

## ELECTORAL MALAPPORTIONMENT

### Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strong-man

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This article revisits the zonal malapportionment and ‘Johrymander’ endemic in Queensland’s electoral system before the Fitzgerald Inquiry and examines how reform was won. Fitzgerald spent little time justifying his intuition that an unfair electoral system eroded accountability, and devolved to the Electoral and Administrative Review Commission (EARC) the task of rewriting Queensland electoral law. It did so by adopting precepts well established in other Australian jurisdictions; the process was one of liberalising, but not groundbreaking, catch-up. The Queensland example is intriguing for the paradoxes it presented. Bjelke-Petersen’s electoral manipulations merged pretence with openness. The concept of zonal weighting was given historical and policy justifications and cloaked behind the work of putatively independent commissions, yet its inherent partisanship was a notorious fact. More curious still, the manipulations were unnecessary either as a means of maintaining the conservatives in office or as a legal subterfuge evading constitutional constraints. Rather, Bjelke-Petersen’s pointed rejection of democratic pluralism married with the projection of an image of leadership by right. Viewing Queensland’s zonal system in the larger perspective of manipulation of electoral maps, this article compares populist strongmen in South Australia (Playford) and Québec (Duplessis), who employed similar rhetoric to entrench themselves in power. Ultimately, as others had, Queensland’s government constructed a long-running but brittle form of agrarian chauvinism, in which the signalling of anti-democratic values inherent in the zonal system was an important rhetorical component. Bjelke-Petersen was proud to govern *over*, rather than *through*, democracy.

Once upon a time an academic said to me: ‘In thirty years people will wonder what happened in Queensland in the seventies. It will all sound like a fairy tale — a man ruling with 19 per cent of the vote, a state politician whose manoeuvres removed a federal government.’<sup>1</sup>

— *Hugh Lunn (1978)*

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<sup>1</sup> Lunn (1978), p ix. Note one infelicity: Bjelke-Petersen never ruled with 19 per cent of the vote — though his predecessor did. In Bjelke-Petersen’s time the Country/National Party won between 20 and 40 per cent, and his Liberal Party Coalition partners hovered between 20 and 30 per cent.

## Introduction: From Fitzgerald to Fairness

Any account of the inquiry of Tony Fitzgerald QC and its effects on Queensland confronts a conundrum. Fitzgerald's was a Commission of Inquiry into police corruption; indeed, it began as a limited investigation into brushfires in the policing of vice in Brisbane. How did this fire spread to consume not just a 32-year-old Country (later National) Party administration, but to generate from its ashes a rewriting of public law in the state? This article describes that process in relation to Queensland electoral law, and in particular the malapportionment of the electoral map. In doing so, it places developments in Queensland in the larger perspective of historical and international manipulation of electoral maps.

The central feature of Queensland electoral law prior to Fitzgerald was its zonal system for distributing electorates in the unicameral parliament. Inaugurated by a Labor administration in the 1940s, the system was fine-tuned under conservative Premiers Frank Nicklin and (most egregiously) Joh Bjelke-Petersen. In symbolic terms, as well as in its conception of representation, the system married with Bjelke-Petersen's identification of himself and his party with Queensland's decentralised regions.

One of the major legacies of the Fitzgerald process was to wash away this system of malapportionment. It did so by adopting the model that was then standard in the rest of Australia, namely one-vote, one-value within a 10 per cent tolerance, overseen by a genuinely independent redistribution commission (albeit that in a quirky nod to the problems of representing the most sparsely populated parts of Queensland, some allowance was given for seats over 100 000 km<sup>2</sup>).

Two further electoral reforms of secondary significance were:

- (a) the reintroduction of optional preferential voting;
- (b) a mild form of campaign finance regulation.

None of these reforms was ground-breaking, let alone radical. Indeed, the public law reforms that resulted from the Fitzgerald process (including freedom of information law) were a form of catch-up as much as a great modernisation. Liberal legal values that had found little traction in the previous several decades flowed into the normative vacuum created by the collapse of a corrupt administration. They were ushered in by a QC's musings in the Fitzgerald Report and an expert law reform commission in the form of Fitzgerald's EARC offspring.

Whilst the focus of this paper is on the undoing of the malapportionment, we are not so much concerned with the mechanics of the system pre- or post-reform. The more interesting story involves understanding what role the manipulation of electoral maps actually played in Queensland under Joh Bjelke-Petersen. Before we turn to consider how reform was won, we will explore that deeper story, including by considering two comparable examples of attempts by strong-man populists to entrench themselves in power. This story requires the distinguishing of different motivations in the design of partisan electoral laws, in particular electoral necessity and legal evasion. Neither of these was strictly present in Queensland.

Instead, we find in Queensland a paradoxical merging of pretence and openness. Parliament did not directly draw the boundaries of electoral districts (Mount Isa aside), allowing the appearance of a figleaf of independence. Further, the concept of zonal weighting was given historical and policy justifications, even

though its inherent partisanship was a notorious fact. Ultimately, Queensland exhibited a long-running, but brittle form of agrarian chauvinism, in which the signalling of anti-democratic values inherent in the zonal system was an important rhetorical component. Bjelke-Petersen was proud to govern *over*, rather than *through*, democracy.

## Malapportionment Queensland Style

### *Electoral Manipulation as Rhetoric*

Electoral district maps are literally the ground rules of elections. The maps offer at least two kinds of temptations to governments, who can draw district lines (gerrymander) and tweak voter numbers in the districts (malapportion) to yield election outcomes 'contrary to the preferences of their constituents'.<sup>2</sup> Bjelke-Petersen's government succumbed occasionally to the former, but most especially to the latter. But there was a paradox at the heart of its strategy. The manipulation of electoral ground rules was elaborate, yet in a strict sense unnecessary. Bjelke-Petersen won every election he contested as Premier by comfortable margins. The Coalition governments he led would have secured power even without tweaking electoral maps in their favour.

The zonal system is usually depicted as having been calibrated to advance two goals. One was to magnify the government's support in both remote regions and in agriculturally oriented coastal and hinterland communities. This was done by over-weighting their votes and, in relation to the coastal and hinterland communities, separating them from Labor-leaning provincial cities.<sup>3</sup> The second goal was to reinforce the status of the Country/National Party as the dominant conservative force over its urbanised Coalition partner, the Liberal Party.<sup>4</sup>

However, as Mackerras argues, the system did not guarantee Country/National dominance.<sup>5</sup> The party's real secret lay in having its support concentrated in winnable seats. Electoral map manipulation only accentuated the deeper distortion inherent in the winner-takes-all system. This system, which inflates the ratio of votes earned to seats won by the largest party, particularly when its rivals are weak or divided, is endemic in former British colonies.<sup>6</sup> Of course, as the epigraph of this article suggests, it was remarkable that the Country/National Party dominated the Coalition government with just on 20 per cent of the raw vote from the implosion of Queensland Labor at the 1957 election until the Labor rout of 1974.<sup>7</sup> Even at its

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<sup>2</sup> Klarman (1997), p 498.

<sup>3</sup> Reynolds (2009), text at table 5.1.

<sup>4</sup> Reynolds (1990), p 245.

<sup>5</sup> Mackerras (1990a), p 250. See also Mackerras (1990b).

<sup>6</sup> For instance, the Nationals won government outright in 1986 with just under 40 per cent of the vote, but in doing so won a majority in seats that contained a majority of the population: Mackerras (1990a), p 252.

<sup>7</sup> Their total vote barely moved in a range between 19.28 per cent (1966) and 20.02 per cent (1969). But this vote must be understood in context: the Country Party stood in under 45 per cent of seats, while its Liberal Party partner tended to stand in the remainder.

apogee of support, Bjelke-Petersen's party achieved just 39.64 per cent in 1986, when it was elected to majority government in its own right, free of a Coalition with the Liberals, for the only time.<sup>8</sup>

Why, then, did the conservative Coalition (because the Liberals, at least while in Cabinet, supported the laws) commit itself to undermining the integrity of electoral law if it were not a mathematical necessity? By conventional reasoning, obviously partisan manoeuvres in electoral mapmaking should have cost Bjelke-Petersen's government dearly in political capital. Still more puzzling, why did it proceed indirectly by maintaining an elaborate, if almost wholly unconvincing, façade of propriety? Queensland at the time had few of the robust legal safeguards for political equality that in other jurisdictions mean partisans must act with stealth. The era of Bjelke-Petersen offers a compelling subject for election law scholars because the usual explanations for partisan electoral maps fall short.

The answers centre not principally on direct legal and electoral consequences, but rather on the political rhetoric implicit in partisan election law. Under normal political rules, when governments write egregiously biased electoral laws, they emit a whiff of desperation — clinging to office against the currents of public sentiment. Some incumbents find themselves duly ejected from office by voters, despite the apparent security of legal entrenchment. But, although famously inarticulate, Bjelke-Petersen was a skilled rhetorical practitioner. His pointed rejection of democratic pluralism was of a piece with a larger set of efforts to project an image of leadership by right over the state.<sup>9</sup> Bjelke-Petersen's cultivated image of reactionary, xenophobic, strong-man leadership took off in 1971, when his government quelled anti-apartheid protests with a brutal police response, and continued thereafter.<sup>10</sup> Partisan electoral laws served an important related purpose — victory through regular democratic channels being too prosaic for a political movement marked by an energetic appeal to agrarian and state chauvinism.<sup>11</sup> The message needed to be one of control *over*, rather than *through*, Queensland democracy.

Understanding the rhetoric implicit in partisan tricks of electoral regulation is a condition precedent for understanding why some such tricks succeed, others fail and still others succeed for a time before failing catastrophically and handing lasting power to the former opposition. This section therefore also considers why some gerrymanders and malapportionments consume political capital while others appear to create it; looking first to Queensland and then elsewhere (to South Australia and to Québec) brings this question into relief.

<sup>8</sup> Bjelke-Petersen had formed a Liberal-less government in 1983, but only after the Liberals had withdrawn from the Coalition agreement and then only by luring two Liberal ministers into the National Party.

<sup>9</sup> On Bjelke-Petersen's projection of Queensland 'nationalism', see Head (1986).

<sup>10</sup> Lunn (1978), pp 85–89. The image was partly a deliberate creation of media advisers, and partly the product of advisers simply letting Bjelke-Petersen be Bjelke-Petersen by encouraging him to 'capitalise on his beliefs and prejudices, which were after all bound to be shared by many in Queensland': Head (1986).

<sup>11</sup> On rural chauvinism in Queensland, see Wear (1990), pp 262–63.

### *A Gratuitous Scheme*

Electoral map-making is properly a task reserved for commissions at arm's length from government. But as Premier, Bjelke-Petersen inherited, embraced and expanded a system of zonal weighting. The partisan map-making methods used are well described in other works and are only rehearsed here in brief outline, in order to focus instead on the rhetoric according to which the government manufactured and sold barefaced electoral manipulations to a mostly tolerant public.

In 1971, 1977 and 1986, the Bjelke-Petersen government kept notionally independent commissions on a short lead.<sup>12</sup> Legislation carved Queensland into zones, each having a unique quota of voters for its average district. Combining odd zonal borders with unequal distributions of voters inflated Country/National Party outcomes, offering a substantial electoral buffer for both conservative power and the party's dominance. This wasn't a gerrymander in the pure sense of artificially drawn boundaries of individual constituencies — although there were a few notable examples of that.<sup>13</sup> Rather, the partisan manipulation was achieved via a scheme of weighting reflecting the demographic appeal of the Country/National Party.

The zonal system was notable for the disparity between city districts in the South-East Zone and the vast, outlying Western and Far-Northern Zone. A typical ratio provided for one voter in a western district for every two voters in a district in the Labor- and Liberal-contested south-east. In some cases, the weight of a westerner's vote, in a district such as Warrego with 8,000 voters, reached four times that of someone in the South-East Zone, as in 32,000-voter Fassifern.<sup>14</sup>

Two further zones, the Provincial Cities Zone and the Country Zone, provided other opportunities for manipulation. By 1986 in the Provincial Cities Zone, which extended discontinuously up the coast and covered medium-sized cities containing Labor voters in abundance, the quota was close to that of the south-east (approximately 19,000 and 18,000 per district, respectively). A vote in the Country Zone (approximate quota 13,000) was not as heavily weighted as the average Western and Far Northern Zone vote (approximate quota 9,000). But the Country Zone, as its name suggests, was a redoubt of the Country/National Party, and its weighting guaranteed the party a rich harvest in terms of the number of seats.

The great curiosity of these schemes is that they were elaborate and thoroughgoing, though the standard reasons why governments try to conceal manipulation of electoral maps did not straightforwardly apply in Queensland's case.

### *Electoral Necessity*

Bjelke-Petersen's popular support was such that the Coalition he led could win elections without having to rig electoral law.<sup>15</sup> Certainly such manipulations raise the bar that oppositions must clear to take power, and weaken them through under-representing them in parliament. Yet even this effect may be overstated. In 1986, the most suspicious gerrymander on the Queensland map involved the Indigenous

<sup>12</sup> Coaldrake (1978), pp 40–51.

<sup>13</sup> See, for example, the discontinuous electorate of Cook: Coaldrake (1978), pp 39–41.

<sup>14</sup> Coaldrake (1978), pp 28–30. As it happened, both were National seats.

<sup>15</sup> Mackerras (1990a), pp 250–58; Coaldrake (1978), p 54.

reserve of Wujal Wujal, positioned geographically outside the Cook electorate of which it was nominally part; this widely remarked discontinuity transferred just 84 votes.<sup>16</sup> Elaborately manipulated maps were notorious but mostly gratuitous — the conservatives would have prevailed in every election had they played the game straight.

One reason was Labor's tendency in this era to self-handicap. It split during the Cold War into a union-based Australian Labor Party, and an anti-communist Democratic Labor Party and a related Queensland Labor Party. This split handed power to the Country Party-led Coalition at a time when Queensland was much less urbanised than it later came to be. The Labor opposition continued to squander energy and popular support on internal factional fighting, including several years of federal intervention, well into the 1980s.

### *Legal Evasion*

Manipulating electoral systems by stealth is often a way around laws that guarantee electoral fairness and equality. Gerrymandering is left as the tool of choice where malapportionment is infeasible because of a one vote, one value rule. Where one vote, one value mandates roughly equal numbers in electorates, a government still has the option to wend boundaries tortuously around demographic groups and voting blocks to bolster its prospects. The most blatant examples come from the United States, where the gerrymander was invented and perfected.<sup>17</sup> The US Supreme Court enunciated a one vote, one value constitutional requirement in *Reynolds v Sims* in 1964, at the dawn of modern American judicial scrutiny of electoral systems.<sup>18</sup> By mandating districts with generally equal populations, however, the court unintentionally set off further gerrymandering and a chain of inconclusive judicial interventions.

Both gerrymandering and malapportionment also help evade voting and election guarantees enshrined in Bills of Rights, or written in anti-discrimination and fair voting legislation (such as the *Voting Rights Act 1965* (US)).<sup>19</sup> Both partisan methods cloak their motivations behind legitimate principles. For example, in drawing district boundaries, the principal legal mandate is to keep 'communities of interest' together.<sup>20</sup> This, like nearly every other legitimate electoral map-making rule, is hopelessly malleable, relying on an open list of indistinct variables such as culture and history. Often, as well, a demographic enclave — for instance, an Indigenous settlement — is at once a community of interest and a coherent voting

<sup>16</sup> Mackerras (1990a), p 254. For an example of a work citing this gerrymander, see Coaldrake (1978), pp 39–41.

<sup>17</sup> See, for example, 'Note: A New Map' (2004), pp 1196–97.

<sup>18</sup> *Reynolds v Sims* 377 US 533 (1964). The court first found electoral fairness justiciable in *Baker v Carr* 369 US 186 (1962). As in Bjelke-Petersen-era Queensland, 'rural bias' was 'a practice common to American legislatures prior to the reapportionment revolution of the 1960s': Muir and Paddison (1981), p 106.

<sup>19</sup> *Voting Rights Act 1965*, 42 USC 1973aa–6. Voting and political candidacy rights are also constitutionally entrenched for all provincial and federal legislatures under the *Canadian Charter of Rights and Freedoms*, ss 3–5, bringing both gerrymandering and malapportionment under judicial scrutiny.

<sup>20</sup> See, for example, EARC (November 1990), 13.35(a) ('EARC Report'); AEC (1985).

block. If so, it becomes difficult to distinguish between gerrymandering and legitimate efforts to concentrate the enclave within a single electorate.<sup>21</sup>

Similarly, partisans can malapportion under the cover of at least three legitimate rationales. First, parliamentarians in a sparsely populated polity like Australia face difficulties servicing geographically large electorates, especially in their ‘ombudsman’, problem-solving role.<sup>22</sup> Containing electorate size is one classic justification for rural weighting. Second, zonal weighting advocates argue for equitable representation of regional voices.<sup>23</sup> On this view, equality between regions is as valuable as equality between individual voters. This view is not meritless: it explains the grossly outsized influence of small states and provinces in the Australian, Canadian and US Senates.<sup>24</sup> A third argument is that flexibility is required to fulfil democratic values other than one vote, one value, such as keeping communities of interest together. The one vote, one value rule, if applied strictly, cannot always accommodate entire communities. Canada recently provided a stark example. Many New Brunswick Acadians — members of a French community over 400 years old — argued against a Federal Electoral Boundary Commission’s decision to transfer them to an Anglophone electorate.<sup>25</sup> The court, describing the commission as unduly beholden to the one vote, one value principle, found for the Acadian activists.<sup>26</sup>

Usually there are relatively easy answers to the question of why governments manipulate electoral maps. Partisan map-making can elude judicial scrutiny — not because judges cannot recognise partisanship, but because judges are bound by the rigidities of legal reasoning. Partisan manipulations remain effective because law can seldom capture the notions of partisanship and manipulation within coherent general rules. The task is complicated because necessarily vague general principles give apparently legitimate cover to manipulations.<sup>27</sup>

<sup>21</sup> For US examples, see Karlan (1998), pp 733, 736; Lublin and McDonald (2006), p 147.

<sup>22</sup> EARC Report (November 1990), 10.191, 10.29 and 13.29–13.30, citing ‘remoteness’. See similarly Ahern (1989), p 3. The evocative ‘ombudsman’ term comes out of the Canadian Supreme Court’s principal holding on the subject in *Reference re Electoral Boundaries Commission Act (Saskatchewan)* [1991] 2 SCR 158. Australia and Canada are uniquely useful comparators in that both employ the Westminster model in sparsely populated states and provinces many times larger than the model’s originator, England.

<sup>23</sup> Labor Premier Hanlon expressed this view in 1949: Coaldrake (1978), p 30. National Party Premier Ahern expressed the same view much later. Ahern (1989), p 2 (citing distinctive rural interests). See also Legislative Assembly of Queensland (Feb 1991), p 9 (‘PCEARC Report’), citing ‘cultural and economic diversity’.

<sup>24</sup> This form of malapportionment by constitutional design reaches its apogee in the United States Senate, where Wyoming and California, having two Senate seats each, experience a 70-fold disparity of voter representation.

<sup>25</sup> *Raiche v Canada (Attorney General)* [2004] FC 679 at [54]–[65].

<sup>26</sup> Similar large departures from one vote, one value in the United Kingdom accommodate ‘geographic communities’. Wear (1990), pp 262–63.

<sup>27</sup> Each decade after *Reynolds*, the US Supreme Court tried controlling the gerrymandering problem that it inadvertently helped create — enunciating, for example, a prohibition against any district ‘bizarre on its face’ in *Shaw v Reno* 509 US 630 (1993). In 1986, the Court in *Davis v Bandemer* 478 US 109 (1986) instructed lower courts to begin spotting

The problem of evading legal constraints did not, however, face Bjelke-Petersen as it has confronted partisans elsewhere in jurisdictions with constitutional guarantees of political equality. While gerrymandering is often a partisan response to enforceable one vote, one value rules, Queensland law offered no such legal roadblocks. No Bill of Rights, nor any effective voting rights or anti-discrimination legislation, applied to limit the government to elaborate and indirect manipulations. There was no reason in law to hide partisan motivations from the courts. (It was only after the demise of Bjelke-Petersen that the High Court's implied rights jurisprudence began to create even the *potential* to challenge electoral map manipulation.)<sup>28</sup> Queensland had a statutory framework for judicial review of partisan boundaries, but this offered little resistance to political interference; the 1985 *Electoral Districts Act* was less a constraint upon partisanship than a tool to give partisanship effect.<sup>29</sup>

### *Public Evasion*

Lastly, could Bjelke-Petersen have meant to fool the public? On this theory, a government hides partisan motivations from public view to raise the bar for its opponents without incurring political costs. But this account is too simple and is ultimately unpersuasive in Queensland's case. Bjelke-Petersen's ministers all but acknowledged their electoral manipulations, and pursued methods characterised simultaneously by stealth and by a blunt frankness. Wells' *The Deep North*, published in 1979 long before the regime's decline, has Cabinet member Russ Hinze admitting: 'I told the premier, "If you want the boundaries rigged, let me do it and we'll stay in power forever ... In South Australia Steele Hall redistributed himself out of office. I don't think you'll be able to blame Joh or me for doing anything like that."' <sup>30</sup> Another time, the government's media director, Allen Callaghan, quipped: 'We feed the gerrymander at 3pm.'<sup>31</sup>

In electoral manipulations, the paradox of open deceit is a puzzling but recurring pattern. Canada's pugnacious first Prime Minister, Sir John A Macdonald, is remembered partly for the gerrymander of 1882.<sup>32</sup> According to historian Waite, Macdonald 'follow[ed] the behests of the more exigent and greedy of his supporters, carving up Ontario in the most ruthless fashion for party advantage, and what is worse, taunting the Opposition at nearly every stage of the process'.<sup>33</sup>

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partisanship directly, but after almost two decades of chequered success, in *Vieth v Jubelirer* 541 US 267 (2004) the court finally told lower judges that, while they could keep trying, succeeding at the task might be impossible.

<sup>28</sup> But even then, in *McGinty v Western Australia* (1996) 186 CLR 140, the High Court reiterated its ongoing refusal to imply one vote, one value into the constitutional structure of Australian states, as it had refused to do federally in *A-G (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

<sup>29</sup> Coaldrake (1978), p 39.

<sup>30</sup> Wells (1979), p 87. Cabinet Minister Don Lane also allegedly bragged around parliament that he and another minister had drawn boundaries for the 1985 redistribution: Paul Reynolds, personal communication with the authors.

<sup>31</sup> Lunn (1978), p 97.

<sup>32</sup> MacGregor Dawson (1935).

<sup>33</sup> Waite (1975–76), p 3.



*Hansard* records one opposition Liberal member calling the redistribution an ‘Act to bull-doze the Liberal Party of Canada’,<sup>34</sup> to which Macdonald admitted: ‘We meant to make you [Liberals] howl.’<sup>35</sup> A much more recent gerrymander in Illinois eclipsed even this episode for its frankness. As reported (if censoriously) in litigation over the case, a Democratic election official declared to his opponents that: ‘We are going to shove ... [this map] up your f----- ass and you are going to like it, and I’ll f--- any Republican I can.’<sup>36</sup> Electoral manipulation also features cases notorious for being dramatic and egregious — obvious to all but the most disengaged voter.<sup>37</sup>

Bjelke-Petersen’s government was thus neither the first, nor the last, to engage in elaborate map-making charades, investing time and effort to manipulate the system indirectly, only then — bizarrely and incongruously — to acknowledge publicly their partisan intentions. His ministers were eager early adopters of computer technologies in the 1980s, allowing complex demographic analyses.<sup>38</sup> Nevertheless, the partisanship under Bjelke-Petersen’s government remained overt.<sup>39</sup> Chants of ‘gerrymander, gerrymander’ greeted him at some public events, particularly out of state.<sup>40</sup> Despite the government’s elaborate methods, public awareness that its stewardship of the electoral system served partisan interests was widespread. It could hardly have been otherwise, given the government’s obvious control of electoral commissioners; the occasionally bizarrely shaped, even discontinuous districts of the Queensland electoral map; and most of all the zonal weightings that to many — especially in urban centres — felt manifestly unfair. Public awareness was a given because the system was egregious and because government ministers spoke about their intentions all but openly.

### *Agrarian Chauvinism’s Brittle Foundations*

This general public awareness of the electoral system’s partisanship raises the question of why the government constructed an elaborate deceit that convinced almost no one, yet persisted for so long. One answer is that, rather than being an electoral or legal necessity, the malapportionment expressed a kind of rhetoric. In

<sup>34</sup> House of Commons (Canada) (1882), p 1409.

<sup>35</sup> House of Commons (Canada) (1882), pp 1489, see also p 1392.

<sup>36</sup> *Hulme v Madison County* (2001) 188 F Supp 2d 1041 at 1051.

<sup>37</sup> See, for example, the infamous Texas 25<sup>th</sup> congressional district, which ‘extended over a thin and ragged column from the city of Austin to the Mexican border 500 kilometres south’: Levy (2008), p 1.

<sup>38</sup> Coaldrake (1978), pp 43–44. Similar practices were developing and becoming standard in politically polarised parts of the United States: Issacharoff (2002), p 624.

<sup>39</sup> Many simpler methods for preserving incumbent power can be imagined. Governments might dispense with electoral commissions, hold elections less frequently, limit the number of candidates to a particular number, or — following the Queensland precedent — abolish a legislative house.

<sup>40</sup> Lunn (1978), p 101. Bjelke-Petersen came prepared to address this common chant. Out-of-staters who acknowledged Queensland’s electoral rort included Prime Minister Whitlam, who called for ‘less vaudeville, less invective and less vote-rigging’ from Bjelke-Petersen: Lunn (1978), p 161.

the right political setting and with the right handling, visibly undermining electoral laws and machinery can generate, rather than spend, political capital. Dramatic acts of gerrymandering and malapportionment have the benefit of being indirect and deceitful in form, but not in practice. These methods helped Bjelke-Petersen define a political movement for which a message of anti-democratic chauvinism was essential.

Yet he could also invoke plausible deniability when he needed it. There was, first, an historical cover. The zonal weighting had been initiated by his Labor predecessors.<sup>41</sup> This lent a sense that ‘everybody malapportions’. Second, a bare thread of legal cover also remained, to suggest propriety and avoid confronting the public too directly with its own complicity in the spell of the seduction. This required a complex rhetorical balancing, as the message was based on a contradiction. A carefully calibrated mixed message of respect and disdain for democratic and historical norms helped construct Bjelke-Petersen’s agrarian chauvinism as the movement rightfully in control of Queensland and its government.

All governments end, however, and in cases such as Bjelke-Petersen’s, they end not because of a gradual rise in opposition support but a dramatic reversal in electoral fortunes. On its eventual decline, even long-standing support for strong-man governments can fall away quickly. The reversal is delayed as long as enough of those in the electorate pretend not to notice the manipulation — viewing themselves as on side with the winners in the game. (On the other side, for those excluded by the mirage of an agrarian, demographically homogenous, superior Queensland, there was seething resentment.) Bjelke-Petersen therefore relied on the support of a complicit majority.<sup>42</sup> Indeed, when the Queensland Liberals tried to distinguish themselves in 1983, on the termination of the Coalition agreement and asserting more liberal values (such as electoral reform), they were electorally punished for threatening the stability of the natural order personified in the strong-man Bjelke-Petersen.

But chauvinistic rhetoric can be rather divorced from substantive ideas and specific policy,<sup>43</sup> and reflect only the most basic in-group/out-group public psychology. A political movement like Bjelke-Petersen’s is therefore brittle from

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<sup>41</sup> A socially conservative party, Queensland Labor was popular in rural areas when agricultural labour was a significant element of the state’s economy.

<sup>42</sup> The PCEARC Report cites public submissions to the EARC accusing the media and public for failing to remain vigilant against electoral manipulation: PCEARC Report, pp 14–15. The possibility of public acquiescence in Bjelke-Petersen’s electoral stratagems offers grist for recent arguments that partisan efforts to rewrite election laws are self-limiting or even, in their own way, democratic. See, for example, Persily (2002). Such (ultimately unconvincing) arguments lie beyond the scope of this article.

<sup>43</sup> Coaldrake notes that Bjelke-Petersen dismissed electoral reform as ‘hooha’ or ‘trendy’, and his government often refused even to acknowledge criticisms levelled against it. As an opposition backbencher, Bjelke-Petersen delivered a denunciation of Labor’s malapportioned zones as ‘mean[ing] nothing but that the majority will be ruled by the minority’, evidencing a breathtaking hypocrisy in light of later events. Coaldrake (1978), pp 2–5, 31.

the strains of holding together its rhetorical contradictions.<sup>44</sup> Given so personalised a message, which invited public identification with the movement,<sup>45</sup> when the government came into disgrace there was a rapid public flight from it.<sup>46</sup> The rot first set in as Bjelke-Petersen over-reached during his period of one-party government. He unsuccessfully sought to leverage his movement into the federal arena. This merely undermined his state-nationalist message at home and exposed his hubris nationwide. More problematically, and in the tradition of strong-man leaders, he was soon ordering capricious ministerial purges.<sup>47</sup> In the process, he exposed his movement as less one of Queensland chauvinism than of one man's banal egoism. The rot then turned to flight and things unravelled relatively quickly in the wake of the scandals Fitzgerald uncovered. As allegations emerged, supporters moved to distance themselves.

Partisan strangleholds relying on electoral manipulation therefore eventually unravel. An important question is why such efforts do not preserve their designers indefinitely — and indeed, why some collapse in dramatic fashion. We might distinguish between the 'numerical-legal' and the 'rhetorical' models of electoral manipulation. Of course, few real-world cases hew entirely to either of these two extremes. Simplifying somewhat, however, the latter model involves mastery of the manufacture of an anti-democratic rhetoric according to which partisan map-making expresses and helps create electoral dominance and success. Departing from the conventional view, then, manipulated maps may have neither significant legal effect nor narrow numerical electoral effects, but can play a longer-term and no less potent political role.

## **Electoral Manipulation and Reform in the Lands of Other Agrarian Strongmen**

### *The 'Playmander': Rural Malapportionment in South Australia*

South Australia provides the most relevant native analogue to Queensland's experience. From 1933 until 1965, the conservative Liberal and Country League governed South Australia (curiously the same length of time for which conservatives lorded it over the Labor Party in Queensland). Political scientists disagree as to the actual effect of South Australia's rural malapportionment, in part because many seats were uncontested in that era. But the system denied Labor office when it attracted over 50 per cent of the two-party preferred vote at anywhere between a couple and half a dozen elections.<sup>48</sup> Unlike Queensland in the 1960, 1970s and 1980s, the South Australian manipulation was an electoral necessity.

<sup>44</sup> Long before Bjelke-Petersen manifested the observation, Weber wrote of the 'sudden inner collapse' of politics founded upon 'boastful but entirely empty' gestures: Weber (1946), p 116.

<sup>45</sup> Walter (1990), p 304.

<sup>46</sup> Williams (1999), p 145. Further on the political demise of Bjelke-Petersen, see Reynolds (2003).

<sup>47</sup> Coaldrake (1978), pp 16–19.

<sup>48</sup> Playford (1982), p 64; cf Blewett and Jaensch (1971), Ch 2.

Like Queensland, South Australia is geographically large, with a predominantly coastal population. However, there are three salient differences. First, South Australia had a united conservative party; Queensland's malapportionment helped Bjelke-Petersen keep the urban Liberals in place. Second, South Australia's rural weighting was purely a creation of the conservative side of politics, which amended the state Constitution in 1936 so that it 'allocated only one-third of the House of Assembly's 39 seats to metropolitan Adelaide, a zone which contained over 60 per cent of the state's population'.<sup>49</sup> This system was dubbed the 'Playmander'<sup>50</sup> after Tom Playford, who reigned as Premier for over 26 years. Third, as Paul Reynolds has observed, South Australia's demographics have more in common with Western Australia (whose elections also, until recently, incorporated significant rural weightage).<sup>51</sup> Those states are large, but with a population centred in a single urban area in their capital city. Queensland, however, was significantly decentralised, through a strip of east coast provincial cities. Nevertheless, both demographics were used to justify rural weightage: South Australian conservatives cited tyranny of distance and fear of Adelaide's dominance; Queensland conservatives appealed to the state's diversified communities and regions.

There were distinct similarities between South Australia's Playford and Queensland's Bjelke-Petersen. They shared puritanical backgrounds, early farming careers, little formal education and a resulting distrust of intellectuals.<sup>52</sup> In politics, they both played on their apparently simple mien and homespun language and philosophies. To supporters, they possessed the common touch and had but one public ambition: the economic development of their state<sup>53</sup> — even if that involved corporatism and cronyism. To detractors, their rule was authoritarian; even a relatively friendly biography of Playford is subtitled 'The Benevolent Despot'.<sup>54</sup> They maintained iron grips over party, parliament and civil liberties, and identified themselves with the state and a parochial construction of 'the people'. But there were differences. Playford was more urbane and genial, having come from a line of influential 'Tom Playfords', including a grandfather who had been Premier and a federal parliamentarian.

What makes the demise of the 'Playmander' remarkable is that it occurred without the trauma of a Royal Commission or even a major scandal. Unlike Bjelke-

<sup>49</sup> Stock (1992), p 331. The average ratio of city seat enrolments to those in the country was three to one, and at worst nine to one: Blewett and Jaensch (1971), p 185. Dean Jaensch described the system as both the 'most retarded' and as the 'zenith' of all Australian malapportionments: Jaensch (1981). For redistribution history in South Australia, see Jaensch (2002), Ch 13.

<sup>50</sup> It was not a gerrymander involving rigged individual boundaries, but a two-zonal system significantly weighting country over city votes. Jaensch attributes the term to fellow political scientist, later federal Labor minister, Neal Blewett: Jaensch (1970), p 101.

<sup>51</sup> Robinson (2003), p 100; Kelly (2006).

<sup>52</sup> On Playford's early life, see Cockburn (1991), Chs 2–4 and Crocker (1983), Chs 2–4.

<sup>53</sup> Playford through industrial development; Bjelke-Petersen through mining and tourism.

<sup>54</sup> Cockburn (1991).

Petersen, the strong-man Playford slipped into retirement after his sole electoral loss in 1965. Labor managed victory in 1965 in spite of the malapportionment. So, for all its electoral efficacy, the Playmander — like Queensland's malapportionment in 1989 — proved beatable. The Liberal and Country League then turned to Raymond Steele Hall, a youngish man who, despite his farming background, was of liberal bent.<sup>55</sup>

Steele Hall led the League back into government in 1968, but was haunted by the fact that the Labor Party had outpolled it 52 per cent to 43.8 per cent on primary votes alone.<sup>56</sup> As a part of a modernising agenda, in 1969 Steele Hall legislated to increase the number of urban members of the House of Assembly. The two-to-one ratio of country to city seats was replaced with a 28:19 ratio in favour of city seats.<sup>57</sup>

Steele Hall certainly faced popular clamour for reform.<sup>58</sup> But he adopted it in an entirely principled way and despite internal opposition, especially from his Upper House colleagues. One, a knight of the realm, likened the weakening of rural malapportionment to 'the rape of the country districts ... pregnant with ill possibilities for the future of country people'.<sup>59</sup> Instead, Steele Hall made a virtuous point of reform, going 'out of his way to make it clear that he did not wish to be elected ... by way of the "Playmander"'.<sup>60</sup>

It is difficult to imagine a Queensland National Party Premier making such a principled stand. Even Bjelke-Petersen's successor, Mike Ahern, at first showed no interest in electoral reform.<sup>61</sup> A movement so wedded to the identification of country with Queensland could not reinvent itself as easily as Steele Hall could modernise his party to identify with metropolitan Adelaide. Queensland simply lacked an effectual Liberal Party. In Queensland, the task of legislating electoral reform fell to the Labor Party in the wake of Fitzgerald's findings.<sup>62</sup> Thus, while

<sup>55</sup> Steele Hall would soon prove his liberal credentials by splitting from the Liberal Party and forming a 'Liberal Movement', which took him to the Senate cross-benches and was a forerunner of the centrist Australian Democrats. See further, Steele Hall et al (1973). He later returned to the Liberal Party fold as a federal MHR.

<sup>56</sup> Blewett and Jaensch (1971), p 155.

<sup>57</sup> The Labor proposal was to reverse the 2:1 ratio. For an account of the process of the reform, see Blewett and Jaensch (1971), pp 185–88.

<sup>58</sup> Blewett and Jaensch (1971), pp 172–73 chronicles reform pressure in the wake of the 1968 election coming from the press, union movement and a public rally of over 10 000 people.

<sup>59</sup> Jaensch (2002), p 180. See also Blewett and Jaensch (1971), pp 185–87.

<sup>60</sup> Crocker (1983), p 118.

<sup>61</sup> Indeed, he commented at his first press conference that electoral reform was 'not on the agenda': Paul Reynolds, personal communication with authors. Under pressure, Ahern's successor, Russell Cooper, proposed a last-minute Bill to hold the 1989 election under reformed boundaries, but this was withdrawn. (Cooper's Premiership lasted just six weeks.)

<sup>62</sup> Labor was also crucial in South Australia. Steele Hall did not introduce one vote, one value fully. For his efforts, he lost the ensuing election to an even more reformist Labor Premier, Don Dunstan. In 1976, Dunstan completed the transition to one vote, one value, entrenching it under an independent electoral and redistribution commission: Jaensch (1981), pp 230–37. In 1991, this was augmented by a 'fair elections' rule

there are analogies between Playford and Bjelke-Petersen, the South Australian experience of reform was more evolutionary.

### *The Québec Experience: Malapportionment and Nationalism*

In electoral matters, our immorality [is] truly scabby. Such and such a habitant [Québécois commoner], who would be ashamed to enter a brothel, sells his conscience at every election for a bottle of *whiskey blanc*. Such and such a lawyer, who demands the maximum sentence for robbery of church poor-boxes, thinks nothing of adding two thousand fictitious names to the voters' lists.<sup>63</sup>

Pierre Trudeau wrote these condemning words in 1952, with his tenure as Canada's Prime Minister still 16 years away. In the 1950s, Trudeau and others led an emerging class of Québécois intellectuals and labour leaders who were developing new, liberal ideals in response to a repressive provincial regime.<sup>64</sup> With the regime's fall by decade's end, similar ideals flourished in the cultural transformations of Québec's Quiet Revolution.

The strong-man of the *ancien régime* was Maurice Duplessis, an abstemious, pious and uncommonly hard-working Premier who identified completely with his province, and who in turn commanded popular support and remained in office for 18 years, from 1936 to 1959 (interrupted in 1939–44). So similar were his qualities and his methods of governance to Bjelke-Petersen's a generation later that the latter gives an impression of having studied the techniques of his Québécois forerunner. First, both men dominated jurisdictions characterised by vast distances for which they promised development, and by sizeable agrarian populations with which they claimed identification.<sup>65</sup>

Second, each premier practised an effective populist oratory that, while generally empty of substantive detail, often included messages of robust and heavy-handed opposition to communism and organised labour.<sup>66</sup> Admittedly, in Québec revolutions and upheaval abroad were recent memories and more plausible continuing threats. The communist scare gave the pretext for Duplessis' Padlock Law, which authorities used to shutter premises where 'subversive' meetings were held.<sup>67</sup> This and Duplessis' harsh rules for labour 'were imposed to create an antisubversive envelope around Québec'.<sup>68</sup> The foreshadowing of Bjelke-Petersen's

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requiring redistributions to model election outcomes to try to ensure that 50 per cent of the two-party vote should translate into 50 per cent of the seats: *Constitution Act 1934* (SA), s 83(1).

<sup>63</sup> Trudeau (1952), p 53, quoted and translated by Behiels (1985), p 220.

<sup>64</sup> Rocher (2002), p 2.

<sup>65</sup> Cuccioletta and Lubin (2003–04), p 130. To be sure, quoting Behiels, Cuccioletta and Lubin suggest that the image of an 'agricultural society outside of the mainstream of the urban-industrial North American way of life' was exaggerated.

<sup>66</sup> Laporte (1960), pp 22–23.

<sup>67</sup> Egerton (2004), p 6.

<sup>68</sup> Cuccioletta and Lubin (2003–04), p 127.

crackdown on public protest, assembly and unions is difficult to miss. Indeed, Duplessis also exercised an attachment to and control over the police force<sup>69</sup> — similar to habits that seeded Bjelke-Petersen's troubles with Fitzgerald.

Third, along with agrarian and anti-communist chauvinism, Duplessis exploited federalism to pitch a staunchly anti-central government message, going several steps beyond the usual bickering endemic to federations.<sup>70</sup> Curiously, however, it is Bjelke-Petersen who seems to have spoken more often of Queensland's secession from federation than Duplessis ever did of Québec's.<sup>71</sup>

But there were also major differences of approach. Notably, only Duplessis relied on an explicit alliance of (Catholic) Church and state.<sup>72</sup> Québec's deep 'clericalism' meant that the church dominated private and public life in the province. Québec, which had been the most socially conservative and pious corner of Canada, quickly became the country's most cosmopolitan and atheistic in the 1960s after Duplessis. In contrast, from the outset Bjelke-Petersen learned to steer away from his 'arch-wowser image'.<sup>73</sup> If both men were known as driven by religious conviction, only in Queensland was this a potential liability.<sup>74</sup>

In Duplessis-era Québec, as in Bjelke-Petersen's Queensland, there was a tendency to overstate the population's rural quotient. Québec was an agrarian province, but not overwhelmingly so: one-third of Québécois lived outside of cities and towns. It was only Québec's malapportionment that made it, electorally speaking, a rural province. Two-thirds of seats in the provincial legislature were in country locations.<sup>75</sup> Duplessis' Union Nationale Party in turn drew 90 per cent of its elected members from country seats.<sup>76</sup> Rural development — electrification, road building and the like — was therefore perennially a plank in the party platform. Duplessis also benefited from the permanent 'linguistic gerrymander' through no effort of his own. By Massicotte's estimate, the distribution of minority English speakers in Québec has given all French nationalist parties — of which there have been many — a five to seven percentage point boost over opponents.<sup>77</sup> Finally, favourable boundaries combined with a barely disguised and thoroughgoing system of government patronage of business to buffer Union Nationale power. The party fought the 1956 election by spending \$15 million — high in modern dollars, but

<sup>69</sup> Cuccioletta and Lubin (2003–04), p 126.

<sup>70</sup> Oliver (1999), pp 532–36.

<sup>71</sup> Lunn (1978), p 257. Secession talk would dominate later Québec Premiers' agendas.

<sup>72</sup> Egerton (2004), p 5. There were notable cracks in the alliance: for example, many progressive members of the church hierarchy supported striking workers in one of Canada's seminal labour disputes, the clash at Asbestos, Québec in 1949. See Fay and Fay (2002), p 249.

<sup>73</sup> Lunn (1978), pp 70–71; see also Wear (2002).

<sup>74</sup> Another difference was that Québec had a Legislative Council until 1968 — in theory, an extra roadblock to autocracy. But during the Duplessis era, the upper house's 24 members, appointed by the Premier, predominantly belonged to his Union Nationale Party.

<sup>75</sup> Behiels (1985), p 222.

<sup>76</sup> Behiels (1985), p 222.

<sup>77</sup> Massicotte (1994), pp 227–44.

truly astonishing in the currency of the time.<sup>78</sup> From 1944 to 1959, Union Nationale was undefeated and undefeatable.

Yet electoral manipulation was unnecessary, at least in a narrow sense. If the popular vote count is to be believed, then Duplessis in fact bested Bjelke-Petersen by securing outright majorities, such as 52 per cent in 1948. While Duplessis' party lost power for the span of the war, its vast electoral war chest and successful mining of the nationalist vote produced quietly unbroken rule for 15 years thereafter. And if electoral calculations did not therefore necessitate Duplessis' dramatic malapportionment, neither for the most part did the law in Canada before the advent of the Canadian Charter in 1982 or the quasi-constitutional Québec Charter in 1976. In addition, like the electoral commissions that did not limit, but rather fulfilled, Bjelke-Petersen's electoral stratagems, similar Duplessis-era commissions were independent only in name.<sup>79</sup> In later years, Duplessis' heavy-handed action against communists and religious non-conformists prompted rebukes by the Supreme Court of Canada; *Roncarelli v Duplessis* remains Canada's celebrated pre-Charter holding on individual freedoms.<sup>80</sup> But legal and institutional constraints still fell well short of blocking electoral manipulation. Like Bjelke-Petersen's, Duplessis' rural weightage was therefore both numerically and legally gratuitous.

While Bjelke-Petersen built a political movement upon a rhetoric of unity of Queensland interests, in Québec — where the tradition of nationalism is older and centres around more serious cleavages of history, law and culture — a similar effect should have been easier to achieve. And so it was. A collectivist ethos led many in the province to eschew electoral liberalisation. Like Bjelke-Petersen's complicit public supporters, Duplessis-era nationalists and clericalists in Québec therefore held righting electoral dysfunction and corruption low among their priorities. 'Out of historical necessity and a devotion to cultural survival French Canadians had learned quickly to use democracy rather than to adhere to it as a political creed.'<sup>81</sup> Duplessis therefore managed to construct a role of 'Master after God'.<sup>82</sup> Québec's upside-down electoral laws helped ensure this, most of all through the rhetoric of political dominance expressed in them.

Ultimately, in Québec we see again the pattern of long-lasting but brittle support that finally crumbles. A flood of corruption stories figured in the events leading to the leader's fall from grace. And again it fell to regime insiders — in this case, a duo of reformist priests<sup>83</sup> — to challenge the entrenched corruption.

<sup>78</sup> Behiels (1985), p 223. The Liberal opposition spent \$275,000.

<sup>79</sup> Ryan (1967), p 152.

<sup>80</sup> *Roncarelli v Duplessis* [1959] SCR 121. Roncarelli was a Jehovah's Witness barred from distributing proselytising leaflets. The decision paralleled the Australian High Court's take on arbitrary power in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. The Supreme Court of Canada ruled against the Padlock Law in *Switzman v Elbling* [1957] SCR 285.

<sup>81</sup> Behiels (1985), p 232.

<sup>82</sup> Behiels (1985), p 222. Duplessis' phrase drew on provincial foundation myths: he seems to have appropriated it from the explorers of New France. See, for example, Legaré and Kaplansky (2004), p 31.

<sup>83</sup> Hébert (1991).



Interestingly, in Duplessis' case the first allegations of corruption to gain traction were electoral. Broader revelations of corruption quickly emerged, as Québec followed the script of cascading scandal familiar to Queenslanders three decades later. The scripts depart from each other, however, at Duplessis' sudden death in 1959 at the height of the controversy. Unlike the Fitzgerald process, the Salvas Commission of inquiry into electoral corruption, struck in 1960 under the newly elected Québec Liberals, therefore played no role in hounding Duplessis from office. But the commission may have helped inaugurate the liberalisations of the Quiet Revolution as, in the words of one watcher of Duplessis' decline, 'shame [became] the beginning of wisdom'.<sup>84</sup>

Duplessis' Québec again suggests how a gerrymander or malapportionment is effective while its message establishes anti-democratic laws as normative, even virtuous, and how successful — albeit brittle — political entrenchment can turn on the rhetorical dimensions of electoral law. But it is also worth noting what Québec suggests about Queensland. Duplessis, like Bjelke-Petersen, married electoral manipulations with his government's other chauvinist expressions. This must have been easier in still-illiberal, nationalist and clericalist Québec. But even without Duplessis' more credible communist bogeyman, Bjelke-Petersen still managed to win elections in part by running against the canard of Whitlamite communism.<sup>85</sup> More surprising still, Bjelke-Petersen — unlike Duplessis — worked a nationalist pitch on a population neither historically aggrieved nor linguistically distinct. The clericalist angle was also absent. The Québec case therefore highlights the rhetorical mastery of Bjelke-Petersen — a leader who achieved similar results under what should have been far less fertile conditions.

### How Change was Wrought

This article opened with the question of how the brushfires of police corruption spread to not just consume a 32-year-old administration, but to generate from its ashes a rewriting of public law.

The metaphor of fire may mislead. It suggests a tinder-dry political atmosphere, whipped by hostile winds and a raging process. Instead, the process of legal change during and after the regime's collapse was more a 'Quiet Revolution': elongated and orderly. More than five years passed between the first Order-in-Council constituting the Fitzgerald Inquiry and the enactment of the new electoral code.<sup>86</sup> The first two years were taken up with the Inquiry proceedings and report-writing,<sup>87</sup> and the last three years with extensive EARC hearings and deliberations

<sup>84</sup> *Le Devoir* editor André Laurendeau, quoted in Behiels (1985), p 230.

<sup>85</sup> Lunn (1978), p 200.

<sup>86</sup> From the Order-in-Council of 26 May 1987 to the *Electoral Act 1992* (Qld), assented to on 1 June 1992.

<sup>87</sup> Culminating in the blandly titled *Report of a Commission of Inquiry Pursuant to Orders in Council* (29 September 1989) ('Fitzgerald Report'). The Commission formally styled itself as the 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct'.

followed by parliamentary review and implementation of its recommendations for a new boundary system in an overhauled electoral code.<sup>88</sup>

Nor is a fire metaphor apt in implying the presence of oxygen. If anything, a vacuum was at the heart of the process. The longevity of the Bjelke-Petersen administration, and his autocratic populism,<sup>89</sup> belied its eventual weariness and hollowness. The party and its leader had over-extended themselves. The former had become internally divided. The latter, as strong-men must, had lost some of his political virility.<sup>90</sup> A profound, if latent mismatch had evolved between Bjelke-Petersen's provocative and sometimes repressive political rhetoric, sideshows and identification with a provincial zeitgeist on the one hand, and the rapid development and urbanisation of South-East Queensland on the other. Ironically, his government's policies had been one stimulant to that development.

Although it was not clear at the time, in retrospect the government was a house of cards. The unfolding revelations of police and ministerial misconduct, overseen by an ageing and previously unchallenged administration, provided the pretext for liberal reforms in the guise of improving governmental accountability.

The key events in the Fitzgerald Inquiry itself were not any particular revelations of corruption, but Fitzgerald's ability to widen the inquiry's scope. The original terms of reference narrowly focused on particular police corruption allegations (although, suggestively, one allegation named a specific political donation from vice figures).<sup>91</sup>

Concerned that the inquiry's future was presumed to be brief and ineffectual, and a suspicion that the police and justice departments wanted to control it, Fitzgerald sought assurances for its integrity. He found an ally in Acting Premier Gunn — who was acting in Bjelke-Petersen's absence overseas. Gunn opened the government to the inquiry and funded it properly. Its terms of reference were twice expanded, by August 1988 to '*Any other matter or thing appertaining to [vice and police corruption] or concerning possible criminal activity, neglect or violation of duty, or official misconduct or impropriety the inquiry into which to you shall seem meet and proper in the public interest*'.<sup>92</sup> Shorn of the flourishes, this was a wide charter.

In Fitzgerald's own metaphor, he was 'pulling a few threads at the frayed edges of society [but to] general alarm, sections of the fabric began to unravel'.<sup>93</sup> By 1988, he had the evidence that — like the proverbial rotting fish — corruption permeated through the highest levels of government, both personal corruption (eg ministerial bribes) and corruption of processes (such as official appointments). In effect, Fitzgerald had become an ad hoc Independent Commission Against Corruption. By this time, the Nationals had replaced Bjelke-Petersen with a milder

<sup>88</sup> *Electoral Amendment Act 1994* (Qld), assented to on 1 December 1994. A further two and a half years elapsed before the political finance system was enacted.

<sup>89</sup> To borrow from the subtitle of James Walter's (1990) account.

<sup>90</sup> Emblemsed most clearly in his Quixotic and ill-fated 'Joh for PM' campaign to enter federal politics in 1987.

<sup>91</sup> Fitzgerald (1989) A26 (second term of reference) and p 18.

<sup>92</sup> Fitzgerald (1989), A 29, emphasis added.

<sup>93</sup> Fitzgerald (1989), p 4.

Premier, Mike Ahern.<sup>94</sup> But the rot had set in and, as earlier described, many of those who had explicitly and tacitly supported the movement were reawakening to a more liberal and less chauvinistic reality.

In considering governance issues, Fitzgerald realised the problems were not merely situational or episodic. They were not merely the product of a particular bad executive or police force. Rather, they had been entrenched in, if not bred by, a system of public laws and conventions that failed to promote accountability.

### *Fitzgerald's Treatment of the Malapportionment*

Part 3.3 of the Fitzgerald Report deals with 'Electoral Laws', although it is just a page in length.<sup>95</sup> Fitzgerald began with the observation that a 'fundamental tenet of ... parliamentary democracy is ... regular, free, fair elections following open debate'. Queensland certainly had 'regular' elections. Indeed, they occurred like clockwork: 11 in the 32 years between the last Labor government and the Fitzgerald Report.<sup>96</sup> But, by implication, the 'free [and] fair' elections criteria were not being met.<sup>97</sup>

Careful not to condemn the system in its totality — after all, he had not inquired directly into the electoral system — Fitzgerald merely noted that electoral fairness had been 'widely questioned'. In particular 'electoral boundaries ... are seen as distorted in favour of the present Government, so as to allow it to retain power with minority support'.<sup>98</sup> What had been notorious but natural under the agrarian populism personified by Bjelke-Petersen was becoming the new anathema.

Then, speaking directly, Fitzgerald wrote:

Irrespective of the correctness of this view, the dissatisfaction ... is magnified by the system under which electoral boundaries are determined. It has not always been obvious that the Electoral Commissioners were independent of the Government ...

There is a vital need for the existing boundaries to be examined by an open, independent inquiry as a first step in the rehabilitation of social cohesion, public accountability and respect for authority ...

The *Elections Act 1983–85* should be similarly reviewed in an impartial manner ...<sup>99</sup>

<sup>94</sup> 'Replaced' does no justice to the machinations involved: see, for example, Wear (2002).

<sup>95</sup> Fitzgerald (1989), pp 127–28.

<sup>96</sup> To Bjelke-Petersen's credit, he only once used the Westminster prerogative of calling an early election to take advantage of his rival's disarray, although such disarray was not uncommon.

<sup>97</sup> In relation to 'open' elections — that is, free political discourse — he spent some time critiquing three bullying tactics by the executive government: media management, the use of 'stop-writs' in defamation, and the heavy-handed and politicised use of policing to inflame public protest in the guise of repressing it. Fitzgerald (1989), pp 141–43. For a perspective on the latter, see Brennan (1983), Chs 4 and 5.

<sup>98</sup> Fitzgerald (1989), p 127.

<sup>99</sup> Fitzgerald (1989), p 127.

In short, without arguing a *necessary* link between the electoral system, broader accountability and the corruption he had unearthed, Fitzgerald deftly aligned the three issues and rationalised a complete review of electoral legislation, with a focus on redistributions and the zonal system. He did not have to attempt a comprehensive justification. Although the *Elections Act* had, as its title suggests, last been overhauled just six years earlier, there was now a general public acceptance that the game of electoral manipulation was up.

Fitzgerald recognised that ‘public sittings of this Inquiry could have gone on indefinitely’. But rather than set himself up as a permanent Star Chamber, he reported by June 1989 to commence stage two, a ‘comprehensive reform’ process. A key part of this process was the EARC, a medium-term venture with a broad remit to draft reforms of public law generally and electoral law in particular. While the EARC would conduct its work in a more low-key way than an inquiry focused on corruption, its impact would be no less significant.

Fitzgerald’s role in this, however, is not just as a midwife: he was *sine qua non*. While elite opinion, the labour movement and small ‘l’ liberals had clamoured for electoral reform, the popular consensus — and indeed the mainstream media — were too dependent on, and even in thrall of, the agrarian strong-man and his tricks to see such reform as fundamentally necessary. With Bjelke-Petersen’s downfall and the National Party government losing legitimacy through daily revelations of police and ministerial corruption, a power vacuum developed. It was filled by neither the (well-meaning) new Premier Ahern, nor the Labor opposition, which was still reinventing itself under a new leader, Wayne Goss, and preparing for the election. Thus, in the stead of a government headed by an agrarian populist, another strong-man emerged in the form of the urbane QC Tony Fitzgerald.

### *Delegating Reform to the EARC*

In relation to electoral reform, Fitzgerald executed a manoeuvre which was to be the hallmark of his report. He did not offer detailed reform proposals, but identified areas of perceived lack, and delegated reform to a new body. Fitzgerald had been a judge and barrister, but his expertise was not in public, let alone electoral, law. For public as opposed to criminal law, he sketched a brief for the EARC.<sup>100</sup> Why did he not leave reform to existing processes? The most obvious answer was that leaving electoral reform to a malapportioned and self-interested body like the unicameral Queensland legislature was a Catch 22.<sup>101</sup> Fitzgerald also explicitly criticised other Queensland law reform processes as reactive, if not moribund.<sup>102</sup>

Of the tasks Fitzgerald set for the EARC, only two of 16 related to electoral democracy *per se*, namely electoral system review (with an emphasis on boundaries) and a donations register. The rationale for entrusting electoral reform to a body otherwise focused on reshaping administrative law and procedures was the presumption that electoral fairness was essential to accountability. The EARC was

<sup>100</sup> Fitzgerald (1989), pp 144–45.

<sup>101</sup> In comparison, the federal law was overhauled in 1983 with input from a joint select committee.

<sup>102</sup> Fitzgerald (1989), pp 138–41.

established by Parliament and required ‘forthwith’ to review the electoral maps and apportionment system.<sup>103</sup>

The EARC was no mere ad hoc law reform body, of the sort to which questions are shunted to put them on a back-burner. On the contrary, the EARC had enormous power for two reasons. One was by virtue of its conception, in the twinkling of Commissioner Fitzgerald’s all-seeing eye. The second was:

an extraordinary pre-election agreement by the leaders of all Parliamentary parties with Mr Fitzgerald QC on the 21<sup>st</sup> July 1989 that ‘all recommendations of [EARC] with respect to electoral matters will be immediately implemented’.<sup>104</sup>

This pledge, which occurred several months before the election that ushered in a Labor government, was politically extraordinary. It mirrored Premier Ahern’s public commitment to implement the Fitzgerald reforms ‘lock, stock and barrel’.<sup>105</sup> Through it, the National Party was effectively committing to the end of the zonal system — although Ahern must have suspected the task would not fall to him, but to a Labor- or Liberal-led government. (For his troubles, Ahern was ousted in September 1989 by Russell Cooper, who led the National administration to defeat fewer than three months later.) The pledge was also extraordinary because it implied ceding parliamentary sovereignty over the electoral system to a body that was not merely unelected, but yet to be created.

The EARC’s legislative mandate was simultaneously remarkable for both its breadth and its narrowness.<sup>106</sup> As Professor Colin Hughes, a leading author of the electoral reforms, has since observed, its mandate’s ‘prohibition of the particular and confinement to the general’ helped its authority and focus.<sup>107</sup> It was broad in encompassing *any* aspect of the electoral process, particularly given that the electoral code had been overhauled as recently as 1983. Yet it was narrow in that the question of reinstating an upper house — or the more general question of democratic means to address the subordination of parliament to a powerful executive — was not placed on its agenda.

In relation to electoral map-making, EARC recommended the system that survives to this day:<sup>108</sup>

- an independent Electoral Commission,
- reconstituted as a three-member Redistribution Commission consisting of a judge and the Electoral Commissioner and the Surveyor-General,<sup>109</sup>

<sup>103</sup> *Electoral and Administrative Review Commission Act 1989* (Qld), s 2.11. For the EARC’s general remit, see ss 2.9–2.12 and Schedule.

<sup>104</sup> PCEARC Report, p iii. The agreement, as tabled in Parliament, is Appendix D(1) to that report.

<sup>105</sup> Reynolds (2002).

<sup>106</sup> *Electoral and Administrative Review Commission Act*.

<sup>107</sup> Personal communication with authors.

<sup>108</sup> EARC Report (November 1990), Chs 11 and 12. See *Electoral Act 1992* (Qld), ss 4–5, 7, 9 and Part 3.

- conducting regular redistributions,
- to achieve one vote, one value, with a maximum tolerance of 10 per cent from the average quota,
- but with a limited weightage for any electorates over 100,000 km<sup>2</sup>.

The EARC's report was then considered by a specialist Parliamentary Committee for Electoral and Administrative Review (PCEARC).<sup>110</sup> Both in this forum and on the floor of parliament, Labor MPs felt a clash of principle and honour. Their principles and long-held policy brooked no watering down of one vote, one value, but their leader, in a pact to depoliticise the process of electoral reform, had pledged to honour the outcomes of the Fitzgerald process. In the end, honour won over principle.<sup>111</sup> As a result, a few vast and remote electorates have 'phantom' voters attributed to them at the rate of 2 per cent of their size in square kilometres.<sup>112</sup>

In relation to its broad remit to redraft the electoral code, the EARC recommended a new voting system in the form of optional preferential voting. It did so on the basis of democratic principle: optional preferential voting increases voter choice.<sup>113</sup> This decision was unexpected, but optional preferential voting had been used in Queensland before.<sup>114</sup> Its political effects have proved surprisingly muted. Labor exploited optional preferential voting when conservative politics fractured again in the late 1990s, with the emergence of the One Nation Party, by campaigning on a 'Vote 1' strategy. (The strategy was disingenuous: Labor preferences were almost never counted.)<sup>115</sup> But by 2008, the major conservative parties had united into a single Liberal National Party. At the time of writing, Labor has been in power all but two of the 20 years since the Fitzgerald Report. If anything, it is Labor that is now dependent on preferences, from left-wing voters whose votes have been lost to the Greens.<sup>116</sup>

The EARC also held a distinct public investigation into political donations.<sup>117</sup> Its recommendations were not considered until the second term of the new Labor

<sup>109</sup> Although the EARC itself was to conduct the first redistribution under a zone-free system, to ensure fair boundaries were available in time for the 1992 election. See *Electoral Districts Act 1991* (Qld).

<sup>110</sup> PCEARC Report. This Committee was established alongside EARC: *EARC Act*, Pt V.

<sup>111</sup> PCEARC Report, p iii ('the members of this Committee are honour bound to give effect to the historic tri-partisan agreement'). Nevertheless, the committee recommended machinery amendments.

<sup>112</sup> For example, an electorate of 110,000 km<sup>2</sup> could fall 2200 electors short of the minimum quota.

<sup>113</sup> EARC Report (November 1990), Ch 6, especially paras 6.19–6.25.

<sup>114</sup> 'Contingent' voting had been pioneered in Queensland from 1892 until 1942. Optional preferential voting has also become the system used in New South Wales elections.

<sup>115</sup> Wanna (2004).

<sup>116</sup> This effect can be over-stated, since the Queensland Greens are not strong and their supporters mostly reflexively preference Labor: see Reynolds (2009). Analysis suggests that the 'exhaustion' of preferences under optional preferential voting does not affect the outcome in many seats.

<sup>117</sup> EARC (June 1992).

government.<sup>118</sup> The resulting campaign finance system was limited to public disclosure of four-figure donations and a scheme of partial public funding of the cost of electioneering. It simply mapped existing federal law on to state politics.<sup>119</sup>

### Conclusion: A Liberal Rhetoric

The electoral reforms that flowed from Fitzgerald — fairer electoral maps, optional preferential voting and campaign finance regulation — were democratically laudable. None, however, was ground-breaking, let alone radical. The quirky nod to a small number of geographically vast electorates offended one vote, one value purists, but was of little practical consequence.<sup>120</sup>

Electors in the rapidly growing south-east conurbation could, however, at last feel that their votes were equal to those of their rural cousins. Whilst administrations since have sought to govern for the whole state, the parliamentary dominance of the south-east has undoubtedly intensified focus on the development and problems of that region. MPs representing remote areas face greater constituency challenges than under zonal weighting. Although Premier Borbidge of the National Party headed a minority Coalition government for two years in the 1990s, he was a product of the Gold Coast, in the south-east corner. It is unlikely that a rural Queensland MP will ever be Premier again. Demographic shifts now replicated in the electoral map have turned the state's politics to Labor and shifted the balance on the conservative side towards the philosophy of urban neo-liberalism rather than the Nationals' more interventionist brand of regional and agrarian development.

While the electoral maps are purer, distortions remain. The winner-takes-all electoral system guarantees this. At its height in 1974, the disparity between votes earned and seats won by the Country/National Party was 19.68 percentage points. Yet, even under one vote, one value, that figure was topped twice and equalled once by the Beattie Labor governments in 2001–06.<sup>121</sup> That fact, as much as any changes to the electoral maps or the introduction of OPV, drove the National and Liberal Parties in 2008 to merge at state level into the Liberal-National Party.

The Fitzgerald process, for all its flowering of potential, did not open up an era of permanent reflection on, or reform to, governmental institutions, public law generally or electoral law in particular. The most notable oversight of the report was any analysis, let alone critique, of Queensland's unicameralism. This was in spite of Fitzgerald recognising that a single legislature was prone to executive dominance, and his insight that, unchecked, such dominance inexorably dragged governance

<sup>118</sup> Legislative Assembly of Queensland (November 1993).

<sup>119</sup> See now *Electoral Act 1992* (Qld), Schedule: Election Funding and Financial Disclosure Based on Part XX of the Commonwealth *Electoral Act*. In some respects, the EARC's recommendations had gone further than the federal regime, but the state-based parties preferred to harmonise the two systems.

<sup>120</sup> Currently, it is of marginal value to just four outlying electorates.

<sup>121</sup> In 1974, the then Country Party received 27.88 per cent of the total votes (without contesting most seats), but 47.56 per cent of the seats. The comparable ratios of primary votes to seats won by Labor in 2001, 2004 and 2006 were 48.93 per cent to 74.16 per cent; 47.01 per cent to 70.79 per cent; and 46.92 per cent to 66.29 per cent.

from public spiritedness into cronyism and corruption. Echoing Lord Hailsham's concern of a drift from legislative to executive dominance, Queensland researchers have recently asked whether unicameralism risks 'elective dictatorship'.<sup>122</sup> Yet Fitzgerald did not even broach the topic and the EARC interpreted its remit as not extending to such a contentious and fundamental reform.<sup>123</sup>

Perhaps this is explicable given the lack of any partisan interest in resurrecting the Legislative Council. But it is difficult to understand, since electoral reform nestles in the broader question of parliamentary design, and difficult to defend, since for at least a decade prior the federal Senate had been reinventing itself as a genuine house of review. The parliament gave the EARC a potentially wide leeway to report into 'the operation of Parliament' and 'public administration'.<sup>124</sup> However, the farthest the EARC strayed from the Fitzgerald blueprint and its legislative terms of reference was to write a general report on constitutional consolidation, which eschewed the absence of a house of review.<sup>125</sup> If ever there were an occasion to seriously reopen the question of bicameralism in Queensland, the Fitzgerald process was it, but it was lost.<sup>126</sup>

A second, interrelated debate left glaringly unopened concerned proportional representation.<sup>127</sup> Admittedly, in Australia only the small jurisdictions of Tasmania and the ACT elect governments via proportional representation. But the model of a proportionally elected upper house like the Senate was an obvious and well-accepted compromise for Fitzgerald or the EARC to recommend. It could have addressed deeper problems with accountability and participation that had haunted Queensland well prior to Bjelke-Petersen. A reform such as this, however, would have challenged the entrenched interests of all the major parties. To the EARC, 'the major problems of Queensland's present electoral system lie in the drawing of electoral boundaries and undue electoral weightage'.<sup>128</sup> But this was as much an expression of an unaccountable government as a cause. In terms of parliamentary and electoral reform, the Fitzgerald process was more a makeover — a partial liberalisation and catch-up — than a real revolution.

We should not be too harsh, however. Significant electoral reform is difficult to achieve at the best of times. And the electoral law catch-up that the Fitzgerald process helped inaugurate seemed improbable at the height of Bjelke-Petersenism. At the peak of his powers, that Premier was an unrivalled rhetorician. His was among an unusual handful of governments that do not waste political capital for

<sup>122</sup> Aroney et al (2008).

<sup>123</sup> EARC Report (Nov 1990), paras 9.48–9.60.

<sup>124</sup> *Electoral and Administrative Review Act 1989* (Qld), s 2.10(1)(a). The EARC interpreted its remit as not extending to such a contentious and fundamental reform: EARC Report (Nov 1990), paras 9.48–9.60.

<sup>125</sup> EARC (August 1993). This culminated in the consolidating *Constitution of Queensland 2001* and *Parliament of Queensland Act 2001*, involving public consultation through a Constitutional Review Commission, without bicameralism featuring on the agenda.

<sup>126</sup> Aroney and Prasser, this issue.

<sup>127</sup> EARC Report (Nov 1990), Ch 4, runs relatively perfunctorily through alternatives to single-member electorates.

<sup>128</sup> EARC Report (Nov 1990), para 4.56.



marginal gains or legal cover, but use partisan electoral maps to hold power robustly. There is a long historical catalogue of governments that, now departed, might have once thought themselves securely propped up by gerrymandered or malapportioned foundations. Yet Queensland under Bjelke-Petersen reminds us that sometimes it is not what the law does, but what it *expresses*, that has the most political salience. In the electoral law context, the right bark — loud enough and pitched just right — carries the fiercest bite. The era demonstrates how control of the rhetorical function of electoral law can translate into astonishing political success. But the era also pictures such success as brittle, and indeed illusory — subject to quick collapse and stark reversal when a state's electors stop believing in the collective illusion, as the Fitzgerald process helped them to do.

The illusion was dispelled by the uncovering of corruption, in the form of police and politicians on the take. As that story unfurled, the agrarian strong-man resigned, leaving a power vacuum his party was ill-prepared to fill. That vacuum was filled, in the first instance, by Fitzgerald himself. For a short but crucial year or so, one strong-man in the form of Tony Fitzgerald QC supplanted another in the form of Premier Bjelke-Petersen. The power Fitzgerald wielded was of a different order. His legitimacy derived from the status of his commission and the perceived probity and success of its anti-corruption work. But it was essentially an autocratic achievement to supplant the old rhetoric and principles with a new (for Queensland) liberal agenda. The spadework was then delegated to a powerful, temporary bureaucracy, in the form of bodies such as the EARC, independent of the by then stultified public service.

Sometimes reform requires the worst of times — earth-shattering scandal and regime change, as in Queensland. It may require transcending parliamentary sovereignty and effectively ceding power to an expert commission, as happened with the EARC and, a few years earlier, the New Zealand Royal Commission on the Electoral System.<sup>129</sup> Fitzgerald's manoeuvre was not to anoint himself as expert, judge and jury over the electoral system. He neither decreed one vote, one value, nor attempted to suggest a model redistribution mechanism. Rather, he smelt the breeze and declared the old order illiberal. The rest, in retrospect, flowed as day follows night.

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