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FAIR ENOUGH? REDISTIBUTIONS IN AUSTRALIA

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Redrawing electoral district boundaries is a task that has political implications. Every electoral district includes some electors and excludes others, and every change to a district's boundary makes it safer or more marginal at the next election. So who draws the lines, what they take into account when they draw the lines, and how they decide whether the new map is good enough - all these things have implications for the voters as well as for candidates, elected members and the parties.

In both Australia and the United States elections are tight contests between parties that have roughly equal support, so the parties in both of our countries take redistributions very seriously. What seems to be quite different is what we ask of a redistribution – what we think a redistribution is *for*.

In both countries, official websites say that redistributions are conducted to adjust electoral district boundaries for population changes. But it is worth remembering why *that* is important. Largely in the 1960s and 1970s, electoral reform campaigns in both of our countries managed to outlaw malapportionment. Malapportionment involves drawing more districts, with relatively few electors in them in areas where MY party has strong support and just a few districts with many electors in them in areas where YOUR party has strong support. With the same number of votes my party wins more districts than yours, and I win government. Those reformers argued that the electoral system should not provide a party with an advantage going into an election.

In the British parliamentary tradition, control over the operation and constitution of the parliament rested with the parliament itself but the rise of party government transferred that control to the party with a majority in the House. In Australia, governments drew electoral districts or gave the job to advisory commissions with criteria that would predetermine the outcome. Either way, the maps were malapportioned, and if population change moved in the right direction the effect could be ramped up by delaying scheduled redistributions or just not approving the new maps. Non-Labor control of Upper Houses meant that it was generally Labor that was disadvantaged, and the Australian push for reform was essentially a Labor project.

In the US, malapportionment disadvantaged Republicans in some states and Democrats in others and when reformers found themselves unable to achieve reform through the legislatures they turned to the courts. Initially the US Supreme Court rejected redistribution cases on the grounds that political questions were not justifiable, but it reversed this view in

1962[1], and two years later it determined that malapportionment was unconstitutional. State and congressional electoral maps in 50 states were suddenly invalid and over the next few years all were redrawn with population tolerances within 15% of the state average, and have since been redrawn every ten years when new census data become available.[2] When majority parties couldn't use malapportionment to provide an electoral advantage, they switched to gerrymandering. They kept districts within tolerance and then either over-concentrated their opponents' support in a few ultra-safe districts or dissipated that support between several districts of their own safe districts. They made their opponents districts more marginal - within reach of a good campaign - and made their own districts less risky. Many US electoral maps are still drawn with more than enough bias to win elections, and the most egregious maps have been appealed. US Courts have invalidated the worst examples on the grounds that a map could be drawn with districts that were closer to population equality; these judgements have gradually narrowed the population tolerance that will keep maps above suspicion, to the extent that 26 US states have just drawn congressional district maps that have no deviation at all in their census population counts, or just one person.[3]

The Supreme Court can no longer use population grounds to invalidate maps with egregious bias, so it will need to return to the question of discerning partisan bias in a map. The Court has recognised in the past that redistricting has a political effect and as Professor Nicholas Stephanopoulos has pointed out it has not been able to derive a standard from the Constitution that would differentiate between egregious bias and the kind of advantage that is expected.[4] The Court has considered the problem, its door remains open, and the academic community seems to agree that when the Court does make a determination it is likely to include a standard along the lines of partisan symmetry. (This standard is easy for Australians to picture – partisan symmetry requires that the parties will have roughly equal proportions of their support in safe and marginal districts so imagine Mackerras's pendulum with the distribution of seats on the left hand side reflected on the right.)

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[1] *Baker* v *Carr*, 369 U.S. 186 (1962).

[2] The cases were *Wesberry v Sanders*, 376 U.S. 1 (1964) (congressional districts) and *Reynolds* v *Sims,* 377 U.S. 533, 579 (1964) (legislative districts).

[3] Even though the average district size varies between states from about 537,000 people to about 784,000. *2010 NCSL Congressional and State Legislative Redistricting Deviation Table* available at http://www.ncsl.org/legislatures-elections/redist/2010-ncsl-redistricting-deviation-table.aspx

[4] *Davis v Bandemer,* 478 U.S. 109, 123 (1986); *Vieth* v *Jubelirer*, 541 U.S. 267, 290 (2004); *League of United Latin American Citizens (LULAC) v Perry*, 548 U.S. 399 (2006).

The difficulty for the US Supreme Court - and this is the nub of Nicholas's work - is to find criteria that will work in practice. The Court may also mandate *a process* – who draws the maps and with what degree of public accountability and transparency. Meanwhile there has been some change. Thirteen states have delegated redistricting to commissions with varying degrees of independence, and there are reform groups with significant levels of public support who advocate for two things: independent commissions and criteria that will prevent a map being adopted if it advantages one party.

Australia's one vote, one value reformers were encouraged by the US court decisions, but their campaigns were won in the parliaments, not the courts. More importantly, when Australian parliaments gave up malapportionment they gave the whole redistribution task to independent bodies. They legislated for a process and criteria that would make the new maps fair to both parties, and gave the commissions the power to bring their maps into effect. The parties then looked outside the electoral system for ways to gain an advantage at future elections. So whereas there is still some debate *in the US* about what can be expected from redistributions, when *Australian* parliaments legislated their one vote one value reforms they agreed that the electoral system should no longer be used to provide an advantage to a party before the election had even begun, and redistributions were for keeping the level playing field level.

Australia's current redistribution process is widely recognised as independent and fair. The commissions' structures keep them independent of the parties and their authority to order maps into effect keeps them independent of the parliament. Their process is transparent and accountable, and redistributions are triggered frequently and automatically – in four jurisdictions they take place after each election. Elector tolerances are relatively tight and in several jurisdictions they apply when it counts - at the time of subsequent elections. The criteria generate relatively meaningful districts and the outcomes are regularly accepted by the parties and the public.

South Australia has an extra criterion. It asks not just for a fair redistribution *process* but for a map that will *operate* in a fair way – translate votes into seats without providing advantage to either party at a subsequent election. After malapportionment had been addressed there was a remaining bias because Liberal votes were over- concentrated in a series of very safe seats so even if the parties had the same level of support across the state Labor would always win

more seats.[5] The fairness clause was adopted to prevent bias as well as malapportionment. At the time, it was assumed that the parties ran campaigns that would be roughly equally effective, so a fair map could be defined as one that would translate the votes of a party with the support of a majority of voters into a majority of seats. The clause is section 83(1) of the state Constitution Act and it reads:

In making an electoral redistribution the Commission must ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed.[6]

Whereas the parties had always informally assessed how a new electoral map would be likely to perform, now the commissioners would need to make their own formal assessment. That meant adopting or developing measures, and the methodology has been central at hearings for each redistribution. The clause has recently survived a direct challenge. At the state election of 2010 Labor ran an extremely effective marginal seats campaign while the Liberals won extra votes in seats they already held or will never hold. So although the Liberals won the support of a majority of voters across the state their extra votes did not translate into enough extra seats to win government. They judged that the fairness clause had not worked and had prevented them from winning government, and using the traditional measure of partisan bias the election result did indicate the map had somehow generated a four-seat bias against the Liberals. But before the election no-one had considered the map to be biased: Liberal support was no more concentrated than Labor support and there were plenty of marginal districts to keep the map responsive. Also if the map was assessed against the 2010 Legislative Council ballot or against House of Assembly results from previous years, it was quite unbiased. The commission's problem was whether to trust that it had created a fair map, or recognise this apparent bias and adjust for it. The focus was on measures: what the Commission needed was a way to differentiate between bias caused by the overconcentration of one party's votes in a series of overly safe districts – which the Commission *should* adjust for – and the skewing effect of two campaigns that were differently effective – which the Commission

[5] E.g. SA, Electoral Districts Boundaries Commission, *1976 Report*, Government Printer, Adelaide, pp. 12-13. SA, Electoral Districts Boundaries Commission, *1983 Report*, Government Printer, Adelaide, p. 10.
[6] *Constitution Act 1934* (SA) s. 83(1)

should not adjust for. We developed measures to do that, all parties have accepted them and the clause remains intact.

For Professor Nicholas Stephanopoulos, Australia offers a chance to study how the aims of both of the US reform groups work in practice. In return he gives us an initial assessment of how well we are doing, and some tools to continue that assessment. If Australians think about redistributions at all, we believe that they are fair enough, but it is probably time we checked, and when we *do* we will need measures and a standard of this kind.