

Defectively Representing Representative Democracy



DAVID WISEMAN[†]

In Volume 24(1) of The UWA Law Review, Peter Creighton contended that the implied constitutional guarantee of representative democracy requires that electoral district apportionment take into account various factors that enhance the effectiveness of representation, even if this means detracting from strict numerical equality among districts. Creighton excluded minority interests from the list of various factors. This article takes issue with that exclusion and argues that, by the terms of Creighton's own argument, the exclusion cannot be justified.

In the course of his article 'Apportioning Electoral Districts in a Representative Democracy',¹ Peter Creighton advances the view, inter alia, that if the High Court of Australia is to derive a principle of electoral equality from the constitutional concept of representative democracy, then that principle should be one of relative equality among electors rather than one of strict equality. According to Creighton, these alternative principles differ in the sense that the former contemplates deviations from strict numerical equality for reasons beyond mere practicability. In other words, traditional factors such as community of interest, geography, infrastructure, population trends and historical boundaries can be considered in the construction of electorates and can justify departures from strict numerical equality.

Creighton is careful to establish that reliance upon the traditional criteria, whilst necessary, is not of itself sufficient to justify deviations from strict numerical equality. Sufficient justification will only exist if it can be shown

[†] LLB (Hons) Monash University; currently undertaking an LLM at the University of Toronto. I would like to thank Professor Kent Roach, Brad Berg, Michael Pratt, Annie Bunting and Lei Farha for valuable comments and to acknowledge the support of the University of Toronto Connaught Scholarship.

1. (1994) 24 UWAL Rev 78.

that, in any particular ‘districting’ instance, it was appropriate both to accommodate some or all of the traditional criteria and to cause the degree of deviation necessary to make such an accommodation. Furthermore, Creighton accepts the possibility that the traditional criteria might not necessarily exhaust the range of factors relevant to deviations from strict numerical equality. However, he does not seek to specify what those other relevant factors could be and he specifically excludes some that might be anticipated. In particular Creighton states 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.*²

Although other parts of Creighton’s analysis contain controversial opinions on constitutional precedent and interpretation, it is only an analysis of this last point that concerns this article. Specifically, this article argues that Creighton fails to show why, if the traditional factors need to be accommodated within the electoral system, other factors — in particular, minority interests — do not also need to be so accommodated. Generally speaking, if the argument is that accommodation of the traditional factors within the electoral system is justified only if it can be shown that they are either necessary in order for representative democracy to exist (ie, for democracy to be representative) or desirable in order to improve representative democracy (ie, for a purpose or value of representative democracy to be effectuated), then exclusion of other factors is justified only if neither of these connections can be shown or if other reasons exist which would demand exclusion despite a shown connection. It is the contention of this article that Creighton fails to establish either of these grounds for excluding minority interests, thereby revealing the need for a more searching inquiry into the concepts and jurisprudence of representative democracy.

LEGITIMATE INTERESTS

After examining the general structures of representative democracy in various jurisdictions, and reviewing accompanying constitutional doctrine, Creighton observes that ‘the principle of equal electorates should be seen as a minimal requirement for a representative democracy’.³ He then argues that strict numerical equality fails to allow other ‘legitimate interests’ to be accommodated within the electoral system and concludes that:

2. Id, 101 (emphasis added).

3. Id, 83.

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.⁴

The obvious question is: what constitutes a legitimate interest? In discussing precedents from the United States, Canada and Australia, Creighton identifies the following factors which might justify deviation from strict numerical equality: practicability, community of interest, geography, infrastructure, population trends, historical boundaries and, possibly, other historical factors. The argument would then be that it is legitimate for a representative democracy to seek to preserve, for instance, communities of interest, and therefore strict numerical equality can be sacrificed in the pursuit of such preservation. But something is missing from this argument, namely why a representative democracy should be concerned to preserve communities of interest and to prioritise that preservation over strict numerical equality, especially given that Creighton is at pains to identify electoral equality as the minimal requirement of representative democracy. Indeed, in the process of that identification, Creighton argues that electoral equality can be justified as a minimal requirement because it 'implements two of the theoretical underpinnings of representative democracy, popular sovereignty and the equality of individuals'.⁵

This is not to say that it is improper to regard the traditional factors as serving some necessity or purpose or value of representative democracy.⁶ Nevertheless, it must be recognised that any ensuing accommodation of such factors within the electoral system is desirable because they serve some other legitimate interest (an interest of representative democracy), not because they are legitimate interests per se. Thus, the legitimate interest must be something else which is served by deviating from strict numerical equality to take account of these traditional factors.

Creighton himself seems to acknowledge this fact as he notes that in the United States deviations from strict numerical equality must be shown to be rationally connected to ensuring fair and effective representation. If that characterisation of United States precedent is correct, then 'fair and effective representation' is the legitimate interest in that jurisdiction. Likewise, Creighton notes that 'effective representation' is the concept which receives constitutional protection in Canada, so that concept can be regarded as the legitimate interest in the service of which the traditional factors may be considered in Canada.

4. Id, 84.

5. Id, 83.

6. See eg F L Morton & R Knopff 'Does the Charter Mandate "One Person, One Vote"?' (1992) 30 Alberta L Rev 669. And to the contrary: A Tupper 'Democracy and Representation: A Critique of Morton and Knopff' (1992) 30 Alberta L Rev 695.

Creighton goes on to refer to various sections of the judgments in *Ex rel McKinlay v The Commonwealth*⁷, *Australian Capital Television Pty Ltd v The Commonwealth (No 2)*⁸ and *Nationwide News Pty Ltd v Wills*⁹ and notes that in *McKinlay* Barwick CJ refers to 'equality of voting value',¹⁰ in *ACTV* reference is made to the notion of 'equal share in political power',¹¹ and in *Nationwide News* Deane and Toohey JJ speak of the entitlement to 'share equally in those ultimate powers of governmental control'.¹²

Eventually, Creighton adopts phraseology along Canadian lines:

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.... Beyond these, the court would need to determine what further considerations are relevant to *effective representation* in a modern democracy.¹³

This passage seems to envisage an instrumental relationship between the effectiveness of representation and the factors which might warrant deviations from strict numerical equality. Thus, factors that impact upon the effectiveness of representation may (and should) be accounted for in the construction of electoral districts in order to improve the effectiveness of representation.¹⁴

MINORITY INTERESTS

Merely stating the legitimate interest as 'effective representation' does not, however, necessarily lead to the conclusion that the traditional criteria may be accounted for but that minority interests may not. In order for Creighton's conclusion to follow, he needs to show that minority interests are not connected to the effectiveness of representation or are not materially

7. (1975) 135 CLR 1.

8. (1992) 108 ALR 577.

9. (1992) 108 ALR 681.

10. *McKinlay* supra n 7, 25.

11. *ACTV* supra n 8, 595.

12. *Nationwide* supra n 9, 723.

13. Creighton supra n 1, 84 (emphasis added).

14. Whilst it might be argued that the traditional factors are inherently, rather than merely instrumentally, deserving of accommodation within the process of constructing electoral districts, this article argues that on neither ground does Creighton show why the traditional factors ought to be considered but other factors, such as minority interests, ought not to be. Creighton's conclusion that certain other factors ought not to be accommodated seems primarily to proceed on the basis of an instrumental conception of the relevance of the traditional factors to the effectiveness of representation; but some aspects of his argument might also be advanced on the basis of a conception that those factors are inherently relevant. Thus, in relation to those aspects which potentially have this dual relevance, this article argues that Creighton's conclusion is, regardless of the conception held, equally unjustified (see text accompanying nn 18 & 19 infra).

connected. In this respect, whilst Creighton's consideration of Canadian constitutional doctrine supports his definition of the legitimate interest, it does not support his conclusion. For instance, Creighton cites with approval the Supreme Court of Canada's decision in *Saskatchewan Boundaries*¹⁵ but the majority in that case specifically affirmed the relevance of minority interest factors. Although Creighton notes that McLachlin J— who gave the majority opinion — outlined various factors that could justify deviation from strict numerical equality, including 'practicability, geographical and historical factors, and the representation of community interests',¹⁶ his paraphrase is misleading because it leaves out another factor identified by Her Honour — 'minority representation'.¹⁷

Thus, either Creighton prefers some but not all of the Canadian attempt to articulate what factors are relevant to the effectiveness of representation, or some other, presumably Australian, conception must be able to explain why the traditional factors are to be considered but minority interests and economic disparities should be excluded. Assuming the latter, Creighton's conclusion still seems rather tenuous — the phrases 'equality of voting value' and 'equal share in political power' do not on their face seem to warrant the inclusion of the traditional factors but the exclusion of minority interests. For instance, since 'equality of voting value' is presented as a justification for preferring relative equality over strict equality, it cannot be that this is a merely formal prescription of equal vote value, because formal equality would seem to infer strict numerical equality. Thus, the prescription must be substantive in nature. In other words, it would seem to be looking at equality of influence over electoral and/or legislative outcomes. If that is the target then there seems to be every reason to consider any under-representation of minority interests which might presently exist. Furthermore, it seems somewhat counter-intuitive to allow deviations to be justified on account of historical electoral boundaries, but not in the interest of minorities, especially since the former may only be accidents of history whilst the latter victims of it.

If nothing seems to exist in the phraseology itself, then perhaps it exists in the justification which Creighton provides for his conclusion: '[T]he court should insist that the electoral system produces a legislature representative

15. *Reference re: Electoral Boundaries Commission Act* (1991) 81 DLR (4th) 16 ('*Saskatchewan Boundaries*').

16. Creighton *supra* n 1, 83.

17. *Saskatchewan Boundaries* *supra* n 15, 36. This article will not consider the extent to which political representation jurisprudence in the US may or may not support Creighton's conclusion because he expresses a general dissatisfaction with the approach taken by US courts (Creighton *supra* n 1, 84). Nevertheless, it should be noted that the US jurisprudence evinces comparatively strong support for the accommodation of minority interests, although *Shaw v Reno* (1993) 113 S Ct 2816 has caused some concern in this regard.

of the electors'.¹⁸ But if that is the court's proper concern, then it hardly excludes consideration of minority interests. In fact it virtually demands such consideration. Furthermore, it barely explains why the traditional factors need to be considered at all; for if minority interests (ie, the electors who express minority interests) are not electors who require legislative representation, it is not apparent why communities of interest do require such representation, let alone how historical boundaries or geographical features qualify for representation (or, at least, accommodation) at all. One argument upon which such a distinction in entitlement to representation could be based is that minorities, as opposed to the traditional factors, simply do not deserve to be regarded as the types of electors who need to be represented in the legislature. But it seems unlikely that such a view, without any accompanying reasoning, would form the basis of Creighton's conclusion (not to mention the fact that the extremity of such a view counts against imputing it to him).

Creighton suggests that the electoral system need not seek to accommodate minority concerns or economic disparities because other 'more appropriate mechanisms are available to address such issues'.¹⁹ Although no such other mechanisms are alluded to by Creighton, it could reasonably be assumed that such other mechanisms as do exist derive from some manner of governmental program (eg, welfare, advisory services, special committees, or specific assistance plans or structures). If this is so, then there is an obvious link between the electoral system and the other mechanisms, namely the former elects the legislature that implements the latter. It is therefore unclear why it is more appropriate for minorities to seek representative benevolence rather than actual representation. If actual representation is an equally compelling goal, then a review of the electoral system and, in particular, a consideration of whether deviations from strict numerical equality might be justified in the interest of improving minority representation seems desirable.

The only other assumption which could dictate Creighton's conclusion would be an assumption, to some extent related to the preceding point, that minority concerns and economic disparities are not exacerbated by the legislature and so their accommodation within the electoral system would serve no end. But then, in order for Creighton's conclusion to follow, it would need to be shown (or assumed) that, in contrast to minority interests, a traditional factor such as community of interest suffers from not being accommodated by the electoral system and the legislature. Although a community of interest may suffer from a lack of such accommodation, it is submitted that there is no basis for assuming that minority interests might

18. Creighton *supra* n 1, 101.

19. *Ibid.*

not also suffer from such a lack. Indeed, it might be argued that minority interests would suffer more. In any event, this argument is highly problematic and seemingly unable to justify Creighton's conclusion.

REPRESENTATIVE DEMOCRACY

If the argument is correct so far then there seems no particular reason to exclude, for instance, minority interests from the list of factors which could justify deviation from strict numerical equality. Nevertheless, it seems difficult to justify the argument that all minority interests (insofar as they can be defined) must necessarily be accommodated by the electoral system and physically represented in the legislature. For one thing, mere physical legislative presence does not necessarily guarantee the achievement of minority goals, nor does it do justice to all that is understood by the concept of representation.²⁰ Furthermore, processes of 'affirmative districting' can lead to the construction of an electoral map (and result) which might improve minority representation without detracting from strict numerical equality at all. In this respect, it should be appreciated that districting is never politically neutral — it always distorts in the sense that it constructs a particular political landscape with a consequent distribution of electoral majorities and minorities. Thus, the issue is which political landscape to adopt.²¹

Even then the issue arises as to what constitutes a minority interest. The United States experience focuses primarily upon racial discrimination and ethnic or linguistic minorities. The Canadian experience is somewhat broader and includes consideration of Aboriginal/native communities spread over vast unpopulated regions and of immigrants in urban areas. Whilst these matters are clearly relevant in an Australian context, there would seem to be no reason for limiting the definition of minority interests to such factors. If other social disparities (such as wealth) or political imbalances are exacerbated by, or receive one-dimensional attention from, legislative representation then all manner of under-represented interests — for instance, the Australian Democrats in the House of Representatives — might make legitimate claims upon the electoral system. Determining which claims are to prevail seems to be at the mercy of somewhat arbitrary opinions of what constitutes a minority interest or under-representation.

Finally, to the extent that the act of 'districting' impacts upon the content of representation so as to create the need to accommodate the traditional

20. See eg H F Pitkin *The Concept of Representation* (Berkeley: California UP, 1967); L Guinier 'The Representation of Minority Interests: The Question of Single-Member Districts' (1993) 14 Cardozo L Rev 1135.

21. See eg R G Dixon Jr *Democratic Representation: Re-apportionment in Law and Politics* (New York: Oxford UP, 1968); B Grofman, L Handley & R G Niemi *Minority Representation and the Quest for Voting Equality* (New York: Cambridge UP, 1992).

criteria and/or minority interests, it might be argued that the appropriate subject of debate is not relative as opposed to strict representation, but rather territorial as opposed to proportional representation. The very fact that proportional representation seems to reconcile both strict numerical equality and minority representation seems to put the entire edifice of territorial representation at risk (at least theoretically). Nevertheless, considerations of government stability and what has been called the representative's role as an 'ombuds'²² seem to be equally valid concerns for any democratic society. Furthermore, it is unclear under what type of representation (ie, single-member territorial, multi-member territorial, proportional) the interests served by accommodation of the traditional criteria are best satisfied. And, of course, no particular institutional or electoral structure can necessarily defeat the temptations of power and the alienation of individuals.

It is with all these considerations in mind that the problem of the terms of judicial review of the institutions and structures of representative democracy must be tackled. The view that the High Court should accept a more meaningful role in safeguarding the legitimacy of Parliament by preserving its representative links to the people seems compelling, and yet it is unclear just what the details of that supervision should be. By the same token, the aim of Creighton's argument — judicial revision of Western Australia's iniquitous electoral map — is worthy of support. Nevertheless, issues of equality and effectiveness of representation seem unavoidable in any consideration of what might be regarded as necessary and sufficient to safeguard the existence of representative democracy and the High Court must therefore develop a standard that can reconcile differing notions of equality with differing perspectives upon the effectiveness of representation. Accordingly, this article has attempted to show that the delineation of such a standard, which inevitably involves effecting political theory through constitutional doctrine, requires a more searching investigation of the concepts of representative democracy and their accompanying jurisprudence than is contained in Creighton's analysis, particularly since Parliamentary democracy is least legitimate for those (minorities) who suffer the greatest under-representation.

22. K Swinton 'Federalism, Representation and Rights' in J C Courtney, P MacKinnon & D E Smith (eds) *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon. Fifth House Publishers, 1992) 18.