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**The Vexing Question of Electoral Boundaries in
Florida and South Australia**

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INTRODUCTION

Florida and South Australia may be half a world away, yet they share similarities in both striving for fair, but having contested, electoral boundaries in their states. Moreover, both experienced disputes emanating from the electoral boundaries used during the 2014 elections, which resulted in questions regarding the legitimacy of the electoral outcomes. From there, however, many of the similarities between each state's electoral boundary disputes end, as South Australia and Florida veered off into separate directions in terms of the questions raised, the concerns voiced, and the foundation for future action moving forward.

These two case studies thus present the opportunity to undertake a truly comparative analysis on intra-state electoral issues. Our objective in doing so is to see not just what commonalities and differences the two cases present, but more importantly to determine whether something about the experiences in one state can inform the other state and whether cross-cultural lessons could be applied. To further enhance our cross-cultural comparative study, our South Australian case is examined from a truly Australian perspective by an Australian political scientist, while an American political scientist studies the case of Florida from an American perspective. From there, we utilize our conclusion section to facilitate our comparative analysis.

SOUTH AUSTRALIA

The state of South Australia lies in the south central part of Australia and was founded as a planned freely settled colonial province rather than a convict settlement. The population of South Australia presently represents less than 8% of the country [1.6 million] and is the most urbanized State in the Federation with approximately 75% residing in the state capital of Adelaide. Over the past 50 years the conservative Liberal Party has only governed in the state legislature for 12 years but, as is explained below, frequently won the popular vote. There are 47 districts in the state legislature's House of Assembly, averaging approximately 23,000 electors. The state contributes 11 electorates, averaging 103,000 electors, to the 150 member Commonwealth Parliament's House of Representatives. Liberal Party fares much better at national elections translating its vote in reasonable proportion to seats won than it does at elections for the state legislature. This is partly

due to the much larger size of electorates ‘evening out’ the geographical disadvantages that occur with state legislature boundaries. Notably, in national Senate elections voting behaviour points to South Australians being less committed to the major parties compared with other states. For example, at the 2013 national poll an independent candidate out-pollled the Labor Party’s combined senatorial vote.¹ Consequently, South Australians are less ‘rusted-on’ to a major party than in the past when electoral law was enacted to ‘fix’ questions of perceived unfairness with electoral districts.

Over the past 25 years, three election results for the state legislature, the focus of this paper, rendered “wrong winner” outcomes. Unsurprisingly this solicited strong rhetoric from, each instance the losing Liberal Party that the government elect was “illegitimate”. This unfortunate situation is arguably derived from a fundamental misunderstanding of what is possible when electing single members for defined electorates using the “alternative vote”, or “preferential voting” as it is more commonly referred to in Australia. This misunderstanding relates to electoral system principles, but also the very apparent electoral reality of declining voter partisanship. Partly as a consequence of compulsory voting, Australian voters’ strength of ‘party identification’, which used to be comparatively high, has eroded over the past 30 years (Bean and McAllister, 2002).

In 1991, South Australian electoral law changed based upon assumptions that party identification would remain intact. Fair electoral boundaries, it was assumed at the time, could be determined by empowering independent “umpires” to follow the supposed logic that, in Australian electoral vernacular, the “Two Party Preferred [TPP]” statewide swing could act as a sound foundation for translating votes into seats.² A “legitimate” government, given these assumptions, forms when the party with a majority of the TPP vote finds that vote translated into a majority of seats in the Lower House where government is formed. The current conundrum South Australian

¹ Antony Green, *Australia Votes - Results Federal Election 2013*: <http://www.abc.net.au/news/federal-election-2013/results/senate/sa/>

² Under the rules of preferential voting, a candidate wins when reaching 50% + 1 votes. To reach a winning majority, a distribution of preferences is required if, on the first count, no candidate has managed 50% + 1. A valid vote requires that voters rank preferences in sequence for each candidate present on the ballot paper. If no candidate achieves 50% + 1 on the first count of votes, the candidate with the fewest votes is eliminated and the second preferences on his/her ballot are distributed to those candidates remaining in the count. The count proceeds, until one candidate is declared elected with a majority of votes. To determine the statewide TPP, preferences are distributed even when a candidate has won with a first count majority.

electoral officials confront is that Liberal Party members' view Labor's 2014 election as "illegitimate" and much of the blame for this is directed at the Electoral Commission for failing to render proportionality between votes and seats won.

Following the March 2014 South Australian election, Liberal Members of Parliament (MPs), talkback radio, and letters to the newspapers bemoaned "fairness denied", and this was not for the first time. The 2010 election produced a "wrong winner" result when this was not supposed to happen given electoral reform that followed the previous wrong winner result in 1989. Accordingly, it is apparent that the 1991 electoral reforms have failed demonstrably as the Liberal Party, notwithstanding it winning the majority of the statewide TPP vote, did not win a majority of districts in 2010 and 2014.

As a consequence, questions are raised over the efficacy of conduct surrounding the electoral boundary review process first introduced in 1991 and currently conducted between elections. The anguish was palpable and, at its worse, prompted a former Liberal Party leader to claim under "Parliamentary privilege" that the South Australian Electoral Commissioner is "utterly corrupt" (Wills, 2014).³ In light of South Australian electoral experience over the past three decades, the point Reynolds and Reilly (2005, p.5) make, "that electoral systems are crucial political institutions and that they are the most easy political institution to manipulate" is shared by many Liberal Party supporters and, while not accurate, is nevertheless contributing to a "democratic deficit" within the polity.

When voters have cause to doubt, not unreasonably, the fairness of an election result, reform is required. But electoral law reform is difficult and often fraught given the degree to which party self-interest acts to compromise ideals and principle. The problem this section addresses appears quite intractable because the poorly conceived 1991 electoral reform asked that the principles of proportional representation be foisted upon a majoritarian single member-focused electoral system. Nevertheless, the reform raised citizens' belief that this would work to end

³ In an intemperate outburst in the Parliament – and therefore under protection from defamation - former Liberal Party leader, Isobel Redmond, after the 2014 election and while not specific with its allegation, accused the head of the Electoral Commission South Australia of being "utterly corrupt". An obvious falsehood, but one that resonated with many aggrieved Liberal Party members who believed that once again their party had been denied government due to the inability of the EDBC to draw appropriate boundaries in the spirit of the fairness clause.

“wrong winner” election results. Thus, in the lead up to the 2018 state election, options are limited but demands for change are loud, and even the current electoral beneficiary, the Labor Party, appear ready to entertain reform. Mindful of the practical power play in the State’s Parliament, however, we suggest a modest solution.

Historical Background

Electoral malapportionment defined Australian electoral systems from the colonial period through to the 1970s for the simple reason that the political culture of the nation valued, largely unquestioned, the virtues of those citizens who lived, worked, and duly voted in the rural and regional electorates (Jaensch 1971; Stock 1991). As a consequence electoral boundaries in South Australia were drawn to benefit rural interests and the parties that represented these interests. By the 1960s arguments defending the undemocratic nature of the system that denied so overtly “one vote, one value” were being challenged by the Labor Party and with the support of a growing urban population. Malapportionment was generally misconceived as a “Gerrymander”, but reform required bipartisan support and this was found when, in the late 1960s Liberal Party Premier, Steele Hall, moved to rectify the situation, a move that caused great rancor within his party (Jaensch 1991). Hall took a principled stand arguing for the removal of zonal malapportionment which had for decades seen rural electorates with less than half the enrolled voters as compared to urban electorates. With the Labor Party’s support Hall established the *Electoral Districts Boundaries Commission*). This was groundbreaking at the time and electorates were made more equal. However, the task of translating election outcomes based on single member electorates into a reasonable proportionality between the statewide TPP vote a Party earned, and the seats it won, would elude the Commission. The best solution was deemed too radical, namely to adopt Hare-Clark proportional representation as is practiced in one Australian state, Tasmania.

The South Australian EDBC commenced its work in the mid-1970s and was the first of its kind in the nation, independent of parliament and charged with ensuring equal numbers of voters in each electorate, guided by a 10% plus or minus threshold. The presiding officers are senior judge of the Supreme Court appointed by the Chief Justice, the Electoral Commissioner and the Surveyor-General and empowered akin to a Royal Commission they are able to call

witnesses to give testimony. The initial key task was to end electoral malapportionment and, importantly, in a manner free from party pressure and always transparent to the voters (Newton-Farrelly, 2011; 2012). Ending systemic malapportionment favoring the Liberal Party was achieved but, due to South Australia being the most urbanized State within the Federation, a new “bias” emerged, and it favored the Labor Party.

This “bias” was generated by the fact that the Liberal Party tended to “lock” a great deal of its core supporters’ vote up in very safe seats in the regions; as such the cessation of malapportionment offered a modest advantage to the Labor Party. But its degree did not become evident until the 1989 election when this underlying “bias” was exposed. The Labor Party formed government despite trailing the Liberal Party both on primary votes 40.1% to 44.2%, and with preferences distributed the statewide TPP vote (Labor: 48%; Liberal: 52%). The seat tally was 22 apiece in the 47 member chamber, with three seats held by independents, Labor gain the support of two Independents, both of whom were former Labor Party members and was able to, form government. In 2002 and 2014, Labor would form minority government with similar primary and TPP vote shares (see Table 1 below), but in these cases with the support of Independents representing traditionally conservative electorates.

Yet this outcome was no great surprise to those familiar with the electoral system and South Australian electoral geography. The EDBC reported that its examination of elections between 1975 and 1989 indicated that there was inherent bias favoring Labor due to the Liberal Party tying up surplus votes in very safe electorates (EDBC 1991, p. 124). As a consequence, both Labor and Liberal MPs agreed to put to referendum a reform aimed at promoting electoral fairness. Known as the “Fairness Clause” voters passed it in 1991 and shortly after the *Constitution Act 1934* was amended so as to require that the EDBC:

“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 allow a government to be formed” [cited in Newton-Farrelly 2012, p. 18].

In practice, the amendment envisaged that when Labor or Liberal secure 50% of the TPP vote they ought to, assuming a uniform statewide swing, win 50% of the seats and thereby be in a

position to form government. This assumption is, of course, false because swings will vary considerably among electorates. The 2010 election highlights the dilemma when Labor received large negative swings in its safe seats, but not sufficient to unseat its candidates while, in nearby marginal seats, swings were muted and incumbent members survived. Factors such as quality of candidate and campaigns tactics matter hugely and as the EDBC noted, while it strives to construct a “level playing field” of electoral boundaries it is “for the parties to present their policies, candidates and campaigns ... The Commission has no control over, and can accept no responsibility for, the quality of the candidates” [EDBC 1991]. The consensus opinion among commentators is that Labor selects superior candidates and campaigns more effectively than the Liberal Party, particularly in marginal seats (Manning 2014; Manning and Manwaring 2014; and Newton-Farrelly 2011). That is not a viewpoint accepted by many Liberal Party politicians or party members in 2014 (Downer 2014), but the evidence is compelling regarding recent Labor superiority (McGuire 2014; Coorey 2014).

As virtuous as the Fairness Clause appears in theory, its fundamental flaw was noted during the debate over its presentation to voters at the 1991 referendum. Prominent academic political commentator and respected psephologist, Dean Jaensch, argued that “fairness” as defined by the amendment was “impossible to obtain” (Jaensch 1991). Reviewing the subsequent efforts to render “fairness”, Glynn Evans (2006, p. 121) correctly observed, “Single-member electoral systems do have a strong tendency to produce results where there is little, if any, correlation between votes received and seats won.” Accusations of unfairness rest upon assuming a majoritarian electoral system may take, in practice, the shape of a proportional system. This is an impossibility for, as Newton-Farrelly explains, it confuses a “skewed result” with a “biased result” [Newton-Farrelly 2011a, p. 5]. Bias relates to electoral geography that may be disadvantageous to a party whereas “skewed” results occur ‘when the parties compete on a level playing field and non-uniform swings translate votes into seats in an exaggerated way’ [Newton-Farrelly 2011a, p. 5]. Moreover, the EDBC must project past individual electorate voting patterns into the next election working with the assumption that these may be abstracted from the machinations of campaigning, incumbency advantages [e.g., ‘sophomore surge’] and, albeit more nebulous, the question of ‘candidate quality’.

Swings vary considerably between electorates at some elections, thereby undermine the utility of the statewide TPP vote as a reasonable measure for redrawing boundaries. The EDBC also struggles to predict the strength of Independents and minor parties. This exercise, in turn, confounds the assumption that the “Two Party Preferred” vote has the utility supposed by current electoral law. That is, the contest for the first and second place in any given electorate is not always between the major parties as, for example, Independent candidates and the Australian Greens candidates may finish in second position. Against this milieu, a “skewed” result is likely, but bias is what many voters see, and what Liberal MPs and party members loudly proclaim.

Table 1: South Australian Election Results – Vote, Predicted Two Party Preferred and Seats Won at Elections 1989 - 2014

| Election | State-wide TPP result | Primary | Predicted TPP required for Lib Majority | Result Seats Won [47 Seat Chamber] |
|------------------------------|-----------------------|---------|---|---------------------------------------|
| 1989 Liberal Party | 52 | 44 | 51.9 | 22 |
| ALP | 48 | 40 | | 22 3 Independents |
| 1993 Liberal Party | 60.9 | 52 | 52.5 | 37 |
| ALP | 39.1 | 30 | | 10 |
| 1997 Liberal Party | 51.5 | 40 | 50.3 | 23 |
| ALP | 48.5 | 35 | | 21 3 Independents |
| 2002 Liberal Party | 50.9 | 40 | 50.2 | 20 |
| ALP | 49.1 | 37 | | 23 3 Independents 1 National Party |
| 2006 Liberal Party | 43.2 | 34 | 48.9 | 15 |
| ALP | 56.8 | 45 | | 28 3 Independents 1 National Party |
| 2010 Liberal Party | 51.6 | 42 | | 18 |

| | | | | |
|------------------------------|------|----|------|----------------------|
| ALP | 48.4 | 38 | 50.0 | 26 3 Independents |
| 2014 Liberal Party | 53 | 45 | 53.0 | 22 |
| ALP | 47 | 36 | | 23 2 Independents |

Source: Compiled by authors.

Table One highlights how the 2010 and 2014 elections produced “wrong winner” elections; in addition, the 2002 election may also be considered as a marginal example. The “predicted” TPP vote required for the Liberal Party to win a majority of seats (24 in the 47 member House of Assembly) indicates the “gap” that the Fairness Clause is supposed to close. The problem for the Liberal Party, apart from the “gap” issue, is that Independent candidates were elected in traditionally safe Liberal regional electorates, but chose to support the Labor Party to form government in 2010 and 2014. While the Liberal Party retained government in 1997 by dint of support from an Independent, it did not win a majority of seats despite winning a clear TPP majority. The 2002 election saw the Liberal Party win a clear majority of votes but again not a majority of seats. In this instance, a former Liberal MP created a new party and was returned, and much to the surprise of all parties and commentators, he chose to support Labor to form a minority government. Bad luck for the Liberal Party rather than overt failure of the Fairness Clause explains this “wrong winner” instance, but the result is recalled as “unfair”.

For the EDBC determining a statewide TPP, it is necessary to meet the spirit of the Fairness Clause, but this can only be achieved by engaging in what is known as a “re-throw” count. Re-throws are undertaken in districts where a major party finishes behind a minor party or independent candidate. The preferences of minor party and independent candidate ballots are distributed to the major parties so as to render a TTP count. Clearly, this is an artifact and, when implemented, tends to overestimate slightly the predicted TPP vote required for a Liberal Party seat majority. It is not a serious impediment to implementing fairness, but may become so should voters continue the trend away from supporting the major parties. More seriously problematic for the EDBC is the fact that, in an effort to match the major parties’ statewide TPP vote closely with the proportion of seats won, commissioners also need to be mindful of how

Independents may lean in the event of a hung Parliament. As a result, avoiding a “wrong winner” result under current methodology is a fraught business. With voter volatility increasing the task of rendering “unbiased” boundaries is impossible to reach with any confidence.

To make matters even more difficult, the EDBC is supposed to factor into its deliberations principles relating to districts topographic integrity; that they reflect “communities of interest” rooted in economic, social and regional factors; and also allow for “the feasibility of communication between electors affected by the redistribution and their parliamentary representative in the House of Assembly.” With each redistribution review, these considerations were compromised as the EDBC wrestled with finding means to distribute part of the “locked up vote” in Liberal safe seats to Labor marginal seats.

In summary, the crux of the problem lies with translating the 50% statewide TPP vote into a majority in the House of Assembly rests on false assumptions. The combination of normal incumbency advantage with a “personnel vote” built upon diligent work servicing constituents, plus, as noted above, increasing numbers of swinging votes acts to undermine the efficacy of the TPP statewide swing as an efficacious measure for determining fairness of outcome. Jaensch (1991) pointed out the logical flaw with assuming past voting behavior, in effect voter loyalty to party, would be in any measureable fashion replicated at the next election. Clearly, too many intervening variables make it all but impossible to confidently define boundaries so as to render a proportional outcome between statewide TPP vote and electorates won by the major parties.

At the time Jaensch’s arguments were dismissed, such was the mood to rectify the 1989 “wrong winner” outcome. The Liberal Party was in no mood for lectures about how single member district electoral systems based on the majoritarian principles of preferential voting could not readily be married to proportional representative electoral systems. In many respects this remains the case today, the accepted wisdom was that one could measure sensibly a statewide or nation-wide swing using the so-called “Mackerras Pendulum.” While the pendulum has its virtue as a means for viewing all electorates by their TPP margins and where majority tipping points lie, its flaw lies with an inherent assumption that votes flow in a uniform manner at any given election. Skepticism of the pendulum as a useful measure has lurked

beneath the Australian psephological surface for many years as evidenced by Sharman's (1978) insightful critique and Jaensch's bafflement at why South Australia enshrined the Fairness Clause in its electoral law. The question we turn to is what might be done to reassure voters that their state's electoral system will no longer render wrong winner outcomes.

A modest proposal for reform

In light of headlines reporting a prominent South Australian Liberal Cabinet Minister serving in the national government, stating that the 2014 election result saw an "illegitimate" government formed, tensions are high. A state parliamentary committee is considering a host of matters relating to the conduct of both lower and upper house elections (ABC 2014). Realistically, the only way to "fix" the flaws with the Fairness Clause is to move to a new electoral system, such as Hare-Clark. This would entail a conversation about abolishing the Upper House, the Legislative Council, which is elected as a single statewide electorate using the Single Transferable Vote [STV], but public opinion strongly favors its review role and its diversity of elected members. Moreover, proportional representation has never been a popular proposition for the major parties as they fear losing the opportunity to form a majority government in their own right. Essentially, any reform must be modest and occur within the context of the Parliament amending the electoral act because more substantial reform would likely require amending the Constitution Act [1934] and thereby require a referendum.

Parties and other interested individuals are invited to make submissions and we expect this will see the Liberal Party argue for more radical redrawing of boundaries to make more Labor seats marginal (or nominally Liberal) and advocate for a greater acceptance of modest malapportionment. This objective is well within the EDBC auspices given that, for each electorate, a 10% plus or minus average of enrolled voters is allowable. Liberal MPs interviewed for this research expressed the view that many Liberal-held regional districts should have their roll reduced toward the 10% threshold. Currently, most districts roll is within 3% variation; consequently there is room to shift voters between districts more robustly than has occurred with past electoral redistributions. In effect, this would see regional districts with fewer

electors than urban, as the Commission aimed to make a number of “safe” Labor electorates marginal and, in some instances, marginal Labor electorates nominally Liberal.

Of course, this approach assumes past voting patterns would persist at the following election; an increasingly dubious proposition. Prime targets would be Labor held electorates that share boundaries with safe regional Liberal districts. For example, among Adelaide’s outer suburban – peri-urban electorates at least seven are readily identifiable – Napier; Taylor; Newland; Morialta; Fisher; Mawson and Kurna.⁴ Electorates such as Newland, Mawson, and Kurna (see Table 2) could be made more marginal by importing voters from neighboring safe Liberal-held seats. Table Two indicates clearly that there is ample room for maneuver by the EDBC should it decide to “explore” more robustly the 10% plus or minus threshold. Newland, one of Labor’s most marginal seats could take on an additional 1,500 voters from both Schubert and Kavel, while remaining below the 10% maximum allowed variance. The dilemma in all such maneuvers is the damage done to the notion that electorates should respect the notion of “communities of interest” and to the fact that MPs who have campaigned diligently, and are respected in their electorates, are nevertheless punished for their success.

Table 2 “Within the Threshold” – Examples of Labor Electorates Adjoining Safe Liberal Seats

| Labor Electorate, Current Margin, Enrolled Voters and variance from State-wide enrolment* | Neighbouring Liberal Electorate, Current Margin, Enrolled Voters and variance to State-wide enrolment* |
|---|--|
| Kurna, 7.7%, 21,113, -9.5% | Finniss, 13.8%, 23,308, -0.2 |
| Newland, 1.4%, 24143, -3.4% | Schubert, 14.6%, 23,126, -1% Kavel, 14%, 23,469, +0.5% |
| Mawson 5.6%, 22,665, - 3% | Heysen, 11%, 24,438, +4.6 |

Average electorate enrolment was 23,354 at the March 2014 Poll

Source: EDBC 2012

⁴ South Australian electoral boundaries - <http://www.ecsa.sa.gov.au/electoral-boundaries/state-boundaries/2014-state-election-boundaries>

Another proposition likely to “square the circle” and to assist with making the statewide TPP vote more proportional with seats won would be the introduction of optional preferential voting (OPV) to replace the current system whereby a valid ballot requires that voters offer sequential preferences for all candidates. OPV is used in other States (e.g., New South Wales and Queensland) and a recent bipartisan report by a committee of the national parliament argues for the introduction of OPV for Senate elections. A move in this direction is likely to flow to State Upper House elections that suffer from the same problems of so-called preference harvesting bedeviling Senate elections (Green 2014).

With the introduction of OPV for Upper House elections, it is realistic to expect that the issue should be entertained for the Lower House. However, the Labor Government moved recently from minority government to a one-seat majority when it won a by-election. Given that the Labor Party is advantaged by full preferential voting, it is unlikely there would be much enthusiasm for a change benefitting the Liberal Party. At the 2014 poll it is likely – though impossible to prove with certainty – that under OPV the Liberal Party would have won an additional two seats (Elder and Colton), and hence a majority. This observation derives from the fact that Labor enjoys 70-80% of Australian Greens Party preferences. By removing compulsion to preference Labor may well lose close contests but, on the other hand, if a strong minor party of center-right wing persuasion emerged, the situation would be reversed and the Liberal Party would suffer.

FLORIDA

American history is filled with fascinating stories over redistricting battles ranging from the drawing of Massachusetts state senate districts in 1812 that first gave rise to the term “gerrymander” to more recent examples such as Democratic members of the Texas House of Representatives going to neighboring Oklahoma in 2003 to prevent a quorum of the legislative body being met in order to block a Republican-drawn congressional redistricting plan. For the purpose of this paper, however, we will focus on events and a series of court orders in Florida

in 2014. Such a case study provides an efficient means to highlight similarities and differences with South Australia's attempts to address the vexing questions of electoral boundaries.

Florida is the southeastern-most state in the United States, and its coastline travels from the Georgia border along the Atlantic ocean all the way around to its western border with Alabama in the Gulf of Mexico. It is the third most populous state in the nation, and has significant and growing Hispanic and African-American populations, with a majority (57% as of 2011) of children 1 year of age being from minority groups. Politically, Florida shows signs of mixed partisan leanings. A majority of voters are registered as Democrats, but recent state elections have favored Republicans. On the other hand, though, the state has tended to favor for Republican presidential candidates, although Barack Obama won the state in the past two elections becoming the first non-Southern Democratic candidate to win the state since Franklin Roosevelt. Due to its population and mixed partisanship, Florida often is a critical state in presidential elections, as most notably witnessed in 2000 and the ongoing legal battles up to the United States Supreme Court's decision in *Bush v. Gore*.

Similar to South Australia, Florida's story over the 2014 congressional elections starts with the passage of reforms designed to address certain biases found in creating electoral districts. In 2010, Florida's voters approved two amendments to the Florida Constitution. Commonly referred to as the Fair District Amendments, these amendments were incorporated into Article III, Section 20 of the Florida Constitution as follows:

"Standards for establishing district boundaries.—In establishing congressional district boundaries:

- (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representation of their choice; and districts shall consist of contiguous territory.*
- (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection 1(a) or with federal law, districts shall be as nearly equal*

in population as is practicable; districts shall be compact; and districts shall where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections 1(a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection."

South Australia's Fairness Clause focused on the *outcome* of elections resulting from the manner in which the boundaries are drawn, albeit by an independent authority, the EDBC. By comparison, Florida's Fair District Amendments focus more on the *process* of drawing the boundaries. The amendments establish certain standards that must be followed in creating congressional district boundaries and, as a result, "significantly decrease the Legislature's discretion in drawing district boundaries" (Lewis, July 10, 2014, p. 3).

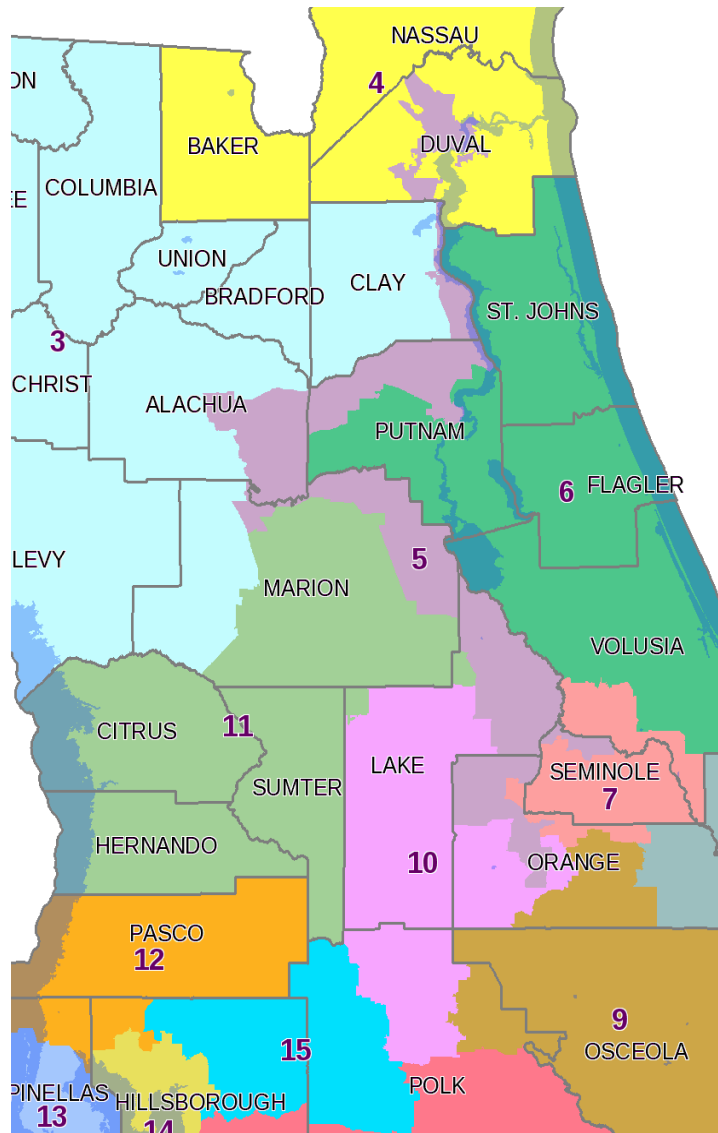
The first court case in which the Fair District amendments were at issue was *Romo v. Detzner*, heard in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida before Judge Terry Lewis. As an issue of first impression, Judge Lewis needed first to decide some overarching issues that would shape his analysis, including:

- *The appropriate standard of judicial review to use:* "I will therefore, in this case apply [a] standard of review ... deferring to the Legislature's decision to draw a district in a certain way, so long as that decision does not violate the constitutional requirements, with an understanding of my limited role in this process and the important role of the Legislature" (Lewis, July 10, 2014, p. 8).
- *Whether to consider a challenge to the entire redistricting plan or just individual districts:* "The districts are part of an integrated indivisible whole. So in that sense, if there is a problem with a part of the map, there is a problem with the entire plan. ... [However], I have focused on those portions of the map that I find are in need of corrective action in order to bring the entire plan into compliance with the constitution" (Lewis, July 10, 2014, p. 8-9).

In focusing on those districts in need of corrective action, most specifically Congressional Districts 5 and 10 (See Figure 1), Judge Lewis did consider the outcome of the redistricting process to a degree. For example, he noted that District 5 failed to satisfy the Fair District

Amendments by being “visually not compact, bizarrely shaped, and [it] does not follow traditional political boundaries ... At one point, District 5 narrows to the width of Highway 17 (Lewis, July 10, 2014, p. 18).

Figure 1: Contested Boundaries of Florida Congressional Districts 5 and 10.



Source: Florida Senate website (flsenate.gov)

The more damaging evidence, however, demonstrated that “political operatives ... managed to taint the redistricting process and the resulting map with improper partisan intent” (Lewis, July 10, 2014, p. 22). Evidence of destroying records; early meetings among legislative leaders, staff, and political consultants; continued involvement of political consultants in the

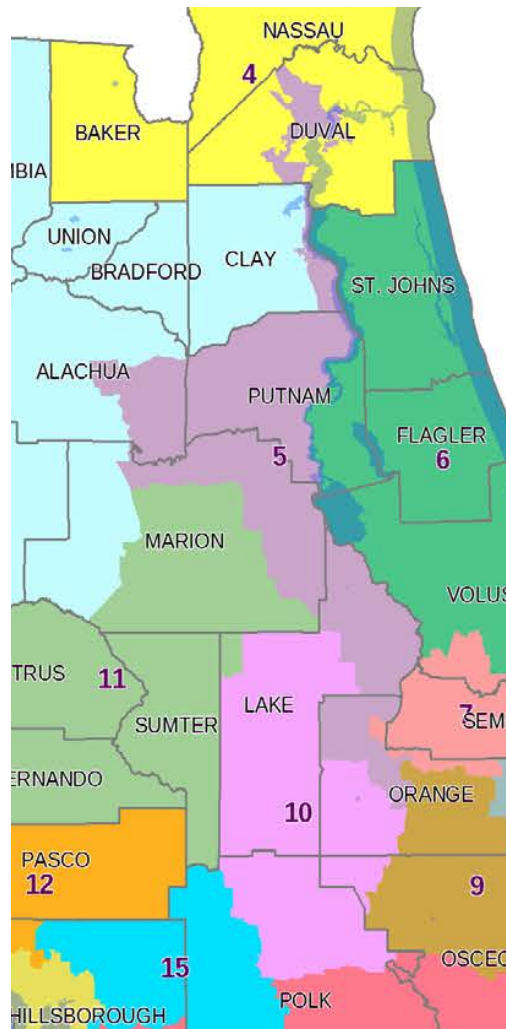
redistricting process; a prior finding of partisan intent in the State Senate redistricting plan; and other evidence of partisan intent all reflect that the process of drawing the congressional districts was flawed. Importantly, these challenges and conclusions were made *prior to* any elections being conducted based on the unconstitutional map, as compared to the *after-the-fact* objections to “wrong winners” that are of concern in the South Australian analysis above.

As with South Australia, we are faced with the question of: In the wake of an improper disruption of the democratic process in crafting electoral boundaries, what is the remedy, reform, or cure for the ills? For Judge Lewis, this question required addressing two issues: (1) who should be responsible for producing a new map that would satisfy Florida’s constitutional requirements, and (2) given that the next congressional election was to be held only four months after the July 10, 2014 finding of an unconstitutional plan, how should the upcoming elections be handled.

For the first question, the plaintiffs who brought the case objecting to the original plan suggested Judge Lewis accept any of the following alternatives: “adopt one of [the plaintiffs’] proposed remedial maps, draw one myself, have an independent expert draw one, or if the Legislature is to redraw the map, that I give them specific, detailed instructions on how to do so” (Lewis, August 1, 2014, p. 2). Recall the standard of judicial review selected by Judge Lewis described above, however, namely being deferential to the legislature. In the *Romo* proceedings, Judge Lewis first gave the legislature a period of time to deliver a proposed new map on its own, then ordered the delivery of a new map, and ultimately approved the revised map. Most informative to understanding this approach, Judge Lewis noted:

“The Legislature is not required, however, to produce a map that the Plaintiffs, or I, or anyone else might prefer. The Legislature is only required to produce a map that meets the requirements of the Constitution. My duty is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid” (Lewis, August 22, 2014, p. 3 [internal quotations and citations omitted]).

Figure 2: Approved Remedial Map of Districts 5 and 10



Source: Florida Senate website (flsenate.gov)

As for the second issue of the upcoming elections, Judge Lewis was willing to consider alternatives besides allowing the November congressional elections to be conducted under the unconstitutional map, but he expressed some concern about adopting such other alternatives. Perhaps hearkening back to his inner-James Madison, Lewis stated that “From the perspective of equity, the cure should not be worse for the patient than the illness” (Lewis, August 1, 2014, p. 3).⁵ When the plaintiffs’ ultimately failed to provide evidence supporting and specific dates for alternative election plans, Judge Lewis permitted the 2014 congressional elections to take

⁵ James Madison famously wrote in Federalist #10 (emphasis added): “There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. *It could never be more truly said than of the first remedy, that it was worse than the disease.*”

place under the unconstitutional map with the boundaries of the approved remedial map to be put into place for the 2016 congressional elections.

Reforming the Process?

The case of Florida in 2014 reflects what would seem to be an extremely legitimizing process, particularly in the structure and political culture of the American political system. The state legislature, whose members are popularly elected directly by the voters of Florida, had the primary responsibility of creating constitutional congressional districts. Opponents were given their “day in court” to challenge the initial plan. Employing the popularly approved amendments to the state’s constitution, and grounded in a system of checks and balances and the foundation of judicial review, the judge ruled that the legislature’s actions were unconstitutional. Rather than placing the power to offer a remedial plan in the hands of the unelected or limitedly elected⁶, Judge Lewis gave the people’s representatives the first opportunity to fix their flawed map, and found that the remedial map satisfied the state’s constitutional requirements.

Yet, the 2014 congressional election was conducted using a map that was flawed, biased, and unconstitutional; some would even say illegitimate. Further, opponents still contend that, notwithstanding Judge Lewis’s finding of constitutional compliance, the remedial map still does not satisfy the requirements of the Fair District Amendments, and appealed the decision to the Florida Supreme Court (oral arguments were heard on March 4, 2015; decision pending as of March 12, 2015). In their initial brief, these opponents, led by The League of Women Voters of Florida, sought similar process-oriented remedies as they proposed to Judge Lewis: judicially drawn districts, adoption of one of the plaintiffs’ (now appellants’) proposed maps, adoption of a map prepared by an independent expert, or the submission of several independently drawn maps that would be submitted to the legislature to select which map would be enacted.

⁶ In Florida, Circuit Court judges are generally elected, although the governor can appoint judges to fill a vacancy. Judge Terry Lewis was first appointed to his Circuit Court judgeship in 1998, and does not appear to have ever faced a contested election for his seat thereafter. Further, the 2nd Circuit Court on which Judge Lewis sits is comprised of six counties in the Florida panhandle, including the state’s least populous county, that comprise approximately 2.0% of the population of Florida.

The continuation of the dispute beyond the initial trial level and the persistent call for a more neutral, less partisan process for preparing and adopting redistricting plans leads to the question, like that seen in the case of South Australia, of whether the process could or should be reformed to try to eliminate contentious and litigious courses of action. In terms of drawing congressional boundaries, Florida is one of 42 states (including the five states with only one member of the U.S. House of Representatives) that give primary responsibility for redistricting to the state legislature, although Ohio and Rhode Island also use non-binding advisory committees for congressional districts. The remaining states utilize commissions of some form to draw congressional redistricting maps, ranging from backup commissions that are given the responsibility if the legislature fails to pass a plan (Connecticut and Indiana), politician commissions on which elected officials serve (Hawaii and New Jersey), and independent commissions in which politicians and in some cases legislative staff and lobbyists are barred from serving (Washington, Idaho, California, and Arizona).⁷

Consideration of the experiences of these other states in creating congressional districts is outside the scope of this paper. However, the South Australian experience is informative of some of the potential limitations of using a separate commission in crafting electoral boundaries. The success or failure of such a separate commission will hinge significantly on the parameters to be used and the objectives to be met, in other words, the charge of the commission.

As discussed above, in South Australia, the charge of the separate commission is based on translating a 50% TTP vote into a majority in the House of Assembly, and the problem with doing so is that this charge rests on false assumptions. Further, the commission factors in certain values in creating electoral districts, such as promoting topographical integrity, facilitating the feasibility of communication between constituents and their representatives, distributing part of the “locked up vote”, and perhaps most importantly reflecting historically significant “communities of interest”.

⁷ The information in the above paragraph was compiled from <http://redistricting.ils.edu/who.php> (last accessed March 22, 2015).

Taken in the American context, what values should a separate commission take into account? In the Florida case, for example, the plaintiffs' proposed exemplar maps would create a "black opportunity district" with a black voting age population (BVAP) of approximately 45% as well as a "minority influence district" with a BVAP around 25% (Lewis, August 22, 2014, p. 2). Certainly, promoting representation of racial or other minority populations is a highly laudable value. But doing so is a value choice as promoting one value may come at the expense of an equally laudable or otherwise legitimate value.

One supposed promise of utilizing a separate commission is that it would take the "politics out of politics", something witnesses in the *Romo* trial in Florida said was impossible even in the context of the Fair Districts Amendments (Lewis, July 10, 2014, p. 4). In some ways, these witnesses make a valid point. Since the process of drawing electoral boundaries is inherently value-laden, requiring the process to be devoid of "politics" or, more specifically, of political choices would be similar to what James Madison referred to as "giving to every citizen the same opinions, the same passions, and the same interests" as a method to remove the cause of faction (see footnote 5). In Federalist #10, Madison called this solution "impracticable" arguing that "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."

In fact, the choice of using a separate commission versus allowing the state legislature to be responsible for determining electoral boundaries is itself a value choice. The rationale of using a separate commission is to avoid the appearance of corruption by promoting the appearance of neutrality. Indeed, the appearance of corruption is a central tenet of reform policies harkening back to the U.S. Supreme Court's decision in *Buckley v. Valeo*, the seminal campaign finance court decision, in which the Court determined that preventing corruption or the appearance of corruption was the only legitimate governmental interests on which the First Amendment rights involved in the case could be restricted (Farrar-Myers).

The cost of utilizing a separate commission, however, is placing the decisions on electoral boundaries in the hands of unelected officials.⁸ The benefit of having the legislatures

⁸ With respect to politician commissions, where elected officials can be members, such officials are elected to office as compared to being chosen specifically to serve on the separate commission.

make the value and policy choices inherent in creating electoral boundaries is that this task thus lies in the hands of the officials elected by the voting public and who, in turn, can be held accountable at the next election if the voting public disagrees with their decisions.

Although having the legislature make decisions on electoral boundaries may create opportunities for overly partisan concerns to drive the process, the risk of corruption or the appearance of corruption can be mitigated through the judicial system, checks and balances, and a process governed by the rule of law. That is why the 2014 congressional elections in Florida, despite utilizing a plan judicially determined to be unconstitutional, did not undermine democracy in America. The full process allowed all viewpoints to be expressed and various interests to be balanced, and as a result the election was legitimized.

Such a conclusion still begs the question of whether there is some way to better reconcile the legitimizing process with the actual use of an unconstitutional map in the 2014 elections. Judge Lewis was cognizant of such a conundrum and offered a way to conceivably reconcile these points: “Despite the legal maxim that for every wrong there is a remedy, our laws do not always allow the most efficient, the most satisfying remedy for those who have been wronged.” In the Florida case, those wronged will receive a remedy of an improved congressional map to go into effect in 2016, as well as the right to continue to pursue even greater changes to the districts through their case before the Florida Supreme Court. These remedies, while perhaps not satisfying or efficient, do meet the criteria set forth in the Fair Districts Amendments and the laws of the State of Florida.

CONCLUSION

The conduct of fair and open elections is at the heart of democratic systems such as those found in the United States and Australia. In the cases of South Australia and Florida examined herein, no instances of voter fraud, election tampering, coercion and threats, or changing results have been discussed. Instead, the focus has been on the underlying structures and processes that are designed to facilitate and give meaning to the concept of fair and open elections, specifically how the boundaries for electoral districts are drawn.

The intriguing part of these two cases is that in one instance (South Australia) the process for drawing boundaries was not corrupted, but the system was seen as failing; in the

other instance (Florida), the process was corrupted and the result of such corruption was implemented, but the system as a whole was shown to work. The basis for resolving such a seemingly contradiction lie in (a) the different focus between outcome and process in the South Australian and Florida cases respectively, and (b) the availability of and likelihood of future avenues to address the underlying problems.

The outcome/process focus has been touched upon above, particularly in the context of the Florida case. In Florida, as inefficient or unsatisfying as the outcome may be in any individual situation, the focus on the process allows for a more systematized approach to reviewing and ultimately legitimatizing proposed electoral boundaries. Such a focus also eliminates the impact of contextual factors that may vary from election to election, such as candidate quality, campaigns tactics, and electoral mood, each of which help frustrate the use of the statewide TPP in the South Australian example.

As for South Australia, the past 25 years of South Australian electoral practice rooted in the Fairness Clause demonstrates how fundamentally flawed in theory and in practice is the belief that the statewide two-party-preferred vote of the major parties at the most recent election may work as sound guide setting district boundaries for the following election. Voter volatility and the contextual factors noted above make the re-districting process particularly fraught. Moreover, implementation of the fairness clause after each election arguably has the deleterious impact, in some instances of penalizing MPs who build a strong respect in their communities and undermining the tradition that electorates should reflect discernible “communities of interest”. The prospect for reform within the spirit of the fairness clause would entail moving away from an outcome-driven focus to one more process- and structural-oriented in nature, such as moving from single member electorates toward zonal multi-member electorates. Other potential reforms discussed above, such as exploring how to utilize the full allowable margins in determining enrollment thresholds or introducing optional preferential voting, would still retain an outcome-oriented focus, but would at least incorporate additional processes by which the desire outcome of translating the statewide TPP could be more readily achieved.

The cases of South Australia and Florida also reflect important differences in the availability of avenues of recourse to address the “wrongs” at stake in the 2014 elections. As discussed above, the South Australian system would seem to be structurally flawed in order to achieve the desired outcome. Moreover, this flawed system could lead to a sense of helplessness among the electorate. In each of the “wrong winner” elections that have occurred since the passage of the Fairness Clause, the party that received the majority TPP vote appears not to have been able to alter the outcome of which party became the governing party.

In order to keep additional “wrong winner” elections from occurring in the future, the system itself must be changed with perhaps a different set of values chosen in structuring the system. However, electoral systems based on the principles of proportional representation fail in Australia to curry favor with the major parties, in large part because of the value they place in obtaining election for their party candidates. As a consequence, the often acrimonious and endless debate over what “fair” boundaries might look like will continue with no timeframe for resolution. In other words, those who object in South Australia to the outcome of a “wrong winner” election or to the system for creating electoral boundaries as a whole have no true recourse by which to put their grievances into action.

By comparison, in Florida, opponents of either the original or remedial maps have multiple avenues to pursue recourse, and more defined and limited time periods with which they would be required to live with the consequences of a perceived flawed process for creating electoral boundaries. First, opponents have immediate recourse to judicial branch. As we saw in the Florida case, opponents achieved a limited victory at the trial level of their litigation and are pursuing broader remedies on appeal. Second, rather than facing no meaningful resolution for an indefinite period of time, such as in South Australia, Floridians had to live with the most egregious electoral map for one election, and with the remedial map at most until new maps are mandated to be drawn following the 2020 census. In the meantime, opponents can resort to the electoral and political processes to try to achieve their desired outcomes within the political system, such as trying to elect preferred candidates in future elections within the boundaries established by the remedial map and in the state legislature in

the 2020 or 2022 elections in order to fill the state legislature with members who reflect their values.

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