

# **Legislative Reapportionment in New Jersey**

**A REPORT PREPARED FOR  
THE FUND FOR NEW JERSEY**

**by Donald E. Stokes**

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## FOREWORD

Ten years ago, a single political party controlled the New Jersey statehouse — governorship and both legislative houses. The 1980 national census revealed that the state's population growth rate was dramatically slowing, and as a result New Jersey would lose one of its fourteen seats in Congress. Warnings abounded that, yet again, the boundaries of New Jersey's remaining congressional districts would be decided in the courts.

This sounds all too familiar to New Jerseyans today who have had to face 1990 census data that indicate we stand to lose another congressional seat, and again face a single-party state government and the prospect of renewed efforts to gerrymander congressional districts to favor the party loyal.

These factors forebode much rancor in the state legislature as its members turn to the task of congressional redistricting early this year. But much of this may be avoided in setting state legislative districts because of New Jersey's unique process of devising these boundaries.

The Fund for New Jersey has asked Donald E. Stokes, Dean of Princeton University's Woodrow Wilson School of Public and International Affairs, to look back ten years to reconstruct the 1981 round of legislative redistricting in New Jersey, to assess the fairness of those district boundaries in light of the intervening state Senate and Assembly elections, and to set forth some observations to help guide us through the process this time around.

Dean Stokes is uniquely qualified to do all this: he is an internationally recognized expert on these matters who has been consulted by a number of governments. And within our state, ten years ago he was appointed by New Jersey Supreme Court Chief Justice Robert Wilentz to be the "public member" of the otherwise party-partisan Apportionment Commission entrusted by our state constitution to set state legislative boundaries.

We hope that this report dispels some of the misperception that seems to shroud the technical and political process of reapportionment. The report aims to provide New Jersey citizens with a historical perspective and a framework for measuring the fairness of competing proposals as they emerge for consideration during the year.

The Fund for New Jersey is a private grantmaking foundation that encourages informed debate of public issues in New Jersey, and seeks to promote economic and social justice for all its residents. We are pleased to present this report as one in an occasional series that focuses on issues of statewide public concern.

Mark M. Murphy  
Executive Director  
The Fund for New Jersey  
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Few aspects of American government enjoy such a bad press as the redrawing of constituency boundaries. From the earliest years of the Republic the apportioning of legislative seats to geographic districts has been thought to be dominated by narrow partisan interests and other self-serving motives of the legislatures and governors to whom the task is generally entrusted. The process has inspired its own term of contempt: when Governor Elbridge Gerry and his fellow partisans rammed a reapportionment through the Massachusetts legislature in the early 19th century, a critic labeled a "Gerrymander" a resulting salamander-like district, and this epithet has become a standard part of our political vocabulary.

This image of legislative reapportionment is hardly lessened by the recent history of congressional redistricting in New Jersey. The Democrats, controlling both houses of the legislature and the governorship after the 1980 census, drew a new set of congressional boundaries that were well calculated to increase the party's share of New Jersey's delegation in Congress — in one case by pitting two Republican incumbents against each other in the same district, in another by pitting a Republican incumbent against a popular Democratic incumbent in a safely Democratic seat. *Congressional Quarterly* called the boundaries "a four-star gerrymander [that] twisted crazily through counties and townships all over the state to create a Democratic advantage." But the Democrats did their work well enough that they gained a seat when the 1982 congressional elections were fought on the new boundaries.

Their handiwork was soon overturned by the courts. Although it is difficult to know the mind of a collegial bench, the U.S. Supreme Court evidently thought so little of the Democratic map that it set it aside (in *Karcher v. Daggett*, 1983) as failing to be a good faith effort to meet the requirement of reasonable population equality between districts — even though the most populous exceeded the least populous of the new districts by less than 0.7 percent of the statewide average. The Supreme Court remanded the plan for further hearings in the federal district court, which supplanted the Democratic boundaries with a plan drawn by the Republicans, and the Democrats lost a seat when the 1984 congressional elections were fought on the new, Republican boundaries.

This experience will add New Jersey voices to the chorus of demands for the removal of reapportionment from politics that has been heard in the U.S. at ten-year intervals for almost two centuries. Journalists and public-interest groups are likely to have a fresh enthusiasm for a neutral method of reapportionment as we await the release of the 1990 census data for New Jersey and the start of the new season for

redrawing the congressional and legislative boundaries within the state.

The paradox in this is that the framers of the 1966 amendments to New Jersey's constitution hit on one of the few practical formulas for reapportionment in the public interest that has ever been devised in the U.S. This fact is almost entirely lost on the general public, and indeed on a good many journalists and citizen groups, because the procedure designed by the framers for redrawing district boundaries for the Assembly and State Senate seems at first glance to be as intensely partisan as the ordinary legislative process by which the state redraws its congressional boundaries. But a closer look at this constitutional procedure, and the results it has achieved, shows that it is far more likely to serve the public interest than is the usual American practice of redrawing constituencies by the ordinary legislative process.

This report re-examines New Jersey's experience with its constitutional procedure for redrawing the state's legislative districts. It describes New Jersey's innovative "mixed" model, clarifies the role of the neutral public commissioner, defines the criterion of fairness between the parties, considers how well the legislative elections of the 1980s have conformed to this criterion, explores the protection of minorities and other criteria that should guide the reapportionment process, offers some recommendations for strengthening New Jersey's model, and considers the possibility of extending the model to the redrawing of New Jersey's congressional districts.

Many of these questions have a special urgency for the redrawing of New Jersey's Senate and Assembly districts. The state's almost unique practice of electing its legislature in odd-numbered years requires these boundaries to be defined before the kickoff of the election season in April of 1991, when the Secretary of State must certify them to the county clerks. What's more, the window between a late release of the census data and the start of the legislative election season may be as narrow this year as it was ten years ago.

## THE PROBLEM OF REAPPORTIONMENT

It is easy to lose sight of the crucial role of representative institutions in modern democracy. The idea of government by the people developed in little places, like Athens and Amalfi, where direct democracy was possible. But there is not the slightest possibility of the people's governing in the national states of the modern world without delegating their authority to elected representatives, apart from the occasional

question that is decided by popular referendum. This delegation, and the rise of political parties to help keep representatives responsive to the electorate, are the essential ingredients of modern democracy.

In the English-speaking world, legislative representatives are generally chosen from single-member, geographically defined constituencies, for reasons that go back to the assembling of the English House of Commons, the more popular house of the "Mother of Parliaments," from geographic places. This practice is more universal today than it was along the way. In the country's earliest years most of the states elected their Congressmen at large, rather than from single-member districts. But the modern practice in the U.S., as well as in Britain and such Commonwealth countries as Canada, Australia, and New Zealand, is to elect representatives from single-member geographic constituencies.

The belief that these constituencies should be of roughly equal population is also a fairly recent idea. In Britain it emerged from the political convulsions surrounding the reform acts of the 19th century. The U.S. Constitution assured the states a number of members in the House of Representatives proportional to their population, and a rough equality characterized the geographic districts from which Congressmen were chosen when the states embraced the idea of electing Representatives from single-member constituencies — even if the variation was far greater than the courts today allow. A degree of inequality, particularly a rural bias, was more prevalent in the state legislatures, especially their upper houses. When New Jersey's delegation to the Federal Constitutional Convention of 1787 proposed the "New Jersey Plan" for equal representation of states in the United States Senate, New Jersey already had equal representation of counties in its own upper house — and preserved this arrangement, strongly favoring rural areas, until it was struck down by the courts almost two centuries later.

Given unequal population change, geographic constituencies can be kept roughly equal in population only by periodically redrawing their boundaries. The U.S. Constitution requires a census of population each decade so that each state will continue to have a number of Representatives proportional to its population, and as the states went over to single-member constituencies in Jackson's day, the decennial census triggered the redrawing of the boundaries for congressional districts and, with some exceptions, for state legislative districts. This practice is now universal, and the release of data from the 1990 census will trigger both the redrawing of New Jersey's congressional districts and the redrawing of its Senate and Assembly districts.



Most of America's peer democracies that use single-member geographic constituencies assign the task of redrawing their boundaries to neutral commissioners, removed from party politics. By contrast, the dominant American tradition is to handle the redrawing of boundaries within the ordinary legislative process in the states. As a result, governors and state legislators have used the reapportionment process to press their parties' advantage, as well as to protect incumbents, penalize opponents, and advance or harm various interests. Divided control of the governor's office and the state legislature affords some protection against excessive partisan advantage, although divided control can also lead to intense partisan wrangling during the reapportionment process.

The public is predictably disapproving. It is hard to give legitimacy to the idea that a party should be able to exploit its control of the legislative process at the moment of reapportionment to strengthen its hold on the state legislature or the state's congressional delegation for the next decade — and perhaps beyond, since this reapportionment may increase an ascendant party's chances of controlling the legislature at the next reapportionment, a decade hence. A kind of conflict of interest is involved when a majority party draws boundaries that increase its likelihood of retaining control. And this conflict of interest is even more troubling when individual legislators use their influence on the reapportionment process to advance their particular interests — for example, by having the boundaries of their constituency redrawn to exclude the home of a potential opponent. A multiple form of this conflict occurs when a legislature redraws constituency boundaries so as to protect incumbents from both parties. As a result, reapportionment has attracted the scorn of the press and public from the earliest years of the Republic, and the evils of gerrymandering are a standard part of what Americans like least about their practice of government.

With the political stakes high and public acceptance low, proposals for transferring the reapportionment task to some sort of neutral agency have been endemic. Apart from the reluctance of those who influence the political process to give up this influence, the main barrier to reform is the difficulty of devising a genuinely neutral alternative. Unlike Britain and the older Commonwealth countries, the U.S. has almost no tradition of neutral commissioners performing such politically sensitive tasks, although the courts have begun to play this role in recent years, as they have increasingly ignored Justice Frankfurter's admonition to stay out of this "political thicket."

Judicial intervention initially focused on the issue of the unequal population size of constituencies. In *Baker v. Carr* (1962) the U.S. Supreme

Court declared this a justiciable issue, and succeeding decisions enforcing the one-person, one-vote principle struck down a series of historic inequities in the representation of urban and rural areas in state legislatures and Congress. In the process the courts for a while swept away any principle other than equal population for representation in the upper house of state legislatures. In New Jersey's case, it was no defense to note that its upper house of one Senator from each county paralleled the "New Jersey Plan" of two Senators from each state in the U.S. Senate. *Jackman v. Bodine* (1965) struck down this plan for the State Senate and forced the 1966 amendments to New Jersey's constitution.

The provisions for the representation of minorities in the Voting Rights Act of 1965 and its subsequent amendments and the Supreme Court's civil rights decisions involving the 14th and 15th amendments have drawn the courts into apportionment issues other than equal population alone. But it was 24 years after *Baker v. Carr* before the Supreme Court said in *Davis v. Bandemar* (1986) that partisan gerrymandering might present a justiciable constitutional issue in its own right, even when the equal-population criterion was satisfied.

But the courts are a cumbersome source of neutral judgment on reapportionment plans. Boundary issues reach the courts only when an original reapportionment plan is challenged on constitutional or statutory grounds, and the courts are often limited to an unhappy choice between two or more plans that serve the interests of the parties proposing them. Moreover, court challenges and the ensuing appeals take time; indeed, these would almost certainly exceed the window for reapportionment that is open in New Jersey between the release of data from the decennial census and the first stage of the election of a new Assembly and State Senate at the beginning of a decade. To fit a constructive process within this window, the framers of the 1966 amendments to the state constitution devised a novel "mixed" process for reducing party bias when the boundaries of the legislative seats are redrawn.

### DESCRIBING NEW JERSEY'S MODEL

**T**he limited constitutional convention of 1966 was charged with bringing the constitutional provisions for New Jersey's legislature in line with the equal-population rule. The resulting amendments to the state's fundamental law provided for a 40-member State Senate serving four-year terms, except for the Senate elected for a two-year term at the first legislative election of each decade. These amendments also provided for an 80-member General Assembly serving two-

year terms, with the members elected at large from two-member districts that coincide with the Senate districts. Apart from the requirement that these legislative districts must be formed of compact and contiguous territory and roughly equal population, little else in the provisions for these districts remains in force. Subsequent court decisions have imposed a tighter equal-population standard than the constitutional requirement that no district be more than 20 percent above or below the statewide average. And subsequent court decisions have also weakened the respect for county and municipal lines that was written into the 1966 amendments.

What *has* survived is the novel procedure devised by the 1966 convention for redrawing the boundaries of the Senate and Assembly districts. This procedure begins with the appointment by the chairmen of each of the state's two major political parties of five members of a ten-member Apportionment Commission. These appointments are to be made by November 15 of a census year, and the Commission has until February 1 of the following year—or 30 days after the Governor receives the census data for New Jersey, whichever is later—to redraw the boundaries of the legislative districts. If the Commission meets this deadline, the new boundaries define the districts for the three Senate elections and five Assembly elections before the next census, subject only to challenge in the courts. But if a deadlocked ten-member Commission fails to meet this deadline, the Chief Justice of the State Supreme Court appoints an eleventh, public member, and the expanded Commission has another 30 days to redraw the boundaries of the legislative districts.

This procedure sets aside the ordinary legislative process for redrawing constituency boundaries in four key respects:

1. *Removing the redrawing of districts from the legislature to a commission.* The first and most evident of these is the idea of lodging in a commission the authority to define the boundaries of the legislative districts. This provision limits the inherent conflict of interest facing legislators when they redraw the boundaries of their own seats (although several legislators are typically included in the party delegations).
2. *Lodging the appointment of Commissioners in the two party chairmen.* This provision underscores the framers' belief that party control is what reapportion-

ment is, and should be, mainly about. More than individual legislators, the party chairmen are responsible for thinking in terms of overall control of the state government.

3. *Balancing the Commission between the two parties.* By giving the two parties equal strength in the ten-member Commission, the framers canceled the possibility that a party temporarily in control of the State House can better its chances of controlling the legislative process throughout the decade — and of controlling the next reapportionment a decade hence. Reapportionment remains an intensely partisan process, but is no longer a biased partisan process.
4. *Adding a neutral, public member.* If the balanced partisan Commission is deadlocked at the end of its allotted time, the 1966 amendments provide for the intervention of a neutral, public member, appointed by the Chief Justice of New Jersey's Supreme Court, to complete the redrawing of legislative districts. This provision further reveals the importance of fairness between the parties in the eyes of the framers.

These constitutional provisions therefore set out a "mixed" process for redrawing the legislative districts. On the one hand, the process retains the practical wisdom of those who know the communities to be represented. An evenly divided party commission is more likely than a neutral boundary commission or the courts to know and respect the established relationships between incumbents and their districts, the outlines of the political and social regions of the state, and the interests of the racial and ethnic minorities and other communities that deserve to be considered in the apportionment process. On the other hand, the intervention of a public member will keep the evenly divided Commission from deadlock and move it to an agreement that upholds the principle of fairness between the parties.

Of these features, the role of the public member is most easily misconceived. But the framers' goal of fairness between the parties will not be achieved unless the ability of the public member to help reach this goal is well understood. Indeed, a misunderstanding of this role has an unfortunate potential for tending to politicize the office of the Chief Justice.

## UNDERSTANDING THE ROLE OF THE NEUTRAL COMMISSIONER

It is easy to think that an eleventh member introduced into the life of an evenly divided, intensely partisan ten-member commission will simply break the tie between Democratic and Republican plans for reapportioning the state. But a moment's reflection makes clear that such a role defeats the framers' objective of eliminating party bias. If the eleventh member only chooses between a plan that favors the Democrats and one that favors the Republicans, the state will be condemned to a biased reapportionment plan for the rest of the decade whichever choice is made, unless the plan is thrown out by the courts. A neutral member limited to this unwelcome choice can reduce the degree of bias by picking the least objectionable of two partisan plans. But the goal of fairness between the parties takes a beating either way.

Such an understanding of the public member's role also has unfortunate implications for the office of the Chief Justice of the State Supreme Court. If the neutral commissioner is seen as picking one of two biased, partisan plans, the parties will have added reason for wanting the judicial office that selects the eleventh member to be in the right hands. Indeed, this was an element of the controversy that surrounded the 1986 renomination and reconfirmation of the present Chief Justice. Because the eleventh commissioner and the Democrats provided the six votes for the reapportionment plan adopted in 1981, some Republicans in the State Senate claimed that the Chief Justice had picked a Democratic tie-breaker to be sure a Democratic plan was adopted.

But no eleventh member committed to fairness between the parties would allow the neutral commissioner's role to be reduced to that of tie-breaker between two biased, partisan plans. Far from showing that the public member plays only a tie-breaker's role, the actual experience of the 1981 reapportionment reveals that a more activist role is open to the neutral commissioner. It is important to spell this out, since it is in the public interest that the public member not be constrained to a tie-breaker's role — and not be perceived as being constrained to such a role.

Since the New Jersey data from the 1980 census were received by the Governor's office only on the last day of February of 1981, the ten-member Apportionment Commission had until the end of March to reach an agreement without the appointment of an eleventh member. The parties worked out the framework of an agreement within this time but remained deadlocked on a number of issues at the end of March. I was then appointed by Chief Justice Robert Wilentz as the eleventh,

public member. Although the Constitution allows the expanded Commission an additional 30 days to complete its task, the Commission needed to be done in half that time if it was not to miss the date on which the Secretary of State would have to inform the county clerks of the new district boundaries.

As soon as I assembled a small staff and became acquainted with the parties' positions, I suggested a three-stage process by which the expanded Commission could reach an agreement:

1. that we first of all go through the outstanding issues between the parties and see which of them could be settled on their merits, knowing that some could be resolved only in the context of an overall settlement;
2. that I would then set out an overall plan I believed to be fair between the parties (as well as meeting the contiguity, equal-population, and compactness requirements) and see whether it had six votes;
3. that if it did not have this support, I would then ask each of the parties to submit an alternative plan and would support whichever was closer to mine.

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 satisfactorily resolved on their merits. Although the plan I then proposed enjoyed support in both party delegations, neither decided to vote for it, and I then asked each of the parties to offer an alternative plan, on the understanding that I would give my own vote to the alternative closer to mine. The result was a pair of alternative plans very close to my own. Although this result meant that all three plans met the test of fairness between the parties as I saw it, the Democrats' alternative was marginally closer to mine than the Republicans' was, and I supported the Democrats' alternative.

I knew from the outset that it would be harder to move the expanded Commission to an agreement unless I was willing to see a new plan emerge by a simple majority vote of 6 to 5. In fact, the final agreement enjoyed substantial support within both parties at the late-evening hour when it was reached, and this consensus is reflected in the fact that the counsel for both the Republican and the Democratic commissioners later joined in filing a common brief and successfully

defending the agreement in the courts. But it was clear that Republican support was likely to melt away by the time the Commission formally voted the new boundaries the following day. With the votes of the public member and the Democrats guaranteeing the state the plan everyone knew was needed to keep to the timetable of the forthcoming legislative elections, the Republicans were free to vote against the plan and ward off the brickbats of those who objected to one or more of its provisions.

But I also knew that a 6 to 5 vote would convey the image of the public member as a tie-breaker who is obliged to choose one or the other of two biased partisan plans. Therefore, when it was clear that the Democrats were preparing not one but two alternative plans, which were equally close to mine, I offered the Republicans the chance to pick the Democratic plan I should support, in return for Republican votes for the Democratic alternative they chose. But this excursion into consensus building proved too intricate for the late stages of a complicated negotiation. When the Commission formally voted the following day, the new plan was adopted by a vote of 6 to 5, a formal outcome that reinforced the tie-breaking image of the public member's role and masked the realities of the process by which the plan had been hammered out.

A public member who persuades the parties to converge on his or her own plan will be well advised to have a clear idea of what is meant by fairness between the parties. Otherwise, such a procedure runs the risk of producing three plans that are biased toward one of the parties rather than three that are essentially fair, as I believe they were in 1981. Such an activist role therefore increases the importance of being able to apply a meaningful test of fairness.

### **THE MEANING OF FAIRNESS BETWEEN THE PARTIES**

**A**lthough the goal of balance or fairness between the parties clearly underlies the 1966 amendments to the state constitution, it is not a simple matter to translate this goal into a test that can be applied to alternative plans. Indeed, the people who operate the political process tend to rely on intuitive judgments of what is fair or is biased toward one of the parties. If the ten-member Commission had come to an agreement in 1981 without the intervention of an eleventh member, it is likely they would have done so without having defined an explicit test of balance or fairness.

At a conceptual level, it is clear that fairness between the parties is a matter of the relationship between popular support and control of the legislature — between votes received and seats won. If one of the

major parties were to have virtually no support in a particular election, it should win virtually no seats in the legislature; and if it were to have overwhelming support, it should 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 that is sketched in Figure 1.

No single curve of this sort describes the relationship of votes to 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 districts. Since accidental factors in how the votes fall 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.

It is important to see that a party's expected share of seats would

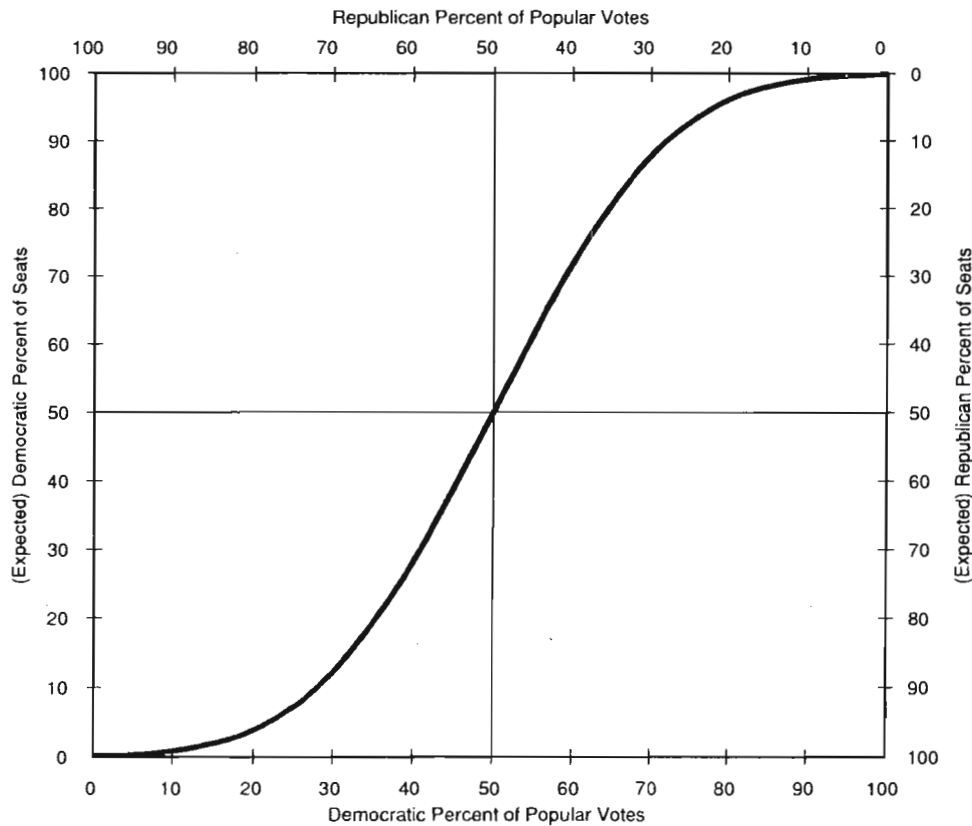


Figure 1

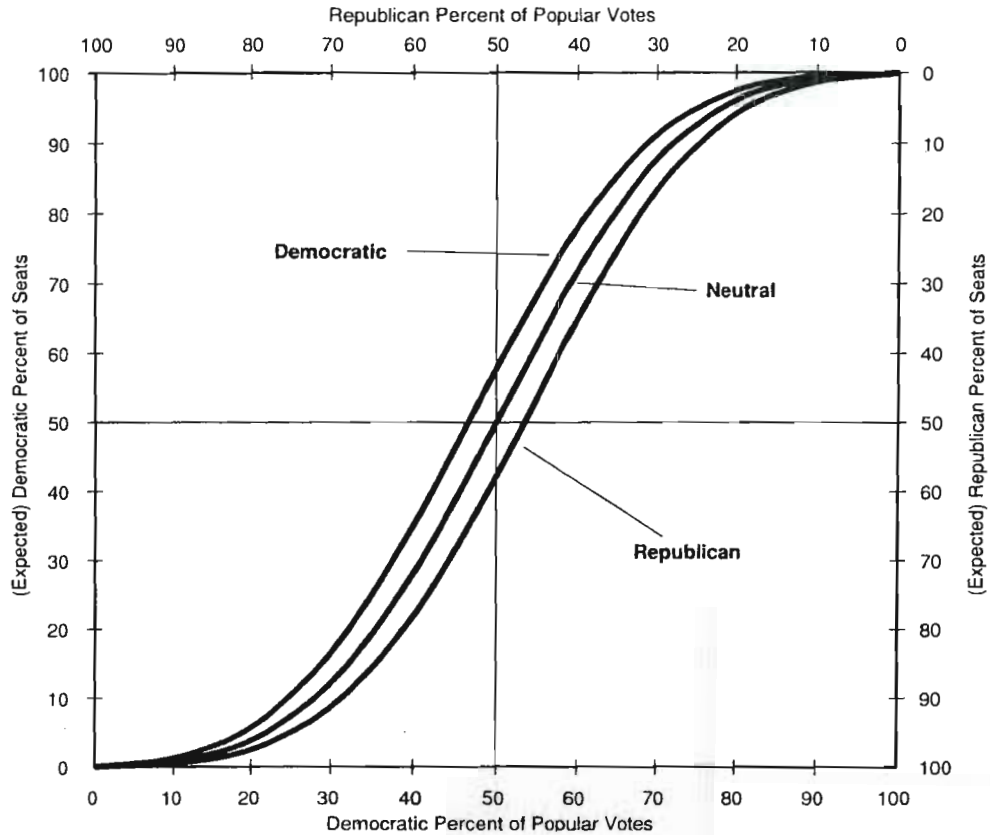


not increase in direct proportion to its share of votes, as a straight line from the lower left to the upper right corner of Figure 1. If the party had virtually no popular support and held no seats, its first increases in votes would win it very few seats. Similarly, if the party had overwhelming support and already held almost all of the seats, its last increases in votes would win it very few additional seats. But 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 share of expected 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. 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.

A crucial aspect of the relationship of votes to seats is 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 neither party "expects" 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 unbiased 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 reapportionment process, 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 neutral 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.

On this reasoning, I proposed to my 1981 Commission colleagues two tests that should be met by any plan that is fair between the parties:

*Unbiased between the parties.* The first is that when the two parties are evenly divided in popular votes across the state as a whole, there should be no reason for believing that



**Figure 2**

one of the parties is more likely than the other to win a majority of seats — although accidental factors will usually keep the actual division of seats from being exactly even.

*Responsiveness to electoral tides.* The second test is that when a tide moves strongly toward one of the parties, this party should fairly quickly win an effective majority of seats.

Each of the curves in Figure 2 gives an idealized account of the 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 we proceeded in 1981 were these:

*First*, we aggregated the vote in the most recent legislative election within a set of proposed boundaries to reconstruct how these proposed districts would have voted at the most recent election.

*Second*, we added to the share of the vote the Republicans would have polled in each of these proposed districts the proportion by which the statewide Republican share of the popular vote fell below 50 percent in the most recent legislative election, in effect simulating 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 the Republicans would have captured in this simulated dead heat.

By these calculations, the district boundaries of the plan I offered the Commission as fair between the parties would have produced an even split of legislative seats under the simulated dead heat between the parties in the statewide vote for the legislature.

These calculations and the relationship of votes to seats are complicated, however, 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. In the 1985 legislative elections, for example, 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 reasons explain this difference. One has to do with the proportion of the population that is of voting age; those who live in Democratic districts tend to bear more children at an earlier age and have a shorter life expectancy than do those who live in Republican districts. But the reasons for this difference also have to do with differences in participation; those of voting age who live in Democratic districts are less likely to register and go to the polls than are those of voting age who live 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.

We need to take account of this difference as we describe the relationship of popular support to legislative seats in 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 were a Republican advantage in the relationship of seats to potential support.

It is not entirely clear what allowance should be made for this difference in turnout 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 willing to register and actually vote. On the other hand, the constitutional equal-population rule that has been defined by the courts makes it clear that representation is about whole populations and not just voters — that the legislators chosen from geographic constituencies are meant to represent all their residents and not only those who get to the polls. A reapportionment plan judged to be fair between the parties if the Democrats and Repub-

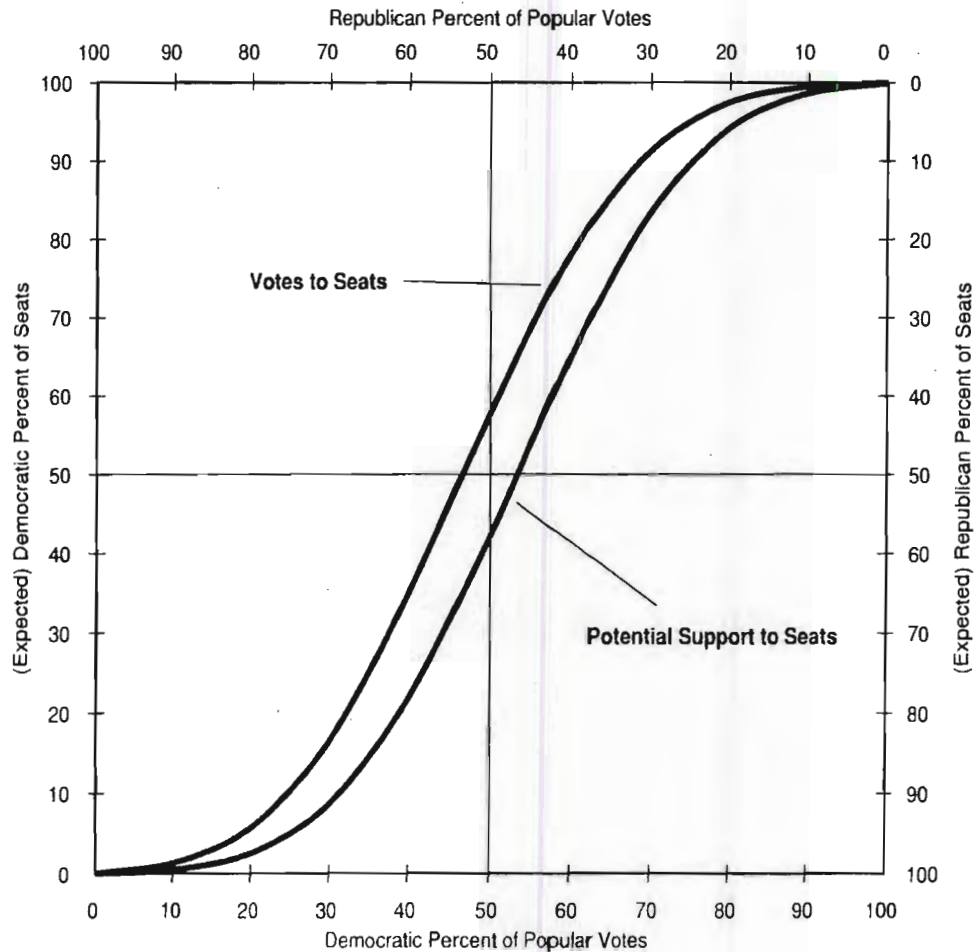


Figure 3

licans have a 50–50 chance of winning control of the legislature when they are evenly divided among potential supporters across the state, could still be judged to be fair between the parties if the Democrats have a majority of seats before they have half of the actual votes cast for the legislature. This point should be kept in mind as we review the evidence from the legislative elections of the 1980s to see whether the 1981 boundaries were fair between the parties.

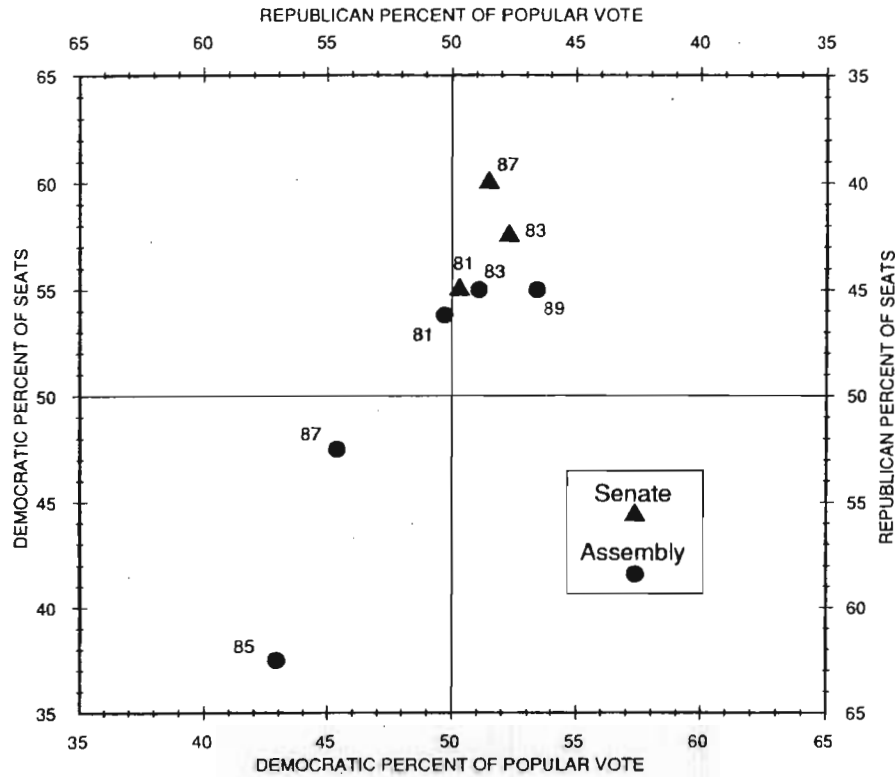
### THE EXPERIENCE OF THE 1980s

**H**ow well have the three elections for the State Senate and five elections for the Assembly met the tests of fairness between the parties that were incorporated in the 1981 boundaries?

*Unbiased between the parties.* From the plot of the parties' share of popular votes and seats for these elections in Figure 4 it can be seen that the party winning a statewide majority of popular votes also won a majority of seats in the State Senate and Assembly in each of the legislative elections of the 1980s, except for the 1981 election for the General Assembly. And this exception would disappear if the turnout in the seats won by the Democrats had been the same as the turnout in the seats won by the Republicans (and the parties had the same shares of these added votes as they did of the votes actually cast). The current boundaries were put to their severest test in 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 of votes, as it should have under a fair plan.

*Responsiveness to electoral tides.* 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 is especially clear when the electoral tide moved strongly toward the Republicans in 1985. A 14 percent spread in the parties' share of votes cast for the Assembly that year was translated into a 25 percent spread in the Republican and Democratic shares of Assembly seats. Over this central competitive range, the reapportionment plan of 1981 is found to translate a 1 percent swing in the division of votes received into a 1.8 percent swing in the division of seats won when this relationship is estimated by the appropriate statistical (regression) methods for the eight legislative elections of the 1980s.

The framers of the 1966 amendments to New Jersey's Constitu-



Democratic Percent of			
	Year	Votes	Seats
Senate	81	50.3	55.0
Senate	83	52.3	57.5
Senate	87	51.5	60.0
Assembly	81	49.7	53.8
Assembly	83	51.1	55.0
Assembly	85	42.9	37.5
Assembly	87	45.4	47.5
Assembly	89	53.4	55.0

Figure 4

tion designed a reapportionment process primarily to reduce party bias. But they also required the resulting legislative districts to be compact and to be composed of contiguous territory. The 1981 reapportionment experience indicates both the ease with which these added criteria can be met and the subtleties of their interpretation.

The courts as well as constitutional draftsmen have long required that districts consist of contiguous territory rather than of two or

more separated pieces. The Apportionment Commission of 1981 had no difficulty meeting this requirement, although its experience highlights some anomalies in the definition of contiguity. Historically the courts have said that a constituency can remain contiguous across water as well as land, an interpretation that countenances such oddities as a river boundary between two districts that dips briefly inland and removes a bit of territory from the district on one side of the river to the district on the other side. Anyone who finds, for example, that the partisan commissioners drew the 1981 boundaries so that they moved part of a district across the Toms River is likely to think this is an anomaly that needs correcting. But to press this view very far is to quarrel with the legal doctrine that water as well as land can keep a district whole.

A computer-assisted world will be increasingly fond of automated tests of how well the criterion of compactness is satisfied. One formula, for example, calculates the ratio of the actual area of a district to the area of the smallest circle that could be circumscribed around the district. In fact, however, the naked eye needs little assistance in judging whether districts are reasonably compact, as it needed little when Elbridge Gerry's critic spotted the "Gerrymander" among the districts drawn by the Massachusetts General Court. Although a few of the Senate and Assembly districts defined by New Jersey's Apportionment Commission in 1981 were fairly extended, their boundaries were as a whole visibly more compact than the legislative districts they displaced — and visibly more compact than the congressional districts that were laid out by the ordinary legislative process several months later.

The only exception to this in the 1981 reapportionment was on a miniature scale, in the intensely urban areas of Newark and Jersey City, and therefore invisible to anyone looking at a map of the state as a whole. Viewing the districts within these areas on a map of greatly enlarged scale reveals boundaries that are irregular in a number of places. Since the rationale for compactness has mainly to do with communication by constituents with each other and with their representative, irregularities are less troubling in a local district that snakes its way across several wards than they would be in a geographically larger district that snakes its way across several counties. In this case, those who possessed the practical wisdom of the parties sought to group together the members of the several communities found within these urban areas, partly to give better representation to racial and ethnic minorities.

## REPRESENTING MINORITIES

Over the past quarter of a century, the criteria guiding reapportionments have been enlarged by the Civil Rights Act of 1965 and its amendments and by Court decisions involving the 14th and 15th amendments to the U.S. Constitution. These changes had as their initial target racial gerrymandering in the southern states, especially efforts to limit the effect of enfranchising blacks by diluting their voting strength among several districts ("splitting"), or by the concentration of blacks in as few districts as possible ("packing"). In time, the target of these changes in the law was extended beyond "negative" racial gerrymandering in the South to include "positive" racial gerrymandering outside the South, encouraging efforts to increase the number of minority representatives by striking the right balance between excessive packing of minority voters on the one hand and excessive splitting of minority voters on the other.

It is far from clear where this balance lies. Those seeking to increase minority representation once believed that blacks and Latinos were likely to be elected only from districts that were heavily minority in their composition, and this belief was translated into guidelines for reapportionment laid down by the Justice Department. But there are now doubts as to whether these guidelines may place too low a ceiling on the number of representatives of color. This question is especially current in terms of black representation in Congress. Now that a black represents each congressional district with a black majority in the U.S., more blacks may be elected to Congress only by a modest splitting of African-American voters and the election of black Congressmen from districts where such voters are a large but not a majority part of the electorate.

Six blacks and one Latino candidate won Assembly seats in each of New Jersey's legislative elections of the 1980s. In addition, a black candidate won a Senate seat in the elections of 1981 and 1983, and two blacks won Senate seats in the election of 1987. But for reasons basically similar to the reason why, as Figure 1 suggested, a party supported by a small proportion of the electorate will win an even smaller proportion of seats, it is difficult for black or Latino votes to elect a proportion of Assemblymen or Senators equal to the proportion these minorities are of the population, even if district boundaries are favorably drawn.

The effort to increase minority representation is helped by New Jersey's mild departure from single-member constituencies. Each of the 40 legislative districts in the state has, in effect, three members — a Senator and two at-large Assemblymen. In the 19th legislative district



in Newark, the seat with the highest proportion black (70.1 percent in 1980), all three of these representatives were black throughout the 1980s. But throughout the decade, a black Assemblyman was also elected in each of a group of districts that were from 28 percent to 51 percent black. Indeed, only one district within this range (28, also in Newark) failed to elect a black Assemblyman, and this district did elect a black Senator in 1987. It therefore seems clear that blacks were able to claim at least one of the seats in a number of legislative districts that were little more than a quarter black. Since a district's two Assemblymen are elected at large, the aid given the representation of minorities by the multi-member character of these districts was clearer in the Assembly than the Senate. Constituting 12.5 percent of the population of the state in 1980, blacks held six of the 80 Assembly seats (7.5 percent) during the 1980s, but only one of the 40 Senate seats (2.5 percent) until the 1987 election, when a second black entered the Senate.

The importance of the fair representation of minorities was underscored by Congress' passage of the 1982 amendments to the Voting Right Act, subsequent to New Jersey's 1981 reapportionment. These amendments settled the question of whether a districting plan that limits minority representation can be set aside only if there is evidence of the *intent* to discriminate, saying that it was necessary to establish only that the *effect* of a plan is discriminatory. Drawing on the Senate report on the 1982 amendments, a 1986 U.S. Supreme Court ruling on a North Carolina case (*Thornburgh v. Gingles*) defined several grounds (the "Gingles criteria") for deciding whether special protection should be given the representation of a minority, especially the minority's spatial compactness and social cohesion and past evidence of racially polarized voting.

### STRENGTHENING NEW JERSEY'S MODEL

**W**hat might be done to strengthen the operation of New Jersey's distinctive model for reapportioning its legislative districts? In the short run it will be worthwhile to give the press, public-interest groups, the attentive public, and those involved in the next Commission a better understanding of this distinctive process. This understanding should include the constitution's stress on fairness between the parties, the conceptual and operational meaning that may be given this criterion, and the role of the eleventh, public member in achieving fairness between the parties, as well as the value of a "mixed" reapportionment process that retains the practical wisdom of those close to the state's system of representation. New Jersey's model of

legislative reapportionment has a far better chance than intervention by the courts of achieving a fair apportionment in the narrow window between the release of the 1990 census data and the April start of the legislative election cycle.

In the longer term it may be worthwhile to amend the constitutional procedures for the reapportionment process so that the Chief Justice appoints the eleventh, public member at the start of the process rather than only when the ten-member Commission is deadlocked at the end of the time allotted it — February 1 or 30 days after the release of the census data for New Jersey, whichever is later. The two party delegations should still be able to reach an agreement on the new boundaries during the first stage of the Commission's work, although the public member should be able to review and vote on the resulting agreement. Only in the second stage of the Commission's work should it be possible for the eleventh member to settle the boundaries of the new districts with the support of one of the party delegations. To assure this, seven votes might be required to reach an agreement during the initial stage of the Commission's work, to be sure the agreement had *some* support within *both* parties, but only six votes during the second stage.

Two benefits would flow from the appointment of the eleventh, public member at the start of the Commission's work. First, the fact that a plan agreed upon by the partisan commissioners would also be voted on by the public member would introduce an element of public interest into the first stage of the Commission's work, since the voice of the public member, even as a minority of one, would be influential when a plan agreed upon between the parties is reviewed by the courts and the public. Second, appointment at the start of the Commission's work would give the public member more time to assemble a small staff and to become familiar with the issues facing the Commission before a deadlock required the neutral member to intervene to bring the Commission to an agreement. The latter benefit would be substantial. The Achilles heel of the present constitutional procedures could well prove to be their tacit premise that the eleventh member will hit the ground running, especially when the census data are delayed and there is a very narrow window between the public member's arrival and the start of the legislative election season. An eleventh member fully familiar with the issues will be more likely to do what is needed quickly and well to go beyond a simple tie-breaker's role.

### SHOULD THE MODEL BE EXTENDED TO CONGRESSIONAL REDISTRICTING?

**T**he contrasting results of redrawing New Jersey's legislative and congressional districts after the 1980 census provided a natural experiment, and no reasonable observer could fail to judge the first of these processes to be fairer between the parties. Controlling both houses of the legislature as well as the governorship after the 1980 census, the Democrats produced a set of congressional boundaries designed to increase the Democratic share of New Jersey's congressional seats. That they did their work well is suggested by the increase in the Democrats' share of New Jersey's seats in Congress in the only election fought on these boundaries, although this increase was canceled when the courts substituted a rival, Republican-drawn plan for the congressional elections of the rest of the decade.

This leads naturally to the question of whether the boundaries of New Jersey's congressional seats should also be drawn by independent commission. Although many of the reasons for asking an Apportionment Commission to redraw the legislature's boundaries carry over to Congress, there are two notable differences between these reapportionments. One is that the conflict of interest inherent in asking legislators to redraw their own constituencies is less when the legislature redraws congressional districts, although it is common enough for congressional boundaries to reflect the aspirations of legislators who plan to run for Congress. A second, more important difference is that party control of the legislature may be determined by how its legislative districts are redrawn, whereas the parties' shares of New Jersey's congressional seats have only a small impact on control of the U.S. House of Representatives.

All the same, the greater fairness of the way New Jersey redraws its legislative districts argues for extending the mixed commission model to the redrawing of congressional districts. New Jersey clearly has the authority to make this change, since Congress has left to the states the decision as to how their congressional redistricting is done. The state's constitution could be amended to extend the mixed commission process to congressional redistricting. But New Jersey could also make this change by statute, requiring action only by the two houses of the legislature and the governor.

It will take public pressure to make this change by either route. The 1966 constitutional amendments on legislative reapportionment were framed under highly unusual circumstances. A legislature divided between the parties was mandated by the courts to lay the groundwork

for bringing New Jersey's system of representation into line with the equal-population requirement. The legislature responded to its mandate by convening a limited constitutional convention that was evenly balanced between the two parties, and the convention responded to its charge by framing a reapportionment process that was also evenly balanced between the parties. Under different political circumstances it will not be easy to summon the political will to extend this balanced process to congressional redistricting. But the case for doing so is clear.