contiguous territory*.<sup>27</sup> After 1862, these standards were included

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<sup>22</sup> Reduction in the House size in 1842 was widely supported by southern members of Congress. After several decades of rapid population growth in the North, a smaller House size was desired by the South in order to decrease the North's advantage in the Electoral College, and thus its potential electoral control over the Presidency.

<sup>23</sup> See Charles A. Kromkowski and John A. Kromkowski, "Why 435?: A Question of Political Arithmetic," *Polity*, (Fall 1991) Vol. XIV, p. 133.

<sup>24</sup> 9 Stat. L. 428, (May 23, 1850), at 432.

<sup>25</sup> The 1850 legislation, for example, was amended in 1852 when the House size was increased by one member (10 Stat. L. 25); and twice in 1862 when Congress and President Lincoln approved an eight-member increase (12 Stat. L. 353) and the district requirements of contiguous territory and single-member districts (12 Stat. L. 572).

<sup>26</sup> Prior to the Fourteenth Amendment's alteration of the constitutional principle of representation, the Thirteenth Amendment (1865) voided Article I's "three fifths" apportionment formula. The latter constitutional change guaranteed eleven additional members to the formerly rebellious Southern states once they were readmitted into Congress. As a consequence, Section 2 of the Fourteenth Amendment was designed by the Republican-controlled Congress in 1866. Section 2 provides for the House apportionment based solely upon state population and includes a new formula for reducing the representation of states that denied or abridged the right to vote. The latter mechanism was designed to dilute southern state representation in the House, and thus to secure a continuation of Republican control of Congress and the Electoral College.

<sup>27</sup> 5 Stat. L. 491, (June 25, 1842).

in subsequent decennial apportionment statutes through the 1911 Apportionment Act.

In 1872, Congress adopted an additional districting policy. This new standard required that congressional districts have "as nearly as practicable an *equal number of inhabitants*."<sup>28</sup> This equal population standard also was included within subsequent decennial apportionment acts through the 1911 Apportionment Act.<sup>29</sup> In 1901 and 1911, Congress enacted a fourth and final districting standard by mandating that congressional districts consist of *compact territory*.<sup>30</sup>

Completion of the 1920 Census precipitated a series of events which fundamentally altered the House apportionment process. Taken at the height of European immigration to the United States and after several decades of African-American emigration from the South, the 1920 Census offered a portrait of the American people that was, for many, alarmingly young, urban and pluralistic. This decennial, demographic portrait also had obvious implications for the apportionment of representation and a variety of interests in Congress responded by deliberately breaking the customary practice of a decennial reapportionment of the House.<sup>31</sup> As a consequence, for the first and only time the House of Representatives was not reapportioned after a new decennial census.

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<sup>28</sup> 17 Stat. L. 28, (February 2, 1872). A Supplementary Apportionment Act in 1872 (17 Stat. L. 192) increased the House size by nine members and permitted states to elect them at-large for the Forty-Third Congress only. This at-large election exception was repeated in subsequent apportionment acts until the 1929 Act.

Notably, the Senate twice agreed in 1842 to require that congressional districts "contain, as near as may be, an equal number of inhabitants to be represented." (See Cong. Globe, 27 Cong., 2 sess., pp. 602-09). According to one contemporaneous observer, the subsequent failure of the measure was due to 'King Caucus'. (See Cong. Globe, June 10, 1842; Works of James Buchanan, John Bassett Moore, ed., (1908), Vol. V: 286).

<sup>29</sup> See 1882 Apportionment Act (22 Stat. L. 5); 1891 Apportionment Act (26 Stat. L. 735); 1901 Apportionment Act (31 Stat. L. 733); 1911 Apportionment Act (37 Stat. L. 13).

<sup>30</sup> 31 Stat. L. 733, (1901); 37 Stat. L. 13, (1911).

<sup>31</sup> For more on Congress's unprecedented failure to reapportion the House of Representatives in 1920, see Orville J. Sweeting, "John Q. Tillson: Reapportionment Act of 1929," Western Political Quarterly (1955), 9: 434-53; Charles A. Eagles, Democracy Delayed: the Urban-Rural Conflict in the 1920s (1990).

After almost a decade of delay, Congress finally enacted an "automatic" decennial apportionment process in 1929.<sup>32</sup> This new apportionment method had a dramatic effect upon the apportionment policies previously adopted by Congress. For after 1929, Congress has not enacted a new apportionment statute and only a few statutes related to the redistricting process.<sup>33</sup> As a consequence, the size of the House of Representatives has effectively been frozen at 435 members. Moreover, the framers of the 1929 apportionment provision did not explicitly include any of the prior district standards requiring compact, contiguous, single-member, or equal population districts.<sup>34</sup>

Congress's omission of national districting policies in 1929 was confirmed by a decision by the U.S. Supreme Court in Wood v. Broom, (1932).<sup>35</sup> The decisions by Congress in 1929 and by the

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<sup>32</sup> On the longer term effects of the 1929 Act, see Kromkowski and Kromkowski, "Why 435?: A Question of Political Arithmetic," Polity (1991), XXIV: 129-45.

<sup>33</sup> In 1940 and 1941, Congress enacted minor amendments to the 1929 Act. The 1940 amendment changed the date of the automatic apportionment process in accord with the new Congressional calendar established by the ratification of the Twentieth Amendment. (See 54 Stat. L. 162, April 25, 1940). The 1941 amendment to the 1929 Act identified the apportionment formula known as the method equal proportions. (See 55 Stat. L. 761, November 15, 1941).

Congress enacted no new redistricting policies between 1929 and 1966. In 1967, Congress required single-member districts for the U.S. House of Representatives. (See 2 U.S.C. 2c, December 14, 1967). In 1982, Congress enacted a new (but highly ambiguous redistricting policy) in the 1982 Voting Rights Act. The literature on this Act is extensive and remains contentious. Arguably, Congress was not attempting to reenter this policy domain because the 1982 Act's contradictory requirements for maximization of minority-member districts without proportional representation ultimately meant that the courts would retain control over the definition and implementation of districting policy.

<sup>34</sup> Kromkowski and Kromkowski, "Why 435?: A Question of Political Arithmetic." Polity, (1991), XXIV: 135.

<sup>35</sup> Wood v. Broom, 287 U.S. 1 (1932).

In Wood v. Broom (1932), the Court reviewed a challenge to Mississippi's congressional redistricting plan devised after the 1930 Census. A three-judge federal district court imposed a permanent injunction against the plan after ruling it violated the 1911 Apportionment Act's standards that congressional "districts [be] composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants."

Although the initial challenge focused broadly upon the legality of the state's redistricting plan, the appeal before the Supreme Court was confined more narrowly to whether the federal judiciary has the authority to provide permanent injunctive relief in redistricting disputes. In the opinion of the Court, however, Chief Justice Charles Evans Hughes overturned the lower court injunction by referring to the lack of districting standards in the 1929 Census Act. Writing for the Court, Hughes definitively declared "[i]t was manifestly the intention of the Congress not to re-enact" the district standards, and therefore the lower court had no authority to provide injunctive relief.

Supreme Court in Wood were far from innocuous. For they signalled the federal government's wholesale retreat from the formulation of national apportionment policies. State legislatures, thus, were free to redistrict congressional districts according to their own standards and many simply refused to reapportion or to redistrict--as several already had with state legislative electoral districts. As a consequence, in many states congressional and state legislative district boundaries were frozen and grew increasingly more unequal in population over time.<sup>36</sup>

The legacy of the Wood decision and of the new apportionment process established in 1929 cannot be overemphasized for together they constituted part of the conditions that, three decades later, prompted the Supreme Court's intervention in Baker v. Carr (1962). The Wood decision, for example, became a leading precedent against a more active intervention by the Supreme Court on redistricting cases. In Colegrove v. Green (1946), Justice Frankfurter relied upon Wood to dismiss a challenge against a malapportioned congressional redistricting plan. Writing for a plurality in Colegrove, Frankfurter denied the plaintiffs' requests for relief, and infamously declared that the Court also "ought not to enter this political thicket."<sup>37</sup> In a line of apportionment challenges until the 1960s, the Supreme Court repeatedly affirmed Frankfurter's non-interventionist position in cases involving challenges against congressional and state legislative districts.

### C. Representational Ratios

The following graphs map changes in the proportional and population variances of U.S.

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<sup>36</sup> When the Court decided Wood in 1932 these aberrational districting practices were already well established in several states. Wood, thus, did not trigger the conditions of malapportionment that ultimately were addressed by the Court in the 1960s; rather the Wood decision bestowed a blanket of legitimacy upon these practices.

<sup>37</sup> Colegrove v. Green, 328 U.S. 549, 556 (1946).

Frankfurter compounded the effect of Hughes' dicta in Wood by further misrepresenting the historical record in several respects. He, for one, argued that Congress on several occasions had failed to reapportion the House of Representatives when, in fact, it did so only after the 1920 Census.

House districts within states, as well as of lower and upper state legislative districts. These variances illustrate the combined effects of the national government's disengagement from apportionment policy after the 1920 Census and of state districting policies that failed to attune political representation with the dynamic demographics patterns of twentieth-century American society. What also becomes clear upon closer inspection of these graphs is that the Supreme Court's decisions to become more active on apportionment policy in the early 1960s do not correspond with the highest interdistrict population variances. Indeed when the Court issued its remedial "one person, one vote" policy in 1964, net population variances already had declined from their highpoint in the 1950s.

### U.S. Congressional Districts

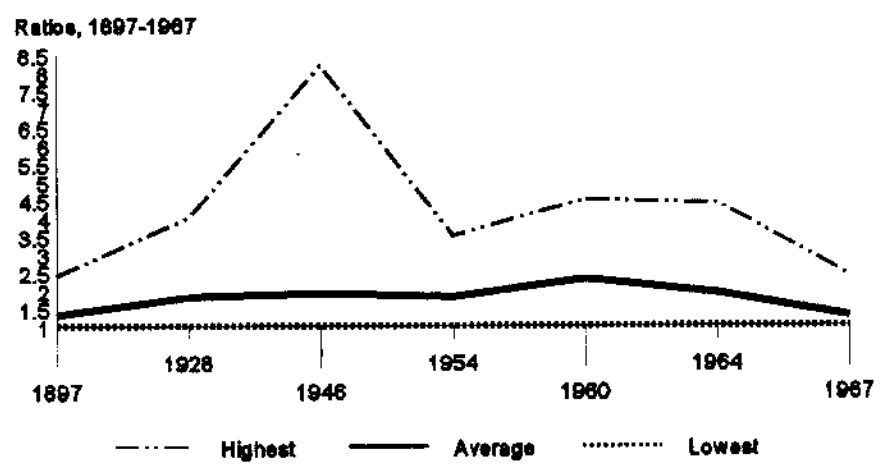


Figure 1

CONGRESSIONAL DISTRICTS

POPULATION DIFFERENTIALS, 1897-1964

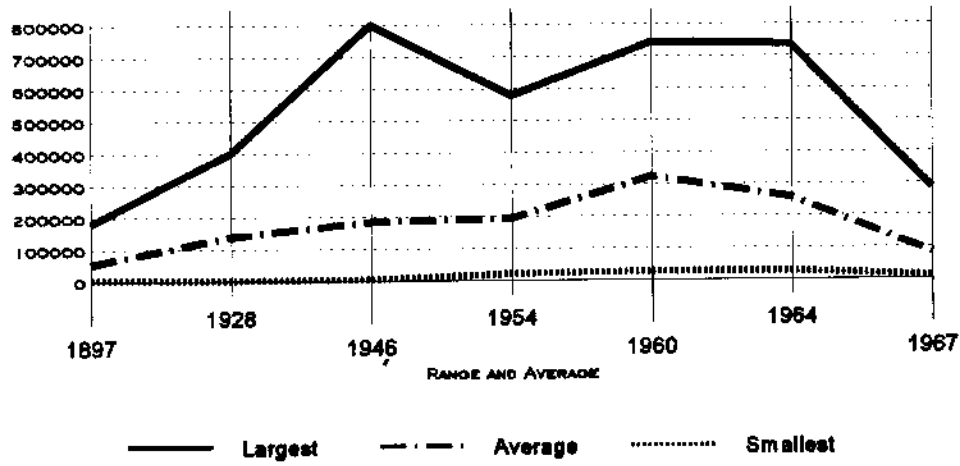


Figure 2

STATE UPPER HOUSE RATIOS, 1940-1964

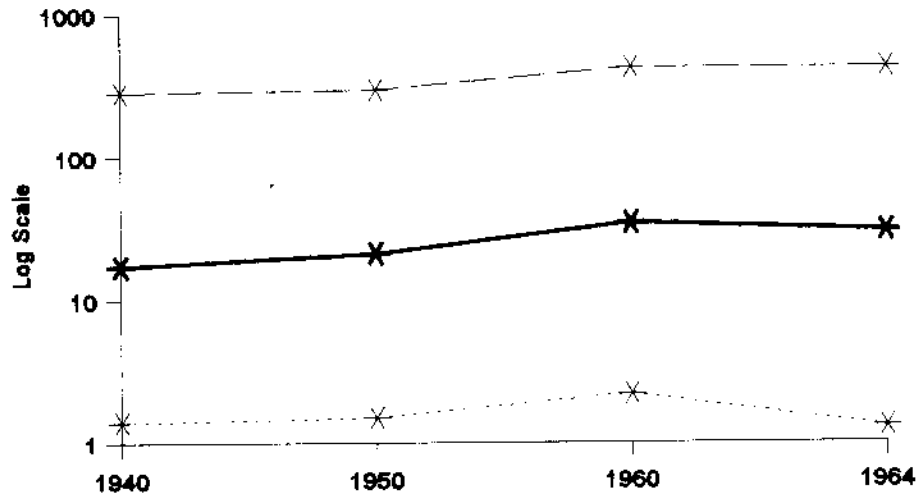


Figure 3

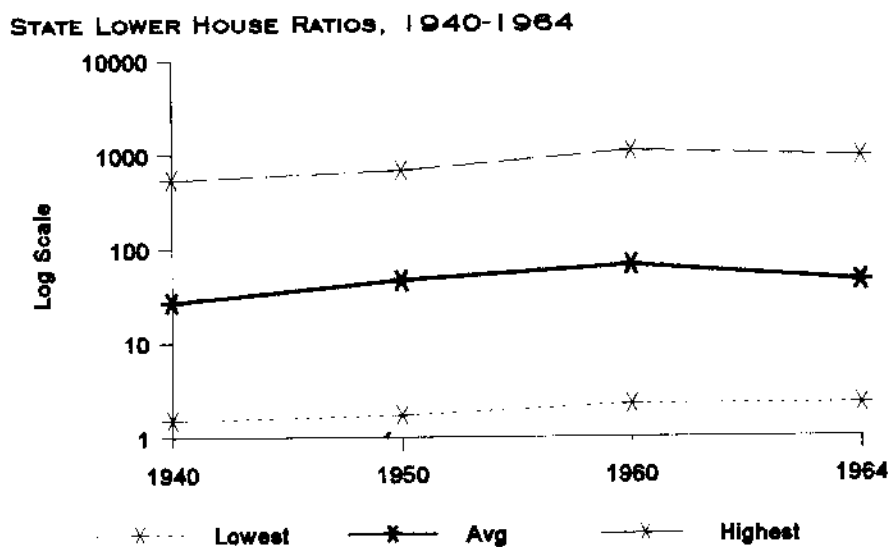


Figure 4

#### D. Party Competitiveness

As illustrated in Table 3, since 1925 the Democrats and Republicans have competed for control of Congress and the Presidency during every decade except 1935-1945. The condition of "1-Party Domination," as opposed to party competitiveness, can be defined as winning control of national institutions for ten consecutive years. If we assume that where party competition exists most interests do not have a motivation to seek judicial intervention, then there seems to be no consistent relationship between partisan conditions in the United States and the Court's decision against intervention in Wood (1932), its decisions to hear numerous challenges but not to intervene between 1932 and 1960, its declaratory intervention in Gomillion (1960) and Gray (1963), or its remedial intervention in Wesberry (1964) and Reynolds (1964).

**Table 3: Party Competitiveness in Congress and the Presidency, 1925-1965**

<u>Period</u>	<u>Congress</u>	<u>President</u>
1925-1935	Competitive	Competitive
1935-1945	1-Party Domination (D)	1-Party Domination (D)
1945-1955	Competitive	Competitive
1955-1965	1-Party Domination (D)	Competitive
1965-1975	1-Party Domination (D)	Competitive
1975-1985	Competitive	Competitive
1985-1995	Competitive	Competitive

D: Democratic Party

## **CASE 2: JAPAN<sup>38</sup>**

Like the U.S. Supreme Court, the Japanese Supreme Court has declared apportionment policies for the House of Representatives both justiciable and unconstitutional. To date, the Japanese Supreme Court has not imposed a remedial apportionment policy.

The first case heard by Japan's highest court was Koshiyama v. Tokyo Metropolitan Election Commission (1964). According to legal commentator Hiroyuki Hata, the Court held in Koshiyama that:

the proportion of the voting population to a Diet member was not the single absolute standard to be considered in determining the apportionment of the Diet, although it was the main one. Second, the Court held that the apportionment of Diet seats was within the province of the Diet's discretionary powers, except in cases where malapportionment created extreme inequality in the enjoyment of the right to vote.... Finally, the Court held that the maximum disparity of 1 to 4.09 between electoral districts was not unconstitutional.<sup>39</sup>

<sup>38</sup> See Hiroyuki Hata, "Malapportionment of Representation in the National Diet," Law and Contemporary Problems (1990), Vol. 53, pp. 157-70; Yasuo Ohkoshi, "Timid Judicial Policymaking of the Japanese Supreme Court on Unequal Representation Cases," 1990 International Political Science Association Meeting of the Research Committee on Comparative Judicial Studies, 20pp.; Daniel B. Ramsdell, The Japanese Diet, (1992).

<sup>39</sup> Hiroyuki Hata, "Malapportionment of Representation in the National Diet," Law and Contemporary Problems, (1990), 53: 161.

Although the Court did not strike down the apportionment of the Japanese House of Representatives, Koshiyama represents the first decision in which the Court held challenges of this sort justiciable. In 1976, 1983 and 1985, the Court again exercised its authority to hear redistricting challenges. In Kurokawa v. Chiba Election Commission (1976), the Court extended the Koshiyama justiciability precedent by declaring the existing apportionment of the House of Representatives unconstitutional.<sup>40</sup>

Unlike the U.S. Supreme Court, however, intervention by the Japanese Supreme Court has not assumed more than a declaration of unconstitutionality. The Court has never invalidated a single apportionment or redistricting law nor has it imposed or proposed districting remedies or standards as extensive as those implemented by the U.S. Supreme Court. In 1983, for example, eight of fourteen Justices declared the population deviations among House electoral districts unconstitutional but ruled that a reasonable period of time was permitted for the Diet to take remedial action. By 1985, the Diet still had not acted and the Court again declared its apportionment scheme unconstitutional; this time, it also observed that the Diet had failed to complete a revision within a reasonable amount of time. Again, however, the Court refused to invalidate the legislature's policy.<sup>41</sup>

Why the Japanese Supreme Court has adopted a less activist type of intervention than the U.S. Supreme Court may become evident from closer inspection of the four contextual conditions which are the primary focus of this study.

#### **A. Constitutional Provisions**

The 1947 Japanese Constitution establishes a bicameral national legislature and requires that

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<sup>40</sup> Hiroyuki Hata, (1990), 53: 162.

<sup>41</sup> Hiroyuki Hata, (1990), 53: 162-65.

"[t]he number of members of each House," the "[e]lectoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law." The Constitution includes several additional provisions related to the electoral system. Article 15 guarantees universal suffrage. Article 44 prohibits discriminatory restrictions on the right to vote. Article 14 guarantees the principle of equality under the law.<sup>42</sup> Finally, Article 43 grants the National Diet ultimate responsibility for all other decisions of electoral design.<sup>43</sup>

### **B. Legislative Legacies (1889-1990)**

Although the Japanese political order was fundamentally reconstructed after World War II, the subsequent development of national apportionment policies also reflects, in part, the path of political development established prior to the War. The 1889 Japanese Constitution, for example, established a bicameral national legislature consisting of a House of Representatives and a House of Councillors. Initially, only the House of Representatives was considered an institution of national representation. Like most newly-organized representative bodies, this body did not wield significant political influence. Over time, however, the institution's political influence grew.<sup>44</sup>

The 1889 Constitution established small, single member electoral districts for the House of Representatives. In 1900, larger, multi-member districts were created and each new district received from four to twelve members. In 1920, a new design was adopted which reverted back to smaller districts containing from one to three representatives. Finally, the 1925 Universal Manhood Suffrage

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<sup>42</sup> Hiroyuki Hata, (1990), 53: 160-61.

<sup>43</sup> Hiroyuki Hata, (1990), 53: 158.

<sup>44</sup> Daniel B. Ramsdell, The Japanese Diet: Stability and Change in the Japanese House of Representatives, 1890-1990, (1992), pp. 4-6.

Act established medium-size districts with three to five Diet members apportioned to each district.<sup>45</sup> After World War II, medium-size, multi-member House districts were retained.<sup>46</sup>

The size of the House of Representatives has been another important element of the institution's development. The pre-World War II House grew from 300 members in 1890 to 513 members in 1924. By 1942, House membership was scaled back to 473 members.<sup>47</sup> The post-War size of the House of Representatives was established at 469 members in 1946. In 1950, the Public Officials Election Act determined the size for the Diet and House of Councillors and it altered the former's apportionment to reflect recent rural-to-urban demographic changes.<sup>48</sup> The 1950 Act additionally declared that "[i]t is to be made a practice to correct" the House apportionment "in accordance with the results of the most recent National Census every five years from the date of its enforcement."<sup>49</sup>

Since 1950, reapportionment has occurred irregularly or with nominal consequences. The first reapportionment of the House of Representatives was in 1964. The House size was increased by nineteen members and the maximum variance in population between the largest and smallest districts was reduced to 2:1. The second reapportionment occurred in 1975. Twenty members were added to the House, but district variance was reduced to only 3.7:1. The latter fact resulted from the

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<sup>45</sup> Daniel B. Ramsdell, The Japanese Diet, (1992), pp. 4-6.

<sup>46</sup> Ramsdell, The Japanese Diet, (1992), p. 10.

<sup>47</sup> Daniel B. Ramsdell, The Japanese Diet, (1992), p. 86.

<sup>48</sup> Hiroyuki Hata, "Malapportionment of Representation in the National Diet," Law and Contemporary Problems, (1990), 53: 158.

<sup>49</sup> Hiroyuki Hata, (1990), 53: 159.

Diet's reliance upon the 1970 census rather than waiting for publication of the 1975 census.<sup>50</sup> The third reapportionment occurred in 1985 and made only nominal changes in the level of district variance. Among the 512 House seats, this reapportionment "allocated one seat each to eight districts, which were intolerably underrepresented, and deprived seven districts, which were overrepresented, of one seat each."<sup>51</sup>

The character of the apportionment of representation in the House of Councillors is less dynamic than in the House of Representatives. The size of the House of Councillors, for example, is 252 members; in 1947, the size of the body was 250 members. One hundred members presently are elected in national elections; the remaining one hundred fifty-two members are elected from fixed districts. The House of Councillors has never been reapportioned or redistricted. In 1983, a partial system of proportional representation was adopted for the one hundred nationally-elected seats.

Although the Japanese Constitution does not bar Supreme Court review of the design of electoral institutions, a partial barrier to a more activist policymaking by the Court is included within the 1950 Act. Article 204 of this Act requires a new election within forty days if an election is declared invalid. Judicial invalidation of an apportionment scheme, thus, would have disruptive consequences upon Japanese politics. For if the Court decided to void the existing apportionment "so as to affect all electoral districts throughout the nation, all members of the affected House would be disqualified, which would make it impossible for the Diet to revise the apportionment law in

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<sup>50</sup> Peter J. Herzog, *Japan's Pseudo-Democracy*, (1993), p. 146.

<sup>51</sup> Hiroyuki Hata, (1990), 53: 160.

Prior to this act, "each district was represented by from three to five individuals, except Amami-Oshima which chose only one. A modifications of the election law in that year created one district with six seats and reduced four districts to two representatives." (Ramsdell, *The Japanese Diet*, (1982), p. 10).

question."<sup>52</sup>

### C. Representation Ratios

The tables below reveal changes in the proportional variances among electoral districts in the Japanese House of Representatives and the House of Councillors. In addition, the date and type of the legislative apportionment policy also is noted.

**Table 4: District Variance in Japanese House of Representatives, 1947-1990**

<u>Year</u>	<u>Ratio</u>	<u>Court Action (Year)</u>	<u>Legislative Action</u>
1947	1.66		
1949			1 seat added
1960	3.55		
1964	4.09	Constitutional, (1964)	Reapportionment, 19 seats added
1964 New	2.19		
1969			5 seats added
1972	4.99		
1975	3.70		Reapportionment, 20 seats added
1975 New	2.92		
1976	4.94	Unconstitutional, Vacated (1976)	
1980	3.94		
1983	4.40	Unconstitutional, Vacated (1983)	
1985	4.40	Unconstitutional, Vacated (1985)	
1986 New	2.99		Reapportionment, 1 seat added
1989	3.15		
1990	3.38		

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<sup>52</sup> Hiroyuki Hata, (1990), 53: 167.

**Table 5: District Variance in Japanese House  
of Councillors, 1946-1990**

<u>Year</u>	<u>Ratio</u>	<u>Court Action (Year)</u>	<u>Legislative Action</u>
1946	1.87		
1964	4.09	Constitutional (1964)	
1970	5.08		
1972			2 seats added
1977	5.26	Constitutional (1977)	
1978	5.37		
1983			Partial p.r. system adopted
1985	5.85		
1989	6.29		
1990	6.48		

#### **D. Party Competitiveness**

Party cleavages were not settled in the first three elections after establishment of the 1947 Constitution. After 1956, the Liberal Democratic Party (LDP) has dominated Japanese elections although it lost control of the House of Councillors in 1989.<sup>53</sup>

**Table 6: Party Competitiveness, Japan 1945-1995**

	<u>House of Representatives</u>	<u>House of Councillors</u>
1945-1955	Competitive	Competitive
1955-1965	1-Party Dominated (LDP)	1-Party Dominated (LDP)
1965-1975	1-Party Dominated (LDP)	1-Party Dominated (LDP)
1975-1985	1-Party Dominated (LDP)	1-Party Dominated (LDP)
1985-1995	1-Party Dominated (LDP)	Competitive

LDP: Liberal Democratic Party

<sup>53</sup> Peter J. Herzog, *Japan's Pseudo-Democracy*, (1993), p. 132.

**CASE 3: CANADA**

In his 1988 Presidential address to the Canadian Political Science Association, John C. Courtney argued that although Canadian courts were beginning to adjudicate reapportionment cases, "it is difficult to conceive of Canadian courts becoming caught, as American ones have, in the tangled web of reapportionment issues."<sup>54</sup> Although provincial courts have heard apportionment and redistricting cases, in 1991 the Canadian Supreme Court reviewed its first appeal concerning the constitutionality of provincial legislative districts. At issue in A-G for Saskatchewan v. Carter was the claim that variances in the size of constituencies for the Saskatchewan (provincial) legislature violated the *Charter of Rights and Freedoms*. The Court subsequently declined to declare the provincial apportionment unconstitutional or to impose a "one person, one-vote" remedial policy. The Canadian Supreme Court instead interpreted the *Charter's* guarantee of the right to vote as the constitutional means for attaining "effective representation."<sup>55</sup>

Despite the Court's decision against becoming a more active policymaker in Carter, Rainer Knopff and F.L. Morton note that "in affirming a judicial interest in fair and effective representation even as it rejected a strict one-person-one-vote rule, Canada's Supreme Court has closed only one door to judicial activism."<sup>56</sup> Indeed, given recent increases in policymaking by the Canadian Supreme Court in other policy domains it seems, barring intervening conditions, that the Court will become

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<sup>54</sup> John C. Courtney, "Parliament and Representation: The Unfinished Agenda of Electoral Redistributions," Canadian Journal of Political Science, (1988), 21: 685n. 18.

<sup>55</sup> [1991] 2 S.C.R. 158; *indexed as Reference Re Provincial Electoral Boundaries (Sask)*.

<sup>56</sup> Rainer Knopff and F.L. Morton, Charter Politics, (NelsonCanada, 1992), 372.

a more active apportionment policymaker as well.<sup>57</sup>

### A. Constitutional Provisions

Prior to the enactment of the *Charter of Rights and Freedoms* and the *Constitution Act of 1982*, which repatriated Canada's Constitution from Great Britain, the extent of the franchise was determined by Parliamentary statutes. Thus, as in Great Britain, the right to vote retained a statutory, not a constitutional, character.<sup>58</sup> Ratification of the Charter recognized a constitutional right to vote: Section 3 of the Charter specifically stipulates that every citizen of Canada has the right to vote in the election of members of the House of Commons or of a legislative assembly.<sup>59</sup> Claims concerning this constitutional right are eligible for adjudication before the Canadian Supreme Court.<sup>60</sup> Although the *Canadian Charter of Rights and Freedoms* resembles other constitutions in its explicit guarantee of the right to vote, the Charter does not contain any provisions related to legislative apportionment in the Canadian Parliament. Thus, as in the American and Japanese cases, the Canadian Parliament is privileged with a natural monopoly over apportionment policymaking.

### B. Legislative Legacies

R.K. Carty posits that during the past 25 years there has been "a revolution in electoral

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<sup>57</sup> Prior to 1982, the Canadian Supreme Court was consistently deferential to legislative policymaking at the provincial and national levels. Between 1960 and 1982, for example, the Court "ruled in favour of the rights claimant in only five of thirty-five decisions." The activity of the Supreme Court changed after establishment of the Charter of Rights and Freedom in 1982. "In its first one hundred Charter decisions (1982-87), the Supreme Court ruled in favour of the rights claimants in thirty-five cases and struck down nineteen statutes." (F.L. Morton, "Judicial Politics Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992," in Curtis Cook, ed., *Constitutional Predicament*, (1994), pp. 135-36).

<sup>58</sup> See e.g. *The Electoral Franchise Act, Statutes of Canada*, 48-49 Victoria, Chap. 40, July 20, 1885.

<sup>59</sup> Section 1 of the Charter stipulates that the Charter guarantees rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>60</sup> See Ian Greene, *The Charter of Rights and Freedoms*, (Lorimer, 1989), 110-26.

mapmaking" in Canada as legislative control over the apportionment and districting processes has been ceded, in part, to national and provincial boundary commissions.<sup>61</sup> Prior to 1964, the reapportionment of the House of Commons was completed by House committees staffed by members of Canada's largest parties. Between 1900 and 1964, the House was reapportioned six times. In addition to a party-controlled reapportionment process, the redistricting process was never standardized before 1964. Thus, according to Norman Ward, although there were attempts in Parliament throughout the twentieth century to adopt national rules, redistricting in each province "was carried out as a free-lance operation in which any rational boundary drawing was likely to be the result of coincidence or accident."<sup>62</sup>

In the 1964 Electoral Boundaries Readjustment Act, Parliament relinquished operational control over redistricting to three-member commissions in each province and the Northwest Territories. In accord with the 1964 Act, these commissions were to be constituted after every decennial census and they are mandated to construct districts corresponding as near as possible to each province's electoral quota. The Act also stipulates that commissions may create districts up to 25 per cent larger or smaller than the electoral quota. Thus, similar to Great Britain, Canadian redistricting policies are defined in general terms by Parliament but designed at the provincial level by non-political commissions.

The 1974 Representation Act amended the 1964 Act. The 1974 Act provided for decennial increases in the size of the House of Commons. Quebec was guaranteed four additional seats

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<sup>61</sup> R.K. Carty, "The Electoral Boundary Revolution in Canada," American Review of Canadian Studies, vol.15, no. 3 (1985), 273.

<sup>62</sup> Norman Ward, "A Century of Constituencies," Canadian Public Administration, (1967), X: 107-10.

whereas the other provinces were to receive additional seats according to their population. Smaller provinces also received guarantees of representation which were not necessarily warranted by their population. Finally, the 1974 Act projected additional increases in the House size, with a 369-seat House after 2001.<sup>63</sup>

In 1985, Parliament enacted a new Representation Act. It curtailed growth in the House size projected under the 1974 Act, guaranteed that each province would have at least as many MPs as senators and no fewer than a province had in 1976. Parliament also permitted subsequent boundary commissions to exceed the 25 per cent district variance threshold under several specified circumstances.<sup>64</sup>

### **Representational Ratios**

The degree of population inequality among national constituencies for the Canadian House of Commons has declined during the last thirty-five years.<sup>65</sup> In 1961, for example, the most populous district contained 267,000 persons and the smallest district approximately 12,000 persons--a ratio of 22:1.<sup>66</sup> Twenty-three years later, in 1984, the variance between the largest and smallest districts had narrowed to 127,000: 28,000--or a ratio of 4.5:1. Moreover, as C.E.S. Frank observes, in 1984 "[o]ne of every five constituencies in Ontario exceeded the tolerance limits of plus or minus 25 per cent established by the Electoral Boundaries Readjustment Act." By 1987, district variance had

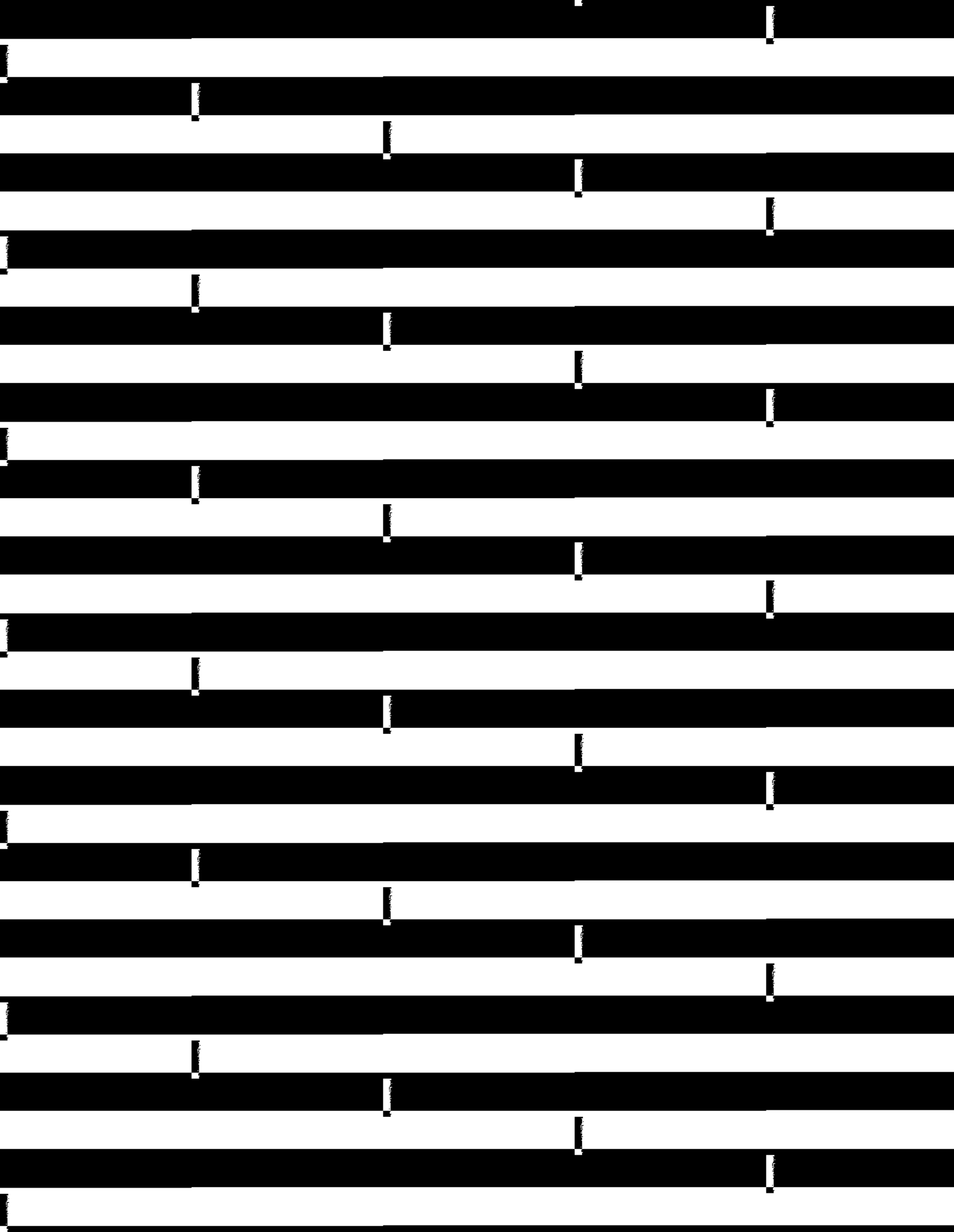
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<sup>63</sup> C.E.S. Franks, The Parliament of Canada, (1987), p. 59.

<sup>64</sup> C.E.S. Franks, The Parliament of Canada, (1987), p. 59.

<sup>65</sup> For a longer-term examination of district variance, see Harvey Pasis, "Achieving Population Equality Among the Constituencies of the Canadian House, 1903-1976," Legislative Studies Quarterly, (1983), 8:: 111-15.

<sup>66</sup> Norman Ward, "A Century of Constituencies," Canadian Public Administration, (1967), X: 107.



narrowed to approximately 3:1.<sup>67</sup>

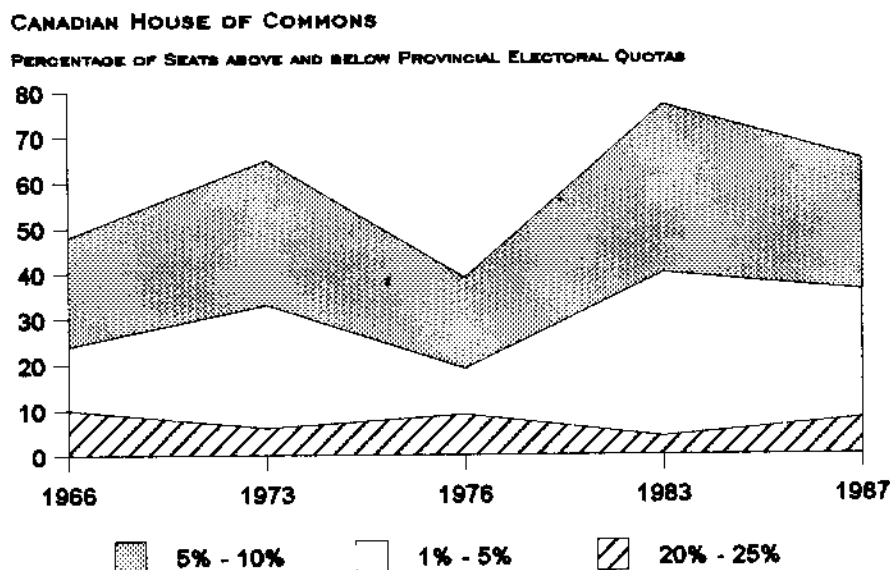


Figure 5

#### D. Party Competitiveness

Table 7 illustrates the conditions of national party competitiveness in Canada since 1945. Overall, partisan competition among the two leading Canadian parties for control of the House of Commons has been a regular element of Canadian politics. Between 1945 and 1987, for example, "the winning party gained more than 50 per cent of the votes" in only two elections: 1958 and 1984.<sup>68</sup> As a consequence of this electoral fluidity, relatively few blocs of policy interests would be motivated or sufficiently organized to bear the costs of seeking judicial, as opposed to legislative, relief from existing apportionment policies.

<sup>67</sup> C.E.S. Frank, *The Parliament of Canada*, (1987), pp. 59-61.

<sup>68</sup> C.E.S. Franks, *The Parliament of Canada*, (1987), p. 60.

**Table 7: Party Competitiveness, Canadian Parliament (1945-1995)<sup>69</sup>**

	<u>House of Commons</u>	
1945-1955	1-Party Dominated	(1945:L) (1949:L) (1953:L)
1955-1965	Competitive	(1955:L) (1957:C) (1958:C) (1962:L) (1963:L)
1965-1975	1-Party Dominated	(1965:L) (1968:L) (1972:L) (1974:L)
1975-1985	Competitive	(1975:L) (1979:C) (1980:C) (19834:C)
1985-1995	Competitive	(1985:C) (1988:C) (1993:L)

C: Conservative

L: Liberal

**CASE 4: GREAT BRITAIN**

Unlike the American and Japanese Supreme Courts, the House of Lords (the highest appellate court) in Great Britain has never ruled an electoral district unconstitutional or illegal. Indeed, unlike the Canadian Supreme, such legal challenges have not been formally or informally declared justiciable by the House of Lords.

The first challenge was decided in Harper v. Secretary of State for the Home Department, (1955).<sup>70</sup> The litigation in Harper was initiated by the City of Manchester which stood to lose constituency seats in Parliament because of the Commission's 1954 redistricting report. At issue was whether the Commission followed statutory guidelines in allocating 506 seats to England. Manchester argued that England should properly have 519 constituencies based upon her population. The City sought an injunction to prevent the Home Secretary from submitting the Commission's

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<sup>69</sup> Adapted from David Butler, "Variants of the Westminster Model," in Democracy and Elections, Vernon Bogdanor and David Butler, eds., (1983), p. 58.

<sup>70</sup> [1955] 1 All E.R. 331.

report, which was approved by Parliament, to Her Majesty in Council.<sup>71</sup> The litigation contested the Commission's formula for deriving the number of English constituencies.

The Court of Appeal determined that the Commission's formula was not a substantive departure nor a general departure from the rules governing the commission.<sup>72</sup> Furthermore, the Court stipulated that it is impossible to suppose that Parliament contemplated that on any of these occasions when reports were presented it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the commission was one which the court thought the best line.<sup>73</sup> According to the Court of Appeal, Parliament had not empowered courts to review the substance of the Commission's decisionmaking, thus it was for Parliament to determine when the Commission erred in recommending boundary changes. Harper was not reviewed by the House of Lords, and the law reports do not indicate whether the Court of Appeal refused to allow the appeal to proceed or whether the Lords' Appeal Committee refused to accept the appeal.

The second legal challenge to the Commission's work occurred in 1983. In R. v. Boundary Commission for England, ex p. Foote, Labour Party and Parliamentary Opposition leader Michael Foote challenged the Commission's report on the grounds that it failed to give effect to the principle of equal representation as mandated by statute.<sup>74</sup> In a companion case, R. v. Boundary Commission

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<sup>71</sup> "Her Majesty in Council" refers to discretionary decisions made by the Monarch's ministers, in this case the Home Secretary. The power to redefine electoral constituencies is delegated to the Monarch by Parliament, and exercised by the Home Secretary, in the statute defining the Boundary Commission's powers. As S.A. De Smith notes, the reasons for delegating power to the Monarch "are partly traditional and partly psychological. It is more dignified and impressive for...[a statute] creating new parliamentary constituencies or altering electoral boundaries, to be made by Her Majesty in Council." S.A. De Smith and Rodney Brazier, Constitutional and Administrative Law, 6th ed., (Penguin, 1989), 154.

<sup>72</sup> [1955] 1. All E.R. 331, 337.

<sup>73</sup> *Id.*, 338.

<sup>74</sup> [1983] 2 W.L.R. 458.

for England, ex.p. Gateshead Borough Council, three local governments sued to prevent the loss of one constituency seat, claiming that the Commission did not adequately account for or review their submissions that the number of seats granted to their county should be 14 instead of 13.

The Court of Appeal refused to intervene in both appeals. For the Foote litigation, the Court noted that the statutes defining the powers and duties of the Commission mandate that "the requirement of electoral equality is...subservient to the requirement that constituencies shall not cross county or London boroughs."<sup>75</sup> Thus, in interpreting the relevant statutes, the Court adhered to representation based on *place*, instead of equal *population* representation. The Court did note a wide divergence from England's electoral quota, but ruled the Commission acted within the discretion granted to it by Parliament in defining constituencies in accordance with county and borough boundaries. For the second appeal, the Court stipulated that the Commission properly exercised its discretion in determining the number and assignment of constituencies.

The Court of Appeal, moreover, refused to allow the parties to appeal to the House of Lords. The litigants appealed to the House, and were refused a hearing by the Lords' Appeal Committee.<sup>76</sup> In essence, then, the Lords upheld the lower Court of Appeal by refusing permission to appeal. As Lord Diplock pointed out for the House, "their Lordships recognize the great public importance of this case. For that reason...they have constituted an Appeal Committee of five instead of the usual three. In their Lordships' unanimous view, no arguable ground has been shown on which an appeal

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<sup>75</sup> *Id.*, 471.

<sup>76</sup> Appeal Committees initially hear appeals to determine whether the House should adjudicate the appeal or not; the Committees serve to set the appellate agenda of the House. However, the lower Court of Appeal can also refuse or grant "leave to appeal" to the House, and also defines the Lords' agenda.

to this House could possibly succeed."<sup>77</sup> Thus, the House considered the Foote and Gateshead challenges to the Boundary Commission and refused to interfere with the Court of Appeals' decision.

Harper, Foote, and Gateshead demonstrate that the Court of Appeal and House of Lords have been reluctant to superintend the decision-making processes of the regional Boundary Commissions. This reluctance can be attributed, in part, to the Commissions' statutory authority to make decisions concerning electoral apportionment. Arguably a more important factor has been that Parliament, despite its authorization of these commissions since 1944, has never completely divested itself from control of national apportionment policy. Not only, that is, has Parliament retained and exercised the authority to review and to amend the recommendations of the various Boundary Commissions, it repeatedly has modified the mandate of these Commissions.

Constitutional rulings, of course, have a different character in British jurisprudence. First, there is no written constitution that can be interpreted by judges and applied to legal disputes. Second, the conceptual foundation of the British constitution is Parliamentary sovereignty which has customarily been understood as barring judicial review of Parliamentary Acts. British courts, however, are independent institutions and they possess the authority to review the *legality* of government action. Courts also are able to impugn action that violates common law or statutory law. Court review of government action, moreover, was standardized in 1981 with the introduction of procedures for judicial review.<sup>78</sup> Thus, although constitutional judicial review does not formally exist

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<sup>77</sup> *Id.*, 485.

<sup>78</sup> The literature on court review of government action and judicial review is numerous. See Sir William Wade, Constitutional Fundamentals, (1989); Gavin Drewry, "Judicial Politics in Britain: Patrolling the Boundaries," West European Politics, (1992) 15: 9-28; Susan Sterett, "Judicial Review in Britain," Comparative Political Studies, (1994), 26: 421-44; Diana Woodhouse, "Politicians and the Judiciary: A Changing Relationship," Parliamentary Affairs, (1995), 48: 401-17.

in British courts, litigants can still pursue their policy goals within the judicial process by using judicial review as a means to establish favorable statutory interpretations or to forestall the application of government policies.<sup>79</sup>

The formal *absence* of judicial review within the British constitution, therefore, does not compel exclusion of Great Britain from comparative judicial study. Moreover, although British courts do not adjudicate as many cases concerning electoral institutions as U.S. courts, David Butler notes that "the only major electoral issues to reach the courts have concerned the drawing of constituency boundaries."<sup>80</sup>

#### **A. Constitutional Provisions**

Unlike the American, German, Japanese and Canadian constitutions, the British Constitution does not explicitly guarantee the right to vote. The design of institutions of representation, including institutions of apportionment, are legacies of past politics which are now governed exclusively by Parliamentary statute. Between 1832 and 1948, Parliament gradually extended the franchise, with a system of universal suffrage adopted in the 1920s. Other institutions of representation, like the apportionment of representation in the House of Commons, also are determined by statute.

#### **B. Legislative Legacies**

The apportionment of representation in the House of Commons continues to reflect the particularities of British political development over the centuries. The modern era of apportionment arguably begins with Parliament's enactment of the 1885 Redistribution of Seats Act. This Act

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<sup>79</sup> Carol Harlow and Richard Rawlings, *Pressure Through Law*, (Routledge, 1992); Jeremy Cooper and Rajeev Dhavan, eds, *Public Interest Law*, (Basil Blackwell, 1986).

<sup>80</sup> David Butler, "Electoral Reform," in Jeffrey Jowell and Dawn Oliver, eds., *The Changing Constitution*, (1985), p. 299.

removed the most egregious apportionment anomalies, but it specifically rejected the principle of equal district population.<sup>81</sup> Parliament first embraced the population principle in the 1918 Representation of the People Act, although Scotland, Wales and Ireland were guaranteed a number of seats disproportionate to their respective populations. The 1918 Act also increased the House of Commons size to 707 members, although this number dropped to 615 with the creation of the Irish Free State in 1922.<sup>82</sup>

Interestingly, during the post-World War II era, Parliament has not been the exclusive policy actor involved with making apportionment policies. In 1944, Parliament established four permanent Boundary Commissions to investigate the problem of malapportionment and to recommend electoral boundary revisions in England, Scotland, Wales and Northern Ireland. Each Boundary Commission was charged with reviewing and reporting on Parliament's electoral apportionment every three to seven years. Parliament also mandated that "so far as practicable" variance of the constituencies should not exceed the national or regional electoral quota by more than 25 per cent.<sup>83</sup> After review and amendment of each Commission's recommendations, Parliament completes the apportionment process by enacting a statute. Parliament, however, can refuse to act upon the Commission's report, thereby postponing apportionment.<sup>84</sup>

In 1947 and 1954, the Boundary Commission completed its review and Parliament enacted

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<sup>81</sup> The 1885 Act abolished exclusive representation for boroughs with population of less than 15,000. Boroughs with less than 50,000 inhabitants received only one member. (Peter G.J. Pulzer, Political Representation and Elections, Parties and Voting in Great Britain, (1967), p. 34).

<sup>82</sup> David Butler and Gareth Butler, British Political Facts, 1900-1994, (1994), 7th ed., p. 240.

<sup>83</sup> Vincent E. Starzinger, "The British Pattern of Apportionment," Virginia Quarterly Review, (1965), 41: 322. See also David H. McKay and Samuel C. Patterson, "Population Equality and the Distribution of Seats in the British House of Commons," Comparative Politics, (1971), 4: 61.

<sup>84</sup> David Butler and Gareth Butler, British Political Facts, 1900-1994, (1994), 7th ed., p. 240.

a new apportionment during the year subsequent to each report. In 1958, Parliament altered the Boundary Commissions' mandate to require reports on electoral apportionment every ten to fifteen years. Parliament also decided to abandon the twenty-five per cent district variance requirement. The Commissions subsequently issued new reports in 1969 and 1983, and Parliament enacted new reapportionments in 1970 and 1983.

In 1986, Parliament enacted the *Parliamentary Constituencies Act*. Section one of this Act mandates that the number of constituencies in Britain shall not be substantially greater or less than 613, and it further allocates at least 71 seats to Scotland, 35 seats to Wales, between 16-18 seats for Northern Ireland and approximately 490 seats for England. The most recent Parliament has 652 seats: 524 for England, 38 for Wales, 72 for Scotland and 17 for Northern Ireland. Thus, Parliament's declared policy for *substantially greater or less than 613 seats* is a command open to a relatively wide range of interpretations.

Section four of the 1986 Act stipulates that the county and borough boundaries should be respected "so far as is practicable" when redrawing constituency borders, but it does empower the Commission with the discretion to create constituencies that cross county and borough boundaries if necessary to reflect demographic trends. Section five mandates that the electorate of any constituency shall be as near the electoral quota as is practicable.<sup>85</sup> Finally, Section six directs the Boundary Commission to depart from the strict application of Sections four and five if there are special geographical considerations.

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<sup>85</sup> The *electoral quota* is the average number of voters in a constituency. When apportioning constituencies, the Commission first creates an *electoral quota* for each of the four regions, England, Wales, Scotland, and Northern Ireland. The quotas are derived by dividing the number of electors in each region by the number of constituencies. Northern Ireland's quota presently is around 55,000, and England's is around 65-67,000; Wales and Scotland fall between 55,000 and 67,000.

In 1992, Parliament again modified the Boundary Commission's procedures when it reduced the maximum time interval between Commission reports from fifteen to twelve years.<sup>86</sup>

**Table 8: Apportionment Policymaking by Boundary Commission and Parliament, 1945-1994**

<b>Boundary Commission</b>	<b>Parliament</b>	
1. Report Issued, 1947		1. Procedural Rules, 1944
		2. Procedural Rules, 1947
2. Report Issued, 1954	3. Reapportionment Statute, 1948	
	4. Reapportionment Statute, 1955	
3. Report Issued, 1969		5. Procedural Rules, 1958
4. Report Issued, 1983	6. Reapportionment Statute, 1970	
	7. Reapportionment Statute, 1983	
5. Report Issued, 1994		8. Procedural Rules, 1992

In practice, the Boundary Commission has been a catalyst of political controversy in Great Britain. The Commission's reports, for example, have consistently been challenged in Parliament by one or more Great Britain's major political parties.<sup>87</sup> Perhaps more tellingly, since 1948 every Boundary Commission review and recommendation has disadvantaged the Labour Party by reflecting population shifts from inner cities to more suburban (and, thus, Conservative party) areas.<sup>88</sup> In practice, therefore, most Boundary Commission reviews tend to favor the Conservative Party and yet, regardless of party in control of Parliament, charges of partisan gerrymandering are levied at the Commission. The political nature of the Commission's work was evident in its 1969 Report which

<sup>86</sup> David Butler and Gareth Butler, British Political Facts, 1900-1994, (1994), 7th ed., p. 240.

<sup>87</sup> David Butler, British General Elections Since 1945, (Basil Blackwell, 1989), 42-55; David Butler, "Electoral Reform," in Jeffrey Jowell and Dawn Oliver, The Changing Constitution, (Oxford, 1985), 297-303.

<sup>88</sup> See R. J. Johnson, "Constituency Redistribution in Britain," in Bernard Grofman and Arend Lijphart, Electoral Laws and Their Political Consequences, (Agathon Press, 1986), 285.

the Labour Government refused to implement. For the Conservatives, one issue of their 1970 election manifesto was the implementation of the Commission's redistricting report which they subsequently enacted in 1970 after winning a majority of the seats in the House of Commons. British Boundary Commissions, therefore, may be more neutral and politically detached than the American and Japanese process of legislative redistricting, but these Commissions are affected by the party composition of Parliament and their recommendations, in turn, have electoral consequences for British parties.

### C. Representation Ratios

In 1946, Parliament modified its 1944 requirement that no constituency have more than a 25 per cent variance from a region's electoral quota. The new requirement was less stringent: it required only that constituencies "shall be as near the electoral quota as is practicable."<sup>89</sup> As illustrated in the graph below, modification of this statutory mandate (along with the essentially fixed levels of Parliamentary representation for Scotland, Wales and Northern Ireland) has yielded less dramatic decline in population variances across constituencies. From a longer view, district variance generally has declined since 1918 and, in recent years, the maximum variance *above* the British electoral quota has decline in proportional terms over the past twenty-five years.

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<sup>89</sup> Vincent E. Starzinger "The British Pattern of Apportionment," Virginia Quarterly Review, (1965), 41: 322.

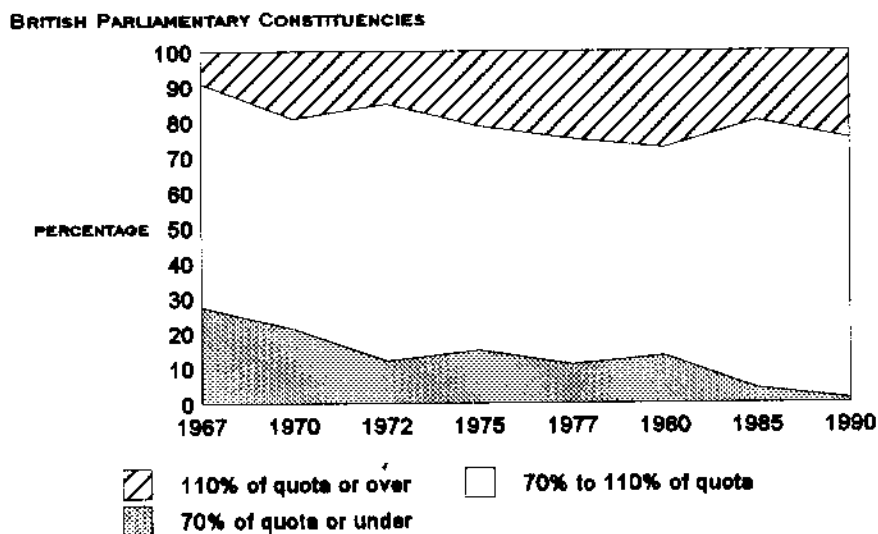


Figure 6

### Electoral Quota, District Variance, Great Britain (1939-1990)

	<u>Avg. Electoral Quota (UK)</u>	<u>District Variance (High/Low Range)</u>
1939:		100,000+ / >30,000
1945:	52,000	
1948:		87,000 / 25,000
1950:	55,000	
1955:	55,000	80,000 / 25,000
1960:		
1964:		90,000+ / 30,000
1965:	57,000	
1966:		102,000 / 25,000
1968:	58,000	100,000+ / 19,000
1970:		98,000 / 25,000
1974:	62,000	
1975:		
1979:		104,000 / 23,000
1980:		
1983:	65,000	94,000 / 22,000
1985:		
1990:		
1992:	66,000	
1995:		

Since 1967, as the chart above illustrates, there has been a notable increase in the number of constituencies with voter populations near the electoral quota. Overall, approximately sixty per cent

of the constituencies are between 70 to 110 per cent of their region's electoral quota. At bottom, therefore, the Boundary commissions and Parliament continue to allow approximately 40 per cent of the constituencies to fall outside of this range.

#### **D. Party Competitiveness**

Table 9 contains indicators of the extent of electoral competition among British parties between 1945 and 1995. Prior to the ascendancy of the Conservative Party in 1979, the two largest parties (the Conservative and Labour parties) regularly competed for control of the House of Commons. Indeed during the two consecutive decades in which there was one-party domination (1955-1975), the Conservative Party was the dominant party between 1955-1965, whereas the Labour Party dominated the subsequent decade. Since 1979, the Conservative Party has been the majority party in the House of Commons.

**Table 9: Party Competitiveness, Great Britain (1945-1995)**

	<u>House of Commons</u>	
1945-1955	Competitive	(1945:L) (1950:L) (1951:C)
1955-1965	Competitive	(1955:C) (1959:C) (1964:L)
1965-1975	Competitive	(1965:L) (1966:L) (1970:C) (1974:L)
1975-1985	Competitive	(1975:L) (1979:C) (1983:C)
1985-1995	1-Party Dominated	(1985:C) (1987:C) (1992:C)

C: Conservative

L: Labour

## **PART II: COMPARISON OF CASE STUDIES**

Two guideposts inform the comparative analysis of judicial behavior across the four examined cases. The first guidepost is the explicit recognition of the analytical costs incurred during the process of comparative generalization. In particular, it is admitted that the transformation of detailed case descriptions into general statements about the conditions necessary for judicial entry into a new policy domain entails wholesale forfeiture of empirically-verified information. This loss of information, more specifically, concerns not only the wholeness of path-dependent political development and the uniqueness of single historical outcomes, but also the individual agents (both judges and legislators) who constituted this process at specific points in time and place.<sup>90</sup>

The latter loss of information is especially troublesome for what is forsaken under the goal of generating a general theory of judicial policymaking behavior are the causal mechanisms and motives that constituted the efficient causes of the historical phenomena under review in this study. Put another way, the controlled-comparative discovery of a correlation between a particular condition and a particular type of judicial behavior offers a particularly thin reed for constructing a theory that purports to explain *how* or *why* this behavior occurred at a specific moment in time.<sup>91</sup> At best, therefore, comparison across the four completed case studies can illuminate only the *necessary but not sufficient* conditions for judicial policymaking. As a consequence, the type of theory that ultimately can be formed from a controlled comparison of cases is limited to explaining only *when* and

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<sup>90</sup> As Alexander L. George noted: "loss of information and some simplification is inherent in generalization and in any effort at theory formation. The critical question, however, is whether the loss of information and simplification entailed jeopardizes the validity of the theory and its utility." (p.47)

<sup>91</sup> See Youssef Cohen, Radicals, Reformers, and Reactionaries. (1994).

*what type* of judicial policymaking is most likely under specified conditions.

The second informative guidepost is the recognition that the methods of agreement and difference share the same underlying logic of variable elimination.<sup>92</sup> Given their common effect, both methods can be synthesized into a composite "method of elimination." This composite method, in brief, justifies elimination of all independent variables that do not covary with the dependent variable across the four cases. Survival of an independent variable--and thus of the hypothesis for which it is a measure, requires consistent variation across all four cases. As illustrated in Table 10, all of the independent variables associated with the three rival hypothesis are eliminated by either the method of agreement or the method of difference. In Table 11, by contrast, the two independent variables used as measures of the *institutional competition* hypothesis covary as expected with the presence and absence of judicial policymaking on apportionment.

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<sup>92</sup> See John P. Frendreis, "Explanation of Variation and Detection of Covariation," Comparative Political Studies, (1983), 16: 260-64.

**Table 10: Covariation Test of Constitutional Violation, Partisan Competition, and Normative Principle Hypotheses**

	<u>Cases:</u>	<u>Method of Agreement</u>		<u>Method of Difference</u>		<u>Method of Elimination</u>
		<u>U.S.</u>	<u>Japan</u>	<u>G.B.</u>	<u>Canada</u>	
<b>Rival Hypotheses:</b>						
<b>Constitutional Violation Hypothesis</b>						
1. explicit procedures		P	A	A	P	Agreement
2. explicit rights		A	A	A	A	Difference
3. implicit procedures and rights		P	P	P	P	Difference
4. representational system <sup>93</sup>		A	A	A	A	Difference
A= majoritarian P= proportional representation						
5. district magnitude		A	P	A	A	Agreement
A= single-member district P= multi-member district						
6. electoral majority		A	P	A	A	Agreement
A= plurality P= majority						
<b>Partisan Conflict Hypothesis</b>						
1. party competition		P	A	P	P	Agreement
A= consecutive decennial control P= consecutive decennial turnover						
2. High number of parties <sup>94</sup>		A	A	A	A	Difference
A= >4 P= ≥4						
<b>Normative Principle Hypothesis</b>						
1. district inequality		P	P	P	P	Difference
A= <2:1 variance ratio P= ≥2:1 variance ratio						
2. timing of judicial action <sup>95</sup>		A	P	A	A	Agreement
A= after peak variance P= before/near peak variance						
<hr/>						
<u>Dependent Variable: Judicial Policymaking</u>		P	P	A	A	
A= non-intervention/justiciability P= declaratory/remedial						

<sup>93</sup> Rein Taagepera and Matthew Shugart, *Seats and Votes*, (1989). Note Japan adopted a partial list system for the House of Councillors in 1983.

<sup>94</sup> The average number of parties (over selected years) in the four cases is as follows: U.S., 2.1, (1910-1970); Japan, 3.3, (1928-1980); Great Britain, 2.5, (1900-1977); Canada, 3.1, (1949-1980). (Taagepera and Shugart, *Seats and Votes*, pp. 90-91).

<sup>95</sup> District ratios serve as a proxy for magnitude of inequality resulting from apportionment system. It is assumed that if "equality" principle is primary incentive for judicial policymaking, then judicial intervention should occur near or at (but not much after) the highest variance in district ratios. Thus, the U.S. Supreme Court is coded as an "A" (Absence) because by the time the U.S. Supreme Court intervened, district ratios (at both the congressional and state levels) were declining, not increasing. Japan is coded as "P" (Presence) because the Japanese Supreme Court intervened in 1976 at a time when district variance in the House of Representatives had surpassed 3:1.

**Table 11: Covariation Test of Institutional Competition Hypothesis**

<u>Central Hypothesis:</u>	Cases:	<u>Method of Agreement</u>		<u>Method of Difference</u>		<u>Method of Elimination</u>
		U.S.	Japan	G.B.	Canada	
<b>Institutional Competition Hypothesis</b>						
1. Legislative policymaking <sup>96</sup> A = < 2.5 P = ≥ 2.5		A	A	P	P	---
2. House size change <sup>97</sup> A = 2 or more consecutive decades of no change P = regular change		A	A	P	P	---
<hr/>						
<u>Dependent Variable:</u>						
<b>Judicial Policymaking</b> A = non-intervention/justiciability P = declaratory/remedial		P	P	A	A	

Of the four hypotheses tested, the institutional competition hypothesis is the only explanation of judicial behavior that is valid across all for cases. Moreover, this hypothesized relationship between legislative policymaking and judicial policymaking is valid both across the four cases and, as illustrated in Table 12, this relationship holds up generally well within individual cases across time as well. The case of the United States is an exemplar of this intertemporal relationship.

<sup>96</sup> Decennial Mean of Legislative Policymaking (1945-1995) = (# of House Size Changes) + (# of reapportionments) + (# of non-judicial policies)/5. See Appendix, Table A and Tables C, D, E.

<sup>97</sup> See Appendix, Tables C.

**Table 12: Variation of Judicial Policymaking with Legislative Policymaking**  
*Date of Judicial Action and Years*  
*Since Enactment of Last Legislative Policy<sup>98</sup>*

Legislative Policymaking	Judicial Policymaking			Non-Interventionist
	Remedial	Declaratory	Justiciable	
<b>Active</b> (0-10 yrs)			U.S. (1946): 5 yrs. Canada (1991): 6 yrs.	U.S. (1932): 3 yrs U.K. (1955): 1 yr.
<b>Irregular</b> (10-20 yrs)		Japan (1976): 12 yrs. U.S. (1960): 19 yrs.	Japan (1964): 14 yrs.	U.K. (1983): 13 yrs
<b>Passive</b> (20+ yrs)	U.S. (1964): 25 yrs.			

### **CONCLUSION: JUDICIAL BEHAVIOR IN NON-MONOPOLISTIC POLICY DOMAINS**

After testing four competing hypotheses, this paper has demonstrated that judicial policymaking on the design of electoral institutions varies according to the levels of policymaking activity by other institutions. When and where, in short, legislative institutions remain active policymakers, judicial action should not be expected. Beyond electoral policies, this paper concludes with the suggestion that the institutional competition hypothesis examined and tested here opens a window onto the much larger and more complex relationship which exists between courts and legislatures.

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<sup>98</sup> Years since enactment of last legislative policy are calculated for each case according to the following reference points:

U.S.: 1941 amendment to 1929 Act

Japan: 1950 Act; 1964 Act

Canada: 1985 Representation Act

Great Britain: 1958 Redistribution of Seats Act; 1970 Redistribution of Seats Act.

**APPENDIX**

**Table A: Index of Legislative Policymaking on Apportionment and Redistricting, (1945-1995)**

	<u># of House Size Changes</u>	<u># of Lower House Reapportionments</u>	<u># of Non-Judicial Policies</u>	<u>TOTAL</u>	<u>DECENNIAL MEAN</u>
U.S.	0	4	1	5	1.0
Japan	1	5	6	12	2.4
Canada	3	4	7	14	2.8
G.Britain	3	4	13	20	4.0

**Table B: Lower House Size (1900-1990)**

	1900	1915	1930	1945	1960	1975	1990
U.S.	386	435	435	435	435	435	435
Japan	376	403	468	464	467	511	512
Canada	214	235	245	262	264	282	295
G.Britain	670	707	615	640	630	635	651

**Table C: Lower House Size Change (1900-1990)**

	1915	1930	1945	1960	1975	1990	<u>Total # of Changes (1945-1990)</u>
U.S.	12.7%	--	--	--	--	--	0
Japan	7.2%	16.1	--	--	9.4	--	1
Canada	9.8%	4.3	6.5	--	6.4	4.6	3
G.Britain	5.5%	-13.0	4.0	-1.6	--	2.5	3

Less than 1.0% not reported.

**Table D: Lower House Reapportionments, (1945-1990)**

	1945	1950	1955	1960	1965	1970	1975	1980	1985	1990	<u>TOTAL</u>
U.S.:		1952		1962		1972		1982			4
Japan:		1949			1964	1969	1975		1986		5
Can.:	1947	1952			1964			1982			4
G.Br.	1944		1955			1970			1983		4

**Table E: Non-Judicial Apportionment/Redistricting Policymaking, (1945-1995)**

	1945	1950	1955	1960	1965	1970	1975	1980	1985	1990	1995	<u>TOTAL</u>
U.S.:					1967							1
Japan:	1949	1950		1964	1969		1975		1985			6
Can.:	1947	1952			1964	1974		1982	1985	1992		7
U.K.:	(2)47-48	1954	1955-58		1969	1970			(2)1983	1992	(2)1994	13