REPRESENTING PEOPLE AND NOT INTERESTS: A RAWLSIAN CONCEPTUALIZATION OF THE RIGHT TO VOTE

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The author advances a Rawlsian rationale for mandating voter equality — that is, "one person, one vote" — as a basic matter of constitutional law in support of a principled and practical interpretation of section 3 of the Canadian Charter of Rights and Freedoms. *The author examines prospective bases for the right to vote, chiefly focusing on two interpretive approaches — presumptive and relative equality. Although John Rawls made it clear in his seminal A Theory of Justice that he favoured voter equality as the basis for political participation in a democracy, a complete account of his reasoning and arguments for this position has seemingly only been possible with the benefit of the consideration of his later works in political philosophy. The author first identifies why the need for a reinterpretation of section 3's right to vote poses a pressing problem for Canada's constitutional democracy and then explains the two leading accounts of presumptive and relative equality as a matter of first principles. With this essential background in place, the author proceeds to consider three broad parts of a Rawlsian rationale for voter equality. The author concludes that mandating voter equality in a democracy allows for the most stable, cohesive, and robust platform permitting individual citizens to pursue their own conceptions of the good while still allowing for the constitutional protection of the fundamental interests of minorities.*

L'auteur avance des raisons rawlsiennes pour rendre obligatoire l'égalité des électeurs, c'est-à-dire « une personne, un vote », comme question fondamentale du droit constitutionnel à l'appui d'une interprétation raisonnée et pratique du 3e article de la Charte canadienne des droits et libertés. *L'auteur examine des bases potentielles du droit de vote, se concentrant notamment sur deux approches interprétatives : l'égalité « par présomption » ou relative. Bien que John Rawls ait souligné clairement dans son ouvrage déterminant, Théorie de la justice, qu'il était pour l'égalité des électeurs comme base de la participation politique des démocraties, un compte-rendu complet du raisonnement et des arguments derrière cette position a apparemment uniquement été possible grâce à l'examen de ses œuvres ultérieures en philosophie politique. L'auteur explique d'abord pourquoi la nécessité de réinterpréter le droit de vote de l'article 3 pose un problème urgent pour la démocratie constitutionnelle du Canada, puis il explique les deux exposés principaux de l'égalité « par présomption » ou relative en tant que principes de base. Une fois ce contexte essentiel en place, l'auteur examine les trois grandes parties d'un raisonnement rawlsien de l'égalité des électeurs. En conclusion, l'auteur affirme que le fait de rendre obligatoire l'égalité des électeurs dans une démocratie crée l'environnement le plus stable, le plus cohésif et le plus solide permettant aux citoyens de poursuivre leurs propres conceptions du bien tout en tenant compte de la protection constitutionnelle des intérêts fondamentaux des minorités.*

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> The health of democracies, of whatever type and range, depends on a wretched technical detail: electoral procedure. All the rest is secondary. — Jose Ortega y Gasset[1]

I. INTRODUCTION

Canadians might be surprised to learn that their votes to elect politicians to Parliament and provincial legislatures carry very different weights depending entirely on where they happen to live across the country. In turn, Canadians might also be surprised to learn the extent to which "one person, one vote" is not how their right to vote is translated into practice.[2] Indeed, even though voting appears to be the quintessential *individual* right, it seems that much discussion of voting rights focuses on the representation of *groups*, not individuals. As Justice Powell of the United States Supreme Court once put it, "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."[3] This description of the representative aspect of democracy clearly applies not just in the United States, but also to other "first-past-the-post" democratic electoral systems, including our own. Heather Gerken explains Justice Powell's observation in this way: so long as each legislator is elected by a cohort of citizens, there must be some basis for assembling that cohort "whether by geography, economic interest, race," or something else. Moreover, none of these bases is neutral.[4]

This is not, of course, to deny that given that we do need some base, we should aim for the most principled, objective one possible. In this article, I will argue that the preferred base for the representation of citizens in a democracy like Canada (or the United States) is representation on the basis of population. Interestingly, electoral apportionment in the United States is guided by a strict insistence on voter equality, whereas in Canada the Supreme Court has held that the preferred interpretation of the right to vote is to favour the "effective" representation of nonpopulation bases including geography, "com-

1 Jose Ortega y Gasset, *The Revolt of the Masses* (1932) at 158, as quoted in Frank Emmer *et al.*, "Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries" (2008) 41 Creighton Law Rev. 3.

2 This is not, of course, to imply that individual voter equality should ground the interpretation given to the right to vote simply because that is what most Canadians might believe. Following Sanford Levinson, I am very much aware that the "mindless repetition of one person, one vote is of almost no help at all to anyone seeking genuine illumination regarding the meaning of equal suffrage." See Sanford Levinson, "One Person, One Vote: A Mantra in Need of Meaning" (2002) 80 North Carolina Law Rev. 1269 at 1277.

3 *Davis v. Bandemer*, 478 U.S. 109 at 167 (1986), as quoted in Heather K. Gerken, "Understanding the Right to an Undiluted Vote" (2001) 114 Harvard Law Rev. 1663 at 1678.

4 Gerken, *ibid.*

munities of interest," and minorities. My aim in this article is to provide a platform to ground the alternative interpretation that the right to vote implies equally weighted ballots.

Under the heading of "Democratic Rights," section 3 of the *Canadian Charter of Rights and Freedoms*[5] holds that "[e]very 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." But while section 3 provides that Canadian citizens have the right to vote in elections, this right is not qualified on its face in the *Charter*. How, then, shall it be interpreted by the courts? This is no minor question. It was first taken up by the Supreme Court of Canada in 1991 in a decision that came to be known as the *Saskatchewan Reference*.[6] In that case, the majority of the Supreme Court held that a guaranteed right to vote does not mean that each citizen has the right to a vote equal to that of any other citizen; instead, it is enough that the citizen has an "effective" vote. The notion that the vote of any one person should be counted the same as the vote of anyone else (that is, one person, one vote) was rejected by the Court.

The repudiation of equally weighted votes in the *Saskatchewan Reference* must be seen as the chief obstacle to the realization of voter equality in Canada. As a result, any attempt to address the issue must provide for a reinterpretation that ensures voter equality. It is noteworthy then that the Supreme Court has recently indicated a willingness to revisit its previously settled jurisprudence on key topics in constitutional law.[7] Elsewhere, I have provided a critique of the majority's rationale in the *Saskatchewan Reference* — a rationale that has not been reviewed by the Court since the time it was first put forward. In that article, I also lay the groundwork for a practical but principled legal reinterpretation of section 3 of the *Charter* that places primary emphasis on representation on the basis of population.[8]

In the *Saskatchewan Reference*, a unanimous five-judge panel of the Saskatchewan Court of Appeal first held that population must be the domi-

5 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

6 *Reference Re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158, 81 D.L.R. (4th) 16 [*Saskatchewan Reference* (S.C.C.), cited to S.C.R.], rev'g (1991), 90 Sask. R. 174, 78 D.L.R. (4th) 449 (Sask. C.A.) [*Saskatchewan Reference* (C.A.)].

7 See *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 191.

8 See Brian Studniberg, "Politics Masquerading as Principles: Representation by Population in Canada" (2009) 34 Queen's Law J. 611.

nant consideration in drawing riding boundaries under section 3 — an approach that I call "presumptive equality."[9] The need for a presumptive equality interpretation of section 3 has existed since the Supreme Court released its decision on the appeal in the *Saskatchewan Reference*, but has received new impetus with the Harper government's recent efforts to introduce new legislation designed to close the representation gap currently faced by British Columbia, Alberta, and (possibly) Ontario. For largely historical reasons, the number of seats in the House of Commons allocated to each province is not made solely on the basis of population. But even assuming the federal government is able to pass legislation that will ensure that each province gets its fair share of seats in Parliament, this act would not ensure voter equality. Instead, under an interpretive approach first put forward in the *Saskatchewan Reference*, the majority of the Supreme Court held that section 3 requires "effective" rather than equal representation. To give meaning to a right to effective representation, the drawers of Canada's electoral borders may have regard to countervailing factors such as communities of interest, minority representation, and geography, an approach that I refer to as "relative equality." Unless the Supreme Court is given reason to reconsider its relative equality interpretation of section 3, electoral ridings within a province would still be drawn to different population sizes on account of these other factors.

I argue in this article that the Supreme Court's reliance on the "effective" representation of voters erroneously depicts individuals casting ballots as members of certain socialized groups; the members of these groups are seen as having interests that derive from being a part of a named category. One of my main tasks in this article, then, is to explicate the legal rationale — really the statement of political philosophy — that underlies the Court's justification of a weighted voting scheme where the ballots of some are worth more than the ballots of others. As I will later explore, the Court's approach is not a Millsian one where extra-weighted votes are given to educated citizens; such a scheme may pass a reasonableness test, but it is not supportive of social stability. Nor, however, is relative equality a class-based platform, under which there is political liberty but not social equality such that citizens in the socially "disadvantaged" parts of Canada benefit from enhanced representation in order to mitigate their disadvantage. This base, though, seems closer to the idea implied in the notion of "effective" representation, where individuals are subsumed within groups marked with determined experiences, socialization, and distinct interests in a sort of Hobbesian materialism. I reject this view,

9 Under this interpretive approach, the deviations from voter equality can be justified as appropriate under section 1 of the *Charter*.

asserting instead that as individuals people cannot be accounted for by their demographic characteristics.

Instead, if I am to advance one person, one vote as the basis for a rival interpretation of the right to vote, I will need to develop an alternative account that is capable of both opposing and superseding this type of implied political philosophy. In the face of such a challenge, then, I will present what is largely a Rawlsian argument to support the contention that the right to vote in a democracy should be interpreted as requiring voter equality. I do so on the basis that Rawls' theory better satisfies the criteria of fairness, reasonableness, and stability than does the view underlying the status quo of unequally weighted votes. Given the Supreme Court's willingness to revisit previously settled questions of constitutional law, it makes sense to ask again what it means to have the right to vote in Canada. Accordingly, my overall goal in this article is to help bolster the alternative interpretation of section 3 of the *Charter* and thereby build the case for why one person should have one vote as a basic matter of constitutional law.

In Part II I outline why a reinterpretation of section 3 is a pressing problem for Canada's constitutional democracy and I then draw out the philosophical components of the Court of Appeal's and the Supreme Court's differing judgments in the *Saskatchewan Reference* (as the major Canadian jurisprudence on this issue). Following this essential backdrop, and with the jurisprudential framework that outlines two very different interpretations to be given to the right to vote in place, I will then consider three parts of a Rawlsian rationale for an interpretation that favours voter equality. These parts are interconnected in that each successively builds on the prior with a more elaborate account of why Rawls would maintain that one person should have one vote. In the first such part, I outline briefly the idea of the original position and Rawls' two principles of justice in order to explore their contribution to a scheme of social cooperation and the characteristics of a just constitutional regime. In Part III of the article, I look at what Rawls calls the basic (constitutional) structure. The thread progresses in Part IV to consider the idea of public reason and how a one person, one vote interpretation corresponds better to the need for public justification in a constitutional democracy. Finally, the need for presumptive equality will become apparent in Part V when I consider how the alternative relative equality interpretation allows for an illegitimate exploitation of electoral democracy. This illegitimacy raises implications for the stability of the democratic regime. A Rawlsian preference for voter equality will be shown to allow for other, more justifiable constitutional protections for minorities than are entailed by their rather clumsy overinclusion in the legislature by way of

toleration for a deviation from representation by population. I conclude by arguing that mandating voter equality in a democracy allows for the most stable, cohesive, and robust platform permitting individual citizens to pursue their own conceptions of the good.

II. THE INTERPRETIVE BACKGROUND

A Theory of Justice and the Impetus for a Reconsideration of the Right to Vote in Canada

In his seminal book *A Theory of Justice*,[10] John Rawls seeks to illustrate the content of his famous principles of justice. To this end, Rawls describes a basic structure that best satisfies the principles and the duties to which they give rise. As Rawls notes, the main institutions of this structure are those of a constitutional democratic state.[11] In the *Theory*, Rawls contemplates the problems of equal liberty, and considers some of the implications of political justice on the design of the constitution. In one section, Rawls declares that

> the precept of one elector one vote implies, when strictly adhered to, that each vote has approximately the same weight in determining the outcome of elections. And this in turn requires, assuming single member territorial constituencies, that members of the legislature (with one vote each) represent the same number of electors. I shall also suppose that the precept necessitates that legislative districts be drawn up under the guidance of certain general standards specified in advance by the constitution and applied as far as possible by impartial procedure. These safeguards are needed to prevent gerrymandering, since the weight of the vote can be as much affected by feats of gerrymander as by districts of disproportionate size.[12]

Rawls has in this way expressly affirmed that in a constitutional democracy, "one person, one vote" should be the guiding principle for political participation. Interestingly, this is almost as much direct treatment as the subject receives in Rawls' published writings.

In his review of Rawls' later book *Political Liberalism*,[13] Michael Sandel reflects on the many debates in political philosophy launched by Rawls' *Theory*.[14]

10 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972) [*Theory*].

11 *Ibid.* at 195.

12 *Ibid.* at 223.

13 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) [*Political Liberalism*].

14 Michael J. Sandel, Book Review of John Rawls' *Political Liberalism*, (1994) 107 Harvard Law Rev. 1765.

One sustained point of contention is an assumption shared by both libertarian and egalitarian liberals "that government should be neutral among competing conceptions of the good life." The debate, then, falters over whether the right truly is prior to the good.[15] This important discourse can be seen in a number of controversial topics in contemporary Canadian constitutional law, including same-sex marriage, a teenager's right to carry a kirpan in school, and, notably, the interpretation to be given to the right to vote.

While Rawls' conclusion — that the precept of one person, one vote should guide participation in a constitutional democracy — was made clear in the *Theory* when it was first published in the early 1970s, a more complete Rawlsian rationale for an insistence on voter equality as the preferred interpretation for the right to vote arguably only became possible in considering Rawls' later works including *Political Liberalism*, "The Idea of Public Reason Revisited,"[16] and *Justice as Fairness: A Restatement.*[17] Significantly, at the beginning of his *Restatement*, Rawls contemplates the roles that political philosophy may have as part of a society's political culture. The first such role focuses on deeply disputed political questions to see whether, despite appearances, it is possible to find some underlying basis for moral agreement. Rawls refers to this as the practical role. The second role considers how people think of their political and social institutions and of their basic aspirations as a society (rather than as individuals). Rawls calls this role orientation. The third role of reconciliation seeks to calm anger against society and, importantly, its history by elaborating on how the institutions of society developed to attain their present rational forms. Finally, political philosophy is also "realistically utopian" in that it is said to probe the very limits of practical political possibility.[18]

As I will try to show later in Parts III through V, each of the roles that Rawls attributes to political philosophy helps establish the case for presumptive equality (although there may be some overlap). Orientation is thus apparent in examining Rawls' basic constitutional structure. As Rawls puts it, this "conception may offer a unified framework within which proposed answers to divisive questions can be made consistent and the insights gained from different kinds of cases can be brought to bear on one another and extended to other

15 *Ibid.* at 1766.

16 "The Idea of Public Reason Revisited" in John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) ["The Idea of Public Reason Revisited"].

17 John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed., (Cambridge, Mass.: Belknap Press of Harvard University Press, 2001) [*Restatement*].

18 *Ibid.* at 1-4. Rawls stresses that the third role of reconciliation finds its primary expression in Georg W. F. Hegel's *Philosophy of Right.*

cases."[19] By considering the two famous principles of justice and the resulting structure of the just constitutional regime when designed from the original position, people are able to understand how their institutions — including the franchise — provide the backdrop against which they are able to conceive of themselves as members of a democratic society. The practical role is evident in the idea of public reason and the need for public justification; such justifications allow for the search for an underlying common basis for moral and philosophical agreement. But, "if such a basis for agreement cannot be found, perhaps the divergence of philosophical and moral opinion at the root of divisive political differences can at least be narrowed so that social cooperation on a footing of mutual respect among citizens can still be maintained."[20] Finally, reconciliation and the expression of what is "realistically utopian" can be considered in portraying an idealized comprehension of what it means to have the right to vote. While reconciliation clearly fits in with the idea of public reason as well, Rawls also remarks here that since people do not necessarily enter and exit political society voluntarily, it is necessary to contemplate to what extent the citizens of a democratic society can really be free.[21] Here one asks "[w]hat would a just democratic society be like under reasonably favourable but still possible historical conditions, conditions allowed by the laws and tendencies of the social world?"[22]

But why is it worthwhile at this point in Canadian history to stop and question an interpretation given to the right to vote by the Supreme Court of Canada nearly twenty years ago? Even if not fully satisfactory, was not the matter settled by the Court? Why revisit the subject now? As a first response, it bears pointing out that Canada's democratic experience has been a story of decidedly unequal representation.[23] More to the point, Janet Hiebert observes that there has been little philosophical debate in Canada about the merits of different understandings of representation.[24] Even in the United States (U.S.), where the U.S. Supreme Court has contemplated one person, one vote in electoral districting since the 1960s, there has been surprisingly little scholarship

19 *Ibid.* at 3.

20 *Ibid.* at 2.

21 *Ibid.* at 4.

22 *Ibid.*

23 Malapportionment — *i.e.*, ridings drawn to sharply different numbers of voters — has featured in every electoral map in Canadian history since Confederation. See *e.g.*, John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (Montreal & Kingston: McGill-Queen's University Press, 2001).

24 Janet Hiebert, "Representation and the Charter: Should Rights Be Paramount?" in John C. Courtney, Peter MacKinnon & David E. Smith, eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House Publishers, 1992) at 4.

offering a positive account of why it should have done so.[25]

The topic also has modern, practical importance. The level of representation per capita in electoral ridings across the country has been shown to significantly affect both per capita levels of federal spending and income taxation. In other words, the most overrepresented parts of Canada receive the most federal funds and are taxed the least.[26] This picture is drawn into sharper focus when it is also considered that federal and provincial public policies have largely neglected what might be considered an "urban" agenda: concern over the environment (*e.g.*, climate change) and concern over the state of municipal infrastructure (*e.g.*, public transportation). As Sujit Choudhry has recently asked, "will votes, political power and public expenditure follow people as they make choices about where to work and live, and in the process, fundamentally alter the geographic distribution of Canada's population?" Choudhry observes that this question has again recently forced itself onto the constitutional agenda, given its relevance to both economic and social policy.[27] As a ready example, the "distorting effect of rural over-representation on federal public policy is perhaps best illustrated by the morphing of the Martin government's cities agenda into a cities and communities agenda, in response to pressure from rural MPs."[28]

It is not a coincidence that urban parts of the country are sharply underrepresented, and this holds true both federally and provincially: Sujit Choudhry and Mike Pal have shown that the "weight" attached to an urban vote in Canada has decreased from 19 percent less than that of a rural vote in 1996, to 27 percent less only five years later in 2001.[29] More to the point, unless the Supreme Court's relative equality interpretation of the right to vote is confronted, this rural-urban divide will become progressively more exacerbated over coming decades to the point where the already severe underrepresentation of certain parts of Canada will get worse.[30] And more notoriously

25 A point many authors have made in their sometimes misplaced critiques of the U.S. Supreme Court's voter equality jurisprudence. See *e.g.*, Grant M. Hayden, "The False Promise of One Person, One Vote" (2004) 102 Michigan Law Rev. 213 at 224 and Levinson, *supra* note 2.

26 See Tom A. Evans, "The Impact of Representation Per Capita on the Distribution of Federal Spending and Income Taxes" (2005) 38 Canadian Journal of Political Science 263 at 280-1. Evans' study controls for income and unemployment levels.

27 Sujit Choudhry, "Constitutional Change in the 21st Century: A New Debate over the Spending Power" (2008) 34 Queen's Law J. 375 at 386.

28 *Ibid.* at 389 (Paul Martin was prime minister from December 2003 until January 2006).

29 See Michael Pal & Sujit Choudhry, "Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada" (2007) 13 IRPP Choices at 7 [Pal & Choudhry].

30 See *e.g.*, Ben Tomlin, "The Seat Shortage: Changing Demographics and Representation in the House of Commons" CD Howe Institute E-Brief, 29 May 2007.

still, Canada's visible minorities are particularly underrepresented as a result of the tolerance for a deviation from voter equality, and this problem too is getting worse.[31]

It is perhaps trite to observe that the outcomes of elections do not depend only on popular votes, but also on the rules used to translate votes into seats.[32] In light of this, William T. Stanbury et al. argue that reform should be implemented as soon as possible because Canada has been undergoing a serious crisis of legitimacy for some time with respect to its political institutions and electoral processes.[33] Richard Nadeau notes that while, as a whole and at a rather abstract level, Canadians are very satisfied with the form of their democracy, there is some cause for disquiet lying below the surface. When compared with the satisfaction levels observed in other similarly affluent and established liberal democracies, Canada's results are distinctly less impressive.[34] Perhaps even more to the point, Neil Nevitte suggests that some of the pillars that serve to prop up citizens' satisfaction with democracy are rather fragile.[35] Following earlier work by Pippa Norris, Nevitte notes that a high level of support exists for the country as a whole, with moderate support for the country's institutions (for example, Parliament). But only a low level of support exists for elected representatives, and even this support seems to be declining.[36] And perhaps most seriously, a majority of Canadians now claim to feel that they have little or no say in what government does.[37] In considering the political implications of these results, Nadeau affirms that "[a] necessary condition for giving citizens the impression of being listened to is to ensure a greater linkage between the message transmitted by voting and the parliamentary representation that results."[38]

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31 Pal & Choudhry, *supra* note 29.

32 See R. Kent Weaver, "Improving Representation in the Canadian House of Commons" (1997) 30 Canadian J. of Political Science 473.

33 See W.T. Stanbury *et al.*, "Political Reforms in Canada: Strengthening Representative Government" in Howard Aster & Thomas S. Axworthy, eds. *Searching for the New Liberalism* (Oakville: Mosaic Press, 2003) 355 at 356: Stanbury *et al.* note that considerable evidence has emerged that an increasing number of Canadians are being "turned off and turned away" by the status quo of electoral politics in Canada.

34 Richard Nadeau, "Satisfaction with Democracy: The Canadian Paradox" in Neil Nevitte, ed. *Value Change and Governance in Canada* (Toronto: University of Toronto Press, 2002) 37 at 44.

35 Neil Nevitte, "Introduction: Value Change and Reorientation in Citizen-State Relations" in Neil Nevitte, ed. *Value Change and Governance in Canada* (Toronto: University of Toronto Press, 2002) 3 at 20.

36 *Ibid.* at 15.

37 See *ibid.* at 20: this sense of voicelessness does not seem to make Canadians less attached to Canada, but it does have a profound negative effect on their level of satisfaction with the way democracy works and on their evaluations of the federal government, politicians and political parties.

38 Nadeau, *supra* note 34 at 55. As a result, both Nevitte and Nadeau favour pursuing reform to

In much the same way, John Courtney has argued that "[e]lections are a key element of any political system that claims to be democratic. Without procedures and machinery that are known to be fair and equitable, the electoral process falls into disrepute and its results are treated with contempt. ... Elections are, in a sense, the linchpins of the political process."[39] But while elections are clearly necessary to a democracy and fair procedures are essential to its sustenance, it is worth contemplating the question posed by Nicholas Aroney: "We speak often of 'representative democracy' and we tend to regard it as the dominant form of government in the modern West. But who or what is represented by the electoral systems of the modern democratic state?"[40] What then is the basis for the weighting attached to the votes cast in an election — is it *citizens* who are represented or some form of aggregation of their *interests*? Given the central importance of elections to a democratic society and the emerging indicators that warn of a crumbling public perception of the value of the vote, it is worth turning now to the respective opinions of the Saskatchewan Court of Appeal and the Supreme Court on the worth that should be given to a vote as a matter of constitutional law.[41]

The Saskatchewan Reference: Presumptive Equality and the Court of Appeal

As noted above in Part I, the section 3 right to vote in the *Charter* is not qualified on its face. What, then, does the right to vote imply in terms of voter representation? Should one person, one vote be the guiding principle — as it is in the United States[42] — or does an alternative interpretation make more

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Canada's electoral system. However, one need not go as far as enacting drastic electoral reform in order to attain an improved linkage between votes cast and election results. Instead, Canada would do well to ensure that the votes of all of its citizens are weighted equally under the present system. Interestingly, Rawls also does not seem to address the design of the electoral system directly, although his discussion on equal participation appears to be premised on territorially-delineated ridings, as in the first-past-the-post system used both under Westminster and in the United States. See Rawls, *supra* note 10 at sections 36-37.

39 John C. Courtney, *Elections* (Vancouver: UBC Press, 2004) 5.

40 Nicholas Aroney, "Democracy, Community, and Federalism in Electoral Apportionment Cases: the United States, Canada, and Australia in Comparative Perspective" (2008) 58 Univ. Toronto Law J. 421 at 422.

41 In this way, and perhaps rather presciently, Locke affirmed that "no Government can have a right to obedience from a people who have not freely consented to it." See John Locke, *Two Treatises of Government*, Second Treatise, c. 16 at para. 192.

42 See *e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), 12 L.Ed.2d 533 [*Sims*]. While there has been later American jurisprudence and commentary on equal voting rights, my take is that much of it is not relevant to a Canadian context or to a wider discussion of how votes should be weighted. The 1990s case law, in particular, was mostly devoted to the infamous racial and other gerrymanders that permeate U.S. politics, whereby politicians draw bi-

sense in the Canadian context? As it turns out, there are essentially two vying interpretations that have emerged in the Canadian jurisprudence on section 3 of the *Charter*, both finding primary expression in the *Saskatchewan Reference*. The decision by Justice McLachlin (as she was then) for a 6-3 majority of the Supreme Court in the *Saskatchewan Reference* is certainly the most significant Canadian jurisprudence to date with regards to equality of voting power and section 3 of the *Charter*, but the unanimous decision of a five-judge panel of the provincial Court of Appeal in the case is particularly noteworthy for the way in which it lays out the alternative interpretive position.[43] My task in this and in the next sections of Part II is to identify the philosophical premises that underlie the rival interpretive positions on section 3 — whether the respective judgments clearly express what these are or not.

At issue in the *Saskatchewan Reference* were the riding boundaries proposed by Saskatchewan's independent boundaries commission in 1988. In July 1990, the Government of Saskatchewan asked the province's Court of Appeal to rule on whether the legislation infringed section 3. The court released its decision in March 1991, ruling unanimously that the provisions of the legislation amounted to a violation of the right to vote contained in section 3 of the *Charter*. The Court of Appeal remarked near the beginning of its judgment that the concepts of freedom and equality and the understanding of democracy which underpin Canadian society — and are now protected in the *Charter* — actually developed over the course of several centuries; among others, the court noted that the philosophical writings of Locke, Bentham, Mills, Montesquieu, Rousseau, and de Tocqueville, have all contributed to the evolution of these concepts.[44] This led the Saskatchewan court to observe that "[t]he voices of voters may be muted in a number of ways."[45] For instance, for "many years Blacks in the United States had the constitutional right to vote, but such right was meaningless and illusory without a judicial remedy to compel registration of voters."[46] The court's point is that the expansion of the franchise has been a long and difficult struggle, and indeed this great effort to

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zarrely-shaped "majority-minority" districts to avoid the dilution (or encourage the concentration) of minorities' votes (see *e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993); and *Shaw v. Hunt*, 517 U.S. 899 (1996)).

43 Justice Cory's minority judgment at the Supreme Court of Canada took somewhat of an intermediate position between these two alternative interpretations, although largely favoured presumptive equality.

44 *Saskatchewan Reference* (C.A.), *supra* note 6 at para. 24. To this list, one might also notably add Rawls whose position on the interpretation to be given to the right to vote in many ways represents the culmination of the thinking of the political philosophers that came before him.

45 *Ibid.* at para. 27.

46 *Ibid.*

arrive at the freedom and equality of every individual citizen is still very much a work in progress in many places in the world. In Canada, the court noted, "modern democratic rights" are now accepted attributes of citizenship, but these rights were won only after long and difficult struggle. At first, suffrage was limited only to property owning males, then to all males, and only to females at the time of the First World War. Of course, Canada also experienced sorry episodes in which the voting rights of specific groups were taken away. But with the advent of section 3 of the *Charter*, the ability of legislators to restrict the franchise (should have) ended.[47]

Importantly, then, with regards to the deviations from voter equality at issue, the Court of Appeal observed that far from being over, the struggle for universal suffrage actually continues into the present day. All of this leads to the conclusion that Canada's history of electoral democracy cannot be of much help in interpreting the right to vote today: "The suppression of fundamental democratic values in earlier times ought not to lead us to a restricted view of the democratic rights enshrined in the Charter."[48] In Canada's modern democracy, it is the will of the people which is sovereign.[49] Moreover, as the ideas of freedom and democracy are themselves inextricably linked, so too are the ideas of equality and democracy; in a democracy, no person's share of the sovereign power notionally exceeds that of any other person. Accordingly, democracy is virtually defined as one person, one vote, and in this way the idea of the equality of all voters is inherent in the right to vote itself.[50]

The Court of Appeal then referred with approval to a passage in *Reynolds v. Sims*:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in

47 *Ibid.* at paras. 25 to 27. The relative equality interpretation which permits vote dilution obviously notwithstanding.

48 *Ibid.* at para. 34.

49 *Ibid.* at para. 36.

50 See *ibid.* at para. 39.

> the city or on the farm.[51]

As the Court of Appeal further explained, "[t]he right to vote would be a diminished right, indeed even a hollow one, if it could be diluted thus, through electoral distribution or other means. The personal right to vote is a value in itself, and a citizen is shortchanged if electoral abuses or distribution rules dilute that citizen's portion of 'sovereign power.'"[52] The court concluded then that the interpretation to be given to section 3 and the right to vote under the *Charter* must be presumptive equality:

> Amongst the basic aims, therefore, of legislative apportionment or distribution schemes must be the fair and effective representation of all citizens. For this reason the controlling and dominant consideration in drawing electoral constituency boundaries must be voter population in the province.[53]

The starting point must be that the seats in a legislative assembly are apportioned on the basis of representation by population.[54] This must be the case because citizens can only participate in the legislature through the election of representatives.[55] As the court puts the point: "Voters' rights merit constitutional safeguard in this way because of the proportionate share of voting power enjoyed by each elected member of the Legislative Assembly. Any malapportionment with respect to voter population, and the consequent dilution of a person's vote, is reflected in the exercise of power in the Legislative Assembly."[56]

The Saskatchewan Reference: Relative Equality and the Supreme Court

After losing at the Court of Appeal, the Government of Saskatchewan subsequently appealed the case to the Supreme Court. The decision at the Supreme Court was split 6-3. Writing for the majority of the Court, Justice McLachlin observed that the critical issue in the case was the definition af-

51 *Ibid.* at para. 44, quoting from *Sims*, *supra* note 42 at 567.

52 *Ibid.* at para. 43.

53 *Ibid.* at para. 51.

54 In this way, one might refer to presumptive equality as an "individualist" conception of the right to vote. That said, in focusing on voting as chiefly an individual right, I need not go along with Aroney who refers to an individualist interpretation as one in which "the individual citizen is understood for political purposes to be part of what is essentially a singular, unitary, and undifferentiated political society." See Aroney, *supra* note 40 at 431 where he posits that "individualist conceptions have dominated much of the American [voting] jurisprudence."

55 *Saskatchewan Reference* (C.A.), *supra* note 6 at para. 51.

56 *Ibid.* at para. 52.

forded to section 3's right to vote:[57] "The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the 'one person - one vote' rule? The answer to this question turns on what one sees as the purpose of s. 3."[58] The contest, then, existed over whether the right to vote mandates presumptive or merely relative voter equality. The majority held that the purpose of section 3 is effective voter representation which entails relative voter equality: "Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative."[59] This understanding of the right to vote has two conditions: the first of these is *relative* parity of voting power; the second amounts to the practical fact that effective representation cannot often be achieved without considering various countervailing factors.[60]

In her judgment, Justice McLachlin went so far as to suggest that even the diluted notion of *relative* parity of voter power may prove to be undesirable because it might weaken the attainment of the primary goal, namely, effective representation. As such, factors including geography, minority representation, and community history and interests, might need to be taken into account for Canada's legislative assemblies to effectively represent the diversity of the population.[61] As an example of this, Justice McLachlin pointed to the "fact" that rural voters make greater demands on their representatives than urban voters, and it may therefore be appropriate that a rural legislator represent fewer voters than an urban one.[62] Interestingly, what Justice McLachlin appears to be saying here is that, contrary to the Court of Appeal's ruling, the intensity of the demands made by different groups of citizens should factor into the amount of representation that these groups receive. Justice McLachlin's judgment emphasized what the majority viewed as practical considerations over philosophical ones, but this does not mean that political philosophy was irrelevant to the majority decision. As Justice McLachlin concluded, in the final analysis, "[r]espect for individual dignity and social equality mandate that citizen's votes

57 *Saskatchewan Reference* (S.C.C.), *supra* note 6 at para. 38.

58 *Ibid.* at para. 46.

59 *Ibid.* at para. 49.

60 *Ibid.* at paras. 50 and 54.

61 These items are merely included as examples of grounds that may serve to justify a deviation from strict representation by population and should not be considered to be an exhaustive list. See *ibid.* at para. 54.

62 *Ibid.* at para. 78. It is worth noting that this there does not seem to be any evidence to support this "fact" – see Studniberg, *supra* note 8 at 629.

not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated."[63] In other words, the majority has favoured giving some groups of voters (*e.g.*, rural residents or certain communities or groups) enhanced voting clout. This is to say that certain interests of voters are necessarily to be preferred over others. In contrast to the "individualist" presumptive equality approach, this "communal" conception

> understands democracy as a form of government by "the people," where political decisions are ideally made not simply by numerical majorities of individual citizens, on the basis of a strictly equal vote, but by the people conceived as a corporate community, governing themselves in terms of the public good. On this view, consensus and deliberation are of utmost importance, and the various non-political communities and groupings to which individuals belong, together with the particular interests, purposes, and values of those groups, are to be given adequate voice in the decision-making processes of the community as a means of securing a general political consensus.[64]

It is worth pointing out, however, that there was a dissenting judgment at the Supreme Court in the *Saskatchewan Reference*, penned by Justice Cory. In the dissent, the minority held steadfastly to the view that "[t]he right to vote is synonymous with democracy."[65] Although the minority noted that strict equality of voting power has never been insisted upon in Canada (having given way to the representation of community interests and geographic considerations), Justice Cory affirmed that "there has been a conscious and continuing move towards greater equality" in Canada.[66] Moreover, "[t]o diminish the voting rights of individuals is to violate the democratic system. Such actions are bound to incur the frustration of voters and risk bringing the democratic process itself into disrepute."[67] I suggest here that this strong minority view is significantly closer to what a Rawlsian interpretation of section 3 would look like. As such, it is Justice Cory's minority opinion in the case which will hopefully serve as the anchor for the Supreme Court's reconsideration of its 1991 decision.[68] Indeed, as Justice Frankfurter insisted in an American context,

63 *Ibid.* at para. 62.

64 Aroney, *supra* note 40 at 431.

65 *Saskatchewan Reference* (S.C.C.), *supra* note 6 at para. 2, Justice Cory.

66 *Ibid.* at para. 5.

67 *Ibid.* at para. 18.

68 Following the *Saskatchewan Reference*, the Supreme Court of Canada has repeatedly confirmed the majority's relative equality approach to interpreting section 3. The Court has, however, done so largely reflexively without considering whether Justice McLachlin's majority decision can continue to (if it ever could) be supported on a principled basis. See Studniberg, *supra* note 8 at section II.D.

the U.S. cases on electoral redistricting required the Court "to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy."[69]

III. THE RIGHT TO VOTE IN THE BASIC CONSTITUTIONAL STRUCTURE

Social Cooperation and the Well-Ordered Society

To imagine what initial institutional processes must exist before any electoral representation becomes possible, one can simply go back to the thought experiment of the original position. What if there were no statutes to establish who could vote or, indeed, how the electoral process is to be organized? Elections, of course, are impossible when thought of in this way, without the procedural trappings that make for a meaningful democratic result. In this vein, Courtney notes that "[f]or legislative, parliamentary, presidential, or congressional representation to take place, acceptable and legitimate means must first be established to turn the inchoate Hobbesian world of total electoral anarchy into an institutional framework for electing members to an assembly and for holding those members ultimately responsible for their actions."[70] Thus, the task here is to design the machinery of democratic elections.

In order to do so, it is worth first stepping back to consider why Rawls would consider the right to an equal vote to be a foundational part of the justice of the constitution or, expressed differently, the basic structure. By basic structure, Rawls refers to a society's main political, social, and economic institutions and the way these fit together to form one greater unified system of social cooperation, capable of extending across time from one generation to the next.[71] One of the central features of Rawls' notion of justice as fairness is that it takes this basic structure as the primary subject of political justice.[72] And fundamental to justice as fairness is the idea of society as a fair system of social cooperation. This idea is elementary in that it is used to develop justice

69 Carl A. Auerbach, "The Reapportionment Cases: One Person, One Vote, One Value" (1964) Supreme Court Rev. 1 at 22.

70 See *Commissioned Ridings*, *supra* note 23 at 4.

71 *Political Liberalism*, *supra* note 13 at 11.

72 See *Restatement*, *supra* note 17 at 10: "[i]t does so in part because the effects of the basic structure on citizens' aims, aspirations, and character, as well as on their opportunities and their ability to take advantage of them, are pervasive and present from the beginning of life."

as fairness into a political conception of justice for a democratic regime.[73]

This central organizing idea of social cooperation has three distinct features, which are relevant as background considerations in exploring why justice as fairness entails the precept of voter equality. First, social cooperation is distinct from mere coordinated social activity. Social cooperation is guided by recognized rules and procedures, which those doing the cooperating accept as appropriate to regulate their conduct. Second, the idea of cooperation also includes the idea that it mandates fair terms; terms are fair in the sense that each participant may reasonably accept (and should accept) them, provided everyone else also does so. And third, the idea of cooperation includes consideration of each participant's rational advantage, which specifies what it is that those engaged in cooperation seek to advance from the standpoint of their own understanding of the good.[74]

As Rawls explains, the role of the principles of justice is to specify the fair terms of social cooperation. By way of these specifications, the principles of justice provide a response to the fundamental question of political philosophy for a constitutional democratic regime. As Rawls puts it, that question asks what is the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens regarded as free and equal, reasonable and rational, and as normal and fully cooperating members of society over a complete life, from one generation to the next?[75] Rawls carries the idea of social cooperation over to the concept of the well-ordered society. In such a society, "the public conception of justice provides a mutually recognized point of view from which citizens can adjudicate their claims of political right on their political institutions or against one another."[76]

The Primacy of Equal Voting Rights in the Constitutional Structure

The members of a well-ordered society are assumed to be free and equal persons. Equality here implies that the members of the well-ordered society view themselves as having a right to equal respect and consideration in deter-

73 *Ibid.* at 5.

74 *Ibid.* at 6.

75 *Ibid.* at 7-8: Rawls further explains that this question is fundamental in political philosophy because it has been the focus of both the liberal critique of monarchy and aristocracy as well as of the socialist critique of liberal constitutional democracy. Rawls adds that it is also notably the focus of the present conflict between liberalism and conservatism over the claims of private property and the legitimacy (as opposed to effectiveness) of social policies associated with the so-called welfare state.

76 *Ibid.* at 9.

mining those principles by which the basic arrangements of their society are to be maintained.[77] People enjoy freedom to the extent that they conceive of themselves as having the moral power to have a conception of the good and the ability to revise it on reasonable and rational grounds if they choose to do so.[78] Interestingly, freedom and equality require each other. While this idea perhaps has its most famous expression in Rousseau, Rawls undoubtedly builds on it when he favours representation by population and thus voter equality.[79] The implication is that treating each voter equally is a prerequisite for the protection of basic liberties. The role of the principles of justice, then, is to assign the rights and duties in the basic structure and to specify the way in which society's institutions are to provide for the overall distribution of the returns from social cooperation.[80] To illustrate this, Rawls suggests considering a pluralistic society that is divided along religious, ethnic, or cultural lines but in which the various groups have nonetheless reached agreement on the principles that regulate their society's institutions. While the citizens of such a society may have profound differences over other things, there is consensus on the framework of principles that applies.[81] What are those principles of justice that serve this guiding function in a well-ordered society? In his *Restatement*, Rawls presents his famous two principles of justice as follows. First, each person has "the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."[82] The equal basic liberties contained in this first principle can be enumerated in list form, and include freedom of thought and liberty of conscience, political liberties such as the right to vote and to participate in political life, freedom of association and the liberties associated with the integrity of the person, and the rights covered by the rule of law.[83] The basic rights and liberties presented in this list are said to be those that protect and secure the scope required for judging the justice of the basic institutions and social policies as well as those that allow members of society to pursue their own conceptions of the good.[84] Rawls' celebrated second principle of justice

77 John Rawls, "A Kantian Conception of Equality" (1975) 96 Cambridge Review 94 ["A Kantian Conception"].

78 *Restatement, supra* note 17 at 19-22.

79 See John Rawls, *Lectures on the History of Political Philosophy*, Samuel Freeman, ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 2007) at 233 [*History*].

80 "A Kantian Conception," *supra* note 77 at 95.

81 *Ibid.*: "[a] well-ordered society has not attained social harmony in all things, if indeed that would be desirable; but it has achieved a large measure of justice and established a basis for civic friendship, which makes people's secure association together possible."

82 *Restatement, supra* note 17 at 42.

83 For a description of how Rawls arrives at his list of basic liberties, see *Restatement, ibid.*, at 44-5.

84 *Ibid.* at 45.

holds that any social and economic inequalities must satisfy two conditions: first, such inequalities must attach to offices and positions open to all under conditions of fair equality of opportunity; and second, the inequalities must serve the greatest benefit of the least-advantaged members of society.[85] Rawls further specifies in the *Restatement* that the two principles are to be applied in the order in which he lays them out. This means the second will always be applied within a setting of background institutions (that is, the components of a constitutional regime) that satisfy the requirements of the first principle.[86] To explain this priority ranking, Rawls remarks that it rules out exchanges (or "trade-offs") that might otherwise be made between the basic rights and liberties covered by the first principle and the social and economic advantages covered by the second. As an example of this, Rawls observes that the equal political liberties such as the right to vote cannot be denied to certain groups on the basis that having these liberties would allow them to obstruct policies said to be needed for economic growth or efficiency.[87] It is for this reason that Rawls refers to the first principle as covering the constitutional essentials, and it is already apparent that Rawls places the right to vote among such essentials. But why the right to an *equal* vote?

In order to begin formulating a response to this question, it is worth reviewing in summary form Rawls' design of his renowned vehicle of the original position.[88] The essential idea of the original position is to come up with a fair procedure such that any principles agreed to under it will themselves be just. Rawls' aim here is to use what appears to be a procedural device as the starting point for a rich theory:

> Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.[89]

To do this, Rawls remarks that parties in the original position do not know certain kinds of facts. No one in the original position knows her place in so-

85 *Ibid.* at 42-3: Rawls explains what he means by "fair equality of opportunity."

86 *Ibid.* at 46.

87 *Ibid.* at 47.

88 It should already be clear that the equal basic liberties include political liberties such as the right to vote and that these items are considered constitutional essentials covered under the first principle of justice. By now explaining Rawls' concept of the original position, I anticipate that the primacy that Rawls would place on the right to an equal vote will become unmistakable itself.

89 *Theory*, *supra* note 10 at 136-7.

ciety in terms of class or social status; such a person likewise does not know of her luck in receiving natural assets and abilities such as intelligence and fortitude. Importantly, the representative person also does not know her conception of the good or even the "special features of her psychology," such as aversion to risk. Moreover, the parties have no knowledge of the particular circumstances of their own society. This means that they do not know of its economic or political situation. That said, Rawls does allow the parties in the original position general knowledge about human society, including how political affairs operate and the principles of economic theory.[90] The bottom line is that under the original position, no one is in a position to tailor principles to her advantage.[91] The evaluation of principles, then, proceeds in terms of the "general consequences of their public recognition and universal application, it being assumed that they will be complied with by everyone."[92]

The goal behind the use of the original position is not to describe or explain how people actually behave or how institutions actually work. Instead, Rawls submits that the aim of the device is to further a public basis for a political conception of justice. Doing this, Rawls asserts, belongs to political philosophy and not to social theory.[93] In the *Restatement*, Rawls explains that the original position models two things: first, what can be regarded as the fair conditions under which the representatives of citizens are able to agree to the fair terms of social cooperation under which the basic structure is to be regulated; and second, what can be regarded as acceptable restrictions on the reasons the representative parties may properly rely on in choosing between candidates for the principles of justice.[94] Importantly, one such rejected candidate (for the second principle of justice) is the utility principle. As Rawls explains, to consider the "calculus of social interests" as perpetually relevant in identifying basic rights and liberties (as the principle of utility does) is to leave the very status and content of these basic rights and liberties unsettled. "It subjects them to the shifting circumstances of time and place, and by greatly raising the stakes of political controversy, it dangerously increases the insecurity and hostility of public life. Consider the unwillingness to take off the political agenda such questions as which faiths are to have liberty of conscience, or which groups are to have the right to vote." As will be seen, such an unwillingness risks perpetuating the sort of deep divisions that lie latent in a society characterized by the fact of reasonable pluralism. More to the point, it

90 *Ibid.* at 137.
91 *Ibid.* at 139.
92 *Ibid.* at 138.
93 *Restatement, supra* note 17 at 81.
94 *Ibid.* at 80.

may also betray a certain inclination to revive old antagonisms with the aim of gaining a better result, should favourable circumstances come to light afterwards. "By contrast, securing the basic liberties and affirming their priority more effectively does the work of reconciliation among citizens and promises mutual recognition on a footing of equality."[95]

A conception of the right to vote that is premised on voter equality is thus substantive and forms part of the constitutional essentials. Rawls emphasizes in the *Theory* that the requisite procedures by which electoral districts are drawn up should be adopted from a position in which no one has knowledge that could be put to use to prejudice the design of constituencies.[96] Rawls is referring here to the well known problem of gerrymandering: the drawing up of the boundaries of electoral districts in such a way as to gain partisan advantage. The rules that govern the design of electoral districts — really the rules that govern the meaningfulness attached to a vote in such districts — should thus be adopted in advance and should be very strict.[97] An emphasis on voter equality minimizes much of the prospect of electoral malapportionment.[98] Thus, Rawls concludes in *Political Liberalism* that "what is fundamental is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation. Such a scheme is fundamental because the adequate protection of other basic rights depends on it. Formal equality is not enough."[99] With these comments, Rawls can be understood to be endorsing the U.S. Supreme Court's jurisprudence from the 1960s insisting on one person, one vote.

Late in the *Restatement*, Rawls considers the familiar Marxist objection that the equal liberties in a modern democratic state are in practice merely formal. Thus, while it may *appear* that citizens' basic rights and liberties are effectively equal — *e.g.*, that all have the right to an equal vote — social and economic inequalities in background institutions are in fact so large that those with greater wealth and position usually control political life and accordingly enact legislation and policies to serve their own interests.[100] To meet this ob-

95 *Ibid.* at 115.

96 See *Theory*, *supra* note 10 at 223: "[p]olitical parties cannot adjust boundaries to their advantage in light of voting statistics; districts are defined by means of criteria already agreed to in the absence of this sort of information."

97 *History*, *supra* note 79 at 18.

98 That said, the precept of one person, one vote does not on its own do away with the problem of gerrymandering. Other rules are undoubtedly necessary in electoral districting to prevent this, but a major culprit in the United States has been the lack of independence of the bodies that actually draw the boundaries.

99 *Political Liberalism*, *supra* note 13 at 361.

100 *Restatement*, *supra* note 17 at 148.

jection, Rawls replies that justice as fairness treats political liberties in a special way: In the first principle of justice, a proviso holds that political liberties (and *only* these liberties) are to be equally guaranteed their fair value. That is, the *worth* of these liberties to all citizens, whatever their social or economic position, must be sufficiently equal such that all have a fair opportunity to hold office and to affect the outcome of elections and the like. This idea of fair opportunity parallels that of equality in the second principle.[101] Thus, in addressing the critique of liberalism (that the political rights of a constitutional regime are merely formal), Rawls replies that all citizens — whatever their position — may be assured a fair opportunity to exert political influence.[102] Rawls further elaborates that one of the features of this guarantee of the fair value of political liberties is that it secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose.[103]

Nonetheless, political power, of course, is always coercive power backed by the state's machinery for enforcing its laws — a notable point that has been repeated at least since Hobbes. But in a constitutional regime, Rawls adds that political power is also the power of equal citizens as a collective body. Coercion is regularly imposed on citizens as individuals, some of whom may not entirely accept the reasons that are widely believed to justify the general structure of political authority (*i.e.*, the constitution).[104] This citizen response indicates the need for public justification and the idea of public reason, a topic explored in the next Part of this article.

IV. VOTING AS EXPRESSION AND THE NEED FOR PUBLIC JUSTIFICATION

Reasonableness as Foundational

Before turning to the idea of public reason, the prior concept of reasonableness itself bears some explanation. In his various works, Rawls frequently refers to the distinction between the reasonable and the rational.[105] In his treatment of Rawls' *Political Liberalism*, Jürgen Habermas explains the distinction in this way: "People count as reasonable who possess a sense of justice

101 *Ibid.* at 149.

102 *Ibid.* at 177. See Part IV below for an extension of this point to a discussion of campaign financing.

103 *Ibid.* at 150.

104 *Ibid.* at 182.

105 See *e.g.*, *Restatement*, *supra* note 17 at 6-7.

and thus are both willing and able to take account of fair conditions of cooperation, but who are also aware of the fallibility of knowledge and . . . are willing to justify their conception of political justice publicly. By contrast, persons act merely 'rationally' as long as they are prudently guided by their conception of the good." Habermas adds that Rawls introduces the "reasonable" as a property of moral persons.[106] As Rawls explains, "[c]itizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of social cooperation (defined by principles and ideals) and they agree to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms."[107] For these terms to be fair, citizens offering them must reasonably think that those citizens to whom such terms are offered might also reasonably accept them. The base question here is: how is it that citizens are able to share equally in the exercise of political power so that each can reasonably justify the political decisions they make to the other?[108]

Rawls answers this question with what he would consider an easy case. If one is to argue, for example, that the religious liberty of some citizens in society should be denied, it is incumbent on her to give these citizens reasons that they cannot only understand but also that they might reasonably be expected to accept as free and equal persons.[109] Rawls thus notes that unanimity of views in a well-ordered democratic society is not to be expected in the normal course. "Reasonable political conceptions of justice do not always lead to the same conclusion." Yet the outcome of a vote is seen to be reasonable, provided all citizens vote on the matter. The fact that a vote is held does not mean the decision reached is necessarily true or correct, but it is assumed (for the moment) that the result is reasonable and binding on citizens.[110]

There is another, indirect argument that Rawls advances for this understanding of first principles. In considering the reasonable parties in the original position, themselves contemplating the principles of justice, Rawls remarks also that it is supposed that the parties are rational, meaning that they can rank their final ends consistently. The modification to the idea of rationality Rawls presents is to exclude "liabilities," such as envy and spite, or a "peculiar aversion to risk and uncertainty." Rawls holds that the parties in

106 Jürgen Habermas, "Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism" (1995) 92 J. of Philosophy 109 at 123.

107 *Political Liberalism, supra* note 13 at xliv.

108 *Ibid.* at xlvi.

109 *Ibid.* at li.

110 *Ibid.* at lvi.

the original position are not moved by such desires and inclinations. The rationale for this is that when setting up justice as fairness, one may describe the parties as best suits one's aim in developing a political conception of justice.[111] Importantly, this modification of the concept of rationality implies that it is likely not appropriate to endow some minorities with a veto over majority action solely on the basis that the minority fears the majority's pursuit of the good. Returning to the precept of one person, one vote, electoral ridings should not then be drawn in such a way that some ridings (nonurban ridings, for instance) contain fewer voters, thereby enhancing the voting power of those citizens who live there — at least on the basis that the citizens who live in such areas are "special" and should be given extra clout in order to counterbalance or contain the majority living elsewhere. Unequal voting weights are consequently inconsistent with Rawls' basic ideas about the reasonable and rational. In a somewhat Hobbesian moment, Rawls adds that reasonable and rational persons — even those in the minority who might otherwise seek extra representation — can understand that they are to honour those principles that allow for the fair terms of social cooperation, provided that others in society can likewise be expected to adhere to them.[112]

On a related point, the concept of moral desert does not help either. The concept cannot be incorporated into a political conception of justice, given the reality of reasonable pluralism. "Having conflicting conceptions of the good, citizens cannot agree on a comprehensive doctrine to specify an idea of moral desert for political purposes." In any event, moral worth would be an utterly impractical criterion on which to resolve questions of distributive justice. As Rawls says here, "[o]nly God could make those judgments." Accordingly, in public life, one needs to avoid the idea of moral worthiness and to find a suitable replacement that belongs to a reasonable political conception.[113] This is much like Locke's view that no one should have political authority over others unless by way of manifest divine declaration. Critically, as in Locke's view, inequalities of age, merit, virtue, and of property exist, but these are not relevant differences for establishing political authority. For Locke — and for Rawls — this is an important way in which to approach the fundamental equality of individual citizens in society.[114]

111 See *Restatement, supra* note 17 at 87: "[s]ince envy, for instance, is generally regarded as something to be avoided and feared, at least when it becomes intense, it seems desirable that, if possible, the choice of principles should not be influenced by this trait."

112 *Ibid.* at 7.

113 *Ibid.* at 73.

114 *History, supra* note 79 at 116. Although while for Locke the origin of human equality is apparently that God has not designated anyone to have political authority over the rest (see 118-21), Rawls

Embracing the Idea of Public Reason

Returning to the basic structure considered above in Part III, Rawls explains that a "well-ordered society is effectively regulated by a public conception of justice."[115] Of course, Rawls does not maintain that everyone in the well-ordered society holds the same religious, moral, or theoretical beliefs; quite the contrary, Rawls even assumes that there are irreconcilable differences between citizens regarding these beliefs. But, critically, there is nonetheless a shared understanding that the principles of justice and their application to society's basic constitutional structure ought to be ascertained with reference to those considerations that are supportable by commonly recognized rational procedures.[116] In this way, justification is addressed to those who might disagree in society; if there is no conflict in judgment about questions of political justice, then there is nothing to justify. To justify political judgments means to convince others by drawing on reason and inference in a way appropriate to fundamental political questions by appealing to the types of beliefs, grounds, and political values that it is reasonable for others to acknowledge.[117] Rawls states the matter perhaps most directly in the *Restatement* when he contends that

> [j]ustice as fairness hopes to put aside long-standing religious and philosophical controversies and to avoid relying on any particular comprehensive view. It uses a different idea, that of public justification, and seeks to moderate divisive political conflicts and to specify the conditions of fair social cooperation between citizens.[118]

For Rawls, this is the idea of public reason. In any debate, each side should make its political arguments in terms of common ground, such that the debate is accessible to all members of society. Democratic politics, in this way, is less a battle for power than it is a kind of public conversation about issues that raise common concerns, along with a decision-making procedure for attaining temporary closure when the time has come to take action.[119] As Peter Singer

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presumably does not take this as the starting point. To put the matter in another way, for Rawls people are sources of "self-authenticating claims" although for Locke they are not. See *Restatement*, *supra* note 17 at 23.

115 See "A Kantian Conception," *supra* note 77 at 94: "[t]hat is, it is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice." Moreover, it "is also the case that basic social institutions and their arrangement into one scheme (the basic structure) actually satisfy, and are on good grounds believed by everyone to satisfy, these principles."

116 *Ibid.*

117 *Restatement*, *supra* note 17 at 27.

118 *Ibid.* at 29.

119 See Peter Singer, *The President of Good and Evil* (New York: Plume, 2004) at 103.

explains the idea of public reason, "[w]e should show that we recognize that we live in a community with a diversity of political and religious views. Hence we should offer reasons that can appeal to all, not only to other members of our own community of belief."[120] While it might be possible in a debate over, say, abortion to make arguments from the Bible, both sides should *also* make arguments that all (reasonable) citizens could agree with. When "all appropriate government officials act from and follow public reason, and when all reasonable citizens think of themselves ideally as if they were legislators following public reason, the legal enactment expressing the opinion of the majority is legitimate law."[121] The important thing is that although each individual citizen may not think that what has been said or proposed by someone else is itself more reasonable or appropriate, it is nonetheless morally binding on her and to be accepted as such *if* the law has been arrived at in a manner in which all have spoken and voted.

Rawls also argues that inherent in the idea of public reason is a norm of reciprocity. For Rawls, civic friendship is to serve as the basis for political relationships in the constitutional democratic state. For example, if the religious liberty of some citizens is to be restricted in some way, the state must provide them with reasons that they can not only understand, but might also reasonably accept.[122] "A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse."[123]

Interestingly, this view of the role of morality in law also finds its expression in Joseph Raz's *The Morality of Freedom*, when he notes that "it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones."[124] Indeed, Raz was very much aware of Rawls' argument of the need for public justification and seems essentially to agree with it. But in many ways, the origins of this line of thought come from Locke. Thus in *A Letter Concerning Toleration*, Locke argues for the exclusion of particular or "passionate" attachments from public debate. Accordingly, candidates for office should not compete for election on the basis

120 *Ibid.*

121 "The Idea of Public Reason Revisited," *supra* note 16 at 137.

122 Accordingly, the norm of reciprocity is normally violated when the basic liberties are denied in some way: see *ibid.* at 137-8.

123 *Ibid.* at 140.

124 Joseph Raz, *The Morality of Freedom* (New York: Clarendon, 1986) at 133.

of characteristics such as race, place of origin, or language.[125] But much like Rawls and Raz, Locke expected that in a state where all citizens are able to enjoy the benefits of citizenship and incur its matching obligations, individual citizens would continue to *privately* identify with particular groups, such as particular religious denominations.[126] Given Locke's formative influence on the American founders, it is perhaps no surprise that the U.S. Supreme Court has come to adopt the implications of public reason for voter equality well before the English or Canadian judiciaries have.[127]

Furthermore, given the need for public justification, Jonathan Quong also suggests that there is a corollary position, one that he suggests is sometimes overlooked:

> those *listening* to the political proposals of others must do so in the same spirit of reciprocity. Every participant in a deliberative democracy has a moral obligation not only to frame his or her own reasons in terms of public reason but also to listen to the reasoning of others with the aim of trying to understand their claims in terms of

125 Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal & Kingston: McGill-Queen's University Press, 2007) at 101.

126 *Ibid.* at 104.

127 While it is beyond the scope of this article to contemplate whether a Rawlsian political philosophy can have (or has had) a similar formative influence over Canadian political jurisprudence, some brief remarks on this point are in order. As Colin Feasby notes, in *Libman v. Quebec (Attorney General)*, [1997] 1 S.C.R. 877 at para. 61, the Supreme Court of Canada held, in a Rawlsian turn of phrase, that the democratic value of fairness "is related to the very values the *Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society." As for the influential *Saskatchewan Reference* (S.C.C.), *supra* note 6, I have covered the respective judgments above in Part II. Let me suggest here, though, that on the basis of the foregoing analysis, I am not persuaded that Canada's electoral jurisprudence should be classified as either "individualist" (*per* the Court of Appeal in the *Saskatchewan Reference* and the American voting jurisprudence) or as "communal" (*per* the Supreme Court and the subsequent Canadian case law). I also respectfully disagree with Feasby's reference to conceiving democracy as either libertarian or egalitarian. I suggest Feasby is much closer to the mark when he suggests that "'[f]airness' is a concept that has long been said to be the guiding purpose of Canadian election legislation," even if I would contend that the legislation has been unevenly so. The bare outlines of an egalitarian conception may explain the motivation behind Justice McLachlin's relative equality approach in the *Saskatchewan Reference*, but as I argue here (and elsewhere) that that approach is not principled, practical, or purposive. Instead, as I explain in this article, presumptive equality is actually a much more egalitarian conception than relative equality, and in this way it is truly Rawlsian. See Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill Law J. 5 at 17 and 31. I also note that Mark Rush & Christopher Manfredi, in a recent article, also maintain that the Court's election law decisions are less supportive of Feasby's egalitarianism than it may initially seem. Like them, I consider that the Court should not be either strictly egalitarian or libertarian in approaching electoral rights. See "From Deference and Democracy to Dialogue and Distrust: The Evolution of the Court's View of the Franchise and its Impact on the Judicial Activism Debate" (2009) 45 Supreme Court Law Rev. (2d) 19.

public reason.[128]

Public reason, accordingly, "is a two-way process: the giving and receiving of reasons with the aim at arriving at a public justification."[129] I argue, that a set of public reasons will not receive their full or fair expression in the absence of an equally weighted vote.

With Quong's distinction in mind, it makes sense to consider what Rawls had to say about campaign financing. In *Political Liberalism*, Rawls stated that electoral laws should be "rules of order for elections" and that they "are required to establish a just political procedure in which the fair value of the equal political liberties is maintained."[130] Colin Feasby observes that in the debate over electoral spending limits, a decision not to regulate spending is a regulatory choice in and of itself — one that favours the wealthy. For Rawls, a prohibition on large expenditures by wealthy individuals and groups in an election "may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and attaining positions of authority irrespective of their economic and social class."[131] On the surface, Rawls' position here appears to present something of a problem in that on the one hand he wants to ensure that disadvantaged views have an enhanced opportunity to be heard in electoral debate, but that on the other hand, all vote ballots are to be treated identically.

This "problem" can be resolved by thinking of democracy as the representation of people and not merely their interests. As Feasby explains, Rawls seeks to protect the quality of political speech, not its quantity.[132] In this contrast, Richard Arneson cites Jeremy Waldron, who dismisses the instrumentalist argument (*e.g.*, that a scheme of unequally weighted votes can be supported on the grounds that it ensures that certain types of views are more likely to be represented in the legislature, which itself entails a better overall result) by arguing that "any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people *disagree* about the goodness of outcomes that they need to set up and recognize an authority."[133] Tiffany Jones, similarly emphasizes the distinction in Rawls be-

128 Jonathan Quong, "What Do Citizens Need to Share?" in David Laycock, ed., *Representation and Democratic Theory* (Vancouver: UBC Press, 2004) 141 at 152.

129 *Ibid.*

130 *Political Liberalism*, *supra* note 13 at 357, as discussed in Feasby, *supra* note 127 at 10.

131 *Ibid.* at 358 (Feasby, *ibid.* at 11).

132 Feasby, *supra* note 127 at 12.

133 Richard J. Arneson, "Democracy is not intrinsically just" in Keith Dowding *et al.*, eds., *Justice & Democracy* (Cambridge: Cambridge University Press, 2004) 40 at 53, quoting Waldron's *Law and*

tween "basic liberties" and the "worth of these liberties." Because, as Rawls notes, the worth of liberties is not the same for all people, the goal must be "to prevent those with greater means from subverting democratic government by controlling the development of policy for their own advantage." It is for this reason that Rawls seeks the "fair value of political liberties."[134] Jones asserts that the regulatory principle that Rawls refers to as the "fair value of political liberties" is "the broader conception of equality that unites voter equality and candidate equality." This commitment to equality requires that all citizens be able to exercise their freedom to hold office and to influence electoral outcomes to an approximately equal extent. And in the area of campaign finance, the commitment invites the public financing of political campaigns and election expenditures, along with various limitations on contributions. These two prongs, Jones argues, would promote both voter and candidate equality.[135]

In drawing this conclusion, I might (admittedly) be going slightly beyond Rawls' comments on public reason. Charles Larmore observes that neither in *Political Liberalism* nor in "The Idea of Public Reason Revisited" did Rawls make note of a distinction between two forms of debate — "*open discussion*, where people argue with one another in the light of the whole truth as they see it, and *decision making*, where they deliberate as participants in some organ of government about which option should be made legally binding."[136] In the former arena, we might require (as Rawls himself allows) that reasonable limits be set on spending during campaigns to ensure that all voices have a chance to be heard. But in the latter arena, justice as fairness demands one person, one vote. One might again consider a contentious issue of public concern that requires a political resolution, where there are a number of different but reasonable points of view. As Larmore explains, under public reason, "[s]tandoffs requiring a decision are indeed to be handled by a vote, but a vote carried out in the spirit of public reason. Citizens should follow their best sense of what public reason entails despite the disagreement about what that is and the uncertainty they may therefore feel in their own mind."[137] Thomas Pogge presents another way to consider this distinction. Pogge observes that Rawls requires citizens exercise their political power in

Disagreement (Oxford: Oxford University Press, 1999) at 253.

134 Tiffany R. Jones, "Campaign Finance Reform: The Progressive Reconstruction of Free Speech" in John Marini & Ken Masugi, eds., *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, Maryland: Rowman & Littlefield, 2005) 321 at 325.

135 *Ibid.* at 325-6. See also the discussion about whether relative equality is affirmative action in Part V.

136 Charles Larmore, "Public Reason" in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003) 368 at 382.

137 *Ibid.* at 387, citing *Political Liberalism*, *supra* note 13 at 217.

a way that honours their "duty of civility":

> At least with regard to political decisions that affect the design of the basic structure itself, they orient the exercise of their political power as citizens, in good conscience and to the best of their knowledge and ability, exclusively according to their shared public criterion . . . This duty does not typically apply within specific organizations such as churches, universities, trade unions, and the like. But it applies in public spaces where citizens argue and vote, and also often deliberate and decide in one or another public role or office.[138]

I am not saying here that the relative equality interpretation of the right to vote is incompatible with the idea of public reason. It is possible (albeit unlikely) that unequally weighted votes could share a common ground in the explanation of how the vote was cast. But if the very purpose of providing enhanced representation to certain groups is to ensure that their interests are better represented in the legislature, it seems to be an odd assertion to then argue that even though select groups gain enhanced status, those not so favoured should have no cause for worry — that the extra rural representatives or candidates for such office, for example, will participate in the public debate on the basis of public reason without prevailing reference to the rural interests that the legislator or candidate is supposed to represent.

In explaining the applicability of the idea of public reason to the precept of voter equality, I should also emphasize that the limits of public reason do not apply to one's personal deliberations or thoughts about political questions. In fact, it is clear that religious or philosophical considerations may play a role here. The ideal of public reason, however, does hold when citizens engage in political advocacy in public fora. This last extension is important as it means that individual members of parties and candidates for election in the course of campaigns should adhere to public reason. For Rawls, then, "the ideal of public reason not only governs the public discourse of elections, but also how citizens are to cast their vote on these questions. Otherwise, public discourse runs the risks of being hypocritical: citizens talk before one another one way and vote another."[139] The bottom line here is that when questions of basic justice are at issue, political power may only be exercised in ways that all citizens can reasonably be expected to endorse.[140] Political liberalism tries to present the account of the values of justice and of public reason as political under a free-standing view, and as values that can be understood and affirmed with-

138 Thomas Pogge, *John Rawls: His Life and Theory of Justice*, trans. by Michelle Kosch (New York: Oxford University Press, 2007) at 140, citing *Restatement*, *supra* note 17 at 92.

139 *Political Liberalism*, *supra* note 13 at 215.

140 *Restatement*, *supra* note 17 at 190.

out presupposing any particular comprehensive doctrine. Rawls thus expresses the fervent hope that political practice can firmly ground the constitutional essentials in political values alone. In so doing, Rawls also endorses the view that strict voter equality — one person, one vote — belongs to a political rather than comprehensive doctrine.[141] Joshua Cohen, relying on the idea of public reason, explains the significance of Rawls' treatment of the various conceptions of the good somewhat differently but in a way perhaps apposite to the matter of mandating voter equality. As Cohen argues, "certain features of people are themselves so dependent on concededly irrelevant facts that to permit them to play a role in political justification would be tantamount to allowing the irrelevant facts to play a role."[142] It is not much of a step further to deem where one lives (whether in the countryside or in a city) or the ethnic or racial composition of one's neighbourhood to be "irrelevant facts" that are not worthy of special recognition in the electoral system.[143]

In John Stuart Mill's classic work *On Liberty*, he provides a statement of his principle of liberty that has lasting relevance for the concept of voting as expression and the need for public justification in a democracy.[144] Rawls' formulation of Mill's famous statement of liberty affirms that "society through its laws and the moral pressure of common opinion should never interfere with individuals' beliefs and conduct unless those beliefs and conduct injure the legitimate interests, or the (moral) rights, of others."[145] This formulation excludes an appeal to three kinds of reasons in public discussion: first, paternalistic reasons which rely on other people's understanding of the good based on their own individual points of view; second, reasons specified with reference to society's ideals of excellence; and third, reasons of dislike or disgust where such preference cannot be supported with reference to the common

141 *Ibid.*

142 Joshua Cohen, "A More Democratic Liberalism" (1994) 92 Michigan Law Rev. 1503 at 1524.

143 In a democracy under public justification, Rawls would let people freely debate their ideas in terms accessible to all. Perhaps one way to characterize a relative equality interpretation of the right to vote, then, is to observe that it pre-selects those interests which get to put forth their preferred ideas. Or to put the matter in another way, Rawls supports limits on campaign spending in order to ensure that no groups obtain a bullhorn that they can use in the democratic debate to drown out the voices of others; in contrast, under relative equality, the groups which gain extra representation benefit less from the assurance of volume parity between groups than from the ability to choose what will be talked about (and decided upon).

144 Exploring J.S. Mill's principle of liberty and its implications for the precept of voter equality is potentially highly relevant to the present inquiry because Rawls himself explains that the content of Mill's principles of political and social justice is very close to the content of justice as fairness, particularly as expressed by the two principles of justice (as formulated in the *Restatement*). See *History*, *supra* note 79 at 267.

145 See *On Liberty* chapter III at para. 9 and chapter IV at para. 3, as stated in Rawls, *History*, *supra* note 79 at 290.

good. Thus, one way to read Mill's principle of liberty is as a principle of public reason in that it excludes "certain kinds of reasons from being taken into account in legislation."[146]

In Mill's estimation, "[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, then he, if he had the power, would be justified in silencing mankind."[147] This squarely raises Mill's famous discussion of the "tyranny of the majority." By the phrase, Mill is not only concerned with the majority oppressing the minority, but also with "the tyranny of the prevailing opinion and feeling . . . the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development . . . of any individuality not in harmony with its ways."[148] For Mill, then, the "tyranny of the majority" is just as relevant as the "tyranny of the minority." The base point is that tyranny of any sort is unacceptable in a democracy. As Rawls explains, "by silencing one person in expressing an opinion, we do injury to the public process of free discussion . . . Moreover, the injury done to free discussion is done without any compensating advantage."[149] One could argue in this way that in giving some voters extra clout, voters elsewhere suffer from inequality (or a reduced ability to contribute to political discussion), but this does not give those who benefit from overrepresentation any more persuasiveness in a debate (or electoral campaign). As Rawls adds elsewhere, "ideally, citizens are to think of themselves *as if* they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact." Furthermore, when such reflection is widespread among citizens, "the disposition of citizens to view themselves as ideal legislators, and to repudiate government officials and candidates for public office who violate public reason, forms part of the political and social basis of liberal democracy and is vital for its enduring strength and vigor."[150]

If citizens start to think of themselves in this way when they elect representatives to serve as members of the legislatures, they are manifesting the ideal of public reason. While such an ideal is seemingly relevant to any democracy, it is particularly important for a society characterized by extensive diversity of religious, moral, cultural, or other types of beliefs. Canada, in this way, would

146 *History, ibid.* at 290-1.

147 See *On Liberty,* chapter II at para. 1, as quoted in *History, ibid.* at 294.

148 See *ibid.*, chapter I at para. 5 (*History, ibid.* at 284-5).

149 Rawls, *ibid.* at 295.

150 John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) at 56.

actually appear to be the model state in which the idea of public reason and the need for public justification *should* have direct application — contrary to the status quo in which certain groups (and their own particular beliefs) gain extra legislative representation over other groups. Favouring presumptive equality and one person, one vote over relative equality and effective representation recognizes that the right to vote is an individual rather than a group right, both with regards to legislative representation and, essentially, to public expression. Voting is the "means by which the citizen expresses her individual political judgment."[151] The legislature, then, acts as the primary democratic body insofar as it presents a cumulative representation of citizens' actual judgments and not a forum for the representation of the interests belonging to groups that citizens are presumed to identify with. Accordingly, "[b]y placing the emphasis on groups rather than individuals, the effective representation approach confuses the individual's right to vote with the group's right to representation." Effective representation ignores voters as individual citizens with their own values and motives and instead considers them as part of larger preselected groups whose interests can be accounted for and explained by their very categorization.[152]

In closing his *Restatement*, Rawls considers the objection that because justice as fairness is not based on a comprehensive religious or moral doctrine, it entails the abandonment of the ideal of a political community and views society instead as many distinct individuals cooperating solely to pursue their own advantage, without necessarily having any ends in common. This objection, as a contractarian position, holds that justice as fairness is unduly individualistic and views political institutions solely as a means to individual (or associational) ends. Rawls' reply to this objection is that justice as fairness "does indeed abandon the ideal of political community if by that ideal is meant a political society united on one (partially or fully) comprehensive religious, philosophical, or moral doctrine." But, for Rawls, that conception of social unity is excluded by virtue of the fact of reasonable pluralism — it is simply no longer a political possibility for those who accept basic liberties and the principle of toleration. Instead, social unity derives from an overlapping consensus on a political conception of justice. And as noted, this consensus is characterized by citizens who hold differing and conflicting comprehensive doctrines affirming justice as fairness from within

151 Robert E. Charney, "*Saskatchewan Election Boundary Reference*: 'One Person – Half a Vote'" (1991-2) 1 National J. of Constitutional Law 225 at 229.

152 *Ibid.* at 229-30. Again, however, under relative equality voters are not themselves able to choose which aspects of their identities gain extra representation – really which groups are to be privileged over others. Presumptive equality leaves it up to the individual to self-select which group identities matter most to her. See Studniberg, *supra* note 8.

their own particular views.[153]

One can in fact, conclude that citizens actually do share ends after all. While they do not affirm the same comprehensive doctrines, they do share the same political conception, and this means that they agree on one basic political end and one high priority: to support just institutions and, as a result, to provide each other with justice.[154] In this way, one citizen's commitment to treating other citizens as equals may be just as foundational a part of one's identity as one's own religious views.[155] Or, as Rawls puts it early on in the *Restatement*, "[g]iven the assumption of reasonable pluralism, what better alternative is there than an agreement between citizens themselves reached under conditions that are fair for all?"[156]

V. IMPLICATIONS OF AN EQUAL VOTE

The Counterargument: Representing Diversity as a Basis for Unequal Voting Rights

As noted at the outset of this article, representing people on the basis of equally weighted votes (as opposed to representing certain interests with unequally weighted ballots) is not necessarily neutral; indeed, there are alternatives to presumptive equality's one person, one vote (including relative equality's effective representation of geography, communities, and minorities). Returning to Aroney's reference to the Canadian voting jurisprudence as "communal" (largely patterned off Justice McLachlin's majority decision in the *Saskatchewan Reference*), I want to put aside the messiness or ambiguity involved in determining exactly what interests are to be preferred by adopting the notion of relative equality, and of how such decisions are to be made by boundaries commissions drawing Canada's electoral maps.[157] Instead, I favour comparing strict voter equality to a conceptually clearer communal basis for democratic representation. But before doing so it is necessary to consider why it might make sense to predicate Canada's electoral system on the representation of interests rather than individual voters.

153 *Restatement, supra* note 17 at 198-9.

154 In a footnote, Rawls extends this further, to suggest that one can even claim "that the shared final end of giving one another justice may be part of citizens' identity:" see *ibid.* at 199.

155 *Ibid.*

156 *Ibid.* at 15.

157 There is no such template. As I note elsewhere, the boundaries commissions have wide-ranging and inherently subjective discretion to exercise as they determine which groups gain extra voting clout at the expense of others. See Studniberg, *supra* note 8 at 643-4.

Hegel's representation scheme, as presented in the *Philosophy of Right*, presents a useful contrast for illustration. Specifically, Hegel rejects universal suffrage because he believes that individuals cannot be represented; instead, "it is not essential that the individual should have a say as an abstract individual entity; on the contrary, all that matters is that his *interests* should be upheld in the assembly which deals with universal issues."[158] In this way, requiring that votes be channelled through corporations (really guilds or associations each of which has a common representative purpose) is not incompatible with the idea of representation. For Hegel, the rational society is a constitutional monarchy with a bicameral legislature.[159] Noteworthy is that "essential spheres" and "large-scale interests" rather than individuals, are to be represented in the lower chamber.[160] In contrast to allowing voters to self-select the interests they wish to have represented in the legislature under strict voter equality, under the communal scheme certain grand interests are preselected for preferential standing. Why might it make sense to predicate Canada's electoral system on the representation of interests rather than individual voters?

The first point here is that even when voting is considered an individual right, the harm vote dilution inflicts on that right is usually characterized in terms of groups.[161] If one were to point out that many Canadians' votes carry sharply reduced weights, one would normally refer to a particular affected segment of society (*e.g.*, urban voters or visible minorities). But knowing that we can identify which groups are penalized by an unequally weighted voting system, the challenge remains to explain why preserving the relatively greater voting power of another segment of society (*e.g.*, rural voters) is an acceptable compromise upon which the Canadian constitution should continue to be founded.[162] Moreover, as long as Canada retains its geographically based system of representation, it will be easier to make accommodations for communities that are concentrated in space, than it will be to make accommodations for minorities that are geographically dispersed.

Digging deeper, we can pause to consider the effect of accepting enhanced voting power for some groups. A consequence of accepting the enhanced vot-

158 Stephen Houlgate, "Hegel, Rawls, and the Rational State" in Robert R. Williams, ed., *Liberalism and Communitarianism: Studies in Hegel's Philosophy of Right* (State University of New York Press, 2001) 249 at 256, footnote 34.

159 For Hegel, the lower chamber is to be elected through the "corporations": See *ibid.* at 261.

160 See *e.g.*, the discussion of Hegel's political philosophy in Peter Singer's *Hegel: A Very Short Introduction* (Oxford: Oxford University Press, 2001 [1983]) at chapter 3.

161 See Gerken, *supra* note 3 at 1681.

162 See Joseph E. Magnet, *Modern Constitutionalism: Identity, Equality and Democracy* (Markham: LexisNexis Butterworths, 2004) at chapter 5, section VII.

ing power of rural citizens, for example, might be that the composition of the legislature more faithfully reflects their interests. Following Grant Hayden, since voting is a way to reveal preferences and counting votes is a procedure to aggregate preferences, assigning weights to different votes means making a judgment as to the proper weight assigned to a given voter's preferences.[163] That, however, means drawing an interpersonal utility comparison — asserting that because of the intensity of preferences of certain groups, it makes sense to give their votes more potency. The relative equality interpretation of the right to vote, then, means providing assistance by way of the electoral machinery to protect the interests of certain geographically concentrated groups. As Wojciech Sadurski asserts, "[w]hile interests have the dimension of intensity which should be counted in the calculus of social decision, the judgments about values do not." It is for this reason that Rawls rejects the idea that "the intensity of desire is a relevant consideration in enacting legislation."[164]

An additional difficulty with the representation-of-interests approach is the unprincipled distinction it draws between geographically-concentrated groups and those that are dispersed (but still have a strong preference intensity). What, if it were possible to conceive of an electoral system that adhered to one person, one vote but also allowed for the parallel representation of such intense preferences? Surely such a system would be favoured as it would be consistent with presumptive equality while still providing for effective representation. Interestingly, such a system exists in New Zealand. Under New Zealand's electoral system, the Maori have access to dedicated seats in the legislature: there are sixty-two "general seats" and seven "Maori seats."[165] The number of Maori seats is based on the number of Maori voters who choose to vote on the Maori roll rather than the general one.[166] Although the Maori voter obtains a right at the ballot box that no other New Zealander gets, the dedicated seats are not in excess of what the voting Maori population would warrant.[167] It is a provocative question whether a similar system would be viable in Canada. In Canada, there are (arguably) many groups that could reasonably lay claim to such a parallel system of representation. So long as the representation was drawn on the basis of population, it would seem to accord with presumptive equality. But the effort may not be practical — how would the electoral authority choose which groups

163 See Hayden, *supra* note 25 at 247.

164 See Wojciech Sadurski, "Legitimacy, Political Equality, and Majority Rule" (2008) 21 Ratio Jurisprudence 39 at 44, quoting Rawls, supra note 10 at 230.

165 See Andrew Geddis, "A Dual Track Democracy? The Symbolic Role of Maori Seats in New Zealand's Electoral System" (2006) 5 Election Law J. 347 at 349.

166 *Ibid.* at 354.

167 *Ibid.* at 361-2.

deserve separate seats and which do not?[168] And even assuming that the system would be implementable, such starkly differentiated representation of particular groups and their interests rather than individual citizens would presumably be unwelcome by the rest of the population, perhaps leading to a backlash.[169] It would certainly raise the issue of the legislature's legitimacy — an issue I turn to in the next section.[170] To the extent that Canada is the archetypal image of a society imbued with the fact of reasonable pluralism, perhaps the New Zealand model would not be workable in Canada.

Democratic Theory: Conceptualizing Universal Suffrage

In the preface to his recent work *On Political Equality*, Robert Dahl remarks that while the existence of political equality is an essential foundation for democracy, the concept's meaning and relation to democracy are not understood.[171] Tellingly, Dahl points out that the expansion of the democratic ideal since the eighteenth century has all but converted the formerly subversive claim that all humans are entitled to be treated as political equals into a trite observation, but it has been influential to the point where even the authoritarian rulers who wholly reject the democratic claim in practice will publicly embrace it in their ideological pronouncements.[172] For Dahl, then, an ideal democracy is premised on both "effective participation" (by which he means that all members of the demos have equal and effective opportunities to make known their views about policy to other members) and "equality in voting."[173]

That said, as Ludvig Beckman observes, the seminal concept of "universal

168 Interestingly, the Royal Commission on Electoral Reform and Party Financing recommended in 1991 that Canada create special aboriginal ridings in the provinces where numbers warrant. See *Reforming Electoral Democracy*, 4 vols. (Ottawa: Supply and Services Canada, 1991), vol. 1 at 11.

169 For a discussion on this point, see Steven Wall, "Democracy and Equality" (2007) 57 The Philosophical Quarterly 416 at 429-31.

170 Before doing so, it is also worth considering, as Stephen Houlgate does, that the problem with a Hegelian critique of Rawlsian liberal democracy is that it does not seek to meet Rawls on his own ground. After all, Rawls' goal is ultimately practical in that he seeks to identify the principles of justice that can be agreed on by the reasonable citizens of a modern and diverse democratic state. Given the fact of reasonable pluralism and the need for stability, "[t]here is no need to seek an account of justice that is free or true . . . because, even if one were found (for example, by Hegel), it could not provide a basis for agreement among citizens of fundamentally different philosophical views." See Houlgate, *supra* note 158 at 262.

171 Robert A. Dahl, *On Political Equality* (New Haven & London: Yale University Press, 2006) at ix.

172 Dahl takes as a starting point that the ideal of democracy presupposes that political equality is desirable. More to the point, this view is itself premised on "the moral judgment that all human beings are of equal intrinsic worth, that no person is intrinsically superior to another, and that the good or interests of each person must be given equal consideration." See *ibid.* at 1-2 and 4.

173 *Ibid.* at 9: this may parallel my distinction between electoral deliberation and decision-making.

suffrage" has itself never been adequately explained. In fact, "the franchise is restricted in every democratic political system."[174] However, while the scope of democracy may (or may not) be ambiguous at its edges, it is clear that democracy is predicated on the underlying legitimacy of the mode of representation through which it is manifested. In scrutinizing the legitimacy of the rival presumptive or relative equality interpretations of the right to vote, we would do well then to separate the notion of universal suffrage from the normative issue of the fairness of the distribution of voting power across a population.[175] As Robert Goodin notes in this vein, impartiality is a necessary condition of both democracy and justice, but is itself a sufficient condition of neither. The point of ensuring an expansive franchise (that is, the historical progression of universal suffrage) is to attempt to ensure that a wider range of preferences is represented in the legislature.[176] But now that universal suffrage has been more-or-less attained, it seems to contradict the point of universal suffrage to systematically give certain preferences special attention. Universal suffrage is consistent with the representation of people and not their interests; giving women extra-weighted votes today (to better ensure the representation of their preferences) is as bad an idea as it once was to give extra-weighted votes to property-owning white males. And if women — sufferers of historic discrimination which in some ways and places continues into the present — should not have extra-weighted votes, then why should rural voters or specific minority or community groups have them?[177]

Moreover, legitimacy itself does not necessarily connote efficacy. As Levinson points out, if the goal of elections is simply to select wise persons to represent society in the exercise of its collective judgment, then there is no basis for the claim that the ability to select such persons depends on population.[178] While this statement merely implies that legitimacy and efficacy are separate considerations in evaluating an electoral system, it does raise the interesting question of whether enhancing the representation of certain interests (such as those of rural voters or select minority groups) provides for better public policy than would representation by population.[179] Following Alexandra Kelso, we can say that the exercise of power by our elected representatives is

174 See Ludvig Beckman, "Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy" (2007) 15 Democratization 29 at 30. Beckman points to the exclusion of resident aliens, prisoners, the mentally impaired and children in the world's democracies.

175 *Ibid.* at 41.

176 Robert E. Goodin, "Democracy, justice and impartiality" in Keith Dowding *et al.*, eds., *Justice & Democracy* (Cambridge: Cambridge University Press, 2004) 97 at 101 and 108.

177 See Pal & Choudhry, *supra* note 29 at 7.

178 Levinson, *supra* note 2 at 1294.

179 I submit that it does not. See Studniberg, *supra* note 8; see also Choudhry, *supra* note 27.

legitimate "to the extent that it conforms to established rules, the rules can be justified with reference to beliefs shared by both dominant and subordinate, and there is evidence of consent by the subordinate to the particular power relation."[180] I argue that presumptive equality can meet this definition better than relative equality.

To see this, I shall consider the (close) analogy to John Stuart Mill's famous plural voting scheme. As Steven Wall does, let us take as a premise that on those many matters of public policy where there might be reasonable disagreement, citizens should vote to express their preferences and to further their own interests.[181] A "well designed" version of Mill's unequal ballots would arguably meet two criteria: (i) it would include a procedure for deciding which types of voters obtain enhanced representation, where type refers to the various countervailing interests considered under relative equality (such as communities of interest, minority representation, community history, or geography); and (ii) it would feature "equality of outcomes" such that the scheme does better than alternative institutions (such as those based on presumptive equality) in producing outcomes that treat citizens with equal regard. If these criteria are met, only then can relative equality's unequal votes (which, after all, amount to giving differently weighted ballots to certain groups of voters) be described as legitimate.[182]

With this in mind, let us consider plural voting in Rawls' own terms. Here Pogge notes that Rawls explains that his first principle of justice should not guarantee the fair value of all of the basic liberties. If it did, such a requirement would serve to rule out those inequalities that improve all socioeconomic positions.[183] The ready example of this type of inequality, which actually improves overall welfare, is some form of affirmative action. It is possible to push back against Rawls here and ask why affirmative action could not apply to the core political liberties — such as the right to an equal vote — that Rawls places at the top of his scheme under his first principle of justice? Here we turn, following Pogge, to Rawls' treatment of Mill's plural voting for the educated citizenry. "Rawls holds that such an inequality 'may be perfectly just' if, by improving the outcomes of political decision making, it renders more adequate the extent or security of other basic liberties."[184] The test for Rawls,

180 Alexandra Kelso, "Reforming the House of Lords: Navigating Representation, Democracy and Legitimacy at Westminster" (2006) 59 Parliamentary Affairs 563 at 565.

181 Steven Wall, "Democracy and Equality" (2007) 57 The Philosophical Quarterly 416 at 419.

182 For the parallel, see Wall, *ibid.* at 426.

183 Pogge, *supra* note 138 at 93.

184 *Ibid.* at 98, quoting *Theory*, *supra* note 10 at 205.

then, is whether, from "the perspective of those who have the lesser political liberty," we can show that they gain more than they lose from the dilution of their vote in terms of their basic liberties.[185] If this is the test, does it favour the relative equality interpretation of the right to vote? I argue that it does not.

The problem in applying the test just specified to Canada's weighted voting scheme is that relative equality does not meet the identified criteria. Following Rawls' analogy, we cannot say here that "[t]he passengers of a ship are willing to let the captain steer the course, since they believe that he is more knowledgeable and wishes to arrive safely as much as they do. There is both an identity of interests and a noticeably greater skill and judgment in realizing it."[186] After all, what is at stake is not giving the educated more votes (as Mill would do), but rather giving those extra votes to nonurban residents, certain (but not other) minority groups, or some communities (but not others). First, note that there is seemingly no objective or principled way to go about deciding which groups gain this extra voting advantage. But more to the matter at hand, even assuming that there were such a fair and reasonable method, it does not go to the "greater skill and judgment" of the groups gaining extra voting power. In fact, there is none of the required commonality of public purpose at all lying behind giving rural residents, say, more voting power because the very purpose of effective representation is to give enhanced expression to certain interests at the expense of others. Following Pogge, this is to say that those who suffer vote dilution are not better off for having given enhanced representation to the groups which gain by it. So while Rawls leaves open the prospect that plural voting for the educated could theoretically adhere to the conditions required by his principles of justice, it becomes clear that plural voting for certain interest groups does not.

Amy Gutmann similarly observes here that for Rawls, the political and personal liberties are co-original, not substitutable, and together take priority over other considerations of justice — so says Rawls' first principle of justice.[187] In the case that conflict emerges among basic liberties, Rawls' theory of justice as fairness is at least open to an arrangement that "would limit some basic liberties for all citizens for the sake of more fully realizing other basic liberties."[188] And more directly to the matter at hand, it would be possible in

185 *Ibid.* (*Theory* at 203).

186 *Theory, ibid.* at 205.

187 Amy Gutmann, "Rawls on the Relationship between Liberalism and Democracy" in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003) 168 at 180.

188 *Ibid.* at 181.

this way "to justify limits on political participation — and the extent of the principle of participation — in order to secure freedom of conscience and religion for all persons more fully."[189] But Gutmann emphasizes that, for Rawls, a constitution may (rather than must) remove or limit the fundamental liberties in this way. "A bill of rights," for example, "may limit political liberty if and only if this can be publicly shown to be a reasonable way of equally protecting the value of the entire set of basic liberties for all citizens."[190] When two liberties conflict, whether those of the "ancients" or of the "moderns," the method to resolve the situation will depend on an assessment of the relative importance of the particular liberties at issue for representative persons in the overall scheme of equal liberties. In this way, the "justification for limiting political participation would therefore be to protect the other basic freedoms."[191] But if this is the standard to be met, it becomes clear that a relative equality interpretation of the right to vote cannot reach it, as relative equality would not limit the basic liberty "of *all* citizens" to be traded off for the sake of all "more fully realizing other basic liberties," which may, again, be to say that *society* as a whole is not better off. Looking beyond even this, what is at stake is restricting the representation of many people to better procure the representation of certain interests. This is surely a raw deal for those who receive less than a full vote and have seemingly nothing to show for it.

Liberalism provides a strong counter to the communal interpretive approach to voting. As Thomas Nagel explains, the original impulse of liberalism is the core conviction of the moral sovereignty of each individual. Liberalism, as a result, implies the existence of limits on the ways in which the state can justifiably restrict the freedom of individuals, even though the state must have a monopoly of force in order to serve society's collective interests and to preserve the peace.[192] But the "other great moral impulse of liberalism," Nagel asserts, is "a hostility to the imposition by the state of inequalities of status, [which] overlaps at its point of origin with the protection of liberty since both of them mean that slavery, serfdom, and caste are ruled out." More relevant for present purposes, however, is that liberalism's opposition to inequality also extends to more positive requirements, including equal citizenship for all groups, universal suffrage, and the right of all citizens to hold of-

189 *Ibid.* at 181-2, citing *Theory*, *supra* note 10 at 228.

190 *Ibid.* at 182.

191 *Ibid.* at 183.

192 Thomas Nagel, "Rawls and Liberalism" in Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003) 62 at 63-4:"[f]reedom of religion, of speech, of association, and of the conduct of private life and the use of private property [therefore] form the core of the protected liberties."

fice — "in short, [to] political and legal equality as a general feature of public institutions."[193] Rawlsian liberalism, in particular, is striking for the degree to which it follows both of these moral impulses and for the way in which it connects them: "Rawls interprets both the protection of pluralism and individual rights and the promotion of socioeconomic equality as expressions of a single value — that of equality in the relations between people through their common political and social institutions."[194] For Rawls, such liberal dualism is inherent in democratic governance.

The Stability of One Person, One Vote

David Hume once mused that "Harry IV and Harry VII of England had really no title to the throne but a parliamentary election; yet they never would acknowledge it, lest they should thereby weaken their authority. Strange if the only real foundation of all authority be consent and promise."[195] But in twenty-first century Canada, the basis for the population's consent to a democratic scheme under which some groups receive more clout than others will come under increasing tension so long as parliamentary representation is premised on anything other than voter equality. Canada is becoming progressively more urban and its population increasingly made up of "visible minorities"; given this reality, legislatures sooner or later will have to confront the effect of population growth and demographic change on representation. In this way, the need for public justification, when viewed across generations rather than at a fixed time, raises the problem of stability. "Stability may be viewed as a wholly practical matter. In this case, if a conception of justice fails to be stable, it is futile to try to realize it. But as long as the means of persuasion can be found, the conception can be viewed as stable."[196] But justice as fairness goes beyond this. Rawls affirms that as a liberal conception, justice as fairness must not only avoid futility. The relevant task is not to bring others who reject a conception to share it or to at least act in accordance with it by sanctions if necessary, "as if the task were to find ways to impose that conception once we are convinced it is sound. Rather, as a liberal political conception, justice as fairness is not reasonable in the first place unless it generates its own support in a suitable way by addressing each citizen's reason, as explained in its own framework."[197]

193 *Ibid.* at 64.

194 *Ibid.* at 65.

195 See "Of the Original Contract" in Charles W. Hendel, ed., *David Hume's Political Essays* (New York: The Liberal Arts Press, 1953) at 49.

196 *Restatement, supra* note 17 at 185.

197 *Ibid.* at 186.

Returning to Habermas, "the philosopher can at most attempt to anticipate in reflection the direction of real discourses as they would probably unfold under conditions of a pluralistic society. But such a more or less realistic simulation of real discourses cannot be incorporated into the theory in the same way as the derivation of possibilities of self-stabilization from the underlying premises of a just society."[198] If unequal voting power is accepted, then future disputes that arise on serious issues of public policy may be decided from an unbalanced position in that minority voters would have disproportionate sway over the majority. Given that one cannot anticipate the policy issues that may arise in the future, it makes sense not to preempt the judgment of what Parliament may decide, were it composed on the basis of one person, one vote.

This is to say that progress may be hindered by artificially inhibiting the precept of voter equality in Canadian democracy. What free and equal citizens *decide* is in the best interest of the country as a whole otherwise may be restrained unduly — or, more notoriously, citizens may not even get the chance to manifest public reason in fair debate on the issues of the day because the electoral system favours some voters over others, and those who benefit from an unequal voting system are inclined to enact policies that will entrench their advantage over time.[199] By comparison, when considered from the original position, strict voter equality becomes attractive.

Importantly here, Rawls distinguishes between neutrality of aim and neutrality of procedure. The former term means that institutions and policies can be said to be neutral in their design in that they can be generally and publically endorsed by citizens. Procedural neutrality, on the other hand, refers to a procedure that can be justified or legitimated without appeal to moral values at all, but may be supported instead by neutral values such as impartiality and consistency. Justice as fairness, Rawls observes, is not procedurally neutral as its principles of justice are substantive and its corollary conceptions of political society and the person express a great deal more than mere procedural values.[200] In this way, Rawls also implies that a one person, one vote conception of the right to vote is substantive and not simply procedural. This is to

198 Habermas, *supra* note 106 at 121.

199 Allen Buchanan remarks that "[t]hus Locke is best interpreted as arguing that it is not the government, but one's fellow citizens to whom one owes obedience (in a properly constituted polity). On this view, where political authority exists the right to be obeyed is owed to those in whose name and on whose behalf it is wielded, rather than those who actually wield power." See "Political Legitimacy and Democracy" (2002) 112 Ethics 689 at 691-2.

200 *Restatement, supra* note 17 at 153.

say that an insistence on representation by population has solid foundations in political philosophy.

That the foundation for the right to vote goes beyond an appeal to neutral values is not particularly surprising. As Courtney explains, when elections operate as they should they "contribute to a sense of citizen efficacy in the larger political system. Having cast a vote in a free and democratic election, a citizen should, as the election day draws to a close, believe he or she has made a contribution to the governance of society. This in many ways is the most elusive and intangible of purposes served by democratic elections."[201] So is the right to vote important in a participatory sense, even though it is not strictly procedural.

Returning to what Rawls understands by a political conception of justice, it is interesting to explore why a tolerance for voter inequality (which exists under any understanding of the right to vote that does not emphasize one person, one vote) places comprehensive or at least illiberal political conceptions ahead of liberalism. A political conception of justice is "worked out to what we may call the 'basic structure' of a modern constitutional democracy . . . By this structure I mean a society's main political, social and economic institutions, and how they fit together into one unified scheme of social cooperation."[202] In contrast, a conception is "comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character and the like, that are to inform much of our conduct (in the limit of our life as a whole)."[203] Rawls explains the implications of the distinction quite clearly: under a liberal political conception, "[q]uestions of political justice can be discussed on the same basis by all citizens, whatever their social position, or more particular aims and interests, or their religious, philosophical or moral views." Moreover,

> [j]ustification in matters of political justice is addressed to others who disagree with us, and therefore it proceeds from some consensus: from premises that we and others recognize as true, or as reasonable for the purpose of reaching a working agreement on the fundamentals of political justice. Given the fact of pluralism, and given that justification begins from some consensus, no general and comprehensive doctrine can assume the role of a publicly acceptable basis of political justice.[204]

201 And, relevant to part of the later discussion of the Rawlsian rationale for one person, one vote is Courtney's further claim that "[h]ow citizens see their electoral contribution to the larger process of governance will in large measure shape their individual perceptions of the responsiveness and inclusiveness of the system:" See *Elections*, *supra* note 39 at 7.

202 John Rawls, "The Idea of an Overlapping Consensus" (1987) 7 Oxford J. Legal Studies 1 at 3.

203 See Rawls, *ibid.* at 3, footnote 4.

204 *Ibid.* at 6.

In considering the case for equal representation, it is worth returning to the question of the point in taking into account minority or community interests when revising electoral boundaries. The response must be to provide *some* ascertainable groups that are geographically concentrated with an improved ability to acquire representation in Parliament. In other words, recognition of communities of interest, or community history, or minority representation is a form of discrimination. The question then becomes whether this discrimination is justified. It is worth noting that the assumption has long persisted in electoral systems based on territorially delineated ridings (that is, a geographic basis of representation) that it is somehow more difficult for a member of the legislature to represent rural voters and so to help alleviate this, fewer of them are packed into any given riding. This assumption was featured in the majority decision in the *Saskatchewan Reference.* But at its base, the Supreme Court's position on effective representation insists that some people need or deserve more representation than others. This arguably cannot form part of a political conception of the good, especially given the definition of a comprehensive conception noted above. It can, however, be a partially comprehensive conception of the good — holding that there are characteristics other than the base equality of citizens that deserve consideration in devising a system of representation in a legislature. Alternatively, effective representation may be thought of as a political conception of the good, though it is certainly not a liberal one, at least in Rawls' sense.

Rawls remarks that when a liberal political conception regulates the basic structure, it meets three essential requirements found in a stable constitutional democratic regime. First, given the fact of reasonable pluralism, a liberal conception "meets the urgent political requirement to fix, once and for all, the content of basic rights and liberties, and to assign them special priority." Fixing the content of political rights and freedoms effectively takes them off of the political agenda and in so doing puts them beyond any transient calculus of social interests, opting instead to establish the terms of social cooperation firmly on a footing of mutual respect.[205] Second, under the ideal of public reason, "[i]t is highly desirable that the form of reasoning a conception specifies should be, and can publicly be seen to be, correct and reasonably reliable in its own terms." Rawls further notes here that any agreement on a political conception of justice is of no use without a matching agreement on "guidelines of public enquiry and rules for assessing evidence."[206] Third, when operating under a liberal political conception, the basic institutions of society — which

205 *Ibid.* at 19-20.
206 *Ibid.* at 20.

includes one person, one vote as a constitutional essential — "encourage the cooperative virtues of political life," such as are evident in reasonableness and a sense of fairness.[207] In this way, a political conception of justice secures stable social unity by way of attainment of an overlapping consensus among citizens. When applied to the problem of the interpretation to be given to the right to vote and the question whether it necessarily implicates a strict form of voter equality, Rawls' notion of an overlapping consensus in a constitutional democratic regime implicates the well-known political idea of the general will. "What makes the will general is less the number of voters than the common interest uniting them."[208] One person, one vote is a constitutional essential not for its (quantitative) insistence on formal equality, but rather because of its (qualitative) contribution to a lasting sense of social cooperation.

Rawls repeatedly emphasizes in his later works that the distinction between political and other more comprehensive doctrines is practically very important. Rawls presents the political conception of justice as a freestanding view in that it is neither presented as, nor derived from, one or more comprehensive doctrines.[209] The contrast between political and comprehensive doctrines is made most clear when it is considered that the distinction is a matter of scope; as might be expected, the wider the range of subjects to which a conception applies, the more comprehensive it is.[210] But Rawls' bottom line is potent in its implications: any type of ongoing shared understanding of a comprehensive doctrine of any kind requires the oppressive use of state power.[211] Critically, political society is not an association. People do not enter into it voluntarily. How then can the citizens of a democracy be free? Rawls' response is to regard political society as a fair system of cooperation extending over time from one generation to the next, where those engaged in cooperation view themselves as free and equal, living complete lives.[212] Accordingly, in order to be stable, a political conception of justice must generate its own support and the institutions to which it leads must be self-enforcing, at least under reasonably favourable conditions. For Rawls, this means that citizens accept existing institutions as just and have no desire to renegotiate the terms of social cooperation: "In a democratic regime stable social cooperation rests

207 *Ibid.* at 21.

208 Jean-Jacques Rousseau, *The Social Contract* (1762) at book II, chapter IV as quoted in Avigail Eisenberg, "When (if Ever) Are Referendums on Minority Rights Fair?" in David Laycock, ed., *Representation and Democratic Theory* (Vancouver: UBC Press, 2004) 1 at 8.

209 *Political Liberalism*, *supra* note 13 at 12.

210 *Ibid.* at 13.

211 *Ibid.* at 37.

212 *Restatement*, *supra* note 17 at 4.

on the fact that most citizens accept the political order as legitimate, or at any rate not seriously illegitimate, and hence willingly abide by it."[213]

Echoing many earlier political philosophers, Rawls observes that political power is indeed always coercive. But under a constitutional regime, political power can also be said to be the collective power of free and equal citizens.[214] For Rawls, the idea of political liberalism actually arises from this source. If one starts with this understanding of political power and then adds the fact of reasonable pluralism in a democratic regime, a problem of legitimacy emerges. A legitimate regime, for Rawls, is one in which its political and social institutions are themselves justifiable to all citizens with reference to their sense of reason, both practical and theoretical.[215] The question becomes how can citizens legitimately exercise that coercive power?[216] As should be clear by this stage, political liberalism replies that the "exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." This, then, is the liberal principle of legitimacy.[217] It entails a prohibition on the majority terrorizing the minority, but also a prohibition on the minority suppressing the majority. Rawls thus indirectly restates his conclusion on the precept of voter equality in this way: "Democracy involves . . . a political relationship between citizens within the basic structure of the society into which they are born and within which they normally lead a complete life; it implies further an equal share in the coercive political power that citizens exercise over one another by voting and in other ways."[218] As Janet Ajzenstat sums up, "if Parliament is to represent all, if there is to be free and full deliberation in the Legislature, no party — that is, no *part* of the people — should be able to claim an advantage under the Constitution."[219]

An insistence on a comprehensive doctrine in place of a political one is thus patently unreasonable as an organizing precept. This would also seem to hold if the organizing precept were a partly illiberal political conception (say with regard to tolerance for voter inequality). As Rawls notes, "people are unreasonable . . . when they plan to engage in cooperative schemes but are

213 *Ibid.* at 125.
214 *Ibid.* at 40.
215 *History*, *supra* note 79 at 13.
216 *Restatement*, *supra* note 17 at 40-1.
217 *Political Liberalism*, *supra* note 13 at 217.
218 *Ibid.* at 217-8.
219 Ajzenstat, *supra* note 125 at 74.

unwilling to honor, or even to propose, except as a necessary public pretense, any general principles or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow."[220] One can now see how a deviation from voter equality as the basic operating principle is repressive. Although the Supreme Court, in favouring effective representation, pays some tribute to the ideal of *relative* voter equality, it essentially posits the mandatory aspect of nonpopulation-based loci of representation. And those who benefit from the present electoral map in use in parliamentary and legislative elections in Canada can claim fealty to the idea of voter equality without actually undermining their over-representation in Parliament or provincial legislatures. Or, as Rawls puts it, those who benefit from the status quo and insist on the truth of their answers to fundamental political questions are seen by others to be simply insisting on their own beliefs. More notoriously, those who so insist on their beliefs "impose their beliefs because, they say, their beliefs are true and not because they are their beliefs."[221] To draw this thought to a close, Rawls suggests that we look at the case from others' point of view. Citizens, of course, are free and equal and have an equal share in the corporate political and coercive power of society. Accordingly, there is no reason why any citizen or association of citizens should have recourse to the state's police power to decide constitutional essentials or basic questions of justice, even if someone's comprehensive (or partly illiberal political) doctrine suggests it. "[W]hen equally represented in the original position, no citizen's representative could grant to any other person, or association of persons, the political authority to do that."[222] It seems perverse, then, to arrange the rules of the electoral game such that some citizens are given primacy over others.

That minority groups should not receive extra-weighted votes does not mean that they are to be subjected to the tyranny of the majority — except, of course, on the basis of public reason and justification. But minorities must not to be sought out and punished qua minorities. Rawls' later works are clearer on this point. The role of judicial review in a constitutional democratic society is a good illustration.[223] As Samuel Freeman recounts, while Rawls' constitutional democracy provides for equal political rights and majority rule, it also provides for other basic liberties to all citizens, equality of opportunity (in some form), and affirms each person's entitlement to a social minimum. "It is

220 *Political Liberalism*, *supra* note 13 at 50.

221 *Ibid.* at 61.

222 *Ibid.* at 62.

223 See *e.g.*, Rawls' introduction to his *History*, *supra* note 79 at 4-5.

the proper role of a democratic government to promote these ends of justice as specified in a democratic constitution." Majoritarian legislative procedures afford the means for doing this. "But when ordinary democratic procedures, for whatever reason, consistently fail to promote the requirements of a just democratic constitution, it is democratically legitimate to impose limitations on these procedures (so long as they effectively remedy the injustice)."[224] Freeman emphasizes that this justifies constraints on majority rule such as checks and balances, separation of powers, and a bill of rights. To the criticism that judicial review is antidemocratic, then, Rawls would reply that it is a mistake simply to take democracy as a voting procedure or government decided by majority rule. Indeed, it is possible that majority rule itself acts in ways that seek to contravene the constitutional essentials of democracy. In *Political Liberalism*, Freeman notes, Rawls extends this to explain why a supreme court might be one of the institutions set up to protect the basic structure.[225] But where this form of protection is adopted, "the political values of public reason provide the Court's basis for interpretation."[226]

VI. CONCLUSION

Justice as fairness holds that the precept of voter equality is a constitutional essential and as such forms part of the basic structure of a well-ordered democratic society. Although Rawls' conclusion that all voters should be treated equally in a democracy is clear, a rationale for this position has been less clear. In this article, I have attempted to make the case that a Rawlsian understanding of the right to vote insists on an electoral system that features voter equality. In the last Part of this article, I noted that judicial review forms part of the stable of mechanisms by which unadulterated majorities are restricted in their ability to pre-empt minority groups. As Rawls explains, "the Constitution puts certain fundamental rights and liberties beyond the reach of ordinary legislative majorities."[227] Among these is the right to an equal vote.

In his *Restatement*, Rawls explains the nature and content of justice for a well-ordered society.[228] This article has explored the contribution that a

224 Samuel Freeman, "Political Liberalism and the Possibility of a Just Democratic Constitution" (1994) 69 Chicago-Kent Law Rev. 619 at 659.

225 *Ibid.* at 660-1.

226 *Political Liberalism*, *supra* note 13 at 234.

227 *History*, *supra* note 79 at 4.

228 See *Restatement*, *supra* note 17 at 13: "[w]e ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable under the circumstances of justice and so under realistic, although reasonably favourable conditions."

Rawlsian account of a rationale for voter equality can make to the notion of democratic society. To accomplish this aim, it was first useful to examine how Rawls' famous device of the original position, with its veil of ignorance and the ensuing two principles of justice, lead to a basic constitutional structure that includes the precept of voter equality. This examination revealed that the right to vote is substantive and not merely procedural, but is nonetheless a primary mechanism of citizen participation in democratic society. With this recognition in place, it became possible to contemplate how one person, one vote fits in with the idea of public reason and the need for public justification. Public reason also allows for stability, as generations over time are able to enjoy their fundamental liberties on a platform of equality. In this way, one person, one vote can be seen as a legitimate operationalization of the right to vote in a democratic society. Such a legitimation of the primacy of the individual voting citizen does not mean that the majority can act unfettered against the minority. Thus, when insisting that each electoral district be drawn as close as is reasonably possible to include the same number of voters, racial or ethnic minorities, or those living in isolated rural areas, should not fear that the majority's public policy agenda is antiethnic or antirural. The constitutional democratic state includes mechanisms, such as judicial review, that protects against such unwarranted intrusions into citizens' private or nonpublic lives. Instead, when contemplated in the Rawlsian sense, the implementation of one person, one vote allows for full and frank public debate about issues of common concern, along with decisions to be made by all people on a genuine basis of equality. "In this way, justice as fairness is realistically utopian: it probes the limits of the realistically practicable — how far in our world a democratic regime can attain complete realization of its appropriate political views — one might call this a notion of democratic perfection."[229]

This conception of full public debate — as a manifestation of public reason — can be contrasted to critiques of liberalism. As recounted by Rawls, one such Hegelian criticism holds that a liberal society "has no universal, collective goal but exists only to serve the particular and private ends of its individual members."[230] Although all persons have their own private ends in mind, these ends are not shared. Under this view of liberalism, the state's institutions provide for a common end only to the extent that they are a means to each individual's own separate pursuits. For the purposes of this critique, the institutions of the liberal democratic state "do not specify a form of public po-

229 *Ibid.* at 13.

230 See John Rawls, *Lectures on the History of Moral Philosophy*, in Barbara Herman, ed. (Cambridge, Mass.: Harvard University Press, 2000) at Hegel Lecture II, section 5 at 365.

litical life that is to be seen by citizens as right or just in itself and from which they are moved by their sense of justice to act." As Hegel emphasizes, Hobbes' society of the Leviathan is an example of such a society.[231]

Rawls suggests in response that it is not clear that liberalism (and especially a liberalism of freedom such as that suggested by justice as fairness) fails to recognize and account for this critique of the overall ambition of the liberal democratic state. Rawls instead contends that under any liberalism of freedom citizens understand that the liberal society is in fact a society premised on the idea of reason: "[C]itizens have the *very same end* of securing for other citizens, as well as for themselves, their basic constitutional rights and liberties."[232] Moreover, as Rawls explains, this shared end is essentially characterized by reasonable principles of right and justice; political life in such a liberal society, is both reasonable and fair. And, of course, it accords with citizens' interests and their ability to pursue their own ideas of the good to have their rights and liberties respected, although respecting these is exactly what citizens owe each other as the shared end of their liberal democratic society. "It is incorrect to say that in a liberalism of freedom the state has no publicly shared common ends but is justified entirely in terms of the private aims and desires of its citizens."[233] This article has tried to make the case (admittedly and unapologetically a very Rawlsian case) that for the liberal democratic state to be able to rebut this criticism, it needs to be based on the fundamental notion of voter equality.

In the introduction to his *Lectures on the History of Political Philosophy*, Rawls observes that while progress has been made in the world's liberal democracies over the last few centuries, it remains the case at the dawn of the twenty-first century that "[a]ll existing allegedly liberal democracies are highly imperfect and fall far short of what democratic justice would seem to require."[234] Because the basic democratic notion of voter equality — one person, one vote — still does not exist in Canada (indeed it never has), the Canadian version of constitutional democracy remains very much imperfect in this way. But, prompted by recent developments, the time may soon be ripe for the Supreme Court of Canada to revisit the meaning given to the *Charter*'s section 3, and when it does so, the Court would well be advised to look to the remarkable theory of justice presented by John Rawls in support of a presumptive-equality interpretation of the right to vote.

231 *Ibid.*
232 *Ibid.* [emphasis in original].
233 *Ibid.* at 366.
234 *History*, *supra* note 79 at 11.