

Revising Constituency Boundaries in the United States and Australia: It Couldn't be More Different

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There are enormous differences in the way constituency boundaries for the national House of Representatives are revised in Australia and the United States. There is little similarity between the processes, which even go by different names—*redistribution* in Australia and *redistricting* in the United States. The personnel who do it, the procedures they follow, and the principles they employ are all very different, and so is the acceptance of the results. The process in Australia is widely viewed as nonpartisan and the results as fair. The process in the United States is widely viewed as partisan and whether the results are viewed as fair often depends on which party's lens they are examined through.

Redistricting in the United States is deeply politicized. It has been referred to as 'bare-knuckle politics' and a political 'blood sport.'¹ The process begins after House seats are reapportioned to the respective states based on their populations as determined by the census, which is taken in years that end in zero. The responsibility for boundaries of the new US House districts is placed with the states, and typically is done, at least initially, by the state legislatures.² The basic constraint on the design of districts is that, within

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¹ D. Rosenbaum, 2002, 'Fight Over Political Map Centers on Race', *New York Times*, 21 February 2002, and T. Aleinikoff and S. Issacharoff, 1993, 'Race and Redistricting: Drawing Constitutional Lines after *Shaw v. Reno*', *Michigan Law Review* 92 (December): 588.

² See M. McDonald, 2004, 'A Comparative Analysis of Redistricting Institutions in the United States, 2001-02', *State Politics and Policy Quarterly* 4 (Winter): 371-395.

each state, districts must be very close to equal in population, again based on the census counts. The formal criteria for locating boundaries vary from state to state, and what these criteria, such as contiguity, compactness, and respect for ‘communities of interest,’ actually entail is itself a matter of debate during the process.³ The most important referents, however, are incumbent protection and/or partisan advantage.

Courts are now a major player in the process as well, as legislative battles over lines are routinely replayed before judges. Litigation over the lines sometimes lasts a decade, until the process starts over again with a new count of the population, and new lawsuits. Judicial intervention, however, in no way minimizes the use of partisan referents in the design of districts, and now virtually encourages it. In the US it is frequently said, and believed, that ‘You cannot take the politics out of redistricting.’ The US Supreme Court shares this view, as it has said, ‘Politics and political considerations are inseparable from districting and apportionment.’⁴

Redistribution in Australia, in contrast, is largely depoliticized. It is viewed as essentially a quasi-judicial, or even bureaucratic, task that is performed without partisan referents. The number of seats to which each state and territory is entitled is determined by population. The redistribution processes and policies employed are based on the Commonwealth Electoral Act of 1918, as amended. The redistribution of seats within any state or territory is triggered after a set of constituencies has been in place for seven years, or the number of seats allocated to a state has changed, or when the voter registration in more than one-third of the districts in a state has exceeded the average district registration by more than 10 per cent for more than two months. The determination of the new boundaries is placed in the hands of small independent committees consisting of federal and state officials who hold specified appointed offices. New boundaries are initially proposed by a committee of two federal and two state

³ For more on the population equality and other criteria, see R.L. Engstrom, 2002, ‘The Post-2000 Round of Redistricting: An Entangled Thicket within the Federal System’, *Publius* 34 (4), 51-70.

⁴ *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

officials, and then, after public objections are registered, reviewed and maybe changed by an augmented commission consisting of two more federal officials.⁵

The equality principle is implemented by requiring districts to fall within defined ranges of voter registration, rather than population as in the US. There is a 10 per cent limit on how far districts may deviate from the average number of registered voters in a state's districts, and a more demanding requirement that the projected registration in each constituency, three and a half years later, deviates from the projected average by no more than 3.5 per cent. The formal rules for delineating constituencies are the same for all states and territories. These are to provide 'due respect' for 'community of interests,' 'means of communication and travel,' and 'physical features and area.' A fourth criterion, which is explicitly subordinate to the others, is to follow the boundaries of existing districts.⁶ While these rules are facially neutral they leave the commissioners with considerable discretion as to where to place the lines. The exercise of that discretion is expected to be, and widely accepted as, free of partisan referents. Most importantly, the boundary choices of the commissioners are not subject to parliamentary approval. The results therefore are widely accepted as fair, with those adversely affected sometimes grumbling publicly about the wisdom of the decisions, but hardly ever the integrity of the commissioners. And unlike in the US, the boundary decisions of the commissions are not subject to judicial review.

From an American perspective, Australia's success at depoliticizing this process is especially remarkable, given the differences in the party systems and governmental format between the two countries. Both use single-member districts to elect their House members, a system in which votes can translate into seats for parties very differently

⁵ Commonwealth Electoral Act (hereinafter CEA), secs. 59, 60, and 70. The redistribution committee typically consists of the Australian Election Commissioner, the Australian Electoral Officer for the state, and the Surveyor-General and Auditor-General for the state. The two people added to constitute the augmented commission are the Chairperson of the Australian Electoral Commission and the Australian Statistician.

⁶ CEA, sec. 67.

depending on the configuration of the constituencies.⁷ While both countries have competitive two-party systems that are highly associated with these election arrangements, Australia's parties have been more adversarial, and party discipline is much more intense in the Australian House than it is in the US House.⁸ Even more importantly, in the American presidential system the party that wins the most House districts is awarded control over the House, one chamber of a bicameral Congress. In Australia's parliamentary system the party that wins the most districts not only controls the House, it becomes the party that constitutes the government as well. In short, the political stakes are higher in Australia. One would shudder to think what redistribution politics would be like in this context if the game were played the American way.

Texas: A Good Bad Example

Perhaps the best way to highlight the differences in these processes is to use congressional redistricting in Texas as an example of how far redistricting in the US can vary from the Australian model and still be approved by American courts. Texas is not a typical case, but more like a worst case, or one of the worst cases, as it is by no means alone among the states in the extent to which partisan concerns dominated the choice of district boundaries. Other states that adopted congressional districting plans following the 2000 census that were widely alleged to be egregious partisan gerrymanders, yet were upheld by courts, were Florida, Georgia, Michigan, Ohio, and Pennsylvania.⁹

In the post-2000 round of redistricting the process in Texas was an overt, unabashed example of power politics designed to protect the Republican majority in the US House of Representatives. The 2000 congressional elections resulted in the 435 House seats being occupied by 221 Republicans and 212 Democrats, and two independents. This close partisan division made congressional redistricting a major concern of the parties. It

⁷ In Australia these elections are conducted under the alternative vote and therefore a majority vote rule, whereas in the United States they are conducted under a simply plurality, or first-past-the-post, rule in all but one state, Louisiana, which employs a majority rule.

⁸ D. Jaensch, P. Brent, and B. Bowdon, 2004, *Australian Political Parties in the Spotlight*, Canberra, ACT, Australian National University, pp. 21-22.

⁹ See, e.g., G. Jacobson, 2005, 'Polarized Politics and the 2004 Congressional and Presidential Elections', *Political Science Quarterly* 120 (2): 201.

was especially so for Texas Republicans, as one of their own, Tom Delay, was the majority leader in the House.

Population growth in Texas between 1990 and 2000 increased the state's number of seats in the federal House of Representatives from 30 to 32. Texas congressional districts are the responsibility of the state legislature and must be approved by the Governor. The legislature was under divided party control, however, with a Democratic majority in the lower house and a Republican majority in the upper house, and could not agree on a new set of districts prior to the 2002 federal election. The new districts therefore were adopted by a federal court.¹⁰

The 30-member Texas delegation to the House was 17 Democrats and 13 Republicans when the districts had to be changed. The court described its plan as a 'least change' plan designed to add the two new seats while trying to limit the changes made in the other districts. The elections in the two new districts resulted in the Republicans gaining those seats, but Democrats maintained all 15 of their previous seats. This left the new Texas delegation with a Democratic majority, 17 Democrats and 15 Republicans.

Partisan control of the Texas state legislature changed as a result of the 2002 state election, a change greatly assisted by a redistricting of that legislature. The 2002 legislative elections resulted in a majority Republican lower house and a larger Republican majority in the upper house. With these majorities in place, and a Republican governor re-elected, the Republicans placed redistricting on the legislative agenda again in 2003. This move, of which Delay was a major initiator, was a shock to the politically conscious not only in Texas, but across the country. While revising plans invalidated by courts had become a common feature of redistricting, adopting a plan to supersede one already declared valid was virtually unheard of in contemporary American politics.

¹⁰ Forum shopping was rampant, as cases were filed in several state and federal courts. Ultimately a federal District Court panel of three-judges meeting in Austin controlled the outcome, which is reported in an unpublished opinion, *Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex. 14 Nov. 2001), summarily aff'd, 536 U.S. 919 (2002).

‘Reredistricting,’ as it became called, was viewed by many as a violation of ‘one of the unwritten “rules of the game.”’¹¹

The 2003 plan adopted by the Republicans has been described as an ‘insurance policy’ to maintain a Republican majority in the US House.¹² It targeted seven white Democratic House members for removal. The justification offered for this was that the Republican Party was supported by a majority of Texas voters, with the evidence being the consistent success of Republican candidates in statewide elections. Republicans therefore argued that they should have a majority of the congressional seats. The court’s ‘least change’ plan, they further argued, continued much of a Democratic gerrymander adopted after the 1990 census. The alleged need for a new plan ignored, however, the fact that a healthy majority of the districts in the court’s plan, 20 (62.5 percent), were already majority Republican, according to the votes cast in the statewide elections. The Republicans had simply failed to get the voters, in 2002, to behave accordingly. In six districts with Republican majority profiles Democratic incumbents were re-elected. What the Republicans couldn’t get the voters to do in 2002 they accomplished by rearranging the voters prior to the 2004 elections.

The 2003 rearrangement was unabashedly partisan. The targeted Democrats, including the six incumbents in allegedly Republican districts, were separated from many of their old constituents and put in districts even friendlier to the Republicans; some were even paired with Republican incumbents.¹³ Democratic legislators bitterly contested the plan, to the point of leaving the state so quorum requirements could not be met in their legislative chambers. Fifty-one Democratic members of the Texas lower house drew national attention when they retreated over the state line to Oklahoma, as did 11

¹¹ J. Riddlesperger, J. King, and R.N. Engstrom, 2005, ‘The Impact of 2003 Redistricting on 2004 Elections: The Cases of Colorado and Texas’, revised version of a paper presented at the 2005 Annual Meeting of the Southern Political Science Association, New Orleans, LA, at 4. A reredistricting in Colorado in 2003 was voided by the state supreme court as a violation of the state constitution in *People ex rel Salazar v. Davidson*, 79 P. 3d 1221 (2003). In 2005 another reredistricting of congressional seats is currently in process in Georgia.

¹² S. Stolberg, 2004, ‘Battle for Control of Congress Plays Out in a Redrawn Texas’, *New York Times*, 18 October.

¹³ R. Gaddie, 2004. ‘The Texas Redistricting, Measure for Measure’, *Extensions* (Fall), p. 22.

Democratic state senators when they later fled to New Mexico.¹⁴ This precluded the Republicans from adopting their plan in the regular session of 2003 and in two subsequent special sessions held for the purpose of redistricting. The Democrats ended their holdout and, in a third special session, the Republican plan was adopted.

When the plan was reviewed by the same court that had adopted the 2002 plan, the court concluded ‘... we are compelled to conclude that this plan was a political product from start to finish’¹⁵, and that ‘There is little question but that the single-minded purpose of the Texas legislature in enacting [it] was to gain partisan advantage.’¹⁶ Despite this, the court rejected the Democratic claims that the plan was an impermissible Republican gerrymander and declared it a valid arrangement. In the subsequent 2004 elections, four of the targeted Democratic incumbents lost their seat. Another retired after he was placed in a new district with a Republican incumbent. Only 4.4 per cent of the new district consisted of his previous constituents, compared to 66.4 per cent that were previous constituents of the Republican incumbent.¹⁷ Yet another changed parties after the new plan was adopted. This gain of six seats left the partisan composition of the Texas delegation to the federal House of Representatives dramatically different, 21 Republicans to 11 Democrats. In the other 49 states the Republicans lost a net three seats.

Partisan Gerrymandering and the Courts

Despite the clear partisan manipulation of the Texas districts, the district court decision to hold the plan valid under the law was not surprising. American courts have a dismal record of policing gerrymandering. The Supreme Court precedent that the district court had to respect, *Davis v. Bandemer*¹⁸, established a burden of proof on the plaintiffs that was virtually impossible to prove. Indeed, the Court’s standard had nothing to do with the gerrymandering issue itself, but rather held that the plaintiffs had to establish that the

¹⁴ The search to find and attempt to bring back these state legislators reportedly involved at least two federal agencies and more than 300 state law enforcement officers, see J. Riddlesperger, ‘Redistricting Politics in Texas.’

¹⁵ *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004).

¹⁶ *Ibid.*, p. 470.

¹⁷ Gaddie, ‘Texas Redistricting’, p. 22.

¹⁸ 478 US 109 (1986).

group claiming to be victimized had to establish that their ‘influence on *the political process as a whole*’ had been degraded.¹⁹

Following the 2002 elections, the U.S. Supreme Court revisited the partisan gerrymandering issue in *Vieth v. Jubelirer*²⁰, a case involving congressional redistricting in Pennsylvania. In this case four justices voted to overrule the *Bandemer* decision and simply declare that there are no ‘judicially manageable standards’ for reviewing partisan gerrymandering allegations, and therefore held the issue to be nonjusticiable. Four others argued that such standards are indeed available, although they did not agree on what those standards would be. The ninth justice decided that it was too early to decide whether such standards are available or not, but found the plaintiffs evidence in the case insufficient to prove unconstitutional gerrymandering.²¹ When the court in Texas reviewed the Texas lines again, in 2005 following the *Vieth* decision, it found that the situation in Pennsylvania was even worse than in Texas. Democratic candidates for statewide office in Pennsylvania had been winning a majority of the votes, but Republican candidates won 63 percent (12 of 19) of the federal House of Representatives seats. The court concluded that ‘... if the effects of the Pennsylvania plan did not provide a basis to find excessive partisanship in redistricting, it is hard to see how the effects of the Texas plan make it constitutionally offensive.’²²

Conclusion

In Australia an allegation that a redistribution plan for seats in the House of Representatives in any state or territory was ‘a political product from start to finish’ is almost unimaginable. As Marian Sawyer has stated, ‘Australia has long enjoyed an international reputation for the quality of its electoral administration, in particular its non-partisan character.’²³ The redistribution of House of Representatives seats has been an

¹⁹ *Ibid.*, p. 132.

²⁰ 541 U.S. 267 (2004).

²¹ For more details on the U.S. Supreme Court’s partisan gerrymandering decisions, see R.L. Engstrom, 2005, ‘Missing the Target: The Supreme Court, ‘One Person, One Vote,’ and Partisan Gerrymandering’, in Peter Galderisi (ed.) *Redistricting in the New Millennium*, Lanham, MD, Lexington Books, forthcoming.

²² *Henderson v. Perry*, No. 2:03-CV-354 (E.D. Tex. June 9, 2005), sl. op. 29.

²⁴ Marian Sawyer, 2004, ‘Election 2004: How Democratic are Australian Elections?’, *Digest*, 3 September, p. 1.

important dimension of this non-partisan administration. Indeed, it is so widely accepted as a nonpolitical process that Australian political scientists rarely write about it, whereas redistricting in the US is a constant subject of attention for American political scientists.

The Australian experience has received almost no attention in the States. Americans continue to think that politics cannot be removed from redistricting. Indeed, it has even been said that ‘You are not going to avoid it unless Christ himself came down to draw the lines.’²⁴ The fact that it is successfully avoided in Australia is, unfortunately, rarely recognized in the States. Given the partisan conflict over redistricting, the lack of legitimacy with which the lines are viewed by many observers, and the years of incredibly expensive litigation that are now a normal part of the process, there is a growing interest in the States in alternative ways to redistrict. And the favorite alternative of reformers is districting by commissions. But these proposals draw nothing from the Australian example.

The American conviction that politics and redistricting are unavoidably entangled is so strong that when American reformers propose a commission, they tend to propose a body and process very different than that used in Australia. Rather than politically independent commissions, they usually propose an explicitly *bipartisan* commission, made up of elected party politicians (typically state legislators) or their chosen representatives. The commissions are to have an even number of representatives from both major parties. The theory behind this approach is to acknowledge the politics and to try to balance it. The fact that this format is likely to end in stalemate results in another feature usually attached to the proposal; a nonpartisan member is added to the commission who is supposed to function as a *tie-breaker*. The tie-breaker is not viewed as someone who simply chooses between partisan proposals, but rather as someone expected to generate negotiation and compromise in return for what is expected to be his or her decisive vote. There is no consensus however on a critical feature of this approach, which is how the tie-breaker is to be selected.

²⁴ Quoted in C. Buchanan, 1977, ‘States Seek Ways to make Redistricting Less Partisan’, *Congressional Quarterly Weekly Report*, 26 November, p. 2482.

There are of course questions about how successfully the Australian model can be imported to the United States. There may be critical differences in the American and Australian political processes and cultures that might affect that success. But American reformers looking for alternative ways to redistrict legislative bodies, at all levels of government, would surely benefit from examining the work of the Australian redistribution commissions. The American debate over whether and how to reform the process should be informed by this exemplary feature of Australian election administration.