Drawing Boundaries: Election Law Fairness and its Democratic Consequences

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> [T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.
>
> (Former US Supreme Court Justice David Souter)[1]

Introduction: An Elusive End

Fairness in governance is elusive at the best of times, but ensuring the fairness of electoral regulation raises a distinct species of problem. Here unfairness has multiplier effects. When politicians write the ground rules of democracy – drawing up the conditions of their own power – they face incentives to help themselves to more years in government, contrary to the 'preferences of their constituents'.[2] And when factions in government regulate elections unfairly, returning themselves to power essentially uncontested, they can then rule widely and unaccountably across many other areas of public governance.

The complex process of drawing boundaries for parliamentary electorates is therefore prone to occasional bouts of partisan manipulation. Two key manipulation techniques are malapportionment and gerrymandering. Both help to suppress the seat counts of opponents, and both feature in the histories of electoral mapmaking in Australia and abroad. Partisans in charge of the process can malapportion by overloading, with too many voters, electorates where opponents poll well. The value of every vote in oversized electorates decreases compared to more modestly sized ones.

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[1] *Vieth v Jubelirer* 541 US 267 (2004). Americans call the electoral boundary-drawing process 'redistricting', and Canadians prefer 'readjustment'. I will use the Australian term 'redistribution' throughout. Also note that the Australian term 'electorate' is equivalent to American 'districts' or Canadian 'ridings'.

[2] Klarman, Michael, 'Majoritarian Judicial Review: The Entrenchment Problem', *Georgetown Law Review,* 1997, vol. 85, pp. 491-553 at 498.

In modern electoral mapmaking practice, however, most jurisdictions impose a legal rule of 'one vote, one value' ('1v-1v'), which helps maintain roughly equal numbers of voters across the districts. Yet this rule still leaves partisans room to gerrymander. A gerrymandered electoral map is a more indirect product of demographic number crunching. Gerrymanderers draw associations between, for example, the Labor vote and working-class or postgraduate-educated citizens, whose locations on the map can be gleaned from census data. Specialised computer software ramped up these possibilities starting in the 1980s. At a mouse click, incumbents (if they control electoral mapmaking) can redistribute boundaries to spread opponents out in sub-majority numbers across many districts ('cracking'), or concentrate them in outsized majorities in very few ('packing').[3] The results have represented democracy's most outlandish manifestations of partisan decision-making, producing exotic figures on electoral maps. Long and slender fingers follow country back roads to unite disparate enclaves of voters.[4] And boundaries wend round demographic blocs, serving as Rorschach shapes for democracy scholars who see parson's noses,[5] nipples,[6] and of course salamanders.[7]

Responding to such problems, in the 20th century independent commissions generally took boundary redistribution out of the hands of legislatures. The Australian Commonwealth was first in with the new model of independent, commission-based regulation early in that century. Though many jurisdictions, including Britain and Canada, later followed suit, some of the more notable exceptions include a number of American States where gerrymandering remains predictably endemic.

Commissions usually replace legislatures' overtly partisan approaches to mapmaking with some notion of fairer redistribution. Yet beyond this, commission solutions markedly differ from place to place. The concepts of fairness implicit in each jurisdiction vary widely and, in their great

[3] Lublin, David and McDonald, Michael, 'Is it Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections', *Election Law Journal*, 2006, vol. 5, 2006, pp. 144-157 at 154; Issacharoff, Samuel, 'Gerrymandering and Political Cartels', *Harvard Law Review*, 2002, vol. 116, pp. 593-648, at 624.
[4] Brennan, Timothy, 'Cleaning Out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean up This Messy Process', *Widener Law Journal*, 2003, vol. 13, pp. 235-349 at 279-280.
[5] Coaldrake, Peter, *Working the System: Government in Queensland*, UQ Press, Brisbane, 1978, pp. 40-51.
[6] Ibid.
[7] Anon, 'Note: A New Map: Partisan Gerrymandering as a Federalism Injury', *Harvard Law Review*, 2004, vol. 117, pp. 1196-1214 at 1196-97.

diversity, not all the solutions have left partisanship behind. In this chapter I look at the distinct concepts of fairness that inform electoral redistribution bodies in the Australian Commonwealth, the Australian States and abroad; concepts that call for scrutiny as Australian jurisdictions experiment with sometimes striking reforms. Other typologies might plausibly organise fairness concepts differently. Yet the analytic lens offered in this chapter is one way usefully to distinguish – and draw out relations – among commissions tasked with drawing electoral boundaries.

In the context of electoral mapmaking, or of any electoral rulemaking, a number of questions follow from this fairness typology. There are questions of application: where do the fairness types appear in Australian and foreign practices of electoral regulation? And there are harder, more normative questions about the virtues of each model. For instance, what are the partisan electoral consequences, if any, of the different fairness models in action? Additionally, do some models function more smoothly than others, being better able to minimise dysfunction or to ensure public trust and confidence? In one form or another, such questions appear with regularity in the literature.[8] And they are important; indeed, unequal political consequences or the sometimes endemic dysfunction of electoral regulation should be key concerns of electoral design.

However, this chapter focuses on an often overlooked, yet more fundamental question: whether particular concepts of fairness square with effective democracy. Like Justice Souter above, many observers are critical of the presumed anti-democratic effects of gerrymandering. But this is a chapter about the consequences for democracy not of gerrymandering, but of the solutions to it. The choice of model to restore fair boundary drawing, it turns out, may matter a great deal to how well democracies carry out their most important function, that of reflecting the preferences of voters. Of course, there are competing views about what values are desirable in a democratic process, and we must consider such basic uncertainties before judging fairness models for their democratic prospects. But unless 'democracy' is a notion empty of content, institutional design should adopt models of fairness bearing a coherent ideal of democratic practice in mind. Whether it does is the key question this chapter poses.

[8] Eg Hasen, Richard, 'Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdowns', *Washington & Lee Law Review*, 2005, vol. 62, pp. 937-999; Grofman, Bernard and Lijphart, Arendt, *Electoral Laws and their Political Consequences*, Algora, New York, 2003.

Concepts of Fairness

Election laws implicitly construct fairness in one or more of three ways; we may call these *perfectionist*, *positive* and *negative*.

Perfectionist fairness

In the case of perfectionist fairness, judges and laws impose fairness on electoral regulation by dictating a set of outcomes in advance. Perfectionist fairness is thus a form of 'first-order' fairness. First-order notions of fairness prescribe exclusive, and often precise, constraints on the results of decision-making.[9] For example, fairness may be understood in a Rawlsian sense, as a set of principles detailing how scarce social goods should be distributed.[10] A decision that substantially yields some other apportionment of goods is then unfair. In contrast, 'second order' concepts of fairness do not prescribe the substantive results of fair decision-making, but only dictate particular forms of fair process.

Shades of perfectionist thinking are evident in court judgments and legislation governing electoral boundary drawing. In electoral mapmaking for the Commonwealth, perfectionism is visible, most of all, in the rule of 1v-1v as it has developed. Tolerances are now plus or minus 3.5 per cent, such that every electorate is to have, 'as far as practicable,' a number of voters within 3.5 per cent of the average.[11] These guidelines stipulate an outcome in decision-making, and permit little leeway. The high-water mark of perfectionism in electoral boundary drawing, however, is the American federal regime, which allows only 1 per cent variation in districts of the House of Representatives.[12] In contrast, across Australia there are more tolerant cut-offs for State parliaments, usually in the order of 10 per cent and, in certain geographically vast rural electorates, two States – Queensland and Western Australia – allow more dramatic departures

[9] Gutmann, Amy and Thompson, Dennis, 'Democratic Disagreement', in Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement*, Oxford University Press, New York, 1999, p. 240.
[10] John Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, Mass., 1971.
[11] Commonwealth Electoral Act 1902 (Cth) ('CEA') s. 66(3)(a).
[12] *Karcher v Daggett* 462 US 725 (1983), elaborating on an implied rule of equality in Art. I, § 2 of the US Constitution.

from the mean.[13] Different versions of the 1v-1v rule, then, are more or less perfectionist. In general, flexibility is antithetical to perfectionism. In some cases – such as Canada's 25 per cent federal tolerances – the 1v-1v rule is so flexible that it is not meaningfully perfectionist.

One of fairness perfectionism's main difficulties is that there is often little agreement as to what is fair in a first-order sense. Contention over the substance of law is usually more intractable than disagreement over what kinds of lawmaking are fair. This is reflected in the often-noted observation that a group on the losing side of a lawmaking contest is more likely to be at peace with a decision that is a result of a process that is itself widely understood as fair.[14] Yet as we will see, the thrust of some Australian reforms of electoral boundary regulation has turned this assumption around, favouring more predetermined, perfectionist outcomes.

Positive fairness

The positive and negative concepts of fairness are second-order. Second-order fairness, as noted, is a fairness of process rather than of outcome. In this way it is more modest than first-order fairness. Positive fairness in electoral law describes only the competence and open-mindedness necessary for a decision-maker to decide fairly. The assumption is that we cannot determine in advance what a fair outcome will be, but we can at least be somewhat certain that a fair process will ensure fair substance. To promote fairness in a positive sense, then, the enabling legislation of a redistribution commission might specify a set of general principles for decision-makers to follow as they write or rewrite electoral maps. Positive fairness is an expectation that, when they sift arguments and facts brought before them, decision-makers will maintain fidelity to the full range and depth of decision-making principles relevant to the problem at hand.[15]

What amounts to a 'relevant' principle depends on the context. In the arena of electoral boundary regulation, a clear – but by no means inevitable – theory of democratic representation

[13] Orr, Graeme and Levy, Ron 'Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strongman', Griffith Law Review, 2009, vol. 18, pp. 638-655.
[14] Tyler, Tom, 'What is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures', *Law & Society Review,* 1988, vol. 22, pp. 103-135 at 129.
[15] This formulation and others like it are common in literatures on decision-making. See examples listed in Levy, Ron, 'Judicial Selections: Trust and Reform', *UBC Law Review*, 2007, vol. 40, 2007, pp. 195-249, at 208-213.

is traditionally at work. That theory in turn gives shape to most or all of the principles meant to guide redistribution decision-making. The key mandate in legislation calls for keeping 'communities of interest' together.[16] Boundary lines should not bisect an enclave of voters defined by a discrete identity, such as an Indigenous community. Other principles only fill in the details of the communities of interest mandate. For example, geographic features such as rivers, mountain ranges and railway lines should divide electorates as little as possible.[17] In addition, there is no clean slate in boundary drawing; instead, the core voter groups inside an electorate remain mostly static, left alone to better establish a shared community.[18] Commissioners therefore follow a rule of historical inertia, updating electorates only at their margins, and gradually. In some jurisdictions, rules of contiguity and compactness also provide that electorates should not connect distant and dissimilar communities, such as inner-suburbs and sparsely-peopled rural zones.[19] Electoral boundary drawing is generally, then, a tool to help MPs serve a particular kind of representative function. By making like electors vote together as united communities of interest, electoral mapmaking presupposes – but also ensures – that electors share a coherent set of interests and identities.

In sum, positive fairness entails spelling out, at least in approximate terms, the content of fair process. Electoral institutions and laws designed with positive fairness in mind do not shy away from defining the principles that inform fair decision-making for a particular context.

Negative fairness

A number of objections to positive fairness are immediately apparent. The principles guiding decision-makers in their work are vague. The theory of democracy to which the principles give effect is still more so. Establishing consensus over the foundational theories that apply (or should

[16] Eg *CEA* s 66(3)(b)(i). Whether individuals in such a community will vote for the same candidates is not certain, nor indeed is it the point. More important is encouraging electoral candidates to recognise the common interests of constituents and to compete for their support.
[17] Eg *CEA* s 66(3)(b)(iv).
[18] Eg *CEA* s 66(3)(b)(v).
[19] Gelman, Andrew and King, Gary 'Advantages of Conflictual Redistricting' in D. Butler and I. McLean (eds), *Fixing the Boundaries: Defining and Redefining Single-Member Electoral Districts*, Dartmouth Publishing, Aldershot, 1996, pp. 207-17 at 208. In the US, 'minority protection' is also a recurring criterion, imposed in part by ss 2 and 5 of the *Voting Rights Act 1965* 42 U.S.C. 1973c (2000).

apply) may be problematic, because the search for united feeling on the question may be elusive. Even more, positive fairness questionably presupposes the trustworthiness of decision-makers. It pictures a cadre of decision-makers with the intellectual competence and normative commitment to help their democracy achieve a set of ultimate ends by applying relevant principles and theories.[20] For sceptics of the power of law to mandate standards of social and political behaviour, positive fairness is an unsatisfying model.

Negative fairness responds to these concerns by taking an easier route less open to obvious objections. The negative concept is indeed the most modest of the three: as much as possible, negative fairness sidesteps affirmative definitions of fairness, telling us not what fairness is but only what it is not. Most importantly, in the negative conception fair decision-making cannot be substantially partisan.[21] It must not primarily serve the interests of a particular identity group or power bloc. If it is to be non-partisan, decision-making must, of course, be something else; however it is unclear what positive content should compensate for the absence of partisan motivation. Negative fairness may leave us with little sense of how decision-makers should decide, if not according to partisanship.

Negative fairness leads to a certain form of institutional regulation, which I call the 'balance' model.[22] In the United States, the approach for boundary redistribution, both federally and among the States, is often by 'bipartisan' commission.[23] This balance strategy requires negotiation between parties, each presumed to have only maximising their own results in the next election at heart. The aim of balance, then, is to pit partisanship against partisanship in order to minimise partisanship. We cannot eliminate partisanship through substantive legal definition, it is thought, because the act of defining the positive content of non-partisan decision-making in law will itself be subject to partisan manipulation.[24] The balance approach is then a procedural conceit leaving to the parties themselves the task of determining what is unfair or fair. Balance makes use of competing partisanships, encouraging the contenders to clash and

[20] I elaborate on these criteria in Levy, 'Judicial Selections'.
[21] Eg Landau, Z., Reid, O. and Yershov, I., 'A Fair Division Solution to the Problem of Redistricting', *Social Choice and Welfare*, 2009, vol. 32, pp. 479-92 at 480.
[22] Levy, Ron. 'Regulating Impartiality: Electoral Boundary Politics in the Administrative Arena', *McGill Law Journal*, 2008, vol. 53, pp. 1-57 at 11, 24.
[23] Lublin and McDonald, 'Is it Time to Draw the Line?'.
[24] The balance model is a variety of 'checks and balances', but denotes a balance of political parties and not separate governmental branches, and generally lacks 'checks' in the form of legal oversight of decision-making.

balance such that, in theory, their partisanships cancel out. The process is usually litigated and almost always contentious: as Gelman and King note, American boundary regulation is 'one of the most conflictual forms of regular politics in the United States short of violence'.[25]

The negative and balance approaches are popular amongst theorists and reformers impressed by certain presumed realities of law and of the exercise of public power. The approaches reflect wariness about setting out affirmative electoral principles in law. At the heart of the negative concept is therefore doubt about the likelihood that decision-makers might sometimes resist the temptation to act in partisan ways. Partisanship infects all stages of lawmaking and standard-setting, the argument goes, and so the wisest policy is, as much as possible, to avoid defining substantive standards. For example, Landau, Reid and Yershov, in proposing a system of redistribution by even balance between 'the two parties' in American politics, 'stress that the "fairness" of the [proposal] is not based on a fixed notion of what is desirable but rather on the preferences of the participants'.[26]

In sum, on the negative fairness model, expressed institutionally through balance, the parties in a contentious political and legal process are themselves tasked with defining the content of fairness, doing so on the go, rather than leaving the content to be preset by law.[27]

Fair Electoral Mapmaking in Australia and Abroad: Critiques from Democracy

Negative versus positive fairness

> The fundamental principle that governs – or ought to govern – human affairs, if we wish to avoid misunderstandings, conflicts, or pointless utopias, is negotiation. The model of negotiation is an oriental bazaar: the seller asks for ten, you offer three, he says nine, you four,

[25] Gelman and King, 'Advantages of Conflictual Redistricting', p. 207.
[26] Landau et al., 'A Fair Division Solution', p. 482.
[27] To be sure, systems premised on negative fairness and balance also mandate that decision-makers should account for communities of interest and other factors. Complex admixtures of positive, negative and perfectionist fairness are common. But aA dominant negative and/or perfectionist approach may render toothless any principles set out in positive fairness terms.

> he goes down to eight, you go up to five, and finally you both agree on six. … [I]n the end, if you are interested in those goods and he is interested in selling them, you are both pleased.
>
> (Umberto Eco)[28]

As tools of effective democracy, negative fairness and balance, though conceptually simple, often fall short precisely because of their simplicity. Positive fairness is more complex but also potentially more robust. Though it is harder to define and is open to the objections raised above, affirmative attempts to define fairness may be worth the effort and risk. We may, after all, level a different set of critiques against the negative concept of boundary drawing. This section focuses on one such critique. Negative fairness helps defeat a main purpose of elections – reflecting public preferences. Negative fairness is anti-democratic to the extent it confuses democracy with political parties. It is primarily a form of fairness between political parties rather than between voters. It lets the parties set the terms and boundaries of public democratic expression, rather than the other way around.

To illustrate some of these claims, first consider cases of negative fairness in the decentralised American process. The US Constitution, as interpreted, gives to the States the task of drawing federal boundaries within their territories.[29] Most State legislatures redistribute federal boundaries through normal acts of legislation. However, by Lublin and McDonald's count, '[n]ineteen states use a commission at some stage of the redistricting process, either as a primary authority or as a backup to the legislative process if stalemate occurs'.[30] In a handful of States, commissions apparently remain non-partisan[31] – suggesting that partisanship is a product of institutional design more than national political culture. But commission partisanship is otherwise the general rule for American redistribution commissions. Commissioners on the

[28] Eco, Umberto, *Turning Back the Clock*, Harvill Secker, New York, 2007, p. 247.
[29] US Constitution, Art. I, § 2, cl. 3 calls for 'Enumeration … within every … Term of ten Years, in such Manner as [Congress] shall by Law direct'. Although the Constitution does not explicitly provide for it, systems for drawing House district boundaries vary state-by-state.
[30] Lublin & McDonald, 'Is it Time to Draw the Line?'.
[31] Ibid.

balance model are not properly 'independent', but rather overtly represent one of the two main political parties and angle for outcomes favourable to their electoral interests.[32]

A model of balanced, negotiated outcomes based on partisan contention may be appropriate in some contexts. There are cases where parties may coherently meet roughly halfway between a set of opposing positions, as if haggling at a legislative bazaar. Taxation is an occasional example. Proponents of two competing and arguably valid doctrines – of fiscal rectitude and generous funding for social services – might sensibly split their differences. Yet there are cases where negotiation and meeting halfway may be unsuitable methods for breaking a partisan impasse. Writing fair democratic ground rules may be such a case. Electoral boundary drawing by a process of balance aims to guarantee, as near to possible, that major parties end up holding a 'balance' of seats after elections. In jurisdictions where a bipartisan commission carries out the boundary-drawing process, its members are drawn from the partisan ranks of the parties either in equal numbers or in proportion to the parties' current membership in the legislature. Not surprisingly, in many US States the former approach yields somewhat evenly divided seat counts, while the latter produces, by design, a wide seat imbalance favouring the majority party – in other words, a gerrymander.[33] Either kind of balance of outcomes is far removed from key democratic goals. Negotiated ground rules predetermine elections. It is no help that evenly balanced elections are predetermined on *bi*partisan grounds; the elections are still substantially predetermined on partisan lines. The value of popular voting diminishes to the extent that an election's outcomes are preordained by partisan agreement. Balanced democratic systems therefore fumble one of democracy's principal functions: that of gauging public preferences.[34]

In the United States, then, the federal system premised on balance comprises – with the noted exceptions – some districts in which State legislatures gerrymander, and other districts in which commissions gerrymander (or impose evenly bipartisan seat counts). Whether the balance model is anti-democratic therefore depends in part on whether gerrymandering compromises democratic governance – a debated point. Some analysts offer empirical support

[32] See generally McDonald, Michael, 'A Comparative Analysis of Redistricting Institutions in the United States', *State Politics and Policy Quarterly*, 2004, vol. 4, pp. 371-395.
[33] Ibid. The handful of party-based Canadian commissions at the provincial level have experienced similar results: Courtney, John, *Commissioned Ridings: Designing Canada's Electoral Districts*, McGill-Queen's University Press, Montreal, 2001, pp. 107-112, 293.
[34] Eg Landau et al, 'A Fair Division Solution', pp. 481-2.

by counting the number of legislative seats locked up well before elections begin. According to Pildes, there are 'four hundred safe seats in Congress',[35] suggesting that voting may be largely futile for most American citizens. If Pildes is correct, then gerrymandered electoral maps in the US leave effective votes only to the citizens residing in the remaining thirty-five districts of the House of Representatives. In their own survey, Lublin and McDonald draw on the useful and easily-measured empirical benchmarks of electoral 'competitiveness' and 'contestedness', and concur with Pildes about the effects of gerrymandering.[36]

Yet there is doubt as to how much it is gerrymandering alone that generates safe seats. Simple demographics may lock up elections for some parties without conscious effort – for example, for progressive parties in poor and multicultural South Side Chicago and urbane inner Sydney, or for conservative parties in rural Nebraska or country Queensland. Indeed, authors such as Grofman and Jacobson, Gelman and King, and Persily suggest that gerrymandering has not significantly affected the competitiveness of Congressional races.[37] Some point to how closely divided the House has been in modern times. How bad can gerrymandering be if it gives neither of the two parties a clear win over the other? On the other hand, in light of the phenomenon of 'triangulation' apparent from the 1990s onward, the closeness of elections is not the only relevant datum. A party that loses elections now adjusts substantive messages accordingly, preferring to co-opt policies from opponents rather than to keep losing.[38]

But beyond counts of party wins and losses, there is also a more intrinsic democratic problem if balance habitually produces gerrymanders. The focus on party balance frustrates

[35] Cited in Jeffrey Toobin, 'The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?' *The New Yorker*, 8 December 2003, p. 63. See similarly Charles Backstrom, Samuel Krislov, and Leonard Robins, 'Desperately Seeking Standards: The Court's Frustrating Attempts to Limit Political Gerrymandering', *Political Science and Politics*, 2006, vol. 39, pp. 409-415.

[36] Lublin & McDonald, 'Is it Time to Draw the Line?'. See also Adams, Bruce, 'A Model State Reapportionment Process: The Continuing Quest for Fair and Effective Representation' *Harvard Journal on Legislation*, 1977, vol. 14, pp. 825-904 at 839-41.

[37] Grofman, Bernard and Jacobson, Gary, *Vieth v Jubelirer*, Brief as *Amici Curiae* in Support of Neither Party, No. 02-1580 (August 2003); Gelman and King, 'Advantages of Conflictual Redistricting'; Persily, Nathaniel, 'In Defence of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders', *Harvard Law Review*, 2002, vol. 116, pp. 649-683; Grofman, Bernard and Jacobson, Gary, *Vieth v Jubelirer*, Brief as *Amici Curiae* in Support of Neither Party, No. 02-1580 (August 2003). Gelman and King, in 'Advantages of Conflictual Redistricting', suggest that though party bias in redistribution decreases voter responsiveness, some bias is an acceptable cost of ensuring responsiveness in general through redistribution. Like many authors, they do not attempt to reconceive boundary drawing to improve responsiveness without substantially increasing bias.

[38] Arts, Bas and Verschuren, Piet, 'Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation', *International Political Science Review*, 1999, vol. 20., pp. 411-424.

what should be one of the primary purposes of democracy, namely the robust expression of public preferences. Persily and others who are sceptical about gerrymandering's anti-democratic effects are content to see factions hand over power to each other from time to time.[39] In a system of balance, one political party transiently controls branches of government and thereby is able to push its own policy agenda without strong opposition. But such entrenchment may be self-limiting: regimes remain in place, preserved in part by gerrymandered electoral maps, until popular opposition toward them rises to a pitch high enough to dislodge the governing party.[40] Negative fairness and the balance model anticipate the parties regularly trading power, leaving none permanently in charge – despite the best efforts of party leaders.[41] Lowenstein and Steinberg therefore discount the severity of gerrymandering; in light of the capacity for self-correction, they argue, courts and the Constitution should stay out of the readjustment game. They cite the example of Arizona, where a citizen-initiated referendum mandated the creation of an independent commission and apparently ended a string of majority-controlled redistributions.[42] The 'self-correction' view also has some judicial support: in her majority judgment in *Davis v Bandemer*, Justice O'Connor cited the role of State governors, who may veto partisan maps drawn by State legislatures for the US House.[43]

To be sure, the expectation of complete and dependable back swings of the electoral pendulum may not reflect reality. Though Democrats began retaking Congress in 2006, a less entrenched and gerrymandered Congress would likely have elected even more Democrats. But beyond these empirical gripes, the balance notion is open to the more fundamental critique noted. The general American embrace of balance in election law reflects classical anti-tyranny rationales for popular rule. Laid out, for example, in the *Federalist Papers* and antecedent works, anti-tyranny informed US political practice from the start in the post-revolutionary Constitution,

[39] Tushnet, Mark, 'Constitutional Hardball', *John Marshall Law Review*, 2004, vol. 37, pp. 523-553 at 533-34; Wald, Patricia, 'A Response to Tiller and Cross', *Columbia Law Review*, 1999, vol. 99, pp. 235-261 at 256-57.
[40] For an Australian example, see eg Orr and Levy, 'Electoral Malapportionment'.
[41] Eg George W. Bush's principal political strategist, Karl Rove, worked to create a 'permanent Republican majority': Fitzgerald, Thomas, 'Democratic Victory Owes Much to Moderate Voters', *The Philadelphia Inquirer*, 8 November 2006, p. A1.
[42] Lowenstein, Daniel, and Steinberg, Jonathan, 'The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?' *UCLA Law Review*, 1985, vol. 33, pp. 1-75 at 4.
[43] *Davis v Bandemer* 478 US 109 (1986) (holding courts may invalidate partisan gerrymandering under undefined circumstances).

and indeed remains a key legal reference point.[44] American institutional design to some extent remains trapped in a constitutional time warp, doomed to relive an eighteenth-century struggle with an overbearing monarch. Of course, we cannot entirely discount this strand of thinking as anachronistic: governments still do overreach. But modern and more richly layered understandings of democracy focus not only on limiting power, but also on the value of empowering citizens' political speech and public influence as an end in itself. It may indeed be the case that no gerrymander lasts forever; yet a model of governance expecting power to swing between the parties, letting each dominate for a time, does not reflect the complexity of popular preferences. High levels of popular consensus against the incumbent are often required before a gerrymandering party is dislodged from power – for instance, ending the recent Republican domination of the US House of Representatives, and transforming Bjelke-Petersen's Queensland.[45] Such intensity of feeling may need to be rooted in widespread and intense disaffection over an incompetent party that overstays its welcome. In the interim, however, democracy by balance makes too little accommodation for the much wider and subtler range of popular sentiments falling short of outright anti-incumbent outrage.

Australian boundary redistribution is generally markedly different from the American regime. A positive conception of fairness in redistribution prevails in most Australian States and in electoral mapmaking for the Commonwealth. Notably, as has been mentioned, legislation guides the process with substantive principles all directly or indirectly based on a 'communities of interest' notion of democratic representation.

As well, Australian jurisdictions staff redistribution commissions with non-party public officials – in particular, civil servants and judges.[46] Any process of boundary drawing begins with the appointment of people to draw the maps, and these personnel choices help establish the tenor of redistributions perhaps more than any other factor. Australian processes implicitly express trust in the independence and impartiality of redistribution commissioners. In sharp contrast to American norms, there is little or no suggestion that a proper role could be played in

[44] Eg *Olmstead v US* 277 US 348 (1928); *INS v Chadha* 462 US 919 (1983); *New York v US* 505 US 144 (1992) and uncounted modern American commentaries.
[45] Orr and Levy, 'Electoral Malapportionment'.
[46] Hughes, Colin and Jaensch, Dean 'Judicialisation of Electoral Redistributions: the Commonwealth and South Australia', *Politics*, 1979, vol. 14 (May), pp. 60-70.

Australia by officials from the political parties. At the Commonwealth level, four officials staff the Redistribution Committees for each State: the Australian Electoral Commissioner and the Electoral Officer for the State, along with two State government officials – the Surveyor-General (or equivalent official) and the Auditor-General.[47] The use of sitting judges in the process also reflects the presumed needs for impartiality and independence. The Commonwealth process includes the judicial chair of the Electoral Commission, whom the government chooses from a list of three candidates nominated by the Chief Justice of the Federal Court.[48] Similarly, judges chair most State-level redistribution commissions.

There is therefore glancing involvement by the political branches in selecting members. Yet more generally a wall of separation divides the process of redistribution from the political actors who stand to gain or lose from it. This norm of independence became entrenched when Australia first empanelled its redistribution commissions. Others followed Australia's early lead, such as the British and federal Canadian Parliaments. All three jurisdictions delegated redistribution to independent commissions expressly with the aim of bringing fairness to a manifestly unfair process.[49] Indeed, for the last half century, Canada and Australia in particular – two underpopulated, federal, Westminster-derived democracies – have evolved their redistribution practice substantially with eyes on each other. The Canadian federal commissions, however, try to take the notion of apolitical redistributions a step further by including academics and even lay members of unrelated professions – police, social workers and others. In the main,[50] the positive concept of fairness is at work: professional partisans are not meant to play a leading role, and independent commissioners are entrusted to apply communities of interest principles substantially without attention to political consequences.

[47] CEA s 60; Orr, Graeme, The Law of Politics: Elections, Parties and Money in Australia, The Federation Press, Sydney, 2010, ch 2.
[48] *CEA* ss 6(4), 70.
[49] Lyons, W.E., 'Legislative Redistricting by Independent Commissions: Operationalizing the One Man-One Vote Doctrine in Canada', *Polity*, 1969, vol. 1, pp. 428-459 at 432-439.
[50] *Cf.* Courtney, *Commissioned Ridings*, pp. 107-112, 293.

Perfectionist versus positive fairness

If the positive conception of fairness generally prevails in Australia, there are however important exceptions. The most dramatic is a perfectionist step South Australia took to close the gap between redistribution and its political consequences. The State's Constitution now instructs commissioners to predict post-election party seat counts. Section 83, the unusual 'electoral fairness and other criteria' provision, begins:

> 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 … they will be elected in sufficient numbers to enable a government to be formed.[51]

Fairness is thus cast in terms of candidates and 'groups' (that is, parties), not voters. Interestingly, a later subsection reaffirms the role of traditional factors such as geography, topography and communities of interest; yet these are now implicitly the 'other criteria' noted in the section heading.

Above we saw that balance is an attempt to ensure fairness between parties by putting them jointly in charge of the redistribution process. Similarly, the South Australian perfectionism is a form of fairness between parties, though here the method is to preset decision-making outcomes. South Australia's perfectionist mode of 'electoral fairness', then, writes the results of redistributions – and of elections – with the parties' interests in mind. The 50 per cent rule of s 83 was promoted as a tool to curb the infamous distortions of single-member district voting, which from time to time keep parties out of government even when they secure majorities of the popular vote.[52] Indeed, prior to the new electoral fairness provision, elections under 1v-1v in

[51] Constitution Act 1934 (SA) s 83.
[52] For a favourable account of s 83 as a fairness guarantee, see Newton-Farrelly, Jenni 'From Gerry-Built to Purpose-Built: Drawing Electoral Boundaries for Unbiased Election Outcomes', *Representation*, 2009, vol. 45(4), pp. 471-484.

the State skewed to Labor.[53] It is worth asking, however, where perfectionist developments leave voters, either as individuals or in their other, more pre-political allegiances – as members of interest and identity groups not directly defined by party membership. Does fairness between parties capture and adequately stand in for these other aspects of citizens' public lives, which they might wish to bring to bear on the political process?

The South Australian innovation is not the only perfectionist incursion into positive fairness in Australia. More common is the rise of 1v-1v as an exacting requirement of boundary-drawing. In the past this principle was one factor to be considered out of several. But perfectionist 1v-1v rules – permitting tolerances of, say, 5 per cent or less – depart from positive fairness by limiting the other principles decision-makers are free to apply. Stricter 1v-1v eclipses principles of communities of interest, the traditional conceptual category in Australia and other Westminster-derived democracies that elect parliamentarians in single-member electorates in order to promote local, constituency-based representation.

The *Raîche* case, a rare instance of a Canadian court reversing a commission's boundary decisions, helps make clear the potential drawbacks of elevating 1v-1v over communities of interest.[54] The court reversed a commission's self-imposed rule of 10 per cent tolerance, where legislation had allowed a 25 per cent buffer. The stricter rule had the concrete result of ousting a distinct community (New Brunswick Acadians) from a position of dominance in their electorate. Applying 1v-1v rigidly, the commission had found itself forced to split the community and distribute its pieces across majority-English electorates. In a country where French is constitutionally enshrined,[55] it was difficult to deny that Acadians – settled from France in 1604, exiled in the mid-1700s, and resettled again – constitute a coherent and historically discrete group. Yet the example also illustrates how, in any number of cases, communities of interest might not fit neatly inside the bounds of electorates when the numbers are inflexible.

The leading Australian and Canadian decisions have thus far avoided perfectionism, expressing doubts about 1v-1v as boundary-drawing's *sine qua non*. The courts might step in to

[53] Jaensch, Dean, *Community Access to the Parliamentary Electoral Process in South Australia since 1850*, State Electoral Office, South Australia, 2002, ch. 13. The Liberal Party was the driving force behind the new rule.
[54] Raîche v. Canada (Attorney General) [2004] FC 679.
[55] Constitution Act, 1982 (Canada) ss 16-23.

reverse egregiously unfair boundary-drawing. But in cases such as *McKinlay*,[56] *McGinty*[57] and (in Canada) *Carter*,[58] the courts directly or obliquely endorsed the importance of communities of interest and therefore refused to overturn more modest departures from 1v-1v.[59] This hands-off judicial position entrusted commissioners with the wide discretion typical of positive fairness, and expressed a faith in the trustworthiness of the process that has largely turned out to be well-founded – though it was not always in the past. In the early 1970s, at the time of *McKinlay*, malapportioned electorates (or alternatively 'zones' or 'areas' of multiple electorates bound together) were still the norm in South Australia, Queensland, Western Australia and Tasmania.[60] But by most accounts, Australian jurisdictions now draw fair boundaries, with only minor and arguable exceptions.

On the other hand, there are signs of shifts in Australia and Canada toward tighter 1v-1v restrictions, perhaps in line with the more general trend of declining trust in governance since the 1960s. The federal Australian 1v-1v legislative mandate mentioned earlier, aiming at a 3.5 per cent tolerance, is particularly narrow. In addition, Australia's lack of explicit individual rights guarantees might explain the High Court's reticence on 1v-1v; however, more than a decade since *McGinty*, with the *Roach* decision having since uncovered new constitutional rights of equal participation in the electoral arena,[61] the Court may be preparing to shed some of its reserve. And in Canada, while lower courts in recent cases were bound to follow *Carter*'s flexible approach, they appeared to do so grudgingly.[62] If there is a lesson from the Canadian cases, it is that judges are ready to begin disciplining readjustment under more exacting formulas, should the issue return to the Canadian Supreme Court.

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[56] Attorney-General (Cth); ex rel McKinlay v Commonwealth (1975) 135 CLR 1.
[57] McGinty v Western Australia (1996) 134 ALR 289.
[58] Reference re Electoral Boundaries Commission Act (Saskatchewan) [1991] 2 SCR 158.
[59] For a defence of the flexible approach, see Creighton, Peter 'Apportioning Electoral Districts in a Representative Democracy', *UWA Law Review*, 1994, vol. 24, pp. 78-101.
[60] Orr & Levy, 'Electoral Malapportionment'; Williams, George, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform', *Melbourne University Law Review*, 1995, vol. 20, pp. 848-870, at p. 856; Stokes, Michael 'A Tangled Web: Redistributing Electoral Boundaries for Tasmania's Legislative Council', *University of Tasmania Law Review*, 1996, vol. 15, pp. 143-195.
[61] Roach v Electoral Commissioner [2007] HCA 43.
[62] Charlottetown (City) v Prince Edward Island (1998), 168 DLR (4th) 79; East York (Borough) v. Ontario (1997), 36 OR (3d) 733; Friends of Democracy [1999] NWTJ No. 28; Reference re Electoral Boundaries Commission Act [Alberta] [1992] 1 WWR 481.

What might be the democratic consequences of trends toward tightening perfectionist fairness? As one South Australian boundary commission noted in the days before s 83, pinning fairness to party fortunes is something akin to 'oneiromancy' – interpreting dreams to predict the future.[63] Indeed, on one hand, perhaps we *cannot* make the necessary electoral predictions; it may be no use guessing whether voters will support any party over 50 per cent, as even polls closest to election day sometimes leave outcomes in doubt.

Yet such empirical doubts overlook deeper objections based in the democratic purposes of boundary drawing. Perhaps we *ought* not urge boundary commissions to divine voting results, if bypassing positive fairness principles in boundary drawing would mean skipping an important step in the electoral process. Under the South Australian or other perfectionist schemes, boundary commissioners aggregate voters into electorates according to presumed bottom-line party support. But as noted, other criteria for aggregating voters are also available, such as by interests or identities – factors much more diverse than party support. Indeed, the broad tent of the Labor Party includes, for example, postgraduate-educated urban voters, ethnic enclaves, religious minorities, Indigenous voters, workers in some sectors of organised labour, and so on. Traditionally, the communities of interest model of representation helped to aggregate voters into such distinctive groups, in order to bring their distinctive and often conflicting concerns before Parliament. Even if they habitually vote for the same party, Labor-supporting groups often disagree on substantive matters of policy. The perfectionist construction of political parties is then comparatively empty of substantive policy content. It groups together voters with little more in common other than presumed voting intentions. This places the cart ahead of the horse by giving parties priority over the discrete groups of people who, under the traditional model of representation, drove the parties in distinctive – and contradictory – directions.

But the turn toward thinking about parties before voters is regrettable only to the extent that we view local-representative politics as preferable. Of course, the option is always open to adopt a proportional representation system, with its own set of democratic strengths and weaknesses. But proportional systems, which explicitly put parties first, may compensate with robust intra-party democracy to accommodate diverse views. If the electoral system remains single-member in form, but is increasingly party-based in effect, it may retain the worst elements

[63] Hughes and Jaensch, 'Judicialisation of Electoral Redistributions', pp. 66-67.

of each system. First, single-member systems at work now in Australia do not especially provide for robust citizen involvement in formulating party policy. Indeed, the popular involvement in Australian parties has long been trending downward.

Second, looking to the American example, the loss of the buffer of positive fairness between decisions and outcomes usually encourages decision-makers to focus first on the partisan consequences of boundary maps.[64] Yet by retaining the single-member form of government, the possibility of gerrymandering remains. The same would not be true under an outright proportional representation system.

And finally, if constituencies can be organised by party support as under the South Australian amendment, or subject to increasingly strict 1v-1v rules, the result might simply defeat the main purpose of single-member democracy. Both of these perfectionist measures trump a more locally-based representation of people aggregated according to common identity. Yet aggregating communities of interest based on local identity groups is central to, and indeed the point of, constituency-based representative democracy.

Conclusion

It may be difficult to predict the future of fairness in Australia. For example, the South Australian innovation is at least a superficially appealing attempt to smooth over the excesses of single-member district democracy, and it may be viral: an idea likely to inform institutional design elsewhere. Alternatively, it might be an interesting example of democratic variation in a federation, but an institutional dead end. The aim of this chapter, however, was not to issue predictions but rather to disentangle conceptual approaches to fair electoral boundary drawing, and to consider the democratic consequences of each. The classical positive model in Australia, Canada and Britain entrusted putatively independent commissions with powers to apply communities of interest principles. But the commissions may not have escaped a generalised climate of declining trust in governance, which encourages suspicion of such broad grants of power. Boundary drawing on negative and perfectionist grounds therefore offer appealing alternatives.

[64] Levy, 'Regulating Impartiality'.

Yet the irony of the modern reforms is that both alternatives delegate power to elements in government that may be the least trusted (and trustworthy) of all: political parties. At a minimum, evolving conceptions of fairness should maintain basic coherence, and in this regard both party-focused alternatives are problematic. The American Framers organised the House of Representatives into districts expecting that, as at Westminster, members would represent local communities. But as we saw, negative fairness – whose theoretical seeds the Framers also planted – discounts notions of coherent, set terms of fairness, and instead gives to the clashing parties themselves the job of defining fair ground rules in a democracy. Rules that are forever therefore in flux may be unable to sustain the communities of interest representational theory of democracy, or indeed any other coherent approach. On the other hand, perfectionism's incoherence is a subtler product of contradictory aims. If a theory of democratic representation based on parties is emergent, then this theory should define and guide fairness throughout the democratic process – not merely at its end, or as an afterthought. Yet experiments in perfectionism thus far have left undisturbed the old forms of constituency-based representation while departing from communities of interest notions, often quietly instituting party dominance in their place.