APPORTIONING ELECTORAL DISTRICTS IN A REPRESENTATIVE DEMOCRACY

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This article explores the extent to which the implied guarantee of representative democracy in the Commonwealth Constitution may require equality in the number of electors in each electoral district at Commonwealth and State elections. It considers the significance of the issue for the pending proceedings in the High Court which challenge the distribution of electoral districts for elections to the Western Australian Parliament

INTRODUCTION

In the recent cases of *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[1] ("*ACTV*") and *Nationwide News Pty Ltd v Wills*[2] ("*Nationwide*"), the High Court recognised that the Constitution established, at least at the Commonwealth level, a system of representative democracy. It held that freedom of political communication was an essential feature of such a system of government and therefore that the Constitution implicitly protected that freedom.

These decisions raised the possibility that further essential incidents of representative democracy might also be identified and accorded protection under the Constitution. The purpose of this article is to explore whether it can be said that representative democracy demands equality in the numbers of electors within each division electing a member of Parliament. In essence, it is suggested that a system of representative democracy does require a degree of equality between electoral districts, but not equality in an absolute sense.

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1. (1992) 108 ALR 577.
2. (1992) 108 ALR 681.

Rather, equality should be the primary objective in determining the numerical size of districts, but it is an objective which may be qualified by measures which are reasonably necessary or appropriate in pursuing other interests which are legitimate for an electoral system within a representative democracy.

If this view were adopted by the High Court, it is likely that the existing laws for elections to the Commonwealth Parliament would in large measure survive scrutiny. However, if the implied guarantee of representative democracy also extends to State constitutions, then the electoral laws in several States, and particularly Western Australia, might well be found wanting. This latter issue is of more immediate interest as it is one of the matters raised in the current High Court challenge to the electoral laws of Western Australia.[3]

THE PRIMACY OF ELECTORAL EQUALITY IN OTHER REPRESENTATIVE DEMOCRACIES

The nature of representative democracy has developed over time and is likely to continue to do so. This is readily observable, for example, in the gradual extension in most democracies of the right to vote, culminating in modern times in the acceptance of universal adult franchise.[4] Similar developments can be seen regarding the basis for allocating representatives in legislatures. In Britain, the House of Commons originally consisted of individuals summoned by the Crown to represent local communities or "communes".[5] In time the representatives from each community were elected, and there subsequently emerged demands that representation should be based on population rather than community or territory. At the heart of these demands were the notions of popular sovereignty, which based Parliament's authority on the consent of the people, expressed through elections, and a belief in the equality of each individual.[6] These considerations required not only an extension of the franchise, but also constituencies that were relatively equal in population.[7] In the absence of relatively equal

3. *McGinty v WA* No P44 of 1993.
4. *A-G (Cth); Ex rel McKinlay v Cth* (1975) 135 CLR 1, McTiernan & Jacobs JJ, 36.
5. Canadian Royal Commission *Report on Electoral Reform and Party Financing* (Ottawa, 1991) vol 1, 136.
6. See A H Birch *Representative and Responsible Government* (London: Allen & Unwin, 1964) ch 3.
7. In most cases, it will be of no great significance whether population is calculated by reference to all persons living in a district or only on the basis of those entitled to vote. Where it is necessary to distinguish between the two, it is submitted that only qualified electors be counted: the arguments advanced here for equality of electorates stress the

electoral districts, a voter in a constituency containing more voters would be denied an equivalent say in the electoral process to one in a less numerous constituency; and the legislature would less accurately reflect the opinions of the electorate.

Although the case for constituencies of approximately equal numbers came to be accepted in principle,[8] the evolutionary and pragmatic nature of constitutional reforms in the United Kingdom meant that its electoral system never entirely abandoned the historical link between community or territory and representation.[9] Even so, the current law[10] requires the Boundary Commissions for each of England, Scotland, Wales and Northern Ireland to draw up constituencies which, while respecting local government boundaries, contain equal numbers of electors, so far as that is practicable. Deviations from equality are permitted for reasons of geographical dispersal or to minimise the disruption attendant upon boundary changes.

Many modern democratic nations that emerged from British rule adopted written constitutions which explicitly adopted the principle of numerical equality in electoral districts. For example, the constitution of Ireland requires that:

> The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as is practicable, be the same throughout the country.[11]

Similarly, in India, the national House of the People and all State legislative assemblies must be elected from constituencies having, so far as is practicable, equal numbers of people.[12]

Insistence on equality in electoral districts is not confined to countries with a common law tradition. In France, for example, the requirement in Article 3.3 of the 1958 Constitution that voting be "universal, equal and secret" has been interpreted as requiring equal electoral divisions, subject to

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importance of equality in the value of each vote.

8. Birch supra n 6, 52 described the Reform Act 1832 (UK) as "an implicit acceptance of the principle of representation by population." D E Butler *The Electoral System in Britain 1918-1951* (Oxford: Clarendon Press, 1953) 10, considered that the principle of equality in numbers between constituencies was, for the first time, fully accepted in 1918.
9. A Reeve & A Ware *Electoral Systems A Comparative and Theoretical Introduction* (London: Routledge, 1992) 49–50.
10. House of Commons (Redistribution of Seats) Acts (UK) 1949 & 1958; *R v Boundary Commission, Ex parte Foot* [1983] 1 All E R 1099.
11. Article 16.2.3. See also *O'Donovan v A-G* [1961] IR 114; *In re Article 26 of the Constitution & the Electoral (Amendment) Bill 1961* [1961] IR 169; *O'Malley v An Taoiseach* [1990] ILRM 461.
12. Ss 81 & 170.

modest deviations required by other public interests.[13]

The use in many European countries[14] of systems of proportional representation may be seen as a further development of the concept of representative democracy. Such a system attempts to ensure that the number of votes obtained by a political party throughout the country is more accurately reflected in the number of members of the party elected to the legislature than occurs under plurality electoral systems.[15] Representation commensurate with population is central to such systems. Most forms of proportional representation use multi-member constituencies. Although the number of members returned may vary as between constituencies, seats are allocated to constituencies according to their respective populations.[16] Even where constituencies supply only some of the legislators, with additional members being drawn from party lists, importance is still attached to the relative numerical equality of constituencies to ensure the equal value of each voter's vote.[17] The ideal of equal voting value reaches its most complete expression in states such as Israel and the Netherlands, where the entire country functions as one multi-member constituency, thereby guaranteeing equal voting value to all citizens.[18]

Although explicit requirements for equal electoral divisions are widespread in more modern democratic constitutions, the absence of express provisions in older constitutions has not prevented the recognition of the primacy of equal electoral divisions as essential to a system of representative democracy. The two principal examples of this are the United States and Canada.

In the United States, the Supreme Court has insisted upon strict numerical equality as the goal of electoral districting. Although grounding

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13. See J Bell *French Constitutional Law* (Oxford: Claredon Press, 1992) 205–209.
14. Proportional representation systems are used in Austria, Belgium, Denmark, Finland, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden and Switzerland.
15. R Rose "Elections and Electoral Systems: Choices and Alternatives" in V Bogdanor & D Butler (eds) *Democracy and Elections: Electoral Systems and Their Political Consequences* (Cambridge: CUP, 1983) 34.
16. Id, 36.
17. See the decision of the German Constitutional Court in the *Apportionment II Case* BVerfGE 16, 130; N G Foster *German Law and Legal System* (London: Blackstone Press, 1993) 110. In November 1993, the electors of New Zealand voted to adopt a system of proportional representation based upon the German model. The new provisions, set out in the Electoral Act 1993 (NZ), will replace a plurality voting system which required equal electorates subject to a 5% deviation from the quota: Electoral Act 1956 (NZ) s 17.
18. Rose supra n 15, 35.

the constitutional requirement in the terms of Article 1 and the Fourteenth Amendment, the court has repeatedly expressed the view that equality of electoral districts is fundamental to a representative democracy. Thus in *Reynolds v Sims*, Warren CJ stated that:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.[19]

Later cases allowed for a departure from strict equality, at least for elections to State legislatures, in the interests of preserving local government boundaries, or in response to geographical features.[20] Even so, it remains clear that only modest departures from the primary goal of equality will be tolerated and then only in pursuit of matters rationally connected to ensuring fair and effective representation.

Canada's Constitution Act 1982 does not specifically address the issue of electoral districts, but Article 3 of its Charter of Rights and Freedoms does guarantee the right of every citizen to vote in an election of members of the House of Commons or the legislative assembly of a province. Interpreting this Article as a broad guarantee of democratic rights, the courts have insisted upon a degree of equality in the numerical size of electoral districts as an essential attribute of representative democracy.

In *Dixon v Attorney-General (British Columbia)*,[21] the British Columbia Supreme Court ruled that the purpose of Article 3 was the preservation[22] of the full democratic rights of all citizens in the government of the country or province. An inherent aspect of these rights is equality of voting power, which is "fundamental to the Canadian concept of democracy."[23]

More recently, the Supreme Court of Canada endorsed this view in *Reference re: Electoral Boundaries Commission Act*.[24] McLachlin J, with whom a majority of the court[25] agreed, explained that the purpose of the Charter's protection of the right to vote was to ensure the effective representation of each citizen. Her Honour stated that the first condition of effective representation was "relative parity of voting power":

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19. (1964) 377 US 533.
20. *Mahan v Howell* (1973) 410 US 315; *Gaffney v Cummings* (1973) 412 US 736.
21. (1989) 59 DLR (4th) 247.
22. Id, 264–265. McLachlin CJSC found that the 1982 Charter had not altered the existing democratic rights of citizens; it merely declared and entrenched them.
23. Id, 259.
24. (1991) 81 DLR (4th) 16.
25. La Forest, Sopinka, Gonthier, Stevenson & Iacobucci JJ.

> A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative.[26]

Her Honour went on to hold that factors such as practicability, geographical and historical factors, and the representation of community interests were among the considerations that might justify some departure from equality.[27] Similarly, Cory J, with whom Lamer CJC and L'Heureux-Dubé J agreed, declared:

> [T]he right to vote is fundamental to a democracy. If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency.[28]

It is clear from this brief survey that one of the features common to modern representative democracies[29] is an acceptance of the principle that the primary basis for representation in the legislature should be population; more specifically, equal numbers of electors should have equal numbers of representatives. This feature is not merely coincidental: the principle implements two of the theoretical underpinnings of representative democracy, popular sovereignty and the equality of individuals. The fact that some systems permit modest departures from equality does not undermine the central importance of the principle; this merely reflects the existence of other interests that need to be accommodated within an electoral system. Thus, the principle of equal electorates should be seen as a minimal requirement for a representative democracy.

REPRESENTATIVE DEMOCRACY UNDER THE AUSTRALIAN CONSTITUTION

If the principle of numerical equality of electorates is an essential incident of representative democracy, it follows that the principle has been

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26. Id, 35.
27. Ibid.
28. Id, 26.
29. The idiosyncratic system in Japan might be cited as an exception. The failure adequately to adjust electoral boundaries to reflect shifts in population has created considerable discrepancies in the numerical size of constituencies for the House of Representatives. Yet it appears that this represents a failure to implement the principle fully rather than a rejection of the principle. Stockwin "Japan" in V Bogdanor & D Butler (eds) *Democracy and Elections Electoral Systems and Their Political Consequences* supra n 15, 219.

entrenched in the Australian constitution.[30] The question then is: what standard should be used to judge whether particular electoral laws conflict with the principle? It is submitted that the court must fashion a test that protects the principle and is compatible with Australian conditions and the court's own jurisprudence. Accordingly, absolute equality as applied to elections to the United States House of Representatives should not be required. That approach fails to allow for the possibility of other legitimate interests that may require accommodation in the electoral process, as is permitted in democracies such as the United Kingdom, France and Canada and even in elections to State legislatures in the United States. In any event, it has already been rejected by the High Court in the decision in *McKinlay*.[31] On the other hand, it is inadequate simply to follow the British approach which leaves the implementation of the principle entirely in the hands of the legislature. In Australia, legislatures must act within the constraints of relevant constitutional limits.[32]

It is submitted that an intermediate approach, similar to that adopted in Canada, offers a more appropriate model for Australia. Not only do Canada and Australia share similar historical and philosophical traditions, as well as similar geographical and demographic obstacles to strict equality of electoral districts, but the Canadian approach to the principle of equal electoral districts is consistent with the High Court's treatment of the freedom of political communication. In each case the principle is protected, not as an absolute value, but one that can be overridden where sufficient justification can be demonstrated. Accordingly, it is suggested that in Australia the system of representative democracy requires that electoral districts be drawn to achieve numerical equality except to the extent that other legitimate interests justify departure from the primary goal. This may be described as a requirement of relative equality of electoral districts.

ARGUMENTS AGAINST A REQUIREMENT OF RELATIVE EQUITY

Two main arguments may be made against the introduction of such a requirement in Australia. The first is that, as a matter of history, the principle

30. *ACTV* supra n 1; *Nationwide* supra n 2.

31. Supra n 4.

32. As Brennan J recognised in *Nationwide* supra n 2, 704, it would be open to the Parliament at Westminster to abolish freedom of speech and thereby destroy representative democracy, but such a possibility is excluded where representative democracy is constitutionally entrenched.

of electoral equality had not been accepted in Australia at the time of federation and therefore cannot have been entrenched in the Constitution at that time. The second is that the decision in *McKinlay* precludes any such development. These issues may be dealt with in turn.

1. History

In support of the first objection, it might be said that at federation the concept of representative democracy had not evolved to the point where it entailed equal electoral districts. It is clear that prior to 1901, the electorates for colonial legislatures bore marked disparities in their numbers. It may also be noted that the framers of the Constitution had little to say about how electoral divisions should be drawn within each State,[33] and included no express requirement of equality as occurs in the constitutions of other countries drafted in later years.

Against this, it must be noted that section 24 of the Constitution allocated seats in the House of Representatives as between the States according to their respective populations. As Isaacs explained, this arrangement reflected the "democratic principle of having representation according to population."[34] Further, it seems that the framers were content to leave the distribution of seats to State legislatures under section 29 on the understanding that the States would refrain from any action by which representation might be made "ineffective or improper", as had occurred in the United States.[35] If a State failed to exercise its power, the State would vote as one electorate,[36] ensuring equal voting power to all its electors. In the event that the States should misuse their power, it was expected that the Commonwealth Parliament would exercise its "reserve power"[37] to remedy the position. As Quick and Garran pointed out in 1901,[38] similar provisions had proved necessary in the United States. There, State legislatures had originally been permitted to

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33. More attention was directed to the question of how membership of the House of Representatives should be allocated as between the States. It was agreed that membership should be allocated according to the respective populations of the States: s 24.
34. G Craven (ed) *Convention Debates Adelaide 1897* (Sydney: Legal Books, 1986) vol III 696.
35. G Craven (ed) *Convention Debates Sydney 1897* (Sydney: Legal Books, 1986) vol II, 454. Barton referred specifically to the problem of gerrymander.
36. S 29. In the first election for the House of Representatives, South Australia and Tasmania each voted as one electorate.
37. Barton supra n 35.
38. J Quick & R R Garran *Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) 465–466.

determine Congressional boundaries until the "grossly unjust apportionment of population of districts"[39] prompted the Congress to enact the Apportionment Act 1882. That Act insisted upon electoral districts which contained, as nearly as practicable, equal numbers of inhabitants.

In Australia, resort to the Commonwealth's "reserve power" was far more immediate. Dissatisfaction with the arrangements made by the States for the election of the first Parliament prompted the latter to legislate regarding electoral districts, in the Commonwealth Electoral Act 1902. The debates over the Electoral Bill revealed no real opposition to the democratic principle that electorates should contain approximately equal numbers.[40] The main argument was over the degree of departure from exact equality that should be permitted and the grounds which might justify departure. Eventually, a tolerance of 20 per cent from the quota[41] was accepted.[42]

There is thus some evidence to suggest that the principle of numerical equality in electoral districts *was* accepted in Australia at the beginning of this century, even if it had not been fully implemented in the States. In any event, it can be argued that the court is not bound to protect only those incidents of representative democracy that had been accepted prior to 1901. Rather, it must from time to time give effect to the concept in accordance with prevailing conditions. The court has regularly adopted a similar approach in relation to the grants of power[43] and there is no reason why the same should not apply also to limitations on power. Indeed in *McKinlay*, Jacobs and McTiernan JJ[44] appeared to adopt a similar approach to the construction of the term "chosen by the people". They reasoned that the application of that term "depends in part upon the common understanding of the time" as to its meaning. Accordingly, they suggested that, although in 1900 universal suffrage had not been adopted in Australia, "it is doubtful whether anything less than this could now be described as a choice by the people". Similarly, in *ACTV* and *Nationwide*, there is no indication that the court thought it necessary to establish that freedom of political communication was recognised

39. Ibid.

40. Aust Senate *Debates* vol 8 (Canberra, 1902) 10797–10805; Aust House of Representatives *Debates* vol 10 (Canberra, 1902) 13942–13957.

41. The figure obtained by dividing the number of voters in a State by the number of representatives to be returned from that State.

42. S 16.

43. Illustrated by the oft-cited principle that: "[I]t is a constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances" *Australian National Airways Pty Ltd v Cth* (1945) 71 CLR 29, 81.

44. Supra n 4, 36.

as an essential element of representative democracy in 1900. Although there were some references to historical views,[45] the judges generally were content to spell out the logical implications of popular soveignty and to cite in support judicial pronouncements from comparable jurisdictions which themselves expounded the current understanding of representative democracy.

If the court adopts a contemporary understanding of representative democracy, then there is ample evidence to suggest that it entails a degree of equality of electoral districts. One can refer not only to the law and practice of comparable democracies outlined above, but also the legislation of the Commonwealth[46] and most of the Australian States,[47] as well as authoritative Australian sources, such as the Constitutional Commission. Reporting in 1988, the Commission accepted that "one vote one value is a fundamental principle of democracy" although it recognised that a tolerance of 10 per cent from the quota would amount to a reasonable application of that principle.[48]

2. Authority

The second possible objection to a requirement of relative numerical equality is that it is incompatible with the decision in *McKinlay*.[49] In that case, the High Court upheld the legislation providing for districts for the election of members to the House of Representatives, despite quite considerable disparities in the numbers of people or electors in different electoral divisions.

However, it is submitted that the court merely decided that the Australian Constitution does not require absolute equality of electoral districts. As the Canadian decision in *Dixon*[50] illustrates, this does not necessarily entail a rejection of a more limited requirement of relative equality. Indeed, the judgments in *McKinlay* are quite consistent with the view that the Constitution requires relative equality of electoral districts. In order to demonstrate this, it is necessary to outline the Constitutional and legislative background to the

45. In *ACTV* supra n 1, 651, Gaudron J cited Blackstone's view that liberty of the press was essential to a free state; in *Nationwide* supra n 2, 724, Deane & Toohey JJ referred to Quick & Garran and the decision in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 to indicate that it had long been recognised that the freedom of citizens to communicate with federal institutions was inherent in the Constitution.

46. Commonwealth Electoral Act 1918 (Cth) s 66.

47. Constitution Act 1902 (NSW) s 28; Constitution Act 1934 (SA) s 77; Electoral Commission Act 1982 (Vic) s 9(2); Electoral Act 1992 (Qld) s 45.

48. Aust Constitutional Commission *Final Report* (Canberra: AGPS, 1988) 154.

49. Supra n 4.

50. Supra n 21. The court there rejected the American model of absolute equality but adopted a requirement of relative equality.

case and refer to the judgments in some detail.

Section 24 of the Constitution requires that the House of Representatives be directly chosen by the people. Further, the number of members chosen in the several States must be in proportion to the respective numbers of their people, provided that there should be a minimum of five members chosen in each original State. Section 29 provides that divisions for choosing members may not be formed out of parts of different States.

Section 19 of the Commonwealth Electoral Act 1918 provided that once the number of seats allocated to each State had been ascertained,[51] the electoral divisions within a particular State were to be determined by Distribution Commissioners. In essence, they were required to achieve equal numbers of electors within each division, although consideration of five specified factors could justify a departure from equality by up to 10 per cent in any electorate.

Although the existing boundaries had been drawn in compliance with the Act, population shifts and a lack of redistribution for six or seven years[52] had caused substantial disparities between the numerically largest and smallest divisions within several States. By 1975, the ratio between largest and smallest divisions in Queensland was 2.1: 1, in Victoria 1.8:1 and in South Australia 1.7:1.

The principle submission of the plaintiffs was that these disparities infringed a guarantee to be found or implied in section 24 of the Constitution that the divisions created for the purpose of choosing members of the House of Representatives should be comprised of "practical equality" of numbers of people, or alternatively, of electors. The court rejected that argument by a majority of six to one. The decision thus established that there is no requirement that electorates for the House of Representatives contain, so far as practicable, equal numbers of persons or electors.

Two general points need to be made about the decision in *McKinlay*. First, most of the judgments focused on whether the particular term "directly chosen by the people" entailed a requirement of equality of electoral divisions. Apart from Stephen J, the judges were not concerned to elaborate upon the requirements of the broader notion of representative democracy.

51. Pursuant to ss 3 & 4 of the Representation Act 1905 (Cth) seats were allocated according to the respective State populations as revealed in the census conducted every 5 years. The court held that this method was invalid:it did not ensure that the allocation reflected the current State populations.

52. S 25 of the Act allowed for redistributions within a State where the number of seats allocated to the State changed or where 25% of electorates came to contain numbers exceeding the 10% margin from equality.

Secondly, the reasons advanced by the majority refute the plaintiff's argument for a requirement of absolute equality tempered only by the demands of practicability. But they are not inconsistent with a view that a lesser measure of equality, qualified by other considerations, is required under the Constitution.

For example, Barwick CJ reasoned that "section 24 does not require a *precise* mathematical relationship of the number of members chosen in a State to the numbers of the people of the State."[53] He pointed to the "rounding" formula in the second paragraph of section 24 and the fact that original States were guaranteed a minimum of five representatives as precluding "*exact*" proportionality between electorates in different States.[54]

These arguments do not reject the significance of relative equality as a goal. Rather, they recognise that there may be other considerations, in addition to practicability, which may justify some departure from that goal. In particular, the second paragraph of section 24 reflects the requirement in section 29 that federal districts do not cross State boundaries, together with the obvious need to determine the number of members for each State in whole numbers; and the minimum representation for the original States represents an historical concession to the smaller States to overcome their fears[55] of being swamped by the larger States in the new federation.[56] The fact remains that these are qualifications on the central thrust of section 24, which allocates members of the House of Representatives as between the several States according to the respective numbers of their people. Thus, the primary basis for entitlement to representation is the number of persons represented.

McTiernan, Jacobs,[57] Stephen[58] and Mason[59] JJ also rejected the requirement for exact equality but acknowledged that some degree of equality is required. The dissenting judgment of Murphy J offered the strongest support for a requirement of equality of electoral districts, although he went further than is advocated here by holding that the only permissible

53. *McKinlay* supra n 4, 21 (emphasis added).
54. Ibid (emphasis added).
55. See eg Craven supra n 34, 710.
56. The provision in s 7 for equal numbers of senators from each State also recognises further grounds for departure from the principle of equality: the federal nature of the constitution and the protection of State interests justified equal representation of States in the upper house. See Quick & Garran supra n 38, 414; *Western Australia v Cth* (1975) 134 CLR 201, Gibbs J, 246–247.
57. *McKinlay* supra n 4, 35.
58. Id, 57.
59. Id, 61. Gibbs J, 64 concluded that there was no constitutional requirement as to the degree of equality between electorates.

ground for departing from absolute equality was the practical impossibility of ensuring that numbers were at all relevant times precisely equal.

Murphy J rested his decision in part upon the analysis of the Supreme Court of the United States that the requirement that House of Representatives be "directly chosen by the people" demanded that electoral districts be numerically equal. But his conclusion also relied upon part of section 30, which stipulates that each elector shall vote only once:

> The purpose of the closing words in section 30 is not merely to prevent multiple voting. The command contained in the words was intended to be effective. The effect cannot be destroyed by some device such as counting some votes several times and others once only or not at all. Equally, its effect cannot be destroyed by diminishing the value of votes by having divisions with either widely differing numbers of electors returning the same number of members, or divisions of the same number of electors but represented by differing numbers of members. This would devalue or debase the vote as much as multiple voting (which is plainly forbidden by section 30).[60]

Insofar as this provision reveals a commitment to the equality of each voter's contribution to the electoral process, it may be seen as further support for the principle of equal electorates.[61]

It is clear then that although the court in *McKinlay* rejected the need for absolute equality, it did not reject a more limited role for equality. Indeed much of the reasoning of the court supports the need for some measure of equality. In particular, many of the judges, in upholding the challenged provisions, drew attention to the fact that they were designed to achieve a high degree of equality subject to modest qualification in pursuit of other legitimate interests. For example, Barwick CJ noted that the Parliament had "[M]ade a real endeavour to secure equality of voting value when providing for the distribution of the States into electoral divisions."[62]

In his view, the factors permitting departure from precise equality were conducive to attaining equality of voting value, rather than preventing the attainment of that goal:

> [S]ection 19 [of the Commonwealth Electoral Act], grounded as it is upon long parliamentary experience, in not insisting on practical equality in numbers in divisions, accepting a tolerance of inequality of numbers expressed in a percentage, and in nominating the various considerations to be regarded when effecting a distribution, in my opinion, represents ... a scheme designed to produce equality of voting value.[63]

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60. Id, 72.
61. Id, 46.
62. Id, 25.
63. Ibid.

In effect, the Chief Justice endorsed the Act insofar as it pursued equality of electorates but qualified that goal by reference to other relevant criteria.

Similarly, Stephen J regarded the provisions of the Act as entirely consistent with representative democracy. Although departure from the principle of precise equality was permitted by section 19, the five grounds justifying such departure possessed "an obvious relevance to the general subject matter of representative democracy."[64]

It is submitted then that there is no impediment in previous decisions of the court to accepting a requirement of relative equality. Indeed, support for a measure of equality in numbers within divisions can be derived not only from *McKinlay*, but also from the decisions establishing the implied freedom of political communication. In *Nationwide*, Deane and Toohey JJ summarised the system of representative government created by the Constitution as follows:

> While one can point to qualifications and exceptions, such as those concerned with the protection of the position of the less populous States, the general effect of the Constitution is, at least since the adoption of full adult suffrage by all the States, that all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control [namely the election of the members of the Parliament and the amendment of the Constitution.][65]

This statement echoes the view of Professor Harrison Moore, published in 1902, that: "The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power."[66]

Mason CJ cited this passage in *ACTV*[67] in reasoning that freedom of communication was essential to representative government. A fortiori, it might be relied upon to establish the need for divisions to contain at least approximately equal numbers. Without relative equality of electoral divisions, the individual voter will be deprived of that "equal share in political power" which is so central to the constiutional scheme. As Budd J stated in the Irish case of *O'Donovan v Attorney-General*:

> [A] "democratic state" denotes one in which all citizens have equal political rights.... That equality is not maintained if the vote of a person in one part of the country has a greater effect in securing parliamentary representation than the vote of a person in another part of the country.[68]

64. Id, 59. McTiernan & Jacobs JJ, id, 37, commented to similar effect.
65. Supra n 2, 723 (fn omitted).
66. See *ACTV* supra n 1, 595.
67. Ibid.
68. [1961] IR 114, 137.

REVIEWING DEPARTURES FROM EQUALITY

If equality of electoral districts is seen to be a protected but not an absolute value, the question then arises as to how the court should decide which departures from that goal are justifiable.

Some of the dicta in *McKinlay* have prompted an argument[69] that there comes a point when the numerical inequality between divisions is so great that the legislature could no longer be described as elected directly by the people. Mason J,[70] for instance, speculated that gross disproportionality between the sizes of electorates might entail invalidity. Further, McTiernan and Jacobs JJ[71] commented that whereas the discrepancies complained of were not so great as to invalidate the Commonwealth legislation, a discrepancy of the kind confronting the United States Supreme Court in *Wesberry v Sanders*[72] may well have exceeded tolerable limits. In the American case, the largest district contained about three times as many voters as the smallest district. Accordingly, it has been tempting to infer that whereas a ratio between the largest and smallest electorate of 2:1 is not invalid, one of 3:1 might be.[73]

Ideally, it may be that representative democracy requires a maximum permissible ratio to be placed upon the numbers in the most and least populous electorates or upon departures from the quota. But the task of determining that limit is fraught with difficulty and the Court may understandably be reluctant to identify a particular ratio as the point beyond which the electoral imbalance will render the system invalid.[74] Such a figure

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69. This was the thrust of the argument in *Burke v Western Australia* [1982] WAR 248, 251. On the approach adopted by the court it was unnecessary to reach a decision on this argument.
70. Supra n 4, 61.
71. Id, 39.
72. (1964) 376 US 1.
73. P Hanks *Constitutional Law in Australia: Materials and Commentary* 5th edn (Sydney: Butterworths, 1994) 75–76 presents figures which suggest that if the comparison is measured in terms of the extent by which the largest division exceeded the *average* electorate in each State, the distinction between Queensland and Georgia appears even slighter: 91.5% in Queensland and 108.9% in Georgia. However, in the judgment of Murphy J in *McKinlay* supra n 4, 64, the figure of 91.5% was cited as the ratio by which the largest division in Queensland exceeded the *smallest* division. The comparable figure for Georgia would have been 202.6%.
74. In *Dixon v A-G* supra n 21, 266–267, McLachlin CJSC stated that "[I]t is appropriate to set limits beyond which [equality of voting power] cannot be eroded by giving preference to other factors and considerations, such as the 25% limit applied in Canada to federal electoral districts or the 10% limit established recently in Australia." It is notable, however, that Her Honour omitted to say *what* limit was appropriate.

would necessarily be arbitrary. It might also be counter-productive, as it might be seen by some as endorsing or even encouraging a relaxation of those legislative criteria which currently demand stricter compliance with the quota.

Instead of this emphasis on the numerical *margins* by which districts may depart from an electoral quota, it may be sufficient for the court to require justification for particular departures from equality. In assessing the adequacy of the justification, the court should allow sufficient scope for reasonable differences on matters of judgment.[75] In this way the court could exercise a supervisory role without having to say how particular boundaries should be drawn. It could leave to other bodies the difficult task of balancing competing interests, but retain the ultimate judgment as to whether that task had been performed in a way compatible with the guarantee of representative democracy.

The role of the court would thus be similar to that adopted in *ACTV* and *Nationwide*, where the court required that legislative restrictions on the freedom of political communication be justified as reasonably necessary or appropriate to the pursuit of some other legitimate public interest. In the case of the principle of numerical equality of electoral districts, departures from that goal would have to be justified as reasonably necessary or appropriate to the pursuit of other interests which are legitimate for an electoral system within a representative democracy.

A similar approach was taken in Canada so that:

> [O]nly those deviations should be admitted which can be justified on the ground that 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.[76]

It is likely that an approach which demands justification for departures from equality will enable the court to avoid having to apply some arbitrary figure as the maximum permissible ratio between largest and smallest electorates or maximum deviation from the quota. Provided there is an adequate mechanism for periodic review and adjustment of electorates, the outcome of distributions applying permitted criteria should avoid the extreme inequalities to which McTiernan, Jacobs and Mason JJ referred in *McKinlay*.

This is not to say that the court would avoid making difficult judgments on matters of degree. They would need to identify what other interests might

75. Cf *ACTV* supra n 1, Mason CJ, 598; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473.

76. *Dixon v A-G* supra n 21, 267.

legitimately qualify the demands of equality and whether particular departures from equality were justified by those interests; they might need to develop some criteria for preventing the qualifications from being used to submerge the primary goal of equality and they would need to give some indication of how often and in what circumstances reviews and redistributions should occur. But at least the process would involve arguments of principle rather than simply the fixing of arbitrary limits which could not be rationally justified or debated.

JUSTIFYING UNEQUAL ELECTORAL DISTRICTS

What factors might be considered legitimate justifications for departing from numerical equality? Obviously, qualifications on equality that are demanded or contemplated by the Constitution itself will qualify. These would include the requirements that there be equal numbers of senators from each State, that the original States have not less than five members of the House of Representatives and that divisions should not cross State boundaries. Beyond these, the court would need to determine what further considerations are relevant to effective representation in a modern democracy.

Without attempting to provide a comprehensive list of such factors, a useful starting point[77] would be the five considerations contained in the Commonwealth legislation upheld in *McKinlay*. The Distribution Commissioners were required to have regard to:

- Community of interests within the division;
- Means of communication and travel within the division;
- The trend of population changes within the State;
- Physical features of the division; and
- Existing boundaries.

Where one or more of these factors was relied upon to justify a departure

77. Another formulation of permissible grounds for departures from equality is the list permitted under the Electoral Boundaries Commission Act 1986 (Sask) s 20 which was upheld by the Supreme Court of Canada in *Reference re Electoral Boundaries Commission Act* supra n 24, 43:

    (i) the sparsity, density or relative rate of growth of population of any proposed constituency;

    (ii) any special geographic features including size and means of communication between the various parts of the proposed constituency;

    (iii) the community or diversity of interests of the population, including variations in the requirements of the population of any proposed constituency; and

    (iv) other similar or relevant factors.

from the quota in a particular electoral district, the question for the court would be whether the extent of the departure was proportionate to the particular needs of the district. Accordingly, only those factors relevant to the *particular* constituency could be relied on to justify a departure. For example, although difficulties of communication and travel within the constituency might be relevant in many rural districts, it might not be relevant in a district composed of a large regional town. Further, comparisons between electoral divisions would be significant, since a modest departure from equality in one district would indicate disproportionality in a district with comparable obstacles to equality but a more extreme departure from the quota. Finally, the court might need to assess the overall balance between the competing interests. Even where there were strong arguments for a deviation, the court might rule that the deviations were so great that they submerged the dominant principle of equality.

In determining both the grounds for departure from equality and the extent of inequality that can be justified, regard should be had to contemporary conditions and facilities. For example, the argument for allowing smaller numbers in more remote electorates on account of the distances separating people may still have some force, but improvements in transport and communications would diminish the degree of inequality which could be justified.

REVIEW AND REDISTRIBUTION

To ensure continued adherence to the constitutional principle, it would be important that the court scrutinise not only the grounds advanced to justify departures from equality when boundaries are first drawn but also the mechanism for review of those boundaries. History indicates that inequalities in the numerical size of districts are often the product of inaction, in the failure to adjust existing boundaries to reflect shifts in population. It is submitted that the guarantee of equality of electoral divisions must entail a continuing obligation to review and adjust the relative size of electorates. Again, this need not be an absolute requirement, but where the departure from equality stems from shifts in population, the court should require the failure to redistribute to be justified.

Clearly there are several factors which might justify some lapse of time between redistributions, as acknowledged by Stephen J in *McKinlay*:

> [C]onsiderations of cost, of the possibility of public inconvenience and, indeed, confusion, and of administrative difficulties might impose very substantial restraints upon ... any proposal for continuous re-assessment and for a change of electoral

> boundaries whenever the criteria of section 19, kept under continuous review, were thought to indicate the need for a redistribution.[78]

Again, a comparison of review mechanisms used in other relevant jurisdictions would be useful. Although Parliament is not required to achieve the ideal solution, the existence of better mechanisms is relevant to show that a particular deviation may be disproportionate.

APPLICATION TO COMMONWEALTH ELECTORAL DISTRICTS

It is likely that on the analysis outlined above, few challenges to the Commonwealth electoral districts would be successful. However, even if the criteria set out in the legislation are appropriate, and there is a 10 per cent limit on departures from the electoral quota, it is still possible[79] that particular districts might be improperly determined: a departure from equality in a given division might simply be unwarranted.

Alternatively, there might be excessive inequality arising from an unjustifiable failure to redistribute. This seems less likely under the current Commonwealth mechanism[80] than under the less satisfactory alternative which attracted the comment of Stephen J in *McKinlay*:

> No doubt were the legislature singlemindedly to set itself to the task of devising legislation more nearly approaching the ideal it could much improve upon the present scheme.[81]

APPLICATION TO STATE ELECTORAL DISTRICTS IN WESTERN AUSTRALIA

The suggested approach will have more significant impact if the principle of relatively equal electoral districts is found to be applicable to

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78. Supra n 4, 60.
79. Unless the court adopted a threshhold rule that deviations below 10% need not be justified: see *White v Regester* (1973) 412 US 735.
80. Redistribution must now occur at least every 7 years: Commonwealth Electoral Act 1918 (Cth) s 59. Given that the distribution commissioners must also attempt to make allowance for projected changes in population by aiming to be within a 2% margin of the quota midway through the 7 years, the mechanism can be regarded as a reasonable accommodation of the need for equality with the practical constraints on continuous redrawing of boundaries. Redistribution is also required within the 7 year cycle if more than a third of the districts are malapportioned or there is an alteration in the number of members allocated to a State.
81. Supra n 4, 60.

State legislatures.

The issue of whether the implied guarantee of representative democracy affects the States was raised but not decided in the political communication cases. Deane and Toohey JJ stated that it was "strongly arguable" that the implied freedom of communication about matters relating to the government of the Commonwealth limited State legislative powers.[82] There is no doubt that an implied prohibition can limit State powers;[83] the difficult issue is to determine whether this particular implied prohibition has that scope.

It might be held that the Constitution guarantees representative democracy with all its ramifications throughout Australia, at all tiers of government, just as it guarantees free trade throughout the nation. But the fact that the court has pointed in particular to sections 7 and 24 as the basis for the implied guarantee may suggest a narrower scope for the guarantee. It is arguable that the Constitution has merely guaranteed representative democracy *at the Commonwealth level*: it created the institutions of government of the Commonwealth but neither created nor altered the institutions of government at State level. Accordingly, it may be that the implied prohibition simply prohibits legislative or executive action at any level which is incompatible with representative democracy at the Commonwealth level.

The question is, then, whether a State electoral system so affects the working of representative democracy at Commonwealth level that it must also satisfy the standards inherent in the concept of representative democracy. It is arguable that it does. The distribution of seats within a State will obviously affect the composition of the State legislature and accordingly of the State government; and the composition of a State legislature and government can have a significant effect upon the working of the Commonwealth Parliament, both in a formal and in a practical sense.

For example, under the Constitution, State Parliaments may determine the times and places of elections of Senators for the State,[84] choose casual Senate vacancies[85] and confer legislative powers on the Commonwealth Parliament.[86] Other provisions which are now practically obsolete also indicate the close relationship between State and Commonwealth Parliaments contemplated by the Constitution: State Parliaments could affect the numbers

82. *Nationwide* supra n 2, 726.
83. *Cth v Cigamatic Pty Ltd* (1962) 108 CLR 372. The formal link between the State constitutions and implied prohibitions within the Commonwealth Constitution may be found in ss 106 & 107 of the latter.
84. S 9.
85. S 15.
86. S 51(xxxvii) & (xxxviii).

of people counted in determining the number of representatives allocated to a State[87] and State laws regarding the method of election of senators,[88] the qualifications of electors,[89] determining electoral divisions[90] and generally regulating elections[91] applied until the Commonwealth Parliament provided otherwise.

At a more pragmatic level, it is notorious that the fortunes of a political party in Commonwealth elections are affected by its performance, in government or opposition, at State level. The boundaries for elections to the House of Representatives take into account boundaries for State elections. Further, "[T]he exercise or non-exercise by a State of its powers may be a factor influencing decisions as to the exercise of Commonwealth power."[92] To summarise, using the words of Deane and Toohey JJ: "[T]he Constitution's doctrine of representative government is structured upon an assumption of representative government within the States."[93]

In the light of these considerations, it is arguable that representative democracy, in the form of relatively equal electoral divisions, must apply to State as well as Commonwealth institutions.

Alternatively, it is arguable that State constitutions themselves guarantee representative democracy. For example, the provisions of the Constitution Act 1889 (WA), particularly section 73 (2)(c),[94] might be seen as entrenching representative democracy. The argument was rejected by the WA Supreme Court in *Burke v Western Australia*,[95] but it would be difficult to sustain the reasoning of the court in the light of *ACTV* and *Nationwide*. It might, however, be open to argue that the form of representative democracy entrenched in the Constitution Act 1889 (WA) did not include the principle of relative equality of electorates. This objection would be of no avail if the court adopted the contemporary rather than the historical understanding of representative democracy.

If the suggested approach to electoral equality is applied to Western Australia, there would appear to be formidable difficulties in justifying the

87. S 25.
88. S 9.
89. Ss 8, 30.
90. Ss 7, 29.
91. Ss 10, 31.
92. *ACTV* supra n 1, Gaudron J, 655.
93. Id, 617.
94. The section requires the approval of a majority of electors voting at a referendum for any Bill that provides that either House of Parliament shall be composed of members other than members chosen directly chosen by the people.
95. Supra n 69.

allocation of seats in both Houses. The system for distributing electoral districts for both Houses involves electoral zoning, whereby the State is subdivided into a number of geographic areas to each of which a fixed number of seats is allocated. The experience in Canada reveals that such a system need not infringe the requirement for relative electoral equality, but that it will be difficult to justify.

Under section 6 of the Electoral Distribution Act 1947 (WA) the State is divided into two areas or zones for the purpose of creating districts for the return of members for the Legislative Assembly. Thirty four districts (and hence members) are allocated to the Metropolitan area and twenty three members are allocated to the remainder of the State. Within each of the two areas, there must be numerical equality as between electorates, subject to a 15 per cent permissible deviation from the quota for the area. However, the number of members allocated as between the respective areas is disproportionate to their respective populations. If members were allocated according to current population,[96] the Metropolitan area, with 73.5 per cent of the enrolled voters, would have 42 members and the rest of the State 15. Under the current distribution, the quota of electors for a district in the Metropolitan area[97] is almost twice the quota for a district in the rest of the State.[98]

Seats for the Legislative Council are also allocated according to regions.[99] The three Metropolitan Regions are allocated seats proportionate to their current populations, but the South-West and Agricultural Regions are allocated a number of seats greater than their respective number of electors would warrant and the Mining and Pastoral Region has an even more disproportionate allocation.[100] In neither case is there any mechanism for reallocating the number of seats assigned to particular areas or regions. That could only be done by legislation.

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96. The figures used here are derived from the Western Australian Electoral Commission's Enrolment Statistics of 7 February 1994.
97. 22 370.
98. 11 888.
99. Constitution Acts Amendment Act 1899 (WA) ss 5 & 6.
100. As at 7 February 1994, the number of enrolled voters per member was:

North Metropolitan	44 985
South Metropolitan	45 353
East Metropolitan	43 785
South West	17 341
Agricultural	17 435
Mining and Pastoral	12 971.

The leading decision in Canada[101] suggests that the fact that seats are allocated by legislation to particular regions, without express reference to their respective populations, is not necessarily fatal. Nor is the absence of a mechanism for altering the allocation to regions when population changes require it. In the *Electoral Boundaries Reference*,[102] the Saskatchewan legislation required the Electoral Commission to allocate 29 seats to urban districts, 35 to rural districts and 2 seats to the remote and sparsely populated northern districts of the province. Yet the Supreme Court upheld the boundaries as drawn by the commission. The allocation of seats between urban and rural districts closely reflected the relative populations of each[103] and it was not disputed that the over-representation of the northern region was justified by the difficulties of providing effective representation in such a remote area. Further, the court found that the evidence relating to geography, community of interest and population trends presented by the Province justified the modest differences in numbers between particular divisions.

But the decision in *Dixon*[104] may provide a more relevant comparison. British Columbia's Constitution Act classified areas as metropolitan, suburban, urban-rural, interior-coastal and remote. Each area was assigned a different population quota, with the general effect that non-urban seats had substantially smaller populations than urban seats. In the judgment of the court, the province had failed to justify the considerable disparities between districts that this system permitted. Factors such as geographic features, community of interest and the difficulties of representing a dispersed population could not justify differential treatment of areas in this generalised, a priori manner. These factors could justify some departures from equality but only when related to the needs of particular electoral districts. Further, even within different areas, there were inexplicable differences in population as between districts. The court concluded that the inequalities in size were simply disproportionate to the alleged justifications for departing from equality.

It is submitted that the burden of justifying the disparities created by the zonal system in Western Australia will be insurmountable. The division of this vast State into two areas for the purposes of the Legislative Assembly seems too simplistic to be rationalised. The system fails to relate departures from equality to the needs of particular districts. It will be difficult to explain

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101. Supra n 21.
102. Supra n 24.
103. Id, 42. Rural areas had 50.4% of the population and 53% of the seats; urban areas had 47.6% of the population and 43.9% of the seats.
104. Supra n 21.

why an electorate on the fringe of the metropolitan area should have approximately equal numbers of persons to one in a remote, sparsely settled area of the State, yet only about half as many members as a neighbouring electorate in the metropolitan area. The only plausible explanation for the weighting of seats is to give greater significance to the votes of rural voters than to those of metropolitan voters, on the basis of claims that the former make particularly valuable contributions to the economy and have particular needs that would not be sufficiently understood by the large majority of voters, who live in the metropolitan area.

It is submitted that it is not the place of the electoral system to address the concerns of minority groups, or those with claims for special consideration on account of their economic strength or weakness. Other, more appropriate mechanisms are available to address such issues. Instead, the court should insist that the electoral system produces a legislature representative of the electors. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[105]

CONCLUSION

Proceedings[106] have now been commenced in the High Court challenging the provisions governing the distribution of seats in the Western Australian Parliament. It is submitted that the way is open for the Court to find that these provisions are invalid as inconsistent with representative democracy. Such a conclusion would not prevent State law from being recast in such a way that many rural electoral districts would still have fewer electors than those in the city. It would, however, demand that more compelling reasons be found for any departure from the fundamental democratic principle that the political rights of all citizens should be equal.

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105. *Reynolds v Sims* (1964) 377 US 533. Similar sentiments were expressed throughout the debate on the Commonwealth Electoral Bill in 1902. For example, the member for Canobolas, Mr Brown, supported "the democratic principle that every elector must have equal voting power" and opposed any return to "representation of acres and gum trees": Aust House of Representatives *Debates* vol 10 (Canberra, 1902) 13956.

106. *McGinty v WA* supra n 3.