Democracy, Community and Representation*

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Abstract: Politico-juridical institutions project particular accounts of human identity and sociality. Democracy, for example, means the rule of the many, and is closely associated with the idea of majority rule. As juridically defined in most modern liberal democratic states, this calls for an electoral system in which each individual is accorded equality of ‘voting power.’ Nonetheless, the electoral systems of many (if not most) liberal democratic states are organised on the basis of discrete constituencies (also known as districts or electorates). Such systems regularly produce representative assemblies which do not reflect voting proportions precisely, and it is often said that a particular democratic system is ‘not working’ properly when this happens. In such systems, equality of voting power seems to have been compromised with other, competing values, grounded in ideas about effective participation, geographical isolation and discrete community representation (‘local’ and ‘provincial’ vs ‘national’). While liberal democratic electoral systems normally contain adaptations of majoritarian democracy to other values of a communitarian, civil or federalistic nature, the relationship between these values in the construction of electoral systems has often been neglected. This paper considers the relationship between democracy and the various ‘intermediate’ institutions of civil society, such as families, churches, associations, corporations and local communities. Should democracy be conceived—and constructed—with or without these institutions in mind? Can it be so conceived—or constructed—without them? This paper explores these important questions.

Keywords: democracy, community, representation, federalism, districting, apportionment, constitution, judicial review
Introduction

We speak often of ‘representative democracy.’ But who or what is represented by the electoral systems of the modern democratic state? The other two papers in this panel I expect will address questions of democracy and democratic representation from a normative perspective, focusing on the question of human identity. I hope I will not disappoint you if I address such questions, as a constitutional lawyer, by focusing on the conceptions of representation that are in fact embodied in our constitutions and interpreted by our courts, and gesturing from there towards certain normative conclusions.

Although we are sometimes prone in discussions of this nature to regard modern liberal democratic states as embodying essentially the same fundamental underlying conceptions of representation, a careful examination of constitutional texts and judicial interpretations reveals some important differences from one country to the next. We are also prone to assume that in modern democratic states the old medieval idea of the representation of the three estates (the nobility, the clergy and the commons or burgesses of the towns and cities) has been displaced by a liberal conception of the equal representation of the individual citizen. However, a close examination of electoral systems in modern democracies shows that, while the nobility and clergy are no longer electorally privileged, vestiges of the representation of discrete communities, analogous to the old towns and cities, continues in varied forms. Thus, the use of discrete electoral districts persists despite pressure to adopt multi-member proportional
or party list systems; and, as will be seen, the definition of electoral districts continues to be shaped by communitarian values in various guises.

I propose in this paper to look closely at, and to compare, the way in which democratic representation is structured in three closely-related liberal democracies, namely the United States, Canada and Australia. I choose these three partly due to my familiarity with them, but also because if significant differences can be identified in polities so similar as these three, then we might expect even more significant differences between the representative institutions of the many different and varied democracies of Europe, Asia, Africa and South America.¹

Superficially, the similarities between the three countries is quite pronounced. All three owe the vast bulk of their national institutions and political mores to a shared Anglo-British colonial heritage. The legal institutions of all three fall within what lawyers like to call the common law tradition. And all three are long-standing liberal democracies, each covering vast amounts of physical territory, overseen by a federally-organised system of government. Each has a written constitution more than a century old which is interpreted by a court of final jurisdiction under a system of judicial review. Each, moreover, has a bicameral federal parliament, one chamber of which is loosely said to represent the people of the nation as a whole, the other which is said to represent the peoples of the constituent states or provinces.

Beneath the surface, however, there are of course significant differences between each country, familiar to us all. The degree and kind of social diversity in each country is different, the political cultures differ and the representative institutions in each country reflect these differences. While we regularly refer to these countries as being liberal democracies, the differences between them, and

not only differences within them, bear out the contested nature of liberalism (and its conception of the self) in our day.²

In some respects, these latter differences are to be seen in the literal texts of each constitution; in other respects, the differences are apparent only in the judicial interpretation of those texts. Remarkably, virtually identical words, borrowed by the authors of one text from the other, are sometimes interpreted in highly divergent ways; at other times, divergent words are interpreted to produce similar results.

In particular, the problem of electoral apportionment has been productive of a remarkably similar series of constitutional cases in the United States, Canada and Australia. The cases have been similar, however, not in their results but in the issues raised. In other words, while the issues have been largely the same, the courts of final jurisdiction in each country have drawn significantly different conclusions on the question of electoral districting, and these conclusions have reflected significantly different conceptions of the representational identity of the human person. While the different conceptions are complex and contain many sometimes overlapping elements, I will argue in this paper that they can be conveniently classified into three general categories: individualistic, communitarian and federalistic. And each of these approaches, I want to suggest, presupposes a distinct conception of the human person.

In order to make this argument, the paper will be organised into the following parts. First, it will be necessary to provide a very brief survey the relevant constitutional provisions in each country. Second, I will comment briefly on the relationship between citizenship and the design of electoral systems. Third, I will turn to the judicial interpretation of the three constitutions.

² Might it be said that the liberalism of John Rawls and Ronald Dworkin is characteristically American, while the liberalism of someone like Will Kymlicka (and indeed, the communitarianism of Charles Taylor) is characteristically Canadian?
And, finally, I will draw some conclusions about the conceptions of human identity that are presupposed in these interpretations.

**Constitutional texts**

The relevant constitutional texts provide only broad guidance on questions of representation and electoral districting. The United States Constitution stipulates that the House of Representatives is to be ‘composed of members chosen ... by the people of the several states’\(^3\) and that the Senate is to be composed of ‘two Senators from each state, elected by the people thereof.’\(^4\) The Fourteenth Amendment to the Constitution also prohibits the states from denying ‘to any person ... the equal protection of the laws.’\(^5\) The Australian Constitution is in similar terms in so far as it provides that the House of Representatives ‘shall be composed of members directly chosen by the people of the Commonwealth’\(^6\) and that the Senate ‘shall be composed of senators for each State, directly chosen by the people of the State.’\(^7\) The influence of the American Constitution upon the Australian is thus particularly evident in the way in which the composition of the House of Representatives and the Senate is defined. However, Australia has no Bill of Rights, and accordingly no constitutional guarantee of equality before the law. In this respect, the Canadian Constitution is closer to the American, for the Canadian Charter of Rights and Freedoms provides that ‘Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination

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\(^3\) US Constitution, Article 1, Section 2, which also provides that the ‘number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative.’

\(^4\) US Constitution, Amendment XVII.

\(^5\) US Constitution, Amendment XIV.

\(^6\) Australian Constitution, Section 24, which also provides that the ‘number of members chosen in the several States shall be in proportion to the respective members of their people’ and that ‘five members at least shall be chosen in each Original State.’

\(^7\) Australian Constitution, Section 7.
and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.’

Indeed, the Canadian Charter goes further than the US Bill of Rights by explicitly providing that ‘Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.’ At the same time, however, the Canadian Parliament is less clearly ‘democratic’ than both the American and Australian Parliaments. While the Canadian Constitution provides that the House of Commons shall consist of members ‘elected’ for each of the Canadian provinces, it also provides that the Senate shall consist of senators appointed by the Governor-General on behalf of the Queen, which in effect means that senators are appointed by the Canadian government.

In sum, then, as far as the popular right to representation is concerned the critically important provisions of all three constitutions are those which define the composition of the legislatures as being ‘chosen’ or ‘elected’ by the people of the various states or provinces, as well as the provision in the US and Canadian constitutions guaranteeing equality before the law, and the Canadian provision guaranteeing a right to vote in elections.

There are obvious similarities between these constitutional texts, as well as potentially significant differences. It might plausibly be expected that the absence of a Bill of Rights in Australia would foreclose any possibility of constitutionally-entrenched, judicially-enforced democratic right to vote. Even the US Constitution contains no explicit right to vote, so that an unhistorical reading of the text alone might lead us to expect that only in Canada would the courts be intervening to protect that right. But, of course, this has not been the

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8 Canadian Constitution, Charter of Rights and Freedoms, Article 15(1).
9 Canadian Constitution, Charter of Rights and Freedoms, Article 3.
10 Canadian Constitution, section 37.
11 Canadian Constitution, section 24.
case. The US Supreme Court has famously held that American citizens certainly enjoy a constitutionally-guaranteed right to vote and, indeed, an equal right to vote in elections for both the federal and state legislatures. And the Australian High Court has taken similar, albeit less bold, steps in the direction of recognising an implied constitutional right to an equal vote. Moreover, while the Canadian Supreme Court has dutifully sought to enforce Canadian voting rights, its interpretation of these rights has been, in a sense, less radical than the American insofar as the Canadian Supreme Court has been more willing to uphold contested legislation notwithstanding its alleged interference with the rights of individual citizens.

Representation, citizenship and the design of electoral systems

There are principally two respects in which electoral systems embody particular conceptions of human identity for the purposes of political representation. The first, and most commonly discussed, is the definition of citizenship, citizenship being the status essential to the possession of political rights, most centrally the right to vote and the right to be a candidate for public office, as well as more general rights facilitative of political participation, such as freedom of speech, freedom of assembly and freedom of association. The second way in which electoral systems embody particular conceptions of representative identity concerns questions of electoral districting and apportionment, and it is upon this second aspect that I am concentrating in this paper. However, it needs to be recognised that the second aspect cannot entirely be separated from the first. Indeed, arguments from the nature of constitutional citizenship regularly form the basis of challenges to particular electoral apportionment schemes.

The one important difference between questions of electoral districting and questions of citizenship is that citizenship, while a status that concerns a person’s standing within a particular political community, is a right which
inheres primarily in individuals, not groups. Thus, citizenship is fundamentally an individual right, albeit a right to participate within a political community. On the other hand, electoral apportionment has to do with the way in which the votes of individual citizens are collectively organized. Thus, under conditions of modern representative democracy, we regularly think of elected members of the legislature as being representatives of particular constituencies. Although the reality of the party system and interest-based politics means that there is a sense in which members of legislatures are elected by and represent supporters of particular parties and interest groups, the formalities of the kinds of electoral systems used in the United States, Canada and Australia present (and thus represent) members of each legislature as representatives of particular districts or electorates. To this extent, then, questions of electoral districting and apportionment invoke conceptions of collective or communal representation. But they at the same time concern the way in which individual citizenship rights are collectively organised.

Electoral districts are not merely arbitrary lines drawn on a map. Almost always they are cognizant of geography and demography. Oftentimes they reflect historically-developed unities of communal self-consciousness of a social and even political character. Indeed, electoral districts not uncommonly coincide with contemporary units of local or regional government. Understandably, then, the population and physical size of particular electorates, as well as their precise boundaries, are often points of political contention. Occasionally they become questions that are taken to the courts for resolution. When this occurs, the courts are primarily required to assess whether electoral administrators have drawn up electoral boundaries in a way that accords with the various guidelines laid down in the relevant legislation. However, under conditions of modern constitutional law, these questions are often tied up with wider constitutional issues concerning

12 Party-based list systems, as used predominantly on the European continent, of course place an even greater accent upon the party political at the expense of the district or electorate.
whether the legislation itself or administrative decisions purportedly made in accordance with the law are consistent with the constitution. And it is at this point that the constitutional provisions surveyed earlier become relevant.

In constitutional cases such as these it is often argued that the relevant parliamentary statute or administrative decision is unconstitutional because it provides for electoral districts of disproportionate size. It is argued that the citizen’s right to vote is necessarily an equal vote, so that each citizen must enjoy an equality of the voting power. This means that citizens must be organised in electoral districts containing the same number of voters or the same population. Otherwise, as is often said, a relatively small number of citizens in one district may have the same number of representatives as a much larger group of citizens in another. In this respect, the provenance of the predominantly individual right of citizenship overlaps with, and threatens to override as it were, the collective idea of the representation of the people of an entire district or community.

Given arguments of this nature, it seems easy to anticipate how the constitutional provisions referred to earlier will be invoked. Each citizen is guaranteed the right to vote under the Canadian Constitution. Each citizen of both the United States and Canada is guaranteed the right to equality before the law. While not in a sense a direct attack on the equality of the right to vote, an electoral system in which there are vast differences in the size of electorates will have a very substantial, though indirect, impact on that equality. Some citizens will be more equal than others.\textsuperscript{13}

It is also possible to imagine how the provision in all three constitutions that members of the House of Representatives shall be ‘chosen by the people’ might be invoked to support the proposition that a genuine electoral choice can only occur when the people have equal voting rights and thus equal voting power. But, of course, to speak of members of the legislature being chosen by the

\textsuperscript{13} George Orwell, \textit{Animal Farm}, chapter 10.
people voting in elections need not necessarily entail equal citizenship together with all of its implications. It all depends on one’s conception of ‘the people’ and their organisation.

Judicial interpretations

In the United States, in cases such as in *Baker v. Carr, Reynolds v. Sims* and *Wesberry v. Sanders*, the Supreme Court has held that the two key constitutional imperatives—‘equality before the law’ and a federal legislature ‘chosen by the people’—both imply an equality of voting power, meaning electoral districts that are ‘as nearly of equal population as is practicable’\(^\text{14}\) or, more rigorously, founded upon a ‘good-faith effort to achieve precise mathematical equality’ and a justification of ‘each variance, no matter how small.’\(^\text{15}\) Attempts to justify departures from strict equality have included appeals to the representation of distinct social or economic interests, the maintenance of districts that are geographically compact, and the preservation of the integrity of existing political subdivisions. However, different standards have been applied in respect of federal and state districting. For the American Congress, the Court has rejected attempts to justify departures from strict mathematical equality on grounds such as those mentioned,\(^\text{16}\) whereas in cases involving the state legislatures the Court has been willing to countenance departures from strict equality, albeit only to a limited extent.\(^\text{17}\)

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17 Kirkpatrick v. Preisler, 394 U.S. 526, 533-6 (1969); cf 532-4 (Harlan J, dissenting). See also Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995) in respect of attempts to facilitate the representation of minorities under the *Voting Rights Act 1965* which ignored ‘traditional districting principles’ according to which there might be good reason for electorates
Decisions such as these have not be uncontroversial. In a series of powerful dissents in *Baker v. Carr*, *Reynolds v. Sims* and *Wesberry v. Sanders*, Justices Felix Frankfurter and John Harlan drew attention to the way in which significantly different conceptions of representation had shaped the electoral systems of the American states since colonial times.\(^{18}\) Foremost among the characteristics of these electoral systems had been the treatment of local government units such as towns and counties as units of representation for the purposes of elections to the state legislature.\(^{19}\) Early on, it appears, most of the original thirteen states had systems in which their respective political subdivisions were either equally represented in at least one of the houses of the legislature, or were guaranteed some representation in at least one of the houses. In this way, the American colonies continued to be shaped by what Frederick Maitland once called the ‘ancient idea of representation,’ a conception which he said entailed ‘the representation of communities, of organised bodies of men, bodies which, whether called boroughs or counties, constantly act as wholes, and have common rights and duties.’\(^{20}\)

Following the establishment of the US Constitution, and particularly during the nineteenth-century, there was a tendency among the American states to adopt electoral systems analogous to the ‘federal plan’ pursuant to which there would be equal representation of counties or towns in one house and representation on the basis of population in the other. Thus, just as the colonial


constitution of the State of Connecticut had served as a model for the federal Congress—as in the so-called ‘Connecticut Compromise,’\(^{21}\) so the Congress served as a model for the later restructuring of the state legislatures. While in the early part of the twentieth-century there was a shift to emphasising the special representational needs of regional towns and country areas as against the cities, the so-called ‘federal’ principle of one house for the people and a second house for the towns and counties remained influential. Indeed, the late Daniel Elazar went so far as to suggest that the reason for this approach to representation lay in a conception of the states as quasi-federal unions and the counties or towns:

While the United States has made a point of specifying the unitary character of the states as polities, many, if not most, states are constitutionally unions of their counties or towns under their own constitutional theories and were held to be such by their jurists until the twentieth century. ... This is another aspect of state constitutionalism that also deserves exploration, particularly in light of the United States Supreme Court reapportionment decisions of the 1960s, which directly, if unthinkingly, assaulted the very foundations of this aspect of state constitutionalism.\(^{22}\)

Early American representative systems were thus influenced by conceptions of representation that might be called, alternatively, communalistic or federalistic. Cases such as *Baker v. Carr* and *Reynolds v. Sims*, however, overturned all of this in favour of an approach in which a conception of the equal rights of the individual citizen became paramount. Electoral districts could no longer represent discrete communities or quasi-constituent political units. Rather, they must henceforth represent collections of individual voters artificially grouped into territorially-defined units of equal population.


General political trends in modern Western democracies might lead one to expect that Canada and Australia would follow the lead of the United States in this respect. However, this has not altogether been the case.

In Canada, particularly under the Charter of Rights and Freedoms, challenges to provincial electoral boundaries on grounds similar to those made in United States have been largely rejected by the Canadian Supreme Court. In Dixon v. British Columbia, Chief Justice Beverley McLachlin, writing for the majority, considered that ‘while the principle of representation by population may be said to lie at the heart of electoral apportionment in Canada, it has from the beginning been tempered by other factors.’23 Rejecting the American requirement of ‘absolute equality of voting power unalloyed by other considerations,’24 her honour insisted that Canadian democracy had developed from different roots and with a different trajectory to that of the United States.25 It is true, the Court held, that the Charter does enshrine a right to vote, that this entails an entitlement to at least a ‘relative equality of voting power,’ so that population must be the ‘dominant’ consideration in determining electoral boundaries and there is a point at which malapportionment will be contrary to the Charter.26 However, deviations from equality will in principle be justifiable, the Court said, so long as they ‘contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.’27

What does this mean in practice? In Reference Re Provincial Electoral Boundaries, the Canadian Supreme Court affirmed the approach that it had taken in Dixon, particularly that the purpose of the right to vote enshrined in the

26 Dixon v. British Columbia (Attorney General), [1989] 59 D.L.R. (4th) 247, [93], [101]. Accordingly, it was not possible to justify many of the very extreme disparities in population size that existed in that case.
Charter is to guarantee ‘effective and fair representation conducive to good
government.’ The idea of a ‘free and democratic society’ upon which the
Charter is predicated, includes principles, it was said, such as ‘respect for
cultural and group identity, and faith in social and political institutions which
enhance the participation of individuals and groups in society.’ Accordingly,
in addition to the primary objective of ‘relative equality,’ it would be legitimate
to take into consideration factors such as ‘geography, community history,
community interests and minority representation’ in order to ensure that the
provincial legislatures ‘effectively represent the diversity of our social mosaic.’
The special conditions of Canadian society, such as its ‘vast, sparsely populated
territories’ and the need to ‘recognise cultural and group identity,’ were thus
reasons why deviations from equality might be necessary and in fact justifiable.

In coming to these conclusions, it is of significance that the Canadian
Supreme Court paid special attention to a decision of the High Court of Australia
in which it similarly rejected the proposition that the Australian Constitution
requires an absolute or near absolute equality of voting power in the
determination of electoral divisions. In the view of the Supreme Court of
Canada, the factor which accounted for the similarity in outlook as between
Canada and Australia had to do with a common orientation to what the Court
called a tradition of ‘evolutionary democracy,’ a ‘pragmatic’ rather than abstract
‘philosophical’ approach, which ‘accommodates significant deviation from the
ideals of equal representation.’

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In the Australian case to which the Canadian Supreme Court referred, *Attorney-General of the Commonwealth; ex rel McKinlay*, it was argued that just as the provision in the Australian Constitution requiring that the House of Representatives consist of members ‘chosen by the people’ was modelled upon the corresponding provision in the US Constitution, so the High Court of Australia should follow the US Supreme Court in concluding that this implied that electoral divisions should as far as practicable contain the same population. In responding to this submission, the High Court, while acknowledging the extent to which the framers of the Australian Constitution had deliberately followed the American precedent, underscored the different constitutional histories of the two countries, one involving unilateral declarations of independence and a ‘revolt against British institutions and methods of government,’ the other explicitly acknowledging the continuing sovereignty of the British Parliament and expressing ‘confidence’ in parliamentary institutions possessing ‘plenary’ legislative powers.  

The different constitutional histories of the United States and Australia was recently repeated in a case in which it was argued that the general principle of ‘representative democracy’ implied that not only federal electoral divisions, but also the districts used for elections to the state legislatures, must as far as is practical be designed so as to contain approximately the same number of eligible voters, thereby ensuring an equality of ‘voting power’ for all electors across the State. In *McGinty v Western Australia*, the High Court by a close majority however rejected this argument—either on the basis that the Constitution did not contain the relevant implication or, even if it did, such a requirement would not

Attorney-General (Aust.); Ex rel McKinlay, (1975) 135 C.L.R. 1, 57 (Stephen J.), 45 (Gibbs J.), 25 (Barwick C.J.).

33 Attorney-General (Aust.); Ex rel McKinlay, (1975) 135 C.L.R. 1, 23-4 (Barwick C.J.); 36-7 (McTiernan and Jacobs JJ.), 45-6 (Gibbs J.), 57 (Stephen J.), 62-3 (Mason J.). See also Burke v. Western Australia, [1982] WAR 248.
apply to electoral divisions for the state legislature.\textsuperscript{34} It is true there was some recognition in the judgments that there might be a point at which the disparities between districts were so great so as to be unconstitutional. However, on the facts of the case, the majority were prepared to uphold an electoral system in which population differences between rural and urban electorates were as much as 376\%, a degree of malapportionment that would certainly be rejected in the United States and almost as certainly in Canada.

Different lines of reasoning for this conclusion were offered by the members of the Australian High Court. For some, the emphasis lay in the importance of judicial restraint and fidelity to the text of the Constitution over and against judicially-devised implications.\textsuperscript{35} For others, however, an important foundation for the conclusion had to do with, as Justice William Gummow put it, ‘the adaptation of representative democracy to federalism by the framers of the Constitution.’\textsuperscript{36} The construction of a specifically federal conception of representation is most apparent, of course, in the principle—common to the Australian and American Constitutions—that the states are equally represented in the Senate, notwithstanding very dramatic differences in state populations.\textsuperscript{37} But it is also apparent in the provision that each state shall have a minimum of representation in the House of Representatives and that amendments to the Constitution can only be made through a popular referendum in which not only a majority of Australian voters agree, but also the voters in a majority of states, and that changes to the representation of any state in the federal legislature or of the boundaries of any particular state can only occur with the consent of a

\textsuperscript{34} McGinty v. Western Australia (1996) 134 ALR 289, 300-302 (Brennan C.J.), 310-11 (Dawson J.), 354, 363 (McHugh J.), 387, 398-9 (Gummow J.), contradicting the conclusion arrived at in McKinlay (1975) 135 CLR 1, 19 (Barwick C.J.), 44 (Gibbs J.), 56-7 (Stephen J.), 62 (Mason J.).
\textsuperscript{35} McGinty v. Western Australia (1996) 134 ALR 289, 294-7 (Brennan C.J.), 307-10 (Dawson J.), 344-8 (McHugh J.).
majority of voters of that State—provisions that also find their counterparts in the United States and Canada.38

It is remarkable that members of the High Court of Australia should reject a general principle of equality of voting power on the basis of federalism.39 First, it represents a determination—not without warrant in the text of the Constitution—to read democracy in terms of federalism, and not vice versa. Second, the argument moves from the adaptation of democracy to federalism at the level of the relationship between the nation and the states to a conclusion about the nature of the representation of local electoral districts within each state. While the connection is not made out fully by the judges, this is clearly reminiscent of the ‘federal plan’ analogy which had shaped the construction of many of the American state legislatures in the nineteenth-century. Under the Australian Constitution, the peoples of the states are equally represented in the Senate on the basis of their constituent status. As a consequence, the recognition of the states as discrete political communities, constitutive of the federation, has specific implications for their representation, as such, in the governing institutions of the federation.40

37 Australian Constitution, sec. 7; US Constitution, Art. I, sec. 3; contrast Canadian Constitution, sec. 22.
39 The argument is, of course, ultimately directed to the conclusion that it falls within the constitutional discretion of the federal and state legislatures to establish electoral systems which recognise the integrity of subnational political communities. There is no suggestion that the Constitution in any sense requires the legislatures to establish such systems.
40 While equality of representation is often referred to as a mere ‘compromise,’ a close, comparative examination of the convention debates in both the United States and Australia reveals that considerations of ‘principle’ were at least as prominent as considerations of ‘real politic.’ See Nicholas Aroney, ‘Formation, Representation and Amendment in Federal Constitutions’ (2006) 54(1) American Journal of Comparative Law (forthcoming) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881510).
Presupposing conceptions of human identity

What conceptions of human identity are presupposed by these decisions? While it is commonplace to speak of liberal individualism as being the dominant political discourse in modern Western democracies, a comparative examination of the constitutional jurisprudence of the United States, Canada and Australia suggests a more complex picture.

Judicial decisions are not made in a vacuum, of course, and the disparate approaches adopted by the courts of each country may well reflect differences in background culture and prevailing ideas. Moreover, on occasion, the judges have shown some awareness of the deeper theoretical issues at stake. As Justice Frankfurter put it in Baker v. Carr:

What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.\footnote{Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter J., dissenting).}

The conceptions of representation adopted in the cases show the influence of different conceptions of the human person as a political agent, which I have classified as alternatively individualistic, communitarian and federalistic.\footnote{Of course, the cases are more complex than this classification might be taken to suggest. Also, in each country, the relative emphasis placed on these different conceptions was always at the expense of dissenting points of view.} The jurisprudence of each of the three countries displays the influence of all three conceptions, but in the United States, individual equality of voting power has been the dominant concern, whereas in Canada individual equality is significantly moderated to make generous allowance for communitarian factors, and in Australia distinctively federalistic considerations have been decisive.\footnote{The German Federal Constitutional Court has likewise admitted the relevance of the need for a ‘closer personal relationship between district candidates and their constituencies’ as justification of the use of single-member districts in combination with a party-list system: see Apportionment}
Admittedly, these are broad categories, just as the principles adopted in each jurisdiction for the determination of electoral boundaries are open-ended. And, while the jurisprudential dimensions of the reasoning have been complex, the theoretical or philosophical treatments have at times been superficial and broad-brush. This is in part due to the inherently limited nature of the judicial function in constitutional adjudication: the courts certainly wield vast powers when exercising judicial review, but there is an intrinsic limit to the practice. Judges are constrained to trace their reasoning to constitutional texts, and have to acknowledge the leading roles to be played by elected legislatures and democratically-accountable governments in the formation of electoral systems. Judges are therefore generally unwilling—or unable—to articulate comprehensive philosophical accounts or prescribe detailed blueprints: for these are matters for wider debate and deliberation in the public sphere.

This of course leaves a great deal still to be determined. Equality of voting power may be enshrined in the United States, but it remains for legislatures, electoral commissions and the like to make specific determinations about the design and shape of electoral divisions, and in so doing, they are free to take a great variety of matters into account, including issues such as the adequate representation of minorities. Likewise, the Canadian Supreme Court has sanctioned considerations such as ‘community interests’ in districting decisions. However, as commentators have pointed out, ‘community’ can be constituted in many different ways and combinations of ways, among them religious, ethnic, linguistic, social, geographic, political and economic.\textsuperscript{44} Legislatures and electoral administrators are thus free to interpret community in a wide variety of ways.


and the courts have yet to lay down anything other than relatively general constitutional guidelines.\textsuperscript{45}

Thus, while a liberal-individualist conception of the human person shapes much of the constitutional jurisprudence surveyed in this paper, it does not altogether dominate that jurisprudence. Conceptions of community and federalism have been admitted as relevant and constitutionally legitimate, at least to some degree. This suggests that modern liberal democracies continue to display at least remnants of the much older, communitarian conceptions of representation that shaped the electoral systems of the late middle ages, and were theorized by the ‘pre-liberal’ political philosophy developed between the thirteenth and sixteenth centuries.

Does this mean that pre-liberal political philosophy might be relevant to current debates and discussions in the post-modern (if not post-liberal) democracies of our day? It is certainly the case that late medieval and early modern writers, such as Nicolas of Cues and Johannes Althusius, constructed sophisticated and systematic accounts of political representation which were forthrightly communitarian and federalistic in orientation.\textsuperscript{46} And the degree to which even earlier writers, such as Thomas Aquinas and John of Paris held similar views is oftentimes under-estimated.\textsuperscript{47} In the sixteenth- and seventeenth-centuries, approaches to politics and political representation such as these were challenged by Jean Bodin, Hugo Grotius, John Locke and Thomas Hobbes.

\textsuperscript{45} As Will Kymlicka has pointed out, ‘The commitment to representing communities of interest shows that politics in the United States and Canada has never been based on a purely individualistic conception of the franchise or representation.’ See Kymlicka, \textit{Multicultural Citizenship}, 136.


However, as this paper has sought to show, the theories of Locke and Hobbes did not decisively shape the representative institutions of modern liberal states until much later, and vestiges of older communitarian and federalistic conceptions still remain to this day. The question, then, is whether these earlier, pre-liberal approaches to political thought might provide guidance and inspiration in our post-modern times.

And yet there is a distinct limit to the extent to which communitarian and federalistic approaches have shaped constitutional jurisprudence in Canada and Australia, let alone the United States. The courts of all these countries have, in the first place said that there is a limit to the degree to which their electoral systems can permissibly deviate from equality of voting power. Moreover, the admission of communitarian and federalistic considerations has always been the context of a broadly liberal democratic framework. While community of interest is a legitimate factor in defining electorates in Canada and Australia, the electorates remain territorially-defined. Similarly, while federalist rationales are given for the recognition of existing local political communities in districting decisions, the cases still treat local political communities as constitutionally subordinate to the wider (state-level) political community. And the courts certainly have not gone so far as to recommend ‘consociational’ (non-territorial) representation of particular communities, nor the recognition of ‘federal’ autonomy for communities which inhabit particular geographical areas.

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48 See, eg, the reliance upon to social contract theory in Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, [31], [93], [115], [140], [182].

The potential, as well as the inherent limits, of using federal territorial structures as a means of securing capacities of local self-government and representation for particular communities, particularly ethno-national minorities, have been discussed extensively.\textsuperscript{50} These limitations are similarly characteristic of the constitutional doctrines developed in Canada and Australia, notwithstanding the extent to which the courts in these two countries have been prepared to acknowledge the legitimacy of communitarian and federalistic considerations in districting decisions. The constitutions of Canada and Australia, like the American, continue to be shaped fundamentally, by overriding general commitments to liberal-democratic polity which places inherent limits on the development of alternative, thorough-going communitarian or federalistic approaches. It would take far-reaching social and political change, expressed in formal constitutional revision—something far from conceivable at the present time—before anything more radically in tune with communitarian or federalistic values could ever develop.

\textit{Biographical note}

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\textsuperscript{50} See, eg, Will Kimlicka, \textit{Politics in the Vernacular} (Oxford University Press, 2001), ch. 5.