

Introduction

During the three and a half centuries since the end of the English civil war democracy has spread well beyond its earliest outbreaks in western Europe. Free and fair elections are a necessary condition of democracy, but the long evolution of democratic government has meant that arrangements, practices and institutions have varied in different countries.

It is more than 180 years since Australians first voted – for the partially elected NSW Legislative Council in 1824 – and 150 years since locally elected politicians gained the power to make electoral laws. Australia’s electoral system reflects a long history of political experimentation, with steadily increasing democracy as the principal theme. But although democracy can grow of itself, it also needs nurturing, and it can be eroded. In this book we show how many of the best features of the Australian electoral system – features that were intact as recently as mid 2006 – have been subverted by recent legislation, and that further erosions are likely.

Although this book is primarily about Australia, we refer to comparable problems and solutions in the United States to place what is happening here in perspective. The influence of the United States can be seen very clearly in the recent changes to electoral laws introduced by the Australian government and in the rhetoric of the key advocates of change within the Liberal Party. As Australian political parties and interest groups have increasingly adopted American election campaign methods – negative advertising, excessive expenditure, direct mail, electronic databases and

push polling – so too have some of their members developed an enthusiasm for elements of US electoral law. We argue that this is a most undesirable development which, in the interest of Australian representative democracy, needs to be resisted. One conservative foreign policy expert, Owen Harries, has declared that “the Bush doctrine – the belief that American power should be used to spread democracy throughout the world – is dead in the bloody water.”¹ One reason for this failure is that parts of the US brand of democracy are not up to export standard.

Popular mythology holds that the United States is both the finest flower of the democratic experiment and its longest continuous example. Both propositions are contestable.² The United States was established at a time (1789) when the idea that *all* the people should have the right to choose their rulers by way of election was still a novelty. Democratic forms were added later (sometimes much later) and in a piecemeal fashion. The Australian nation’s foundation in 1901 was less dramatic than America’s but reflected the advances in democratic theory and practice that had occurred in parts of western Europe and in the Australasian colonies in the second half of the nineteenth century. Australia and New Zealand share the honour of being the oldest continuous, modern democracies. It is regrettable that some members of one major component of Australian democracy, the Liberal Party of Australia, now seem to regard their party as the south-west Pacific version of the Republican Party – or at least its Texan branch – and want to import some of the least democratic elements of the United States’ electoral procedures. At the same time, ironically, quite a few American electoral reformers look to the Australian electoral system as a model worth emulating.

The suggestion that the United States has a major democratic deficit may seem like a serious and provocative charge. But the recent bipartisan Carter–Baker Commission on Federal Election Reform, chaired by a former Democrat president and a former Republican secretary of state, argued that “Americans are losing

confidence in the fairness of elections.” The twenty-person commission was “united in the view that electoral reform is essential...”³ While we don’t endorse US journalist Gregory Kane’s approving remark that “the United States is a republic, not a democracy,”⁴ we do argue that America’s current electoral machinery manifests major, overlapping shortcomings which can be categorised under the following heads: fragmentation; voluntarism; partisanship; and excessive judicialism.

Its **fragmentation** is demonstrated by the fact that the United States does not have a single, consolidated, federal electoral law. Section 4 of the US constitution allocates to the 50 states the power to frame electoral procedures for the federal executive and legislature elections – and the states often hand the job over to local counties. The consequence is a bewildering mish-mash of laws and procedures that are open to partisan manipulation and excessive judicial review. In the wake of the controversies surrounding the 2000 presidential election, the US congress passed the *Help America Vote Act*, the declared objective of which was to facilitate the voting process. Unfortunately the Act also introduced voter identification requirements that have the potential, according to the political scientist Michael L. Goldstein, “to discriminate against poorer and less-educated voters.”⁵ Australia, by contrast, enacted the federal *Franchise Act 1902* and the *Commonwealth Electoral Act 1902* to enable uniform national regulation of all elections for federal parliament.

Unlike in Australia, both voting and enrolment are entirely **voluntary** in the United States. This produces chronically low voter turnouts and inaccurate electoral rolls, and – without a reliable database of enrolled voters – makes it impossible to draw accurate electoral boundaries. As we will see, the absence of compulsion leads to widespread disenfranchisement. Moreover, millions of otherwise eligible US citizens are denied the vote because of prior felony convictions. It is not unusual for people to be jailed for voting while disqualified, and the laws are so confusing and inconsistent that many don’t know they aren’t entitled

to vote. Party activists can challenge the eligibility of would-be voters queued at polling stations by accusing them of felony convictions or launching investigations to scare voters away from the polls on election day.⁶ Voluntary voting operates more satisfactorily in other countries, which suggests that the development of the electoral administration in the United States is a large part of the problem.

Partisanship is embedded in the American electoral system, taking a number of forms that would greatly alarm Australian voters. The task of drawing US House of Representatives electoral boundaries – what Americans call *redistricting* – rests almost exclusively in the hands of state legislators and governors who, of course, represent political parties and have no qualms about gerrymandering against their opponents.⁷ While a handful of states have bipartisan redistricting panels, none have non-partisan ones. In most states the top electoral officials are elected representatives of political parties; they are permitted to design ballot papers to benefit their party’s candidates and to make decisions during and after the vote that can and do affect results. In Florida (2000) and Ohio (2004), the two states crucial to the outcome of the presidential election in those years, the top electoral official also served on the Bush–Cheney election committee. The unprecedented difference between the official results of the 2004 presidential election and the usually accurate exit polls has opened the way for allegations that the election may have been “stolen.”⁸ In Australia all of these functions are discharged by the statutory Australian Electoral Commission, or AEC, whose charter mandates strict impartiality on the part of its officials.

The final undesirable feature of American electoral law is the excessive **judicialisation** of almost the entire process. In Australia the courts play a very minor role in the voting system, but in the United States the approach of a presidential election sees the parties dispatch swarms of lawyers into the key “swing” states, ready to launch litigation to secure every possible advantage for their candidates and to subvert their opponents. Thousands of

votes cast in US elections may not be entered into the count because of legal challenges by partisan interests. Most notably, the 2000 US presidential election was decided not at the polling places but in the federal Supreme Court on appeal from a state court.

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In this book we generally take as our starting point the major amendments to the *Commonwealth Electoral Act* enacted under the Labor government in 1983. While recognising some shortcomings in the 1983 legislation, we judge it to have been generally bipartisan and democratic. We compare that legislation with the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, which we contend was motivated by partisanship and signals a retreat from Australia's characteristic democracy.

The 1983 amendments to the electoral system were the most comprehensive since the electoral Act was consolidated in 1918, and were introduced following a report by the Joint Select Committee on Electoral Reform, or JSCER. This was a committee of great expertise in electoral matters, with members from all parties represented in parliament. Its members worked solidly through the winter and took six months to write their report. At the time it was frequently remarked how unusual it was that, when it had the numbers in both houses to do whatever it wanted with the electoral system – provided the Democrats agreed – the Hawke government was willing to put the matter to a parliamentary committee to achieve the maximum amount of consensus.

The outcome was a comprehensive reform of the system. The new, statutory Australian Electoral Commission, or AEC, had more autonomy and responsibility than the Australian Electoral Office, which it replaced. The Senate grew from 64 members to 76 and the House of Representatives from 125 to 148. The Act ended malapportionment – in other words, electorates with unequal enrolments – and improved the process for drawing electoral boundaries, removing the power of either house of