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Electoral Districting in the U.S.: Can Canada Help?

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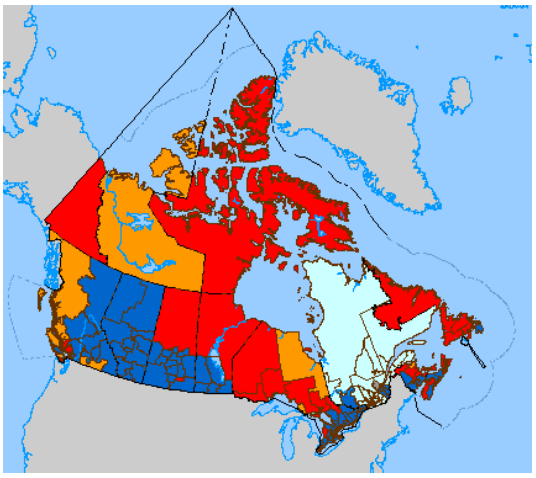
EXECUTIVE SUMMARY

In the concluding chapter of *Red and Blue Nation? Consequences and Correction of America's Polarized Politics* (Brookings Press, 2007), Pietro S. Nivola and William A. Galston lay out a series of changes aimed at "depolarizing" the politics of the United States. One of their recommendations calls on the states to introduce fundamental changes to the process of redistricting congressional electoral districts. A handful of states have already established redistricting commissions, so the first steps have been taken in reforming one of the most important pillars of the electoral process.



© Map of the 39th Federal Election, 2006. Natural Resources Canada 2008, courtesy of the Atlas of Canada

This paper explores the possibility that the United States could build on those initial moves. Additionally, would it be possible to "import" the Canadian model of independent electoral boundary redistricting commissions? For the first 100 years of Canadian history redistricting seats in the federal House of Commons followed a pattern familiar to Americans. It was a process firmly under the control of the politicians, and the results reflected that. Wide disparities in population size were a tell-tale sign of the extent to which Canada's parliamentary districts were gerrymandered.

Starting at the provincial level in the 1950s, partisan redistricting eventually gave way in all jurisdictions to nonpartisan commissions. How that change came about and why the Canadian commission-directed redistricting commends itself to Americans concerned about the highly politicized state of redistricting in the United States are the subjects of this study.

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The American Electoral System: Where to Begin?

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Whenever I contemplate the American electoral system, a quip of Peter Ustinov's comes to mind. Landing at JFK from Britain, Ustinov was asked by an immigration official to complete an entry form. According to the actor, one of the form's questions read, "Is it your intention, stated or otherwise, to overthrow or cause the overthrow of the American government?" His answer was simple and to the point: "I wouldn't know where to begin."

Outsiders studying U.S. elections and electoral institutions share much the same sentiment. It is hard to know where to begin, especially if one is interested in proposing possible reforms. Would it be best to start on the financial side of the electoral equation and seek to limit radically the amount of money that parties and candidates must take in and spend to compete in an American election? Or would that be doomed as impractical and of dubious constitutional validity? Bearing Florida 2000 in mind, could clear and simple ballots be deployed along with accident-proof voting machines? Are truly nonpartisan administrative operations possible for state and national elections? Could voter registration practices be improved in the hope of ensuring that a larger share of the voting age population makes it onto the list of eligible voters? Should felons who are American citizens be entitled to vote? What groups of voters are most directly affected by Voter ID laws—such as Indiana's, recently upheld by the U.S. Supreme Court? Are there alternative ways of verifying voters' identities that would accomplish the same objective but without effectively barring some Americans from voting? The list of possible changes is daunting. And, it must be admitted, when compared with the voter registration, election financing, franchise, voter identification, and election administration practices of other Western liberal democracies, those of the United States reinforce the country's exceptional character.

But caution is always the best guide when it comes to drawing lessons from any comparative policy analysis. Nowhere is that truer than with elections and electoral administration, for each country's electoral apparatus is a reflection of its history, its political culture and its form of government. Is it a federal state, and if so highly centralized or decentralized? Is its constitutional framework based on a separation of powers or is it parliamentary? What are the social values and political principles that underlie the construction and operation of its electoral institutions? What role can, or should, the state play in constructing a framework for its elections that is both trusted and reasonable? Are its citizens wary of a large measure of state involvement in electoral administration, or are they more favorably disposed to the idea that electoral institutions should be under the control of the state and not the political parties? American exceptionalism might be demonstrated by its electoral apparatus, but equally that exceptionalism is a product of over 200 years of political development under a set of institutions, principles and values unique in the world. As path dependency theory reminds us, the sequencing of events and processes in the course of a country's history limits the options that political actors can realistically pursue at any given time.

Red and Blue Nation? A Call for Redistricting Reform

Forewarned of the risks of "looking elsewhere" for possible solutions to electoral problems in the United States, it is nonetheless tempting to see if lessons can be learned from the institutional reforms put in place in other countries. But first, a comment about electoral reforms in the United States. In the concluding chapter of *Red and Blue Nation? Consequences and Correction of America's Polarized Politics*, Pietro S. Nivola and William A. Galston lay out a series of changes aimed at "depolarizing" U.S. politics. It is an imaginative and comprehensive list of changes that if accepted would, in the authors' view, go some way toward reversing the increasing polarization of American politics.

Nivola and Galston's concern with political polarization in the United States stems from a number of discernible changes in the electorate, the parties, Congress and the presidency over the recent past. They conclude that heightened polarization has contributed to a decline in public trust in government, a "relentless, even reckless, upward spiral" in government spending, a marked attenuation of a bipartisan foreign policy, and a "petulant mind-set" in the selection and confirmation of judicial appointments. The law of unintended consequences being what it is, the authors correctly note that not all past changes in the electoral machinery have worked for the best. The introduction of nonpartisan ballots a century ago contributed to depressed voter turnout figures, and direct primaries rendered U.S. elections "less democratic" because only "small bands" of voters bothered to participate. The campaign finance reforms of 2002 simply altered the ways in which money could be channeled to candidates and parties, as witnessed in the success of the so-called "527s" in the 2004 presidential election when more money was raised than ever before.

If redistricting reforms are to be introduced in the United States, they will have to come from the "bottom up" rather than the "top down."

Mindful of the risks of unforeseen side effect, however, Nivola and Galston compiled a shopping list of reforms aimed at reducing polarization in American politics. The suggested changes are of a largely institutional bent, ranging from the introduction of multimember districts and instant runoff elections on the electoral front, to regular and frequent press conferences by the president and a bipartisan recrafting of some important congressional rules.

One of their recommended reforms caught my attention: changes to the process of redistricting congressional electoral districts. Prompted by a concern with what they describe, with reference to redistricting in California, as a "fail-safe incumbent protection plot," (a "plot" that must stand, ironically, as the epitome of *bipartisanship*, for politicians of both parties connived willingly in it), Nivola and Galston express unease over the reduction in the number of competitive congressional districts in the past quarter century. Conservative estimates suggest that the current state-based, party-driven redistricting exercises may account for as much as 36 percent of the reduction in competitive congressional districts.

If redistricting reforms are to be introduced in the United States, they will have to come from the "bottom up" rather than the "top down." The Supreme Court's "reluctance to enter the thicket of redistricting controversies" means that if the

Independent redistricting commissions, or what Canadians call "redistribution commissions," may have some utility in the United States.

redistricting reform challenge is to be taken up it will be the states that do it. And, indeed a handful of states, including Washington, Idaho, Alaska and Arizona, have done just that through the establishment of some form of nonpartisan or bipartisan redistricting commission.[1]

In other words the door leading to redistricting reforms is now ajar. Canada, another territorially large, socially diverse, federal system has gone through the same transformation with great success. Precisely because of that success, Canada's experience with redistricting, or what Canadians call "redistribution," may have some utility in the United States.

How Canada Came to Adopt Independent Commissions

For 100 years after Confederation (1867) redistributions at both the federal and provincial levels in Canada were carried out by elected politicians. To be exact, they were carefully managed by whatever party happened to be in office at the time. As is still true in the United States, the results in Canada were predictably partisan and self-serving affairs aimed at maximizing the chances of returning incumbents and of defeating political opponents.

The most gerrymandered seats in Canada were often markedly smaller in population than a province's average per district population. Although the degree of malapportionment was pronounced in many jurisdictions, Québec serves as a case in point of a highly malapportioned provincial legislature. Measured in the early 1960s by the Dauer-Kelsay Index (a then fashionable, but crude, way of gauging district inequality), 26 percent of Québec's population could, theoretically, have elected a majority of the members of the provincial assembly. By that measure Québec was *more* malapportioned than Tennessee when, at roughly the same time the U.S. Supreme Court, accepting Dauer-Kelsay as a valid measurement of malapportionment, issued its historic *Baker v. Carr* decision. Population variances among seats in Canada's federal Parliament were no less extreme. In the 1965 federal election – the last before districts were constructed by independent, nonpartisan commissions at the federal level – the largest seat in Parliament, in Ontario, contained 267,253 residents and the smallest, in Québec, 12,479.

Partisan and politically-charged gerrymanders that enabled such wide variations in constituency size are now a thing of the past in Canada. An argument advanced by, among others, Lord Bryce when he was British Ambassador to the United States a century ago explains why this should be so. Federal countries have a distinct advantage over unitary ones in so far as they allow "experimentation" in their local "test tubes." In

[1] Iowa has legislated a different kind of reform. Nonpartisan legislative staff design the maps for Iowa House and Senate and U.S. House districts. The legislature votes on them. For details on state commissions and Iowa's unique system see: http://www.ncsl.org/programs/legismgt/redistrict/com&alter.htm

political science we now call this the "diffusion of innovations" theory, and in the language of the street it is, simply, "copy-cats." Canada's test tubes are, of course, its ten provinces, just as those in the U.S. are its 50 states. It is within one or more of those ten Canadian jurisdictions that a host of federal programs and institutions, ranging from snowmobile regulations (this is Canada, after all) to universal, publicly-funded medicare, have had their origin. One of the institutional reforms that spread successfully to all provinces and the federal government has been the independent electoral boundary commission for the periodic redistribution of legislative/parliamentary districts.

The province of Manitoba was the first Canadian jurisdiction to pass legislation mandating the establishment of an arms-length, nonpartisan boundary commission once every ten years. Why that province at that time? A confluence of three political developments set the stage for all-party approval in the provincial legislature in 1955: glaring voter inequities resulting from a history of government-controlled redistributions; reform-oriented and innovative opposition parties, soon joined by the premier, pushing a novel idea; and a measure of public and political dissatisfaction with the proportional representation and alternative vote electoral systems then used for provincial elections.

For the first half of the 20th century successive governments in Manitoba had consciously sought to over-represent rural parts of the province in the legislature. Following the government-controlled redistribution of 1949 (the first seat reallocation in 29 years), the gross disparity between urban and rural Manitobans was abundantly clear: the province's 228,280 urban voters were represented by 17 members in the legislature and the 224,083 voters in rural Manitoba by 40 members. Urban residents, backed by reform opposition members, called for "fair representation," by which they not only meant relatively equal district populations but also nongovernment-controlled redistributions that were widely seen as open to abuse. Coinciding with these events was the increasing hostility to instant runoff elections for provincial legislative members from the city of Winnipeg.

The province looked to Australia and New Zealand as possible sources for an acceptable alternative to government-dominated gerrymanders – another illustration of diffusion of ideas. They found their answer in the independent electoral boundary commissions used in both countries. The legislative committee that designed Manitoba's independent electoral boundaries act relied heavily on the Australian model. A geographically large federal country with a parliamentary system, two large urban centers, and a sparsely settled hinterland, Australia shared much in common with Canada. The Manitoba committee's fundamental premise was that "representation by population should be the basis of electoral divisions," but that population should not be the only factor to be considered when seats were designed. Equally important were "community or diversity of interest, means of communication, and physical features." Australian experience throughout the 20th century had demonstrated, the committee reasoned, that all of these factors could be brought successfully into the boundary readjustment exercise. To remove the possibility of partisan gerrymandering, Australia

also showed that the entire process could be handled by small nonpartisan commissions made up of judges and such senior government officials as the chief electoral officer and the surveyor general.

Manitoba's success in establishing a process whereby district boundaries would be regularly redesigned by a nonpartisan body was adopted within a decade by the federal parliament. From there the idea spread to the province of Quebec. Over the course of the next 25 years, all the remaining provinces and the three territories adopted some variant of either the Manitoba or the federal scheme.

Basics of Federal Redistricting in Canada

Ottawa's *Electoral Boundaries Readjustment Act*, adopted in 1964, set out the five basic elements of the federal exercise:[2]

(a) A separate three-member commission for each of the ten provinces appointed by federal cabinet on the recommendation of the Commons' Speaker and the Chief Justice of each province;

(b) A requirement that no constituency's population could vary by more than 25 percent above or below the provincial electoral quota unless there were "exceptional circumstances" justifying the construction of seats with populations that exceeded or fell below the limits. The provincial quotas were to be determined by dividing a province's population by the number of seats to which it was entitled in the House of Commons.

(c) A stipulation that the population of each electoral district was to correspond "as nearly as may be" to the province's electoral quota. Nonetheless the commissions were to consider the following in determining district boundaries: (i) the community of interest or community of identity in or the historical pattern of an electoral district, and (ii) a manageable geographic size for districts in sparsely populated, rural, or northern regions of a province.

(d) An opportunity for the public to present written briefs and to make representations at public meetings called by the commission about the maps first proposed by the commission.

(e) An opportunity for MPs to voice their concerns with the proposed maps once formal objections to a commission's work had been filed with the Commons' Speaker by any ten members. The debate precipitated by the objections would, together with the maps as originally proposed, be forwarded to the commission for its consideration. The decision that the commission reached would be final.

[2] The redistricting procedures adopted by the provinces for the purpose of redistricting provincial legislative assembly seats vary from one province to another. For the most part they closely parallel the fundamentals of, and the principles underlying, those of the federal *Electoral Boundaries Readjustment Act*.

Each of these elements requires brief elaboration:

(a) The chairman of each three-member commission must be a superior court judge in the province. In contrast to the United States, no members of the judiciary in Canada are elected, so judicial partisanship is not an issue in the country. The Speaker of the Commons, although serving as an elected MP with a party label, is the impartial presiding officer of the House. The remaining two members of each commission are, typically, university-based social scientists and retired public servants. Twelve of the 20 commissioners appointed for each of the redistributions of 1991 and 2001 were political scientists.

(b) and (c) These two provisions introduce an obvious tension that commissions must resolve in some fashion. Federal districts should, on the one hand, correspond "as nearly as may be" to the province's electoral quota; on the other hand they may vary by as much as 25 percent above or below a province's per district average population. Together these reflect a profoundly different understanding of the "value of the vote" in Canada than in the United States. In the only redistricting case to have been heard by the Supreme Court of Canada (*Reference re: Provincial Electoral Boundaries [1991]*) the court attempted to clarify these seemingly contradictory provisions when it explicitly rejected what it called the "American model" of "voter parity" or "one person, one vote." Instead, the majority ruled in a 6-3 decision, Canada's more pragmatic, pluralist and group-based notion of representation could be traced back to Confederation. The right to vote guaranteed in section 3 of the *Canadian Charter of Rights and Freedoms* was, in the court's words, "not equality of voting power *per se* but the right to 'effective representation.'" Recognizing that absolute equality of voting power is impossible (because "voters die, voters move"), the court accepted "relative parity of voting power" as the principal condition underlying effective representation.

The 1991 decision held that relative equality of voter power could even be "undesirable" if it detracted from the primary goal of effective representation. And what constitutes "effective representation" in Canada? The judgment gave illustrations of what the court had in mind: "Geography, community history, community interests and minority presentation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples. . . . The list is not closed."

(d) As would be expected, public participation in open meetings varies according to the degree of controversiality of the proposals. When a commission's proposed changes to district boundaries are modest, or in line with those advanced by citizens' groups, political parties, politicians, and social scientists, the hearings get little media attention and small audiences. When the reverse is the case and boundary adjustments are proposed that are deemed to be too radical, or too out of keeping with the social complexion or economic ties within an area, or too likely to create an unmanageably large constituency, there is considerable public interest. Large attendance and strongly expressed emotions characterize the public meetings.

(e) Not surprisingly, Members of Parliament like the boundaries of the districts from which they are elected and are suspicious, even resentful, of commission-mandated changes. The debates in the parliamentary committee assigned to hear Members' concerns are one of the few occasions when, in an otherwise deeply partisan institution, inter-party coalitions are formed on a purely *ad hoc* basis. Regardless of their party affiliation, members from large cities band together as do Members from rural districts. In the final analysis it makes little difference, for the commissioners have made up their minds at the point of parliamentary debate and rarely make any substantial changes to their proposed maps because of the debates and cross-party alliances. If anything, the fact that Members of *all* parties may be distressed by what the commissions have designed makes the jobs of the commissioners easier than it would be otherwise. As the final authority for the new set of maps rests not with Members of Parliament but with each of the ten commissions, the parliamentary debate stage is largely superfluous and could, in my view, be dispensed with.[3]

The role that the states play in determining all manner of institutional, statutory and regulatory provisions relating to congressional elections knows no equivalent in Canada, and the differences between congressional-presidential and parliamentary governments are enormous.

Could a Canadian-Style Redistribution Reform Fly in the United States?

The electoral districting reforms introduced first in Canada in the 1950s are now firmly embedded. Five redistributions (one following each decennial census) have been conducted at the federal level since the 1960s. They followed on the heels of a century of gerrymandered districts and partisan maneuvering. In spite of what the *Electoral Boundaries Readjustment Act* defines as tolerable limits for districts (+/-25% the mean population) and regardless of what the Supreme Court of Canada has described as the guiding right to vote principle underpinning electoral districting (effective representation), the federal commissions have moved with each successive decade increasingly in the direction of voter parity. Save for the commission in one small province (Newfoundland), those in the remaining nine provinces have designed 90% to 100% of their districts within +/-15% of the mean provincial population. It is not "one person, one vote," but it is a lot closer than the parliamentarians intended and the Supreme Court sanctioned.

Could a similar scheme make its way, through diffusion of innovations, into the United States for congressional redistricting? Not everything is possible in politics, but equally not everything is impossible. The fact that some states have started the redistricting ball rolling, à la Manitoba in the 1950s, is a good sign. Not all the particulars of the Canadian commission scheme would be suitable to, or perhaps transferable to, the

[3] A dispute over boundaries of two electoral districts in the latest federal redistribution of New Brunswick was resolved in 2004 through an unprecedented special redistribution. At issue was the "linguistic, economic and cultural community of interest" of two Acadian communities, an issue raised and argued forcefully by New Brunswick MPs in the House of Commons. The special redistribution followed a court-ordered redistribution of the two districts in question. Details at: http://www.elections.ca/scripts/fedrep_nb/main_e.htm

United States. The role that the states play in determining all manner of institutional, statutory and regulatory provisions relating to congressional elections knows no equivalent in Canada, and the differences between congressional-presidential and parliamentary governments are enormous.

Still, both countries are federal, have had a history of gerrymandered districts in their national legislative assembly, and are committed (in varying degrees, admittedly) to improving their electoral machinery. One possible avenue for federal action in the U.S. draws on Article 1 Section 4 of the American Constitution. There "Congress may at any time by law make or alter such regulations" relating to "the times, places and manner of holding elections for Senators and Representatives." Should Congress choose to pursue the possibility of mandating every state to redistrict congressional districts *via* nonpartisan commissions, it is conceivable that the Canadian model of redistribution commissions would have some utility in the ensuing debate. The political will on the part of Congress to legislate such a mandated requirement would have to be massive. Equally, the questions of constitutional permissibility and political advisability would have a strong bearing on the course of action pursued. But based on the Canadian experience, change cannot be ruled out.

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