

Legislative
Redistricting
by the
New Jersey Plan

Donald E. Stokes

**A Report for
The Fund for New Jersey**

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The Fund for New Jersey supports projects that promote public policy, citizen action, and environmental stewardship, to the benefit of all New Jersey residents.

Foreword

New Jersey's state constitution was amended in 1966 to set out a unique process for configuring the boundaries of state legislative districts following each decennial census. An Apportionment Commission combining the independent judgment of a "public member" with the political astuteness provided by representatives of the two major parties devised these boundaries in 1981 and again in 1989.

Because no other representative democratic jurisdiction has attempted such a mixed commission concept, The Fund for New Jersey commissioned a study in 1990 to make the lessons of our first experience in 1981 available for independent assessment. We asked Professor Donald Stokes, the dean of Princeton University's Woodrow Wilson School of Public and International Affairs and a specialist on elections in the United States and the commonwealth countries, to write that report. Professor Stokes was in a unique position to evaluate New Jersey's model because he had served as the public member on the Apportionment Commission in 1981.

His report, *Legislative Reapportionment in New Jersey*, examined the process and product of the 1981 round of redistricting in the light of various tests for electoral fairness and compliance with various state and federal court mandates.

When The Fund for New Jersey published this report we did not know that in 1991 Professor Stokes would again be appointed by the Chief Justice of the New Jersey Supreme Court to act as the public member on the 1991 Apportionment Commission. The tests of fairness and the criteria for court compliance spelled out in his study for The Fund had an important effect on the deliberations and final boundaries established by the 1991 Commission.

Following on this second round of experience with the mixed commission model, the concept was adapted for use in setting the political jurisdictions of New Jersey's Congressional seats, and for those of Freeholders in Atlantic, Essex, and Hudson counties where geographical represen-

tation is provided. Clearly the principles of New Jersey's mixed commission model are gaining acceptance through these expanded applications.

Important modifications distinguish these latter commissions, however, and these should be taken into account in assessing the effectiveness of the overall approach and in its applied variations. Fresh research questions arise, therefore, from New Jersey's four distinct redistricting experiences using variations of the mixed commission model. Answers to these questions will be important determinants for the further application of the mixed model to new districting situations, and for thinking about ways to strengthen the process where it is already in use.

To help explore these questions, The Fund for New Jersey has again turned to Professor Stokes. In the report that follows, he sets out observations in three key areas to help assess the record and to provide insight for the future. First, he analyzes both the proceedings and the resulting boundaries of the 1981 and 1991 Legislative Apportionment Commissions. Second, he distinguishes the essential variations of the model as applied to the creation of Congressional and Freeholder districts. And third, he spells out recommendations for enhancing the strengths of the mixed commission model, and points out weaknesses that should be addressed in order to ensure that the most appropriate practices are adopted if the model is to enjoy even wider acceptance in the future.

Mark H. Murphy
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The Fund for New Jersey
March, 1993

Summary

In recent years New Jersey has pioneered a new way of redrawing legislative constituencies. The "New Jersey plan" of redistricting lies midway between the British practice of leaving the task to neutral boundary commissioners, who lack the practical wisdom of politics, and the American practice of leaving the task to the ordinary legislative process, with results that are notably short on public interest.

This novel plan was first successfully applied to the legislature, after this approach was written into the state constitution in 1966. But it has now been extended by statute to New Jersey's congressional districts and to freeholder districts in the three counties of the state that do not elect all of their freeholders at large.

Under the New Jersey plan the redistricting commissions have equal numbers of commissioners from the two parties, with a public member to move the commission to an agreement that meets clear tests of the public interest. The public member is chosen by the Chief Justice of New Jersey's Supreme Court in the commissions that redraw the legislative and freeholder districts. The law creating the 1992 congressional commission provided for a neutral chairman to be chosen by the other commissioners.

The public member is not simply a "tie-breaker" who is bound to choose between a set of boundaries that tilts toward one party and an alternative set that tilts toward the other. Experience bears out that the public member can move the commission to adopt boundaries that are fair between the parties and meet the other criteria of a good plan — compact and contiguous territory, equal population, and the representation of minorities and geographic communities.

The greater fairness of redistricting by the New Jersey plan is especially clear when the congressional seats drawn by bipartisan commission in 1992 are compared with the congressional seats drawn by the legislature ten years earlier — and when the freeholder districts drawn by

bipartisan commissions in Atlantic and Essex Counties are compared with the freeholder districts that were earlier drawn for these counties by their party-controlled boards of election.

Several steps should be taken to strengthen this model so that the New Jersey plan can work effectively after the census of 2000:

1. *Renewing the authority for redistricting congressional seats by commission.* Prior to the expiration of the current law, the legislature should take steps to provide authority for redistricting the state's congressional seats by the New Jersey plan by constitutional amendment or by statute.
2. *Defining the selection and role of the public member.* The constitutional amendment or statute renewing the authority for redrawing New Jersey's congressional districts by commission should provide for a public member or neutral chairman with full voting rights who is selected by the Chief Justice of New Jersey's Supreme Court.
3. *Providing the public member with technical support.* A small working group of concerned leaders from the state government, academic institutions, independent foundations, and other interested groups should help define the data, technical resources, and staff expertise required for the New Jersey plan of redistricting to work effectively after the census of 2000 and help locate the funds and institutional base that are needed to lay this groundwork.
4. *Clarifying the budget arrangements.* The public member should be allocated an explicit part of the appropriation for the state and congressional redistricting commissions, and counsel to the public member should not be dependent on the counsel to the party delegations for the payment of legal fees.
5. *Balancing public information and the integrity of bargaining.* The commissions redrawing the congressional, legislative, and freeholder districts should gather the public's views in hearings in varied locations but should be exempted from the provisions of the state's Public Meetings Act.

New Jersey, having once supplied a key element of the constitutional plan of representation in our national government, has in recent years sought to answer one of the most vexing questions in the practice of representative government—how we should periodically redraw the boundaries of legislative constituencies. The state has by now extended to three levels of government its pioneering effort to find a better way of drawing district boundaries, with results that can help New Jersey and other states to prepare for the next round of redistricting, after the census of 2000. This report gives the background of New Jersey's experiment, analyzes the results and implications thus far, and proposes worthwhile steps to build on this experience.

The Problem of Redistricting

With government so under a cloud, it is easy to lose sight of the crucial role of representative institutions in modern democracy. The idea of government by the people took root in little places, like Athens and Thebes, where direct democracy was possible. It could not have been extended to the huge national states of the modern world without the invention of representative government. Although heroic efforts to achieve direct democracy by referendum or electronic plebiscite may lie ahead, representative institutions remain the best hope of keeping government responsive to the people. The delegation of authority to elected representatives and the role of political parties in the conversation between leaders and led are the essential means of modern democracy.

In the English-speaking world, legislative representatives have been chosen from geographic constituencies ever since the English House of Commons, the popular chamber of the "Mother of Parliaments," assembled from geographic places. The absorption of this idea into American practice is more recent than is often realized. When the nation was formed, many of the states elected their Congressmen at large, rather than from the separate districts that came into general use only in Jackson's time. But the modern practice in the U.S., as in Britain and such Commonwealth countries as Canada, Australia, and New Zealand, is to elect representatives from geographic constituencies.

The idea that these constituencies should be of roughly equal population is also fairly recent. In Britain it emerged from the convulsions surrounding the reform acts of the 19th century, although it was not fully accepted until after World War I.¹ The U.S. Constitution assures the states a number of Representatives proportional to their population, and by

¹For a survey of the background and current practice of districting in the English-speaking world, see David Butler and Bruce Cain, *Congressional Redistricting*. New York: Macmillan, 1992.

Jackson's time the states were subdivided into congressional districts of roughly equal population, although the variation was greater than the courts would today allow. There was a wider degree of inequality in state legislatures, which tended to overrepresent rural areas, especially in their upper houses.

Given the unequal pace of population change in different places, the population of geographic constituencies can be kept roughly equal only by periodically redrawing their boundaries. The U.S. Constitution requires a census of population at the start of each decade so that the members of the House of Representatives can be apportioned to the states in proportion to their population. When the states were divided into districts, the decennial census also triggered the redrawing of congressional districts within states as well as the redrawing of the boundaries of the state legislative districts.

The English-speaking world has evolved two sharply divergent views of who should periodically redraw constituency boundaries. In Britain and the older Commonwealth countries the task is assigned to neutral commissioners, wholly removed from politics. In marked contrast, the American tradition entrusts this task to the ordinary legislative process within the states, thereby allowing legislators and governors to use redistricting to press their parties' advantage, as well as to protect incumbents, penalize opponents, and advance or harm various interests.

Each of these models has its drawbacks. The British and Commonwealth practice of leaving the task to neutral commissioners insulates the process from political influence but also insulates it from the practical wisdom of those who operate the institutions of representative government. As a result, the boundaries drawn by neutral commissioners often disrupt the political and social life of natural communities. And the commissioners may unwittingly draw boundaries that are biased toward one of the parties, in a sense to be spelled out below.

On the other hand, the American practice of leaving the task to the ordinary legislative process gives far more weight to particular interests than to the general interest and has invited the public's contempt since the time of Elbridge Gerry, the governor of Massachusetts whose fellow partisans rammed through the legislature a set of districts that included a salamander-like constituency, which was promptly dubbed a "Gerrymander." It is hard to justify a party's exploiting its control of the legislative process in the redistricting season to strengthen its hold on the legislature or the state's congressional delegation for the next *decade*—and perhaps beyond, since its skill in doing so will increase its chances of controlling the next redistricting, a decade hence. There is an inherent abuse in the parties redrawing legislative boundaries to perpetuate their advantage, and it is equally troubling when individual legislators use their influence on redistricting to advance their own agenda—for example, by drawing the boundaries of their districts to exclude potential opponents. We have a multiple form of this conflict of interest when a legislature draws district boundaries to protect incumbents from *all* parties.

Apart from the reluctance of those in control to give up their influence on the political process, the main barrier to reform is the difficulty of devising a practical alternative. Unlike Britain and the Commonwealth countries, the U.S. has almost no tradition of neutral commissioners performing such politically sensitive tasks, although the courts have increasingly played this role, ignoring Justice Frankfurter's admonition to stay out of this "political thicket." But the courts also lack the practical political wisdom of those who make our representative institutions work and are a cumbersome source of neutral judgment on redistricting plans. Boundary issues reach the courts only when original plans are challenged on constitutional or statutory grounds, and the courts are often limited to the unhappy choice between two or more plans that serve the interests of the parties proposing them.

These aspects of the redistricting problem give a broader significance to New Jersey's pioneering efforts to find a better way. Although it began its search in particular circumstances, the state has in effect sought a general model that allows the practical political wisdom of the parties to flow into the redistricting process while also requiring the process to meet clear tests of the public interest, especially the test of fairness between the parties. Such a model would lie somewhere between the British and Commonwealth practice of assigning the task to neutral commissioners who are notably short on practical wisdom and the American practice of leaving the drawing of boundaries to the ordinary political process, with results that are notably short on public interest.

The Origin of New Jersey's Experiment

When the courts were remaking American representation in the wake of *Baker v. Carr*, they came upon an upper house in New Jersey's legislature composed of one senator from each county. The New Jersey Supreme Court was unimpressed by claims that such an arrangement might be appropriate for the state that had once sold the rest of the country on the idea of the equal representation of states in the United States Senate. It declared this "little New Jersey Plan" to be a violation of the U.S. Constitution and mandated the state legislature to call a limited constitutional convention to fix it. Since the legislature was then divided, with the General Assembly in the hands of the Democrats and the Senate strongly tilted toward the Republicans, it summoned a finely balanced convention, and the two sides worked out a redistricting procedure that was itself finely balanced between the parties.

Under this procedure, redistricting begins in a census year with the appointment of a highly partisan but balanced Apportionment Commission of ten members, five chosen by each of the two state party chairmen. These party delegations have a month to agree on the boundaries of the forty

legislative districts.² If they do reach agreement, these boundaries hold for the next decade unless they are overturned by the courts. But if the ten party commissioners are unable to reach agreement, the Chief Justice of the State Supreme Court chooses an eleventh, public member, and the expanded Commission has another month to finish the job. The constitution does not say what will happen if it fails to do so, but no public member worth her or his salt will let the second month run out.

Although this procedure differs from the ordinary political process by taking redistricting out of the hands of the legislature, it is easy to exaggerate this difference. There is no bar to the appointment of Senators or members of the Assembly to the Apportionment Commission, and the two party delegations have included members of the legislature on each of the four occasions—after the 1966 constitutional convention and after the censuses of 1970, 1980, and 1990—when the procedure has been used. There is also a dense flow of (accurate and inaccurate) information to and from the legislature as the Commission does its work. In practical terms, the Commission may not be more removed from the legislature than would be a special committee selected from the Senate and Assembly to draw the new boundaries, although the legislature does not vote on the boundaries agreed upon by the Commission.

What does set the Commission's work fundamentally apart from the ordinary political process is the equal weighting of the parties and the procedure for moving a deadlocked Commission to an agreement without tilting it toward one party or the other. The appointment of ten members by the party chairmen guarantees that the Commission will be exquisitely political, in keeping with the character of New Jersey as a strongly partisan state. It has been more than twenty years since a party delegation split on a Commission vote, and the Commission is awash with the practical knowledge of its partisan members. But neither delegation can dominate the other on a straight party vote, unlike the situation in the legislature when both houses (and the governor's office) are controlled by the same party. And if this balanced, ten-member Commission is deadlocked at the end of the month it works on its own, the neutral public member supplied by the Chief Justice will not simply deliver control into the hands of one party or the other.

This last point deserves a good deal of emphasis, since it is so widely believed that a public member inserted into a deadlocked Commission will simply break the tie by choosing one or the other of two partisan plans. Such a limited tiebreaker role would reduce fairness between the parties either to a lottery between the parties or to choosing the marginally less biased of

²The ten party members of the Apportionment Commission are appointed by the party chairmen by November 15 of the census year. The Commission has until February 1 or until one month after the census data are delivered to the state, whichever is later, to reach an agreement on the new boundaries. In recent years the inability of the U.S. Census Bureau to deliver the data during the census year has left the ten-member Commission only a month to reach agreement before they are joined by the public member.

two biased partisan plans. Either way, the tiebreaker would give one party an advantage for the next ten years, unless the courts intervened. The positive promotion of the public interest requires a more activist role by a public member who has a clear idea of what fairness between the parties means.

Moreover, limiting the public member to choosing one or the other of two biased plans would put added pressure on the neutrality of the Chief Justice, who appoints the eleventh member, since such a role would create powerful incentives for governors and senators to nominate and confirm a Chief Justice who could be depended upon to pick a partisan tiebreaker. We had a glimpse of such pressures when the current Chief Justice was renominated in 1986.³ Republican Senators who opposed him on other grounds charged that he had supplied the 1981 Apportionment Commission with a public member who was a registered Democrat and could be relied on to produce a 6 to 5 Democratic vote. They therefore urged the Republican governor to nominate a Chief Justice who could be relied on to produce a 6 to 5 Republican vote in the Commission to be appointed after the 1990 census. This argument might have been more influential if the public member had not played a far more activist role in moving the 1981 Commission toward a fair agreement, in a manner that needs to be understood.

How the Process Worked in 1981

The Census Bureau delivered New Jersey's 1980 census data to the governor's office on the last day of February in 1981, only six weeks before the statutory date on which the secretary of state needed to notify the county clerks of the boundaries of the legislative districts so that prospective candidates would know where they could run.⁴ The ten party commissioners appointed by the party chairmen hammered out the framework of an agreement during March, the month allotted them. By agreement, the Democrats were given wide latitude in drawing boundaries in Hudson County and Newark, the most urban part of the state, the Republicans equal latitude in drawing boundaries in the northwestern part of the

³Justices of New Jersey's Supreme Court are initially appointed by the Governor and confirmed by the State Senate for a term of seven years. If renominated and reconfirmed at the end of this term, they serve until retirement.

⁴New Jersey is divided into forty legislative districts, each of which sends to the legislature a Senator and two members of the General Assembly elected at large. All eighty members of the Assembly are elected to two-year terms in each of the odd-numbered years of the decade. All forty Senators are elected to two-year terms in the odd-numbered year at the beginning of the decade and to four-year terms in the second and fourth odd-numbered years of the decade. Hence, the year after the census is always a major election year, and New Jersey has a brisker timetable for redistricting than states where a major election does not occur until the second year after the census.

state. The Republicans also accepted their rivals' objective of creating a new Democratic district in New Jersey's rapidly expanding waist, although they expected something in return. On this and a series of other issues the party delegations were genuinely deadlocked when the month ran out.

Toward the end of March the Chief Justice contacted me about becoming the public member if the Commission deadlocked, and I joined the Commission at the beginning of April, with the starting date of the state's electoral timetable only two weeks away. I quickly assembled a small staff, with Joseph E. Irenas, then a partner in the firm of McCarter and English and now a judge of the federal district court, as counsel and Ernest C. Reock, director of Rutgers' Bureau of Government Research, as election analyst. After getting to know my fellow Commissioners and the issues dividing them, I proposed that we move to an agreement by three stages:

- that we first of all go through the outstanding issues and see whether some could be resolved on their merits, knowing that others would be resolved only in the context of an overall agreement;
- that I then set out a plan I believed to be fair between the parties (and that also met the equal-population, compactness, and contiguity requirements) and see whether it had six votes;
- that if it did not, I would then ask each party to submit an alternative plan and would support whichever was closer to mine, provided it met the tests of public interest.

These steps moved the expanded Commission to an agreement within the two weeks before the secretary of state's notice to the county clerks was due. Several particular issues were disposed of on their merits. Although the plan I then proposed enjoyed support in both party delegations, neither voted for it, and I asked each party to offer me an alternative plan, on the understanding that I would give my vote to the alternative closer to mine if it met the required tests. The result was a pair of alternative plans that were virtual photocopies of my own. Although both of the other plans met my test of fairness between the parties, the Democrats' was marginally closer than the Republicans' to mine. I therefore supported the slight modification of my own plan offered by the Democrats.

This agreement enjoyed substantial support in both of the party delegations, and this consensus is reflected by the fact that the counsel for the two parties filed a common brief and successfully defended the plan when it was later confronted by a minor challenge in the courts. But at the late-evening hour when the agreement was reached I knew that its Republican support would melt away before the Commission formally voted the new boundaries the following day; with the public member and Democratic commissioners guaranteeing the state the plan everyone knew was needed

if we were not to make a mess of the state's electoral timetable, the Republicans were free to vote against the plan and ward off the brickbats of those who objected to particular features. Despite the appearance created by the 6 to 5 vote on the final plan, the fact is that it would have made not a particle of difference to any of the major issues on which the parties were previously deadlocked *which* we chose of the three virtually identical plans submitted at the end, mine or the alternatives submitted by the two parties. But it made a great deal of difference that we chose one of *these* plans, rather than one or the other of the two conspicuously biased plans on which the parties were deadlocked when I joined the Commission as its public member. I will detail this point after describing the experience with this constitutional procedure following the 1990 census.

How the Process Worked in 1991

The Census Bureau delivered New Jersey's data on the first day of February in 1991, four weeks ahead of its 1981 delivery, indeed early enough for an expanded, eleven-member Commission also to have a month for its work without missing the start of the state's election timetable, if a deadlock forced the procedure to this further stage. But the context of the Commission's work was drastically changed by the collapse of the Democrats' prospects after their newly elected Governor, Jim Florio, pushed a large tax increase through the Democratic legislature in his early weeks in office. The public's reaction led both of the party delegations named to the Apportionment Commission in November of 1990 to expect a Republican avalanche at the polls. As a result, the Democrats had little stomach for negotiating from what they felt was a position of weakness. They went not into the committee room but into the courts, where they challenged the census figures as seriously undercounting blacks and Hispanics. The U.S. government had responded to this same challenge from the City of New York by promising a federal district court in Brooklyn that the Secretary of Commerce would announce July 1 whether the Department would release revised data. In view of this promise, the Democratic members of the Apportionment Commission asked New Jersey's courts to say that the data released by the Census Bureau were only "preliminary" and that redistricting should be deferred until the "official" data were released during the summer.

This legal challenge reached New Jersey's Supreme Court near the end of the month in which the Republican and Democratic Commissioners would ordinarily have fashioned the framework of an agreement. On the last day of February the Court, with the Chief Justice absenting himself, unanimously ruled that the data released by the Census Bureau were sufficient for New Jersey's redistricting process. Since the month allowed the unexpanded Commission had elapsed, the Chief Justice appointed the

public member, and the expanded Commission had the month of March to get the job done.

The situation differed dramatically from 1981 as I again accepted the Chief Justice's appointment as public member. Far from hammering out the framework of an agreement, the parties had not even met. Each of the delegations and their staffs had done a good deal of preliminary work, with coaching from Washington. But nothing had been agreed to, or even discussed, between the parties. In this situation, the public member had little choice but to begin talking with the two party delegations to learn their agendas, and I prepared the ground for an agreement by beginning to draw possible maps of my own, assisted by the counsel and election analyst I enlisted ten years before and by an additional consultant, Mark Murphy, Executive Director of the Fund for New Jersey.

Since New Jersey's constitution envisages a first phase of direct negotiation between the two party delegations, I told the parties that I would stay out of their way for the first of the four weeks given the expanded Commission to finish the job if they could make headway on their own. But the prospective Republican avalanche and cleavages within the Democratic delegation so impaired the bargaining between the parties that this week produced as little as had the prior month. If there was to be an agreement, it would emerge only from parallel discussions of the public member with the two party delegations.

This created a quite different channel for the parties' political objectives to guide the bargaining process, but the parties' views were again consulted. They had in particular a chance to express their view of the risk to members of the Senate and Assembly whose fortunes could be affected by changes in the legislative districts. Given the population shifts in New Jersey during the 1980s, no one could have drawn the boundaries of a new set of compact, contiguous, and equally populous districts without pitting some incumbents against others or separating some incumbents from most of their constituents. The redistricting procedure written into New Jersey's constitution clearly intended these decisions to reflect the views of the parties and not to be left only to the wisdom of the public member.

Although we worked intensively, the job could have been done well before the end of the month allotted us. Little change was needed in a band of districts across New Jersey's waist. But the population north of this mid-section was down by the equivalent of one legislative district, and the population south of this mid-section was up by an equal amount. Hence, a district would need to disappear above this waist and reappear below it, with the additional changes this would entail in the surrounding districts. As the constitutional deadline approached, I set out a plan I thought was fair between the parties and met the other legal requirements, including those on the representation of minorities, but also reflected the practical wisdom of the parties on a swarm of particular points. In this case, the plan *had* six votes—the public member's and the five Republicans'—although I was unclear until the last moment which party would supply the additional votes to carry a plan.

Hence, the role played by the public member in the extraordinary circumstances of 1991 was very far removed from the idea of breaking a tie by choosing one of the other of two partisan plans. Indeed, the 1991 experience demonstrated the resiliency of New Jersey's constitutional procedure under a complete breakdown of negotiations between the parties. Since the public member played a role akin to that of a court-appointed master, counseled by leaders from each party, it is all the more important to know whether such a master can be guided by principles that genuinely serve the public interest—or whether this constitutional procedure is simply a screen for politics in a different form. We should in particular ask whether the idea of fairness between the parties can be given objective meaning rather than being in the end a wholly subjective judgment call. I will answer strongly in the affirmative and outline the objective criteria I have twice put into practice, before turning to minority representation and the other tests a plan must meet.

Fairness Between the Parties

As I joined the 1981 Apportionment Commission I sensed how difficult it was for my fellow commissioners to say in general terms what the idea of fairness between the parties meant. Although an agreement reached on their own would probably have been fair by a process akin to the "unseen hand" of competitive markets, they were unable to give much conceptual meaning to this idea. We can make a start toward clarifying the idea of fairness if we see that it involves a *relationship*, between popular votes received and legislative seats won. A set of district boundaries will be fair between the parties if the party that wins a majority of votes ends up with a majority of seats. This idea implies two essential tests of fairness:

- *lack of bias*: if there is a dead heat in popular votes, there should not be a built-in reason for expecting one of the parties, rather than the other, to control a majority of seats
- *responsiveness*: if a political tide moves the electorate away from a dead heat, the party toward which the tide is moving should build up a majority of seats

Each of these tests has to do with the functional form of the relationship between popular votes and legislative seats sketched in Figure 1. If one of the major parties had virtually no support in a particular election, we would expect it to win virtually no seats in the legislature; and if it had overwhelming support, we would expect it to win virtually all of the seats. In between, the party's proportion of seats should increase with its share of votes cast, according to the sort of relationship sketched by the figure.

No single curve of this sort describes the relationship of votes to

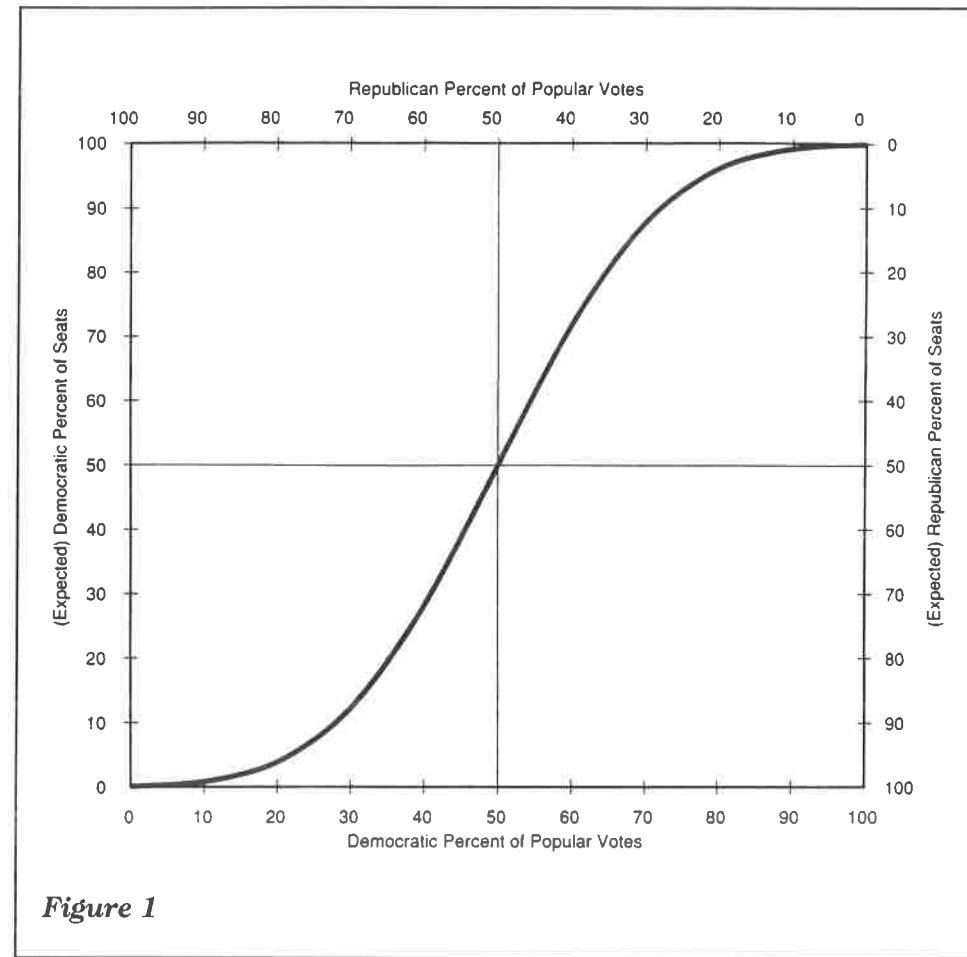


Figure 1

seats. On the contrary, the shape and location of the curve depend on how the boundaries of the legislative districts are drawn and on how those who are predisposed to vote for one party or the other are distributed across the districts. Since accidental factors will affect the number of seats produced by a particular share of statewide votes in a particular election, it makes more sense to regard the vertical axis of Figure 1 as the share of seats a party would, in the statistician's sense, *expect* to have on the basis of a given share of the statewide vote in a given election—with its actual share varying for accidental reasons above or below this expected share.

It is important to see that a party's expected share of seats does not increase in direct proportion to its share of votes, as a straight line from the lower left to the upper right corner of Figure 1. If the party had virtually no popular support and held no seats, its first increases in votes would win it very few seats. Similarly, if the party had overwhelming support and already held almost all of the seats, its last increases in votes would win it very few additional seats. In between, in the more competitive range, a given

percentage increase in the party's share of votes will typically bring a greater percentage increase in its expected share of seats. These facts together give the curve describing this relationship in Figure 1 its "S" shape and a slope greater than one in the competitive, central range.⁵ This slope in the central range describes how responsive the division of seats in the legislature is to the electoral tides that may move toward one or the other of two fairly evenly matched parties.

The aspect of this relationship of votes to seats that bears on the first of the tests articulated above (*lack of bias*) is the question of whether a party's expected share of seats is at 50 percent—or is above or below 50 percent—when its share of the statewide vote is at 50 percent; that is, whether either party can *expect* to have more than half the seats when there is a dead heat in the popular vote. Figure 2 shows three alternative relationships between votes and seats. The first of these, the curve to the left, is biased toward the Democrats, since the expected Democratic share of seats passes 50 percent before the party polls 50 percent of the statewide vote. The second, the middle curve, is fair between the parties, since neither party expects to have a majority of seats when the statewide vote is a dead heat. The third, the curve to the right, is biased toward the Republicans, since the expected Republican share of seats passes 50 percent without the party having polled 50 percent of the statewide vote. In an intensely partisan redistricting, the goal of the Democrats will be to draw the boundaries of the legislative districts so that a left-biased curve, such as the one labeled "Democratic" in Figure 2, describes the relationship between votes and seats. The goal of the Republicans will be to draw the boundaries so that a right-biased curve, such as the one labeled "Republican" in Figure 2, describes this relationship. The goal of the public member will be to draw the boundaries so that the curve is unbiased and passes through the joint 50 percent point of Figure 2, as the one labeled "Neutral" does.

Each of the curves in Figure 2 gives an idealized account of the

⁵ It is a general characteristic of systems of geographic representation with plurality election for swings in seats won to exaggerate swings in votes received. It was once believed that this exaggeration followed a "cube law," with the ratio A:B of the shares of the votes received by parties A and B leading to a ratio A³:B³ in their shares of seats won. Hence, a 2 percent swing in their shares of votes would produce an 8 percent swing in their shares of seats when the parties were fairly evenly matched. This idea enjoyed a particular vogue in Britain, the country that gave us the geographic, plurality-election plan of representation, as electoral studies gathered momentum there after World War II. But two statisticians, Maurice Kendall and Alan Stuart soon showed ("The Law of Cubic Proportions in Election Results," *British Journal of Sociology* Vol. 1, 1950, pp. 183-97) that such a law holds only under certain distributions of party strength across constituencies. And the reduction in marginal seats has substantially reduced the "exaggerative" effect of this system of representation both in the British House of Commons and the U.S. House of Representatives in recent decades. But the distribution of party strength across New Jersey's legislative districts still produces a swing in seats that is roughly twice as great as the swing in votes, as noted below.

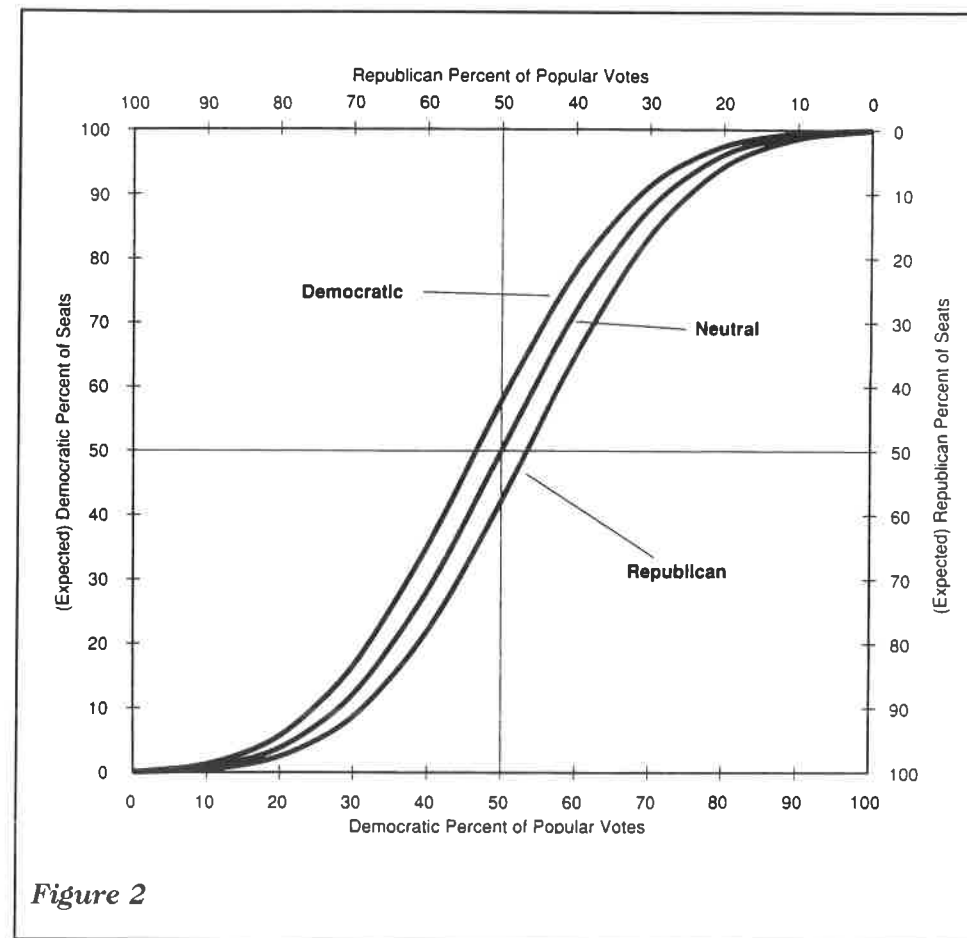


Figure 2

relationship between votes and seats. Since there are few legislative elections from which we might chart this relationship empirically, we need some added assumptions to apply these tests to a set of proposed boundaries. The steps by which the public member and his team applied these tests in 1981 and 1991 are these:

- First, we aggregated the vote in the most recent legislative election (or other past elections) within a set of proposed boundaries to reconstruct how these proposed districts would have voted if these new boundaries had been in force at the time of the election in question.
- Second, we reduced the share of votes the party that won statewide would have polled in each of these proposed districts by the proportion by which its statewide share of the vote exceeded 50 percent in order to simulate, within the proposed districts, an election in which there was a dead heat in the statewide vote.

- Third, we calculated the share of the proposed seats each of the parties would have captured in this simulated dead heat.

The proposed boundaries are fair between the parties if, under this simulation of a dead heat in the popular vote, each of the parties would expect to win half of the seats.

The relationship of votes to seats is, however, complicated by the fact that a higher fraction of the total population goes to the polls in legislative districts won by the Republicans than in legislative districts won by the Democrats. For example, in the 1985 legislative elections in New Jersey, the average turnout was 25.6 percent as a proportion of the total population in Assembly districts won by the Republicans and only 20.3 percent in Assembly districts won by the Democrats, a difference of more than 5 percent. Several factors lie behind this difference. One has to do with the proportion of the population that is of voting age; a greater proportion of the population in Democratic districts is below voting age, since those living in Democratic districts tend to have more children than do those living in Republican districts. But the reasons for this difference also have to do with rates of participation; those of voting age who live in Democratic districts are less likely to register and to go to the polls than are those of voting age who live in Republican districts. Indeed, aliens who cannot register are more heavily concentrated in Democratic than in Republican districts. These factors together account for the considerable spread between the fraction of the total population that votes in Republican and Democratic seats.

This difference needs to be taken into account as we describe the relationship of popular support to legislative seats under a fair plan of representation. If the preferences of those who go to the polls reflect the interests and preferences of everyone who lives in their districts, the lower turnout in the Democratic seats produces a leftward shift of the curve that describes the relationship between popular support and seats. This shift is illustrated by Figure 3. As the figure suggests, the different rates of turnout between Democratic and Republican seats could produce a Democratic advantage in the relationship of seats to *actual* support even if there was a Republican advantage in the relationship of seats to *potential* support.

It is far from clear what allowance should be made for this difference in participation in redrawing the legislative boundaries of the state. On the one hand, it could be argued that a system of representation should take account only of those who are able and willing to register and vote. On the other hand, the courts have long since made clear that representation is about whole populations, and not only about those who vote, or about those who are registered to vote, or about those who are qualified to register. It is about everyone, including children and aliens. From this perspective, a set of boundaries will be fair between the parties if the Democrats and Republicans have a 50-50 chance of winning control of the legislature when they are evenly divided among *potential* supporters across the state. Hence,

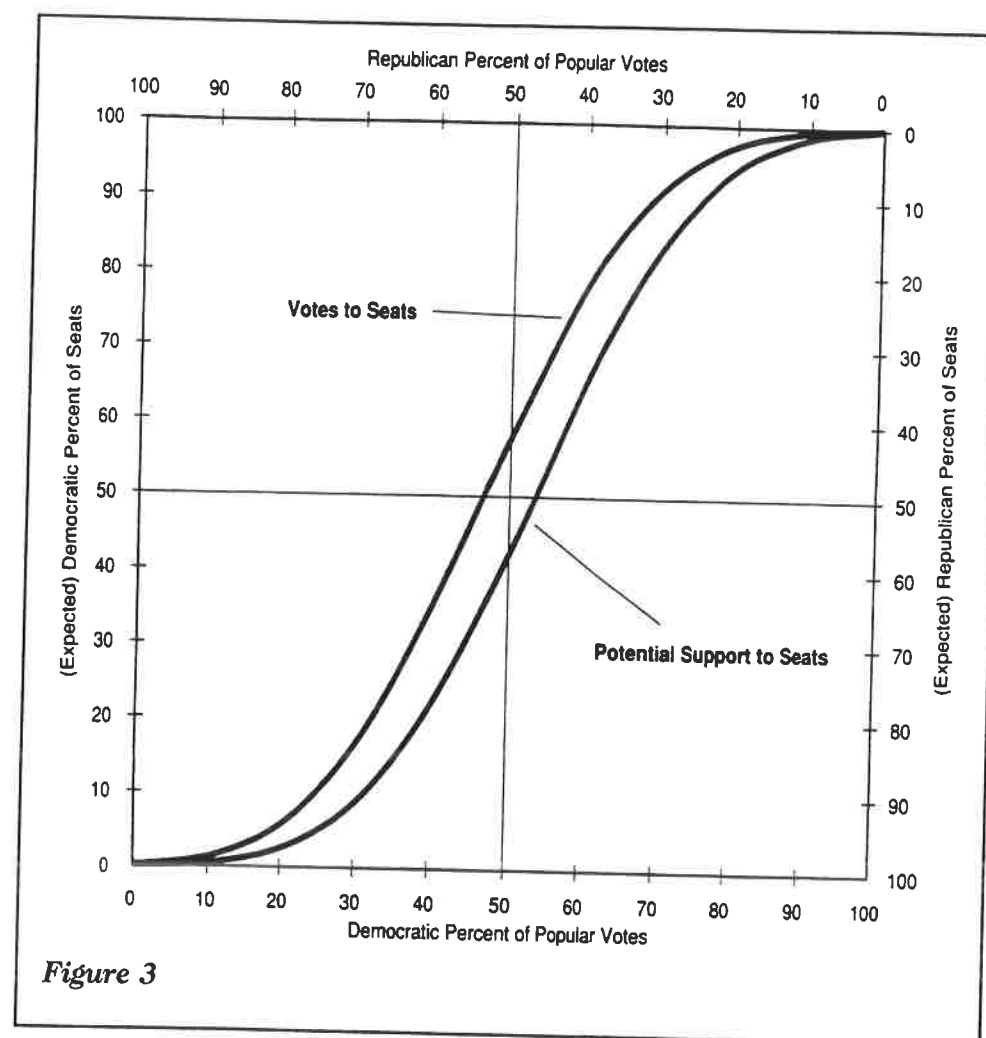


Figure 3

a set of boundaries could still be judged fair if the Democrats have a majority of seats before they have half of the actual votes cast for the legislature. Under the assumption that those who do vote represent the interests and preferences of those who don't, this complication can be removed from the relationship of votes to seats by redefining the horizontal axis of Figure 3 as the average of the parties' share of the popular vote calculated district by district across the state, rather than the parties' share of the vote pooled across all districts of the state. If my assumption holds, such a redefinition removes the effects of the differences in demography and participation between Democratic and Republican districts, and the graph of the relationship between votes and seats will pass through the 50-50 point under a fair plan.

Hence, there is a clear answer to the question of what fairness between the parties means, and a clear algorithm that a public member can use to test the fairness of particular plans. I applied this test to alternative plans in the 1981 redistricting. The plan I proposed met this test, as did both

of the virtual photocopies of my own plans submitted as alternatives by the parties. As the 1991 season of redistricting neared, I published this test and the associated algorithm in an earlier report for the Fund for New Jersey that circulated widely in the parties.⁶ As a result, the party commissioners and their staffs understood in this latter year that there is an objective criterion of fairness and a means of saying whether a particular plan was fair. This was a genuine resource in bargaining with the party delegations, and the plan that in the end won six votes met this test of fairness between the parties.

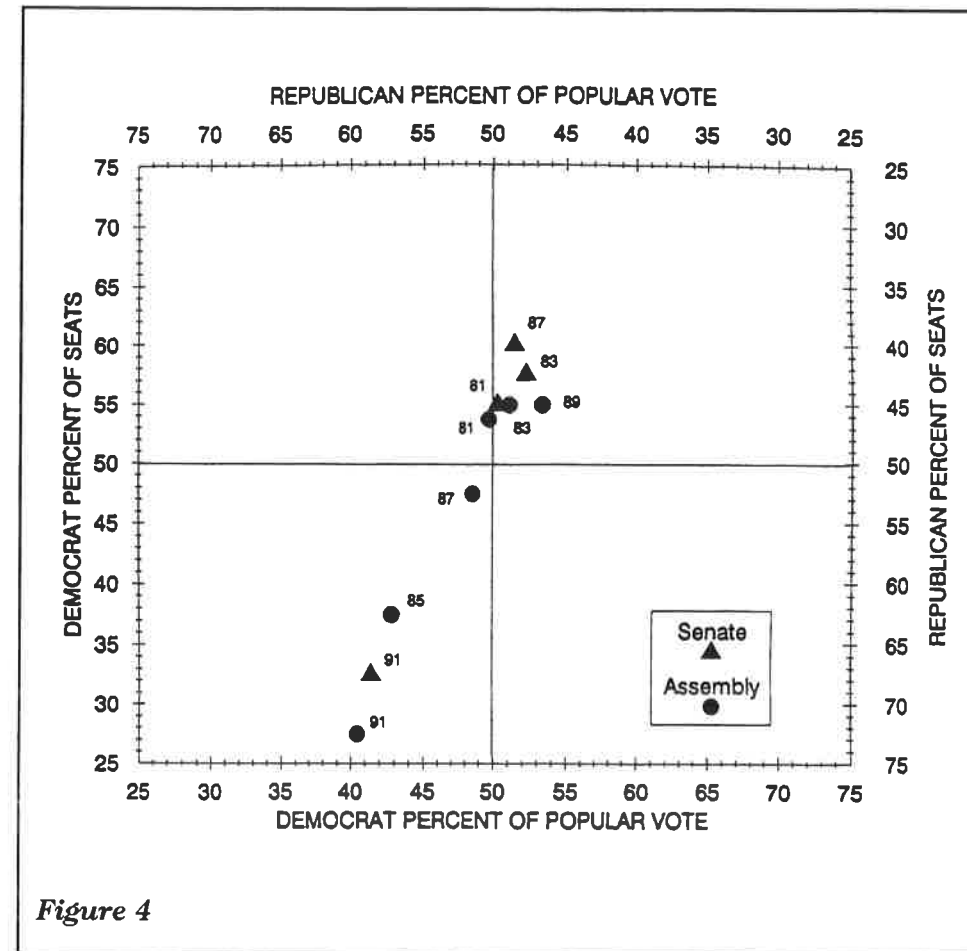
How Fair Have the Results Been?

However clear this test of fairness may be, a public member who rallies his fellow commissioners to such a standard is all too aware that subsequent elections will give an unsparing judgment on how correctly this test and its associated algorithm were applied. There have now been ten legislative elections since this standard was first applied in 1981—six for the Assembly and four for the State Senate. How well have the results upheld the belief that the boundaries of the legislative districts have been fair?

Lack of bias. From the plot of the parties' share of popular votes and seats for these elections in Figure 4 we can see that the party winning a statewide majority of popular votes also won a majority of seats in the Assembly and State Senate in each of the legislative elections from 1981 to 1991, except for the 1981 election for the General Assembly. And we will see in a moment that this exception vanishes when the horizontal dimension of the chart is adjusted to take account of differences in turnout between Democratic and Republican seats. The fairness of boundaries drawn by this test was most severely pressed by the results of the legislative elections of 1987, when one party, the Republicans, received a statewide majority of votes for the Assembly and the opposite party, the Democrats, received a statewide majority of votes for the Senate. When these votes were translated into seats, each of the parties controlled the house for which it polled a statewide majority, as it should have under a fair plan.

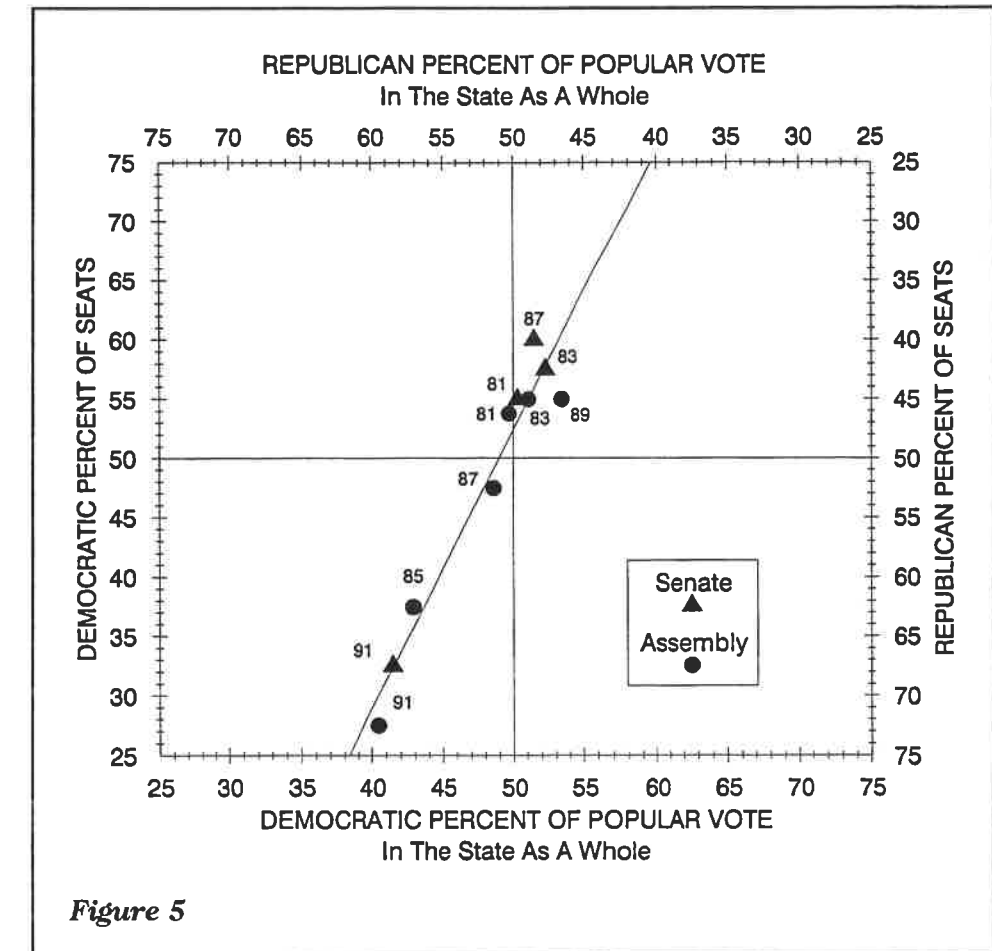
Figure 5 adds to the scatter of points in Figure 4 a line that best fits the results of the ten Senate and Assembly elections since 1981. Although this regression line representing the relationship between the parties' shares of seats and their shares of votes passes close to the (50,50) point standing for a dead heat in the popular vote and an even split in legislative seats, it intersects the horizontal line marking an even split of seats just to the left of the vertical line marking a dead heat in the popular vote. This slight leftward shift suggests that the Democrats could expect half the seats when they received only about 49 percent of the popular votes.

⁶Legislative Reapportionment in New Jersey (Fund for New Jersey, 1991).



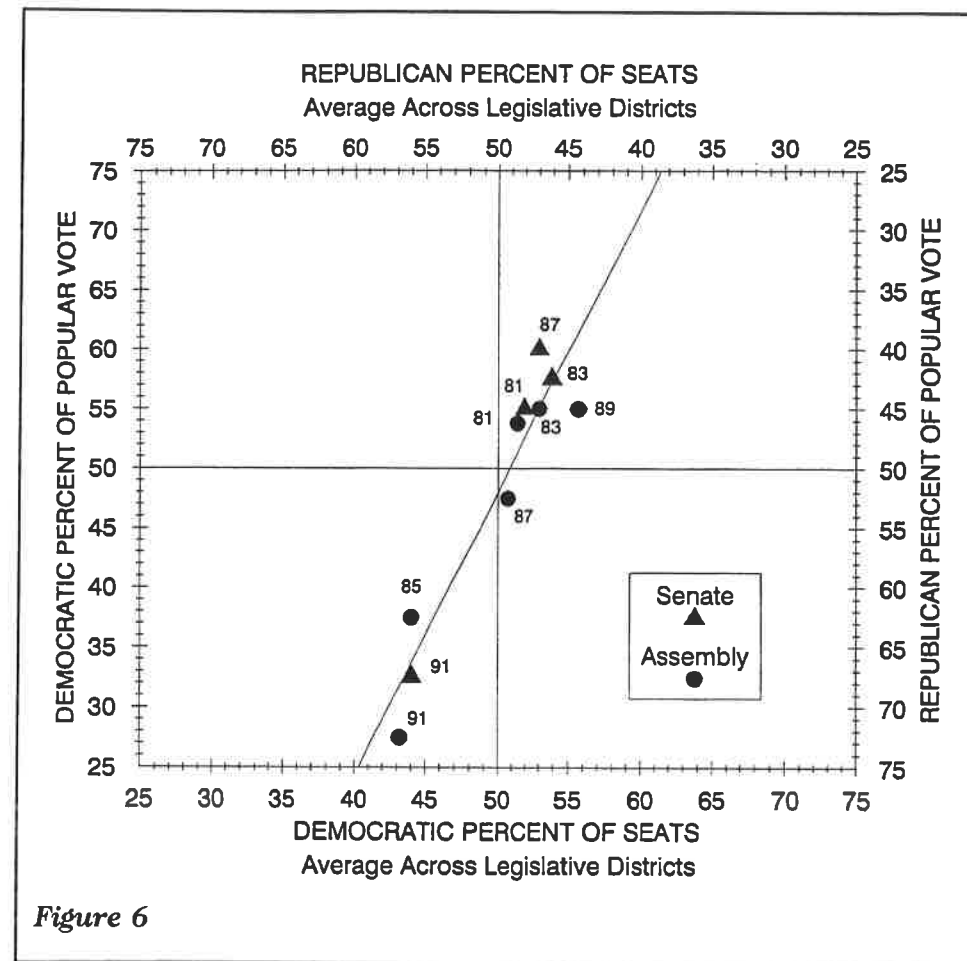
It would be wrong to interpret this as even a small bias toward the Democrats. As we noted above, a smaller proportion of *potential* Democratic support is converted into actual votes on election day, in view of how many more of the Democrats' natural constituency are children, aliens, unregistered adults, and other non-voters whose interests nonetheless count in the representation process. As we also noted, we can remove the effect of this difference in the ratio of actual to potential support within the two parties by averaging the percent voting Democratic across the forty legislative districts of the state, if we are willing to assume that the party shares of the votes cast in each district reflect their shares of support among *potential* supporters too.

This adjustment is made in Figure 6, where the horizontal axis of the figure shows not the percentage of votes received by the Democrats and Republicans in the state as a whole but rather these percentages averaged for a particular election across the legislative districts. The regression line that best fits the results of the legislative elections since 1981 now intersects the horizontal line marking an even split of seats a little to the *right* of the vertical line marking a dead heat in the popular vote. Although



the line again passes close to the joint (50,50) point, this slight rightward shift suggests that the Democrats need to have the potential support of *more* than half of those across the state who have a preference between the parties to expect an even split of legislative seats. The patterns shown in Figures 5 and 6 are very much in line with the theoretical pattern suggested earlier by Figure 3. Too much ought not, however, to be made of Figure 6, since it requires us to assume that the party shares of the vote reflect the preferences of those who could not or did not vote, district by district across the state. A reasonable judgment from these data is that the district boundaries drawn in 1981 and 1991 made a small allowance for the greater chance that those with Republican preferences will record these preferences in actual votes.

Responsiveness. The tides of popular support that moved back and forth between the parties in these legislative elections were translated into substantial changes in their shares of seats in the Senate and Assembly. This was notably clear as the electoral tide moved toward the Republicans in 1985 and 1991. In the first of these years, a 14 percent spread in the parties' share of votes cast for the Assembly was translated into a 25 percent spread



in the Republican and Democratic shares of Assembly seats. In the latter year, a 17 percent spread in the parties' share of votes for the Senate and 19 percent spread in the parties' share of votes for the Assembly were translated into a spread in shares of seats of 35 percent in the Senate and of 45 percent in the Assembly. The steep slopes of the lines showing the relationship of votes to seats in Figures 5 and 6 indicate that over this central competitive range, the redistricting plans adopted in 1981 and 1991 translated a 1 percent swing in the division of votes into more than a 2 percent swing in the division of seats.

These results confirm the conclusion that New Jersey's mixed process of redistricting, with balanced party membership of the Apportionment Commission and a public member committed to explicit standards of public interest, can produce boundaries that are fair between the parties and responsive to the shifting tides of electoral support. These are not, however, the sole tests of a set of district boundaries. Five other criteria—compactness, contiguousness of territory, respect for the boundaries of existing civil divisions, equality of population, and the representation of minorities—are important parts of the redistricting repertory. We should

ask how well New Jersey's mixed form of redistricting performs by these additional tests.

Other Criteria

As the idea of representing geographic communities took root historically, constituencies were generally required to be compact, to consist of contiguous territory, and wherever possible to be aligned with the boundaries of such existing civil divisions as counties, townships, and municipalities, which themselves tended to define long-standing communities. Although the criteria of compactness, contiguousness, and respect for the boundaries of civil divisions are by no means identical, the three belong together, since they share the common goal of creating a bond between elected representatives and constituents who constitute a geographic community. These requirements were also a prime defense against the gerrymanderers, since it is more difficult to give a partisan tilt to compact and contiguous districts that are aligned with the boundaries of pre-existing civil divisions.

These three criteria were incorporated in the 1966 amendments to New Jersey's constitution, and all three remain part of the American practice of redistricting. But all three have come under heavy pressure from two other criteria that are by now also standard parts of the redistricting process—the requirements that districts be of equal population and provide adequate representation for minorities. Indeed, the tradeoffs between preserving geographic community, on the one hand, and satisfying the requirements of equal population and minority representation, on the other, have supplied a good deal of the tension that has marked recent redistricting.

The quest of population equality has eroded geographic community less in the drawing of state legislative districts, since the courts still permit a 10 percent variation between the most and least populous legislative districts out of respect for the desire of the states to keep their civil divisions whole. New Jersey's Apportionment Commissions in 1981 and 1991 had no difficulty in laying out districts that were contiguous and compact and varied in population by less than half the difference the courts allow, while keeping intact each of the state's municipalities, except for Newark and Jersey City, which are too large to be contained within single districts. But it should be noted that the respect for county boundaries written into the 1966 amendments to the state's constitution has long since given way to the pressure for population equality generated by the courts.⁷

⁷ This is unsurprising, in view of the fact that New Jersey fell afoul of the courts in the first place because of the extreme form of respect for counties incorporated earlier in its upper house, composed of one Senator from each county. But the constitutional amendments of 1966 attempted to save something of the old system by prescribing, in Article 4, Section 2, Par. 1 that "each Senate district shall be composed wherever practicable of one single county and if not so practicable of two or more contiguous whole

The equal-population rule has led to a greater erosion of geographic community in *congressional* redistricting, since the Supreme Court has at this level applied a much stricter standard of population equality and has struck down plans in which the most and least populous districts have differed by less than 1 percent. Since this standard exceeds the capacity of the Census Bureau to say what the true population of districts is, it is difficult to escape the sense that the Court has at times used trifling departures from precise equality to void plans it objected to on other grounds.⁸ The Court may have taken such a carom shot at the gerrymandered congressional boundaries drawn by New Jersey's Democratic legislature in 1982, in the last weeks of the Byrne administration.

As it redistricted the state legislature following the 1990 census, the Apportionment Commission again built New Jersey's legislative districts from the municipalities that completely partition the state, except in Newark and Jersey City, as we have noted. By contrast, the statutory commission created to redistrict New Jersey's *congressional* districts felt obliged to meet the Supreme Court's equal-population requirement in order to fend off challenges by those who might come even closer to precise equality. Hence, the commission's members felt they had no choice but to abandon municipalities and use the much smaller election districts of the state—and in some cases individual city blocks—to build New Jersey's congressional seats. To eliminate any possibility of attack from this quarter they went to the remarkable lengths of creating eleven congressional districts with populations that were precisely equal by the 1990 census count—594,630 each—and two other districts with populations of 594,629—one person short of the other eleven by the 1990 census count.⁹ It is not surprising that in the process they divided 24 towns, some into three pieces, and defined several notably non-compact districts.

Moreover, once civil divisions are pulled apart to equalize population, they are more likely to be divided for other reasons as well, such as the protection of incumbents and the representation of minorities. Indeed, in the redistricting that followed the 1990 census across the U.S. as a whole, the idea of representing geographic communities came under pressure less from the drive for equal population than it did from the drive for increased minority representation. This tension was visible in New Jersey too, even if the tradeoff between preserving geographic communities and increasing minority representation was less difficult here.

counties." This provision too was swept away by a series of decisions of the New Jersey Supreme Court in the early 1970s.

⁸ In *Karcher v. Daggett*, 1983, the Supreme Court said that a Democratic map for New Jersey's congressional districts failed to meet the equal-population test even though the most populous exceeded the least populous of the new districts by less than 0.7 percent of the statewide average. The undercount acknowledged by the Census Bureau would lead the true population of districts judged precisely equal by the published figures for the 1990 census to vary by more than 0.7 percent of the statewide average.

⁹ This precise equality is of course a purely formal result, achieved for legal motives. In view of the errors of the census count, the actual populations of these districts varied by a percent or more, even at the moment the census was taken.

Representing Minorities

Minority representation became a central concern of redistricting with the enactment of the 1982 amendments of the Civil Rights Act of 1965 and the court decisions involving the 14th and 15th amendments to the U.S. Constitution. The redistricting efforts under the 1965 act had as their initial target racial gerrymandering in the southern states, especially schemes for depriving blacks of effective representation by concentrating their voting strength in a few districts (*packing*) or diluting their voting strength among several districts (*cracking*), or by submerging black voters in larger electorates that chose all of their representatives at large. Interventions under the act therefore sought to complete the admission of newly enfranchised black voters to the political process. Indeed, it was felt that these extraordinary steps were needed to complete the historical process, which began in Reconstruction times, of bringing African-Americans into the country's political life.

The courts and the U.S. Department of Justice therefore overturned racial gerrymanders designed to keep newly enfranchised black voters from electing representatives of their choice—in many cases black representatives, in accord with the experience of other groups that have gained access to the political process. They sought to translate black votes into seats by creating heavily minority (*majority* minority) districts, and laid down the working rule that districts needed to be 65 percent minority to ensure this result, in view of the lower fractions of blacks who are of voting age, and are registered, and turn out to vote.¹⁰

Over time, the courts and Department of Justice extended their view in three respects—from the South to other parts of the country, from blacks to other minorities, especially Latinos, and from *negative* racial gerrymandering to *positive* racial gerrymandering to promote the prospects of minority candidates. With these shifts the initial goal of completing the inclusion of blacks in the political process was transformed into one of increasing the number of black and Latino candidates elected.

This focus on the relationship between votes cast and minorities elected links this area conceptually with the problem of fairness between the parties, since a geographic system of representation places racial and ethnic minorities under the same disadvantage in translating votes into seats that is faced by small political parties, even if its supporters are fairly concentrated geographically. The shape of the curves in Figures 1 to 3 suggests how difficult it is for a minority element of the population to claim a share of seats proportional to its share of votes, since the functional relationship between votes and seats is not a proportional one represented

¹⁰ Commentaries on this controversial rule are almost a growth industry within the literature of redistricting. The Justice Department never intended it to be an absolute guide, and the fraction of the population that needs to be minority to permit such a local majority to elect a representatives of their own choosing turns on such factors as the fraction of the minority and non-minority populations that are of voting age, their relative rates of participation, and the degree to which the vote is polarized along racial lines.

by a straight line running from 0-0 to 100-100. This home truth is reflected by the fact that, whereas African-Americans constituted 13.4 percent and Hispanics 9.6 percent of New Jersey's population in 1990,¹¹ the last elections prior to the census gave blacks 7.5 percent of the seats in the Assembly and 5 percent of the seats in the Senate and gave Latinos 1.5 percent of the seats in the Assembly and no seats at all in the Senate. Therefore, both minorities fell short in these terms, with the somewhat greater success of blacks reflecting their greater numbers, residential concentration, and influence within local party organizations.

Under our system of geographical representation, no minor party is assured a share of seats equal to its share of votes. If anything, this lack of proportionality is thought to be a virtue, since it limits the legislative presence of splinter parties until they have a substantial hold on the electorate. But the tendency of a geographic system to limit the legislative presence of a minority element of the population is seen in a very different light in the case of racial and linguistic minorities, and the practical thrust of constitutional and statute law is to bring the proportion of seats held by these minorities closer to the proportion they are of the population.¹² The so-called "Gingles" rule articulated by the courts in deciding a North Carolina case was understood by those drawing boundaries after the 1990 census to mean that wherever they could create a district in which a previously discriminated against racial or linguistic minority would constitute a majority, they were legally required to create it.¹³ In their desire to enhance the representation of blacks and Latinos, the redistricters have sometimes neglected the courts' concern for compactness. They did so, for example, as they created a North Carolina congressional district that picks up black voters along an interstate highway linking two widely separated and disparate communities—Durham at the eastern end of the district and Charlotte at the western end. They also did so in creating the New York City district that stitches together pockets of Latino strength in three of the city's five boroughs.

¹¹ Although the Department of Commerce did not release figures corrected for the undercount, informal conversations with the Census Bureau suggest that the undercount could be corrected by multiplying the black and Hispanic population by 1.06 and everyone else by 1.02. Such a correction would raise the estimate of the African-American proportion of New Jersey's population to 13.9 percent, of the Hispanic proportion to 10 percent.

¹² Neither Congress nor the Supreme Court has equated this commitment with the representation of African-Americans by blacks or of Hispanics by Latinos. They instead have required district boundaries to be drawn to give these minorities a chance to elect representatives (of any race or ethnicity) of their own choosing. But the classic pattern of American politics is for a rising minority to establish its claims on the political system by electing its own

¹³ *Thornburg v. Gingles*, 1986. The courts ruled that a district should be created in which the majority of its population is made up of a minority group when the effects of discrimination are evident and when the following three conditions are met: (1) the area contains a sufficiently large and geographically compact minority population, (2) this minority is politically cohesive, and (3) the area is one where minority candidates have been defeated by the bloc voting of whites.

The steps taken in 1991 by New Jersey's Apportionment Commission to enlarge minority representation in Trenton did not sacrifice the goal of compactness. In view of New Jersey's need to be ready for a major election in the first year after the Census, the national parties saw the Commission as an early testing ground for their strategies on minority representation, especially for the Republican effort to create majority-minority districts as a way of packing Democratic votes. Staff representatives of the Republican National Committee recruited part of the state's NAACP leadership to the idea that a district should be at least 65 percent black to guarantee the conversion of African-American votes into actual representation in the legislature.

This issue was most directly joined in Essex County (Newark and its northern and western suburbs), where the Republicans wanted two heavily black and Hispanic districts, and the Democrats wanted three less tightly packed minority districts. Both the Republicans and Democrats argued that their plans would send more black legislators to Trenton. The Republicans gave great weight to the Justice Department's guidelines, which were said to require at least 65 percent minority districts. The Democrats countered that these guidelines were developed to cope with discriminatory districting in the South, that the Republicans wanted to pack largely Democratic minority voters into two districts, which would be overwhelmingly majority-minority when Hispanics were also counted, and that a greater number of African-American legislators would be elected if the blacks in Newark and its suburbs were spread over three less heavily majority-minority districts.

As this clash of views suggests, the translation of minority voting strength into seats is conditioned by the realities of local politics, especially those of the nominating process. In this respect the politics of Newark and Essex County are dramatically unlike the areas of the South for which the Justice Department's guidelines were originally drawn. Although the blacks of Essex County are economically less prosperous than the whites, their political empowerment in Newark and its near-suburbs is well advanced. This power ensures the nomination of black candidates for the Assembly and Senate from the legislative districts where they are in the majority, except for cases where a white incumbent holds onto office for a while in a district in which blacks are becoming the majority. Such survivors are sometimes displaced by minority representatives when district boundaries are changed.

In view of these realities, I believed that three black-dominated Essex districts were more likely than two overwhelmingly minority districts to give these groups a wider opportunity to elect representatives of their choice and, if their choice was to elect minority candidates, a greater number of minority representatives in Trenton. It seemed likely that three moderately majority-minority districts would send more than the present five minority representatives to Trenton after the 1991 election and might send as many as nine by the end of the decade. Accordingly, I worked out with the Democrats the boundaries of three such districts that were also likely to replace a surviving white incumbent by a black representative in 1991 and made clear to the Republicans that I could not vote for a plan that

packed an excessive number of black and Hispanic voters into two districts. The Republicans accepted this decision readily enough, since their main interest lay in clearing the way for the statewide election they expected to win. The irony in this was that the 1991 plan, which in the end was voted by an alignment of the five Republicans commissioners with the public member, was one on which the Republicans had lost on the most difficult issue we faced, while the Democrats voted in the end against a plan on which they had prevailed on the most difficult issue we faced. This irony underscores the fact that much more than a simple tie-breaker's role was required to reach a fair agreement in 1991.

The legislative elections of 1991 did in fact increase minority representation in Trenton, although the location of these gains reminds us of how uncertain electoral forecasting can be. Districts 27, 28, and 29, the three majority-minority districts created from Newark and its western suburbs, did elect an additional black to the Assembly and held out the prospect of sending additional African-Americans to the legislature in future years. The number of Latinos in Trenton went from one to two as an Hispanic in the Assembly moved to the Senate and another Latino was elected to the Assembly. The number of African-Americans in the Senate remained at two, while the number of blacks in the Assembly rose from six to ten. This increase came largely from seats that were not majority-minority districts; indeed, two of the newly elected blacks were Republicans.

The Standing of Other Criteria Under New Jersey's Model

How well does New Jersey's way of redistricting serve criteria other than fairness between the parties? I believe that this distinctive model can also help to find a balance between the goals of equalizing population and enhancing minority representation on the one hand and of representing compact geographic communities on the other. Since *Baker v. Carr* the courts have made great strides toward banishing gross population inequalities from representation in America and, with the help of Congress, toward including African-Americans in our political life, restarting a process that stopped short after the Civil War. But these gains have come at a price, since the redistricters have tended to treat the Court's tests as absolute strictures that demand almost precise mathematical equality between districts and the creation of majority-minority districts wherever they can be drawn—if need be, letting the goal of representing geographic communities fall by the way.

It seems clear that this result goes beyond what the courts require. In the *Karcher* ruling, for example, the majority did not say that all plans must meet a test of precise population equality but only that the Court must be given legitimate reasons *why* a plan has departed from this standard. Although the Court was unwilling to sanction departures that reflected only

the interests of those dominating redistricting by the ordinary legislative process, it showed in the *Karcher v. Daggett* case an awareness of other legitimate goals that might conflict with the one person/one vote ideal. In the words of Justice Brennan:

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives.¹⁴

Since the plan the Court had before it emerged from the ordinary legislative process, it was not hard for the Court to believe that the small population variation that did remain was a byproduct of the effort to draw boundaries that served the dominant party's advantage, rather than efforts to represent geographically compact communities or to serve the other criteria listed by Justice Brennan.

A case can be made that a balanced apportionment commission, committed to explicit criteria of the public interest, including population equality, enhanced minority representation, and the representation of geographic communities, would have greater standing before the courts in attempting to balance these partially conflicting goals. This was understood by New Jersey's Apportionment Commission as it redrew the boundaries of the state's legislative districts in 1991. Presumably it was less clear to the commission that later redrew the boundaries of New Jersey's congressional districts, since they so clearly felt that exact population equality was the safest defense against court challenges under the equal-population rule. It is a reasonable conjecture that the courts would be more accepting, even at the congressional level, of population variations reflecting good faith efforts by bipartisan commissions to balance population equality with the claims of geographic community than they are of departures from the equal-population rule reflecting the political agendas of the parties dominating the legislative process.

A similar point can be made about the representation of minorities. With encouragement by the Department of Justice, legislatures have sometimes treated the enhancement of minority representation as a license for drawing districts worthy of Elbridge Gerry. An extreme example was provided by the districts drawn for the New York City Council under intense pressure from the Department of Justice to increase the representation of blacks and Hispanics. The resulting districts did widen the presence of African-Americans and Latinos in the Council. But the district boundaries were so bizarre as to amount almost to electing New York City's council members by proportional representation from city-wide racial and ethnic lists. The political and constitutional pitfalls in moving to such a system are so formidable (e.g., which racial and ethnic groups are to have lists—Asian-

¹⁴ 462 U.S. 725, at p. 740

Americans? Poles? Jews?) that it is unlikely we will jettison altogether the deeply rooted idea of also representing geographic places. Indeed, the courts, as they articulated the Gingles rule included the requirement, which subsequent redistricters at times forgot, that majority-minority districts must be reasonably compact. Balanced commissions, alert to each of these goals, may be in better standing with the courts to work out the tradeoffs between these important, but partially conflicting, criteria.

Extending New Jersey's Model to Congressional Redistricting

The success of New Jersey's experiment in redistricting has progressively persuaded the state's political activists, journalists, and citizen groups that the mixed model, written into the state's constitution, of redrawing the legislative district boundaries is a better way and should be extended to other levels of government. But as is so often true, a "better idea" has spread when it has suited the interests of those effecting the transfer. Before the lame duck Democratic legislative leadership swept from power by the 1991 elections lost its majorities in the Senate and Assembly, they canceled the control of congressional redistricting by the incoming, veto-proof Republican legislature by instead assigning this task to a balanced partisan commission. A new statute provided that within each party three leaders—the state chairman and the leader in the Assembly and the Senate—would each name two members to a commission of twelve, which would be presided over by a neutral chairman playing the tiebreaker's role.

Although this extension of the mixed commission idea reflected the success of the constitutional procedure for redistricting the legislature, the statute prescribed a more limited role for the neutral chairman of the congressional commission. It is not hard to see this as a reflection of the Democratic leadership's mixed feelings about their recent experience with the strongly activist public member in the commission that redistricted the legislature itself. In any case, their statute provided for the neutral chairman to be chosen not by the Chief Justice but by the party commissioners, on the stipulation that they would be turned out of office if they failed to reach a choice within a specified time. Moreover, the neutral chairman would have no vote unless the Commission deadlocked at the end of the month allotted it. And in this case, the chairman could vote only on the two plans with the widest support, playing a "tiebreaker's" role in the strictest sense. Indeed, the statute creating the congressional redistricting commission took the remarkable additional step of also seeking to constrain the State Supreme Court to the most limited tiebreaker's role by requiring the Court, if it became involved, to pick only one or the other of the two plans with the largest number of votes in the Commission. It is by no means clear the Court could be bound in this way.

The congressional commission named in 1992 selected as its neutral chairman Alan Rosenthal, the able and highly experienced director of Rutgers' Eagleton Institute of Politics. After the commission's public hearings, Rosenthal devoted his early efforts to trying to get the two parties to agree on a bipartisan plan, an objective he initially felt was feasible. When it was clear that this goal was unattainable, he set out for the party delegations the standards he believed a fair plan must meet in terms of population equality, minority representation, and lack of bias between the parties and asked each delegation to submit a proposal that met these standards, indicating that he would vote for the plan that came nearest to meeting them. For several days he was involved in discussions with each group in order to try to move the negotiations toward the fairest plan possible. In the end, he accepted a Republican plan as closest to the standards of a fair plan.

All of this was in line with the approach of the public member in the 1981 and 1991 Legislative Apportionment Commissions, although Rosenthal did not present a plan of his own or develop the technical capacity for doing so. Considerable technical resources would have been needed, in view of the decision of the congressional commission to draw districts that were precisely equal in population. Early in its proceedings the commission resisted his effort to enlist the help of the election analyst who had assisted the public member in the 1981 and 1991 Legislative Apportionment Commissions, and Rosenthal took no further steps in this direction. Only the party delegations possessed the technical capacity to develop proposals, although Rosenthal felt he would have met no further resistance from the commission if he had chosen to develop this capacity and to put forward his own plan.

We should note a profound difference between the tasks the two apportionment commissions in terms of party bias—and an additional goal that inevitably guided the congressional commission. The full state legislature would be elected from the districts drawn by the state Apportionment Commission. This is why the question of fairness between the parties was the paramount issue the Apportionment Commission faced. By contrast, a small fraction of the U.S. House of Representatives would be elected from the districts drawn by the congressional commission. Although questions of party advantage of course arose, the congressional commission believed that a key part of its role was to serve the common interest in protecting New Jersey's clout in Congress by retaining the highest-seniority members of the congressional delegation. It did this work well, even if its efforts were confounded by the decision of several senior members not to seek reelection.

And the Counties, Too

Subsequently it served the political interests of the incoming, veto-proof Republican legislature to extend the better idea of a balanced and mixed commission to yet another level of government. In early March of 1992 the governor signed into law a bill creating such commissions to redraw the boundaries of the districts from which county freeholders are chosen in the three counties of the state that do not elect all of their freeholders at large. The existing law had placed the drawing of freeholder districts in the hands of county election boards, to which each of the county party chairmen appoint two members, with the deciding vote cast by the county clerk. Since the county clerk was a Democrat in each of the counties—Atlantic, Essex, and Hudson—with freeholder districts, the new law in effect canceled Democratic control of the redistricting process in these counties. Indeed, in both Atlantic and Essex Counties it canceled new boundaries already drawn by Democratic-controlled election boards to reduce the number of Republican freeholders. Much of the impetus for the new law was supplied by two Republican Assemblymen who in 1991 ran successfully for the legislature because their freeholder seats in Atlantic and Essex Counties would be wiped out by these prospective changes.

Reflecting the success of New Jersey's experiment with a mixed model of redistricting, their statute declared that "fairness can be strengthened by adopting a method of selecting district commissioners based on the provisions in the New Jersey Constitution for the selection of members of the Apportionment Commission, which establishes legislative districts after each decennial Federal census." The act thereupon reproduced the main features of New Jersey's experimental model, including the designation of a public commissioner by the Chief Justice of the State Supreme Court if the party commissioners deadlocked. In view of the size of the county election boards, each of the county chairmen would appoint two, rather than five, commissioners. Hence, each of these commissions would have five members when they were joined by their public commissioner.

Because Atlantic County was preparing to elect district freeholders in 1992, candidates who intended to enter the April primary needed to know the district boundaries by early April. In view of this, the legislature prescribed a crash timetable for redistricting all three counties if the governor signed the act by March 9, 1992. Under this timetable, the county chairmen were to name the party commissioners and the Chief Justice the public commissioner within three days of the date the act took effect, and the commissions were to complete their work within ten days of their appointment—not only in Atlantic County, where there would be a freeholder election in 1992, but also in Hudson and Essex Counties, where the earliest freeholder elections were a year off. With strong staff assistance, the commissioners got the job done within deadline in all three counties.

The Chief Justice named Gerald Pomper, Professor of Political Science at Rutgers, to be the public commissioner in Hudson County and Charles Tantillo, Senior Vice President of Stockton State College, to be the

public commissioner in Atlantic County. My own assignment was to serve as the public commissioner in Essex County, the site of the most difficult issues resolved by the state Apportionment Commission. Returning to the trenches, Ernest Reock, who had helped me with the 1981 and 1991 Apportionment Commissions, agreed to provide technical support to the public commissioners in all three counties. Since Joseph Irenas, who twice had served as my counsel, had been nominated for a federal judgeship, David Satz, former United States Attorney for New Jersey, agreed to serve as legal counsel to the public commissioners in all three counties. These two kinds of technical support strengthened the hand of the public member in each commission, since the party commissioners, unlike their analogs in the legislative and congressional redistricting commissions, were unstaffed and uncounseled. Indeed, David Satz in effect served as counsel to each of the commissions and not just to the public members, and Ernest Reock's ability to marshal figures and draw maps was an essential reason all three commissions met their early deadlines.

Atlantic County. In this county, as in Essex, a Democratic county clerk had recently voted with the two Democrats on the county election board to redraw the freeholder seats to the party's advantage. This partisan gerrymander was designed to increase Democratic strength in a previously Republican seat by splitting the black voters in Pleasantville off from the blacks in Atlantic City and combining them with a district that was previously largely white. The Republican freeholder who was the target of this maneuver was one of the newly elected Republican Assemblymen who championed the idea of canceling the boundaries drawn by the county election boards and giving the task of redrawing the freeholder districts to balanced commissions, leavened by the presence of a neutral public commissioner. But the Democratic gerrymander was also challenged by the party's key constituency whose votes were being redistributed, and the leaders of the local NAACP demanded that the blacks in Pleasantville and Atlantic City be kept together to preserve a strong black district in a county that was 16.8 percent black.

Charles Tantillo, the commission's public member, met with representatives of each of the two groups of party commissioners to work out the basis of an agreement. The Democrats readily abandoned the Pleasantville gerrymander. Chaired by Tantillo, a meeting of the full commission adopted a plan that preserved a strong black seat on a three-to-two vote, the two Democrats voting with the public commissioner. But the plan enjoyed broad support. The Republicans had registered an important gain over the plan voted earlier by the Democratic-controlled county election board. And the local press presumed the plan to be fair since it had been drawn by a balanced commission with a neutral member chosen by the Chief Justice.

Hudson County. The Democratic dominance in Hudson County left little room for maneuver by the Republicans, who felt it was impossible to draw a seat their party could win. A principal goal of the Democrats was to protect most of their current freeholders by avoiding pairing two incumbents within a single district wherever possible. Beyond this, they pursued

a variety of particular purposes—to give Union City a freeholder by unseating an out-of-favor incumbent in Jersey City, which was due to lose a seat; to keep the four “trans-Hudson” communities together and whole by combining Secaucus, Kearney, Harrison, and East Newark into a district; to keep an African-American incumbent in a solidly black district; and to separate the Cubans in Union City from the Puerto Ricans and Dominicans in West New York, Weehawken, Guttenberg, and Hoboken.

Gerald Pomper, the public commissioner, met separately with each side and made clear his desire to keep each of the county’s municipalities whole—except for Jersey City, which was too large not to be divided. Hoboken was put back together, with a piece of Jersey City added on. The commission held a series of non-quorum, private discussions. Reflecting the Democratic domination of Hudson County, it adopted a unanimous report within the tight deadline. Its one public meeting, which was chaired by the public commissioner, lasted twelve minutes. The unanimous vote was later useful when Hudson County’s deposed Democratic leader challenged the authority of the two Democratic commissioners, and counsel could point out that the plan enjoyed majority support without the votes of the Democratic commissioners.

Essex County. The issue of minority representation had sharply divided the state Apportionment Commission as it redistricted Essex County. Moreover, a Democratic-controlled county election board had recently redrawn the boundaries of the freeholder districts in the northern and western suburbs of the county to reduce the Republican representation on a nine-member board from two seats to one, and very possibly to none at all. I therefore felt that there were important issues both of minority representation and of fairness between the parties to be dealt with.

The fairness issue extended only to the five district freeholders and not to the four elected at large; the distinction between these two kinds of seats seemed to me a charter issue for the county rather than an issue for the redistricting commission. An analysis of party registrations and returns from prior elections for the board of freeholders and the Assembly and State Senate suggested that the Democrats enjoyed something like a three-to-two edge over the Republicans in potential support county-wide. It was clear to me that a three-to-two split in district freeholders better matched this strength than did a four-to-one or five-to-zero split, even allowing for the greater shifts of seats than of votes in the mid-range of party competitiveness. I therefore told the Democratic commissioners I could not support the election board’s boundaries, and they quickly agreed that the Republicans should have two winnable seats.

We then turned to the question of minority representation. Although the blacks in Newark and its near suburbs were economically worse off than the whites in the northern and western parts of Essex County, they were equally empowered in a political sense. But this was not yet true of the county’s growing Hispanic element, the Puerto Ricans in Newark’s north and central wards and the Portuguese in Newark’s east ward; the politics of inclusion had yet to reach these groups where the county’s legislative body

was concerned. It was clear that a district could be created from these three wards of Newark in which Hispanics would be the largest population group, although not a majority. Knowing that I had the Republican votes to create this district if the Democrats opposed it, the key Democratic commissioner, the leader of Newark’s east ward, moved with breathtaking speed. In twenty-four hours he won the blessing of the county Democratic leadership for moving the incumbent freeholder, an Italian-American in the east ward, from this district to an at-large seat and asked the leadership of the Hispanic community in the north ward to propose a candidate to run as a Democrat for the district seat. The resulting plan made headway on the issues both of fairness between the parties and minority representation. It enjoyed broad support in the commission as a whole. It was formally adopted—within our very tight deadline—by a three-to-two vote that aligned the two Democrats with the public commissioner in a meeting chaired by the public member. Yet it was the Republicans, as in Atlantic County, who had most to gain by the substitution of these districts for the ones previously drawn by the Democratic-controlled election board.

Evaluating New Jersey’s Experiment

A reasonable judgment of the results of the state’s redistricting experiment is that New Jersey *has* found a better way, one that lies somewhere between the practice in Britain and the older Commonwealth countries of leaving the redrawing of constituency boundaries to neutral commissioners, who are notably short on practical wisdom about politics, and the typical American practice of leaving the task to the ordinary legislative process, with results that are notably short on public interest. New Jersey’s mixed model retains an input from those with the practical wisdom of politics but balances the two parties and introduces a public member to move the process to an agreement that meets explicit criteria of the public interest.

The first of these criteria is fairness between the parties. Both in 1981 and in 1991 the constitutionally mandated Apportionment Commission drew boundaries for New Jersey’s legislative districts that were free of bias toward one of the parties. Their fairness is borne out by the party shares of votes and seats in the ten legislative elections—six for the Assembly and four for the Senate—that were held from 1981 to 1991. The severest test of the 1981 boundaries was the election of 1987, when the Democrats won a narrow statewide majority of votes for the Senate, the Republicans a narrow statewide majority for the Assembly. In the wake of the election, the Democrats controlled the Senate, the Republicans the Assembly, as they should have under fair boundaries.

It was starkly evident after the 1980 census that the New Jersey plan of redistricting produces a fairer result than does the ordinary legislative process. In 1981 the Apportionment Commission drew a set of boundaries

for the legislative districts of the state that were fair between the parties and enjoyed broad support in both camps. But when the Democratic legislature redrew New Jersey's congressional districts before the party lost control of the governor's office, *Congressional Quarterly* called the resulting boundaries "a four-star gerrymander [that] twisted crazily through counties and townships all over the state to create a Democratic advantage." The Democrats did their work well enough that the party gained a seat when the 1982 congressional elections were fought on the new boundaries. But their handiwork was soon overturned by the courts. As it passed down the *Karcher* ruling, the Supreme Court remanded the plan to the federal district court, which supplanted the Democratic boundaries with an alternative plan drawn by the Republicans to further their own party advantage, and the Democrats lost a seat when the 1984 congressional elections were fought on the new, Republican boundaries.

This comparison, and New Jersey's renewed experience with its distinctive model when the legislature was redistricted after the 1990 census, helped build the consensus that extended New Jersey's plan of redistricting to the drawing of the state's congressional districts in 1992. No neutral observer could compare the congressional districts drawn by the 1992 commission with the districts drawn ten years before without feeling that the commission idea had again led to fairer boundaries. The spreading belief in its fairness extended New Jersey's plan to county government as well. It would be equally difficult for a neutral observer to miss the greater fairness of the boundaries of freeholder districts drawn by the balanced commissions in Atlantic and Essex Counties when these are compared with the boundaries of freeholder seats drawn for these same counties by a politically biased process a few months before.

New Jersey's plan of redistricting has also served well the other legal *desiderata* of good boundaries—that the districts should be compact, composed of contiguous territory, respect established civil divisions, and provide for the fair representation for minorities. And the commission plan has shown that it is better able than the ordinary legislative process, with its inevitable court challenges, to grapple with the inherent tradeoffs between equality of population and minority representation on the one hand and representing geographic communities on the other. The one exception to this is the experience of the 1992 commission that redrew the boundaries of New Jersey's congressional districts. This commission carried mathematical equality to the ultimate extreme as the safest defense against any challenge under the one person/one vote rule, whatever the cost in terms of divided townships and even divided city blocks. But the courts would almost certainly be more sympathetic to the efforts of mixed commissions to balance the several goals of redistricting than they are to departures from the equal population rule that are byproducts of the political agendas of partisan legislatures.

Strengthening New Jersey's Model

The wave of redistricting that broke over America following the 1990 census has now passed, mercifully in the view of some who rode it. Another such wave will not break over the country until after the census of 2000. In the interim, steps will need to be taken by a number of state legislatures and other public and private agencies to prepare the ground for the next wave. In this period of relative calm, a growing awareness of the benefits of redistricting by the New Jersey plan may influence the preparations elsewhere. But in this period of calm, New Jersey also needs to take steps to strengthen its distinctive model of redistricting.

After closely observing the workings of New Jersey's model for more than a decade, I would propose five steps to strengthen this plan of redistricting:

1. *Renewing the authority for redistricting congressional seats by the New Jersey plan.* The use of New Jersey's model in redistricting the legislature has been mandated by the state constitution since 1966. The use of this plan to redraw the boundaries of freeholder districts was mandated by a statute with no date of expiration. But the use of the New Jersey plan in redistricting New Jersey's congressional seats was mandated by a statute that is due to expire January 1, 2001. Hence, the authority for redistricting by the commission plan will need to be renewed before the start of the redistricting season after the census of 2000.

I therefore recommend that

the legislature take steps to provide continuing authority for redistricting the state's congressional seats by the New Jersey plan by constitutional amendment or by statute.

2. *Defining the selection and role of the public member.* The framers of the 1966 amendments to the state constitution provided for the Apportionment Commission's eleventh, public member to be selected by the Chief Justice of New Jersey's Supreme Court. The statute extending the commission idea to the redrawing of freeholder districts also provided for the public commissioner to be chosen by the Chief Justice. On the other hand, the statute extending the commission idea to the redrawing of New Jersey's congressional districts prescribed that a neutral chairman be selected by the party commissioners, who would automatically be dismissed if they failed to make this choice within a specified time. This statute further provided that the chairman have no vote except on the two final proposals having the largest number of votes if the party commissioners deadlocked.

A chair so chosen has considerably less authority than a public member who is independently selected by the Chief Justice. This added authority is important even if the party commissioners muster a majority for a plan without the public member's support; these commissioners are

sensitive to the fact that a "no" vote cast by the public member on a plan that violates one of the clear tests of the public interest may be influential with the public and the courts. This possibility was an important resource for the public member in the state Apportionment Commissions of 1981 and 1991. But the authority of being independently chosen by the Chief Justice is still more important in breaking through a deadlock between two biased, partisan plans and encouraging the party delegations to converge on a plan that meets the tests of public interest, as my experience in the 1981 and 1991 showed. To limit the public commissioner or neutral chairman strictly to the role of tiebreaker between two biased party plans is to condemn the state to one biased plan or the other for the next decade, unless the courts intervened.

In view of this, I recommend that

The constitutional amendment or statute renewing the authority for redrawing New Jersey's congressional districts provide for a public member or neutral chairman with full voting rights who is selected by the Chief Justice of New Jersey's Supreme Court.

3. *Providing the public member with technical support.* As this report may show, some of the issues surrounding redistricting are conceptually and technically difficult, and the redrawing of district boundaries is likely to be even more of a high-tech calling by the time the next wave of redistricting breaks over the country, after the census of 2000. Moreover, New Jersey elects its full legislature in the first, odd-numbered year of a new decade. Since the Census Bureau is unlikely to release its data until the early months of that year, the state's legislative districts must be redrawn in the few short weeks between the release of the data and the April date on which the Secretary of State must inform the county clerks of the district boundaries so that candidates may file for the forthcoming primary election.

In view of this timetable it is essential for the public member to be able to hit the ground running. In the 1981 and 1991 Apportionment Commissions the public member was an election specialist who understood the logic of fairness between the parties and could quickly assemble the required analytic and legal staff. It would be unwise to suppose that this accident will be repeated. Indeed, it is essential for the Chief Justice not to be constrained to fill this role with an election specialist who brings a great deal of academic baggage to the commission process. The timetable is somewhat more relaxed for a commission redrawing New Jersey's congressional districts, since these do not need to be ready until a year later. But providing adequate technical support for a generalist public member is an undersolved problem for the functioning of the commissions at both levels. Indeed, the resistance of the party commissioners to their neutral chairman's request for technical assistance in redrawing the 1992 congressional districts shows that providing adequate technical support and defining the role of the public member or neutral chairman are linked.

The need for technical support has been well stated by Ernest Reock, the retired director of the Bureau of Government Research at Rutgers, who assisted me in the 1981 and 1991 Apportionment Commissions:

While these constitutional and statutory provisions have proven effective in achieving fair and bipartisan representative districts, experience has shown the need for a neutral staff agency to provide assistance to the various commissions and, more specifically, to the public member. The party delegations, backed in many cases by substantial permanent staffs, have many months to prepare for negotiations and approach the process with their own personnel and data resources. The public member, however, who frequently comes on the scene late in the process, must develop a neutral staff capability and a data base from scratch in a very short time. Usually, reliance must be placed upon volunteered resources, and the quick identification of appropriate persons who can be available for long hours on short notice is far from certain.¹⁵

It would be all too easy to put this problem aside and expect it to be dealt with at the end of the century. But it is much easier to find a reasonable solution while the experience of redistricting after the 1990 census is still fresh.

A solution will require both funds and an institutional site for this staff capacity. Since the unit Dr. Reock headed, now the Center for Government Services within Rutgers University's School of Planning and Public Policy, has a track record in providing such services, it is a natural candidate for institutional site, although others may be equally appropriate. Ernest Reock's assistance to successive public members was partly a *pro bono* contribution and partly a contribution by Rutgers. Such a pick-up game will not be good enough in the first round of redistricting in the new century, since this round will require data resources, computer capacity, and staff expertise beyond those required in the 1981-2 and 1991-2 rounds.

Dr. Reock's own recommendation is that the Rutgers Center for Government Services be designated by law as the permanent staff agency for congressional, state legislative, and county freeholder redistricting and that it be asked to build a data base that would be available to all parties in the redistricting process as well as to serve as the analytic arm of the public members appointed to the redistricting commissions. Reock would meet the problem of institutionalizing public spending for an activity that is concentrated in the first two years of a decade by proposing that the Center for Government Services be funded in the "out" years for issuing the *New Jersey Legislative District Data Book*, which its predecessor unit had prepared as a public service in every year since 1976, recovering only a small part of its costs. Gathering for such a volume the expanded data on the state's legislative districts and the communities of which they are composed would of course be a prime resource for the next round of redistricting.

¹⁵ Private memorandum, June 18, 1992.

My reservations about publicly funding the Center for Government Services for this work are mainly the practical questions of whether the governor and legislature will be prepared to include such an item in the state budget in hard times when the next round of redistricting is so far off and whether, if they don't, their successors will take such an initiative later in the decade—yet far enough in advance of redistricting to allow the necessary data base, computer capacity, and staff expertise to be built up. It may be easier to get this sort of commitment from one or more independent foundations that are committed to the success of the New Jersey plan and its capacity to improve this aspect of American democracy. A small conference of those from the state government, the universities, the private foundations, and other public interest groups should be convened to consider steps that might be taken to meet this need during the rest of this decade and the first years of the next decade.

I therefore recommend that

a small working group of concerned leaders from state government, academic institutions, independent foundations, and other interested groups help define the data, technical resources, and staff expertise that will be needed for New Jersey's plan of redistricting to work effectively after the census of 2000 and to locate the funds and institutional base that are needed to lay this groundwork.

4. *Clarifying the budget arrangements.* In the round of redistricting following the census of 2000 the public members of the state legislative and congressional redistricting commissions should have separate and assured budget allocations. Their costs are unlikely to be large. I would expect the public members and neutral chairs of the post-2000 commissions to serve *pro bono*, as did their predecessors after the 1980 and 1990 censuses. If my prior recommendation inspires steps to provide the public member with technical support, no additional budget will be needed for this purpose. The public members are again likely to incur costs mainly for legal fees. When the Chief Justice asked me to be his public member in 1981 he offered two pieces of advice, the first of which was that I was free to ignore the second. The second was that I should hire a good lawyer. It was not advice I was likely to ignore, and I will always be grateful for the contribution Judge Irenas made to the redistricting process in 1981 and 1991.

He did so at a fee far below his ordinary rate. But it was entirely right for him to be paid, at the rate at which the legal counsel for the party delegations were paid. He was, with no apparent problem in 1981, although the bills were routed through the counsel to the Democrats, the party then in control of the state government. In 1991 the situation was quite different, and the payments were late and uncertain. No doubt this mainly reflected the splits among the Democrats, who were again in control of the state government (in 1991 there were two Democratic counsel rather than one)

and their initial reluctance to be drawn into the redistricting process at all—and not any attempt to influence or harass my counsel. All the same, the logic of an independent public member is incomplete if he or she is forced to depend on one of the parties for the payment of legitimate costs.

I therefore recommend that

the public member be allocated an explicit part of the appropriation for the state and congressional redistricting commissions and counsel to the public member not be dependent on counsel to the party delegations for the payment of legal fees.

5. *Balancing public information and the integrity of bargaining.* Although the Attorney General told the 1981 Apportionment Commission it was exempt from the state's Public Meetings Act as a constitutional body, the commission voted to bind itself by this "sunshine law." The result was a shambles. The party commissioners knew it would be impossible to publicly negotiate anything so sensitive as a new set of legislative boundaries, and they made no attempt to do so. They instead observed the letter of the Public Meetings Act by never allowing a quorum to be present. And matters were made worse by the arrival of the public member, since a quorum would have been present if I met even with the full delegation from one side. Some of the time wasted in shuttling commissioners in and out of meeting rooms could well have been spent in public hearings that allowed interested individuals and groups to make a greater input into the commission's work.

This shambles was visible enough that the legislature explicitly exempted the 1991 Apportionment Commission from the Public Meetings Act. And it incorporated a similar exemption in the statute creating the commission that redrew the boundaries of New Jersey's congressional districts. It did not, however, include this exemption in the statute extending the mixed commission model to the redrawing of freeholder districts. Hence, on advice of counsel, these mini-commissions repeated the shambles of 1981 by never allowing a quorum to be present until they met to vote the agreed-upon boundaries.

The public deserves to have access to the redistricting commissions in public hearings in various locations around the state. It also deserves a flow of information about the commission. I regarded it as a *de facto* part of the public member's role to respond, discreetly but informatively, to inquiries from journalists that came my way. But the public interest is not served by allowing the provisions of the Public Meetings Act to complicate the already sensitive task of negotiating a new set of constituency boundaries. Accordingly, I recommend that

the commissions redrawing the congressional, legislative, and freeholder districts gather

the public's views in hearings in varied locations but be exempted by statute from the provisions of the state's Public Meetings Act.