Research Note 18: February 2011

Study Tour Report by the Library's Electoral Specialist

NCSL CONFERENCE ON REDISTRICTING, WASHINGTON, D.C. and MEETINGS WITH NEW JERSEY REDISTRIBUTION AUTHORITIES

House of Assembly / Parliament Research Library Research Grant 2010-2011

This Research Note reports on a conference in Washington, DC, on electoral redistribution, and meetings with authorities on the New Jersey redistribution process. *The purpose of the study tour was to gather information that will help the South Australian Parliament, the Electoral Districts Boundaries Commission and the parties, in their approach to South Australia's next redistribution of state electoral districts, due later this year.* In particular I was looking at methodology issues (especially what measures are most commonly used for partisan support). The grant will also partially fund a second trip to New Jersey in April which will focus on political approaches to ideal redistribution outcomes.

Background - South Australia

South Australia is the only Australian jurisdiction that requires its redistribution authority to consider the pattern of voter support across the state when drawing electoral districts. The original purpose of this fair outcomes criterion was to eliminate an apparent bias against the Liberal Party that was caused by geographic concentration of Liberal support in rural areas.

The Electoral Districts Boundaries Commission is required – as far as it is practicable to do so – to draw districts that will ensure that a party which wins the support of a majority of voters across the state will win a majority of seats.

To comply with this requirement, the Commission has consulted with the parties to develop its methodology. One aspect of that methodology is that the most recent election results are understood to be the most useful predictor of the pattern of voter support across the state at a subsequent election; that assumption will be in dispute when a redistribution takes place later this year because our most recent election results produced a pattern of swings that was unusual and may not be repeated. If the Commission uses that pattern of support to assess the districts it draws this year, it will be difficult to know how to assess whether the new districts will produce a fair outcome at the 2014 state election.

Essentially the Commission needs to find agreement with the parties about how to measure partisan support in such a way that it can differentiate bias from campaign effects.

Because South Australia is the only Australian jurisdiction where redistributions officially consider voter support for the parties, methodology questions like this have not been addressed in our country. By contrast, US redistributions generate commentary and debate that addresses these conceptual issues in various ways.

The US took its ten-yearly census in 2010, and over the next 18 months every state will use these new population figures to redraw their state legislative district boundaries in time for their next state and congressional elections.¹ Note that the US is roughly the same size as Australia geographically but had a population of almost 309million people at last year's census.

Redistribution structures and aims differ from one US state to the next. Most US state legislatures appoint a committee of their own members to draw their plans, and a party which currently has a majority in the legislature's lower house will have most members on the committee. It is accepted that any plan produced under these circumstances will advantage the majority party. Other states appoint bipartisan committees which tend to draw plans that protect incumbents and generate few marginal seats, so some work with an additional requirement to draw some marginal seats. Several states appoint independent commissions, though the commission members are invariably appointed by the parties or elected officials and their plans can still be vetoed by the legislature. One state — New Jersey- appoints a bipartisan commission, and if that commission cannot reach agreement after a month one more member is appointed by the Supreme Court. For the past three commissions, these independent members have assessed the various plans put forward by the parties using several criteria, including a fair outcomes criterion, very similar to ours.

One of the key differences between the Australian and US redistribution processes is that the courts have almost no role in Australia but a large role in the US, which means that in the US plans are drawn with an eye to legal precedent as much as to legislative criteria, and most plans drawn this round are expected to face court challenge. The US Supreme Court first entered this area with its judgement in Baker v Carr 2 in 1962 which led to a series of cases in which that court derived a requirement from the US Constitution that congressional and state legislative districts should have equal population.³ Those "One Vote One Value" cases were picked up in Australia and became important in arguments against malapportionment that existed in most Australian states at that time, but the Australian High Court has consistently refused to derive a similar requirement from the Australian Constitution or from a state constitution.⁴ Meanwhile the US Supreme Court has moved on to consider whether gerrymandering or partisan bias might also be unconstitutional; although there has been a series of cases in the US Supreme Court where the primary cause was gerrymandering⁵ that court has not found itself able to derive a standard from the Constitution that would allow it to distinguish between partisan advantage (which it regards as an inherent aspect of all redistributions, and therefore permissible) and egregious bias that would offend the Constitution. The US Supreme Court has left the door open to future appeals, and the next round will arise as a result of the redistributions taking place across the US now.

Washington DC conference

The U.S. National Conference of State Legislatures⁶ has conducted a series of conferences on electoral district redistribution for state legislators and legislative staff. The final conference in this series was held in Washington DC on January 21 to 24, 2011. About 500 attendees

¹ US States and Territories will also draw their congressional district boundaries. Most jurisdictions will hold their state and congressional elections on the same day.

² Baker v Carr, 369 U.S. 186 (1962)

³ In fact the Court derived a requirement for equality in congressional districts from Article 1 of the Constitution (*Wesberry v Sanders*, 376 U.S. 1 (1964)) and an equality requirement for state legislative districts from the equal protection clause of the Fourteenth Amendment (*Reynolds v Sims*, 377 U.S. 533 (1964)).

⁴ Attorney General v. Commonwealth, ex rel. McKinlay (1975) 50 A.L.J.R. 279: McGinty v Western Australia (1996) 70 ALJR 200.

⁵ Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v Jubelirer, 541 U.S. 267 (2004); LULAC v Perry, 548 U.S. 399 (2006).

⁶ The NCSL is "a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL is an effective and respected advocate for the interests of state governments before Congress and federal agencies." http://www.ncsl.org/AboutUs/tabid/305/Default.aspx

included legal advisors, academics (politics, geography and law) and mapping package providers, who provide paid services to parties and redistribution authorities.⁷

Day 1, Friday January 21st 2011

This day focused on software user group meetings. Representatives from redistribution software companies were available to demonstrate their mapping software programs. During this segment and over the next few days I spoke with representatives from ESRI, Maptitude and Borderline. Initially many jurisdictions and some consultancies built their own software but few of the legislators and staff I talked to considered this worthwhile anymore. For any map generated, all of the software applications will show variables that are required in order to design districts that will comply with Supreme Court rulings on population tolerances and also with the federal Voting Rights Act. In addition they will display a range of census variables for each district including total population; voting age population; blacks as a percentage of the total voting age population; hispanics as a percentage of the total voting age population; black and hispanic as a percentage of the total voting age population. Political data that are displayed for each district include total registered voters; Republican voters as a percentage of all registered voters; Democrat voters as a percentage of all registered voters; Independents as a percentage of all registered voters; blacks as a percentage of all registered voters; hispanics as a percentage of all registered voters. (The importance of numbers of blacks and hispanics is that in most states they vote very strongly Democrat and the federal Voting Rights Act 1965 requires that in areas where there is a high concentration of black or hispanic voters boundaries should be drawn to allow these minority voters to be in a majority in as many districts as possible.)

Finally, specific election results within each district are usually shown. Software developed by Florida's redistricting authority was produced for drawing congressional districts and shows just two results: the percentage vote for Bush in 2000 and the percentage vote for Gore in 2000 (I assume that the 2008 presidential vote figures will soon be programmed into that system.) Using the presidential vote would not be regarded as satisfactory for drawing state legislative districts, and most packages allow for several election results to be programmed in.

None of the packages display an average election result over a given period or a trend. On the other hand, drawing and assessing a set of districts using the results of just one election was considered to be too limiting, and the consensus among people with experience of the redistribution process was that maps would be tested against several election outcomes. This is in line with publicity material distributed by one consultancy, which states that

"In previous decades there was a general rule of thumb that a redistribution database needed three election cycles to depict the political makeup of an area. That would mean for this decade the need for the 2006, 2008 and 2010 election results. But an additional argument can be made to have the extreme outcomes in the system, so that as districts are drawn one can evaluate their outcomes in terms of strongly Republican or strongly Democratic elections. For most states that would mean adding the heavily Republican year of 2004 so it can balance the strongly Democratic year of 2008." §

Neither enrolment nor voting are compulsory in the US, so election results are affected dramatically by turnout differences from one election to the next. In most jurisdictions, members of the state legislatures are elected for two year terms on the same day as the state's representatives in congress (and usually using the same ballot paper). Every second election is also a presidential election and on these occasions turnout is higher – particularly among Democrat supporters. Republican supporters are said to turn out more reliably, which means that marginal seats can swing between Democrat and Republican from a presidential election round to a non-presidential round just because of turnout differences. Judging the underlying

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⁷ Redistributions in the US are highly partisan and all consultants and legal advisors are aligned with one party or the other. Software providers are not.

⁸ Election Data Services Inc. pamphlet.

level of support for the Democrat and Republican parties in these areas requires extra information, and voter registration information is the most commonly-used. Voters register to vote as Republicans, Democrats or Independents and this information is used as a second level of information about the underlying support within a given geographic area. Still, voters are not obliged to vote according to the way they register, and they are not obliged to turn out either, so it is not uncommon for legislators to describe themselves as Democrats representing Republican districts (or vice versa).

Essentially, any election data or voter registration data were seen as indicating a potential vote, which could be maximised given a good list of candidates for all offices, most importantly the presidential candidate. In this environment of voluntary turnout, a single election result is seen as an unreliable measure of underlying voter support for the parties.

I was able to speak to Professor Michael P MacDonald⁹ about a software program – Judgelt - which is publicly available and was widely referred to in reports about the 2001 round of redistricting. Professor MacDonald confirmed that it is inaccessible by anyone without a strong computing background and it has been superseded by a range of simpler software programs that are similarly publicly-available. Although Professor MacDonald had used Judgelt in the past he would not use it now. It is essentially a fairly simple regression equation with election results as the outcome of three factors: partisan support, incumbency and campaign effects. Parties regularly code in all five of the election results recorded on the basis of the current district plan, and Professor MacDonald's opinion is that the most recent results alone would not be considered sufficient because it would not be possible to judge how big the campaign effects would have been.

Professor MacDonald agreed that it perhaps doesn't make a lot of difference which measure is used (a trend line, a series, or elections plus registrations); the key is that the parties need to agree on the most appropriate measure.

Day 2, Saturday January 22nd 2011

Professor Justin Levitt ¹⁰ focused on the basic requirements for redistribution plans to comply with Supreme Court rulings on population tolerances. He also covered the requirements of the federal *Voting Rights Act 1965*, which protects the ability of minority groups to elect a candidate of their choice where they constitute a majority of the population within a district (in most cases only blacks and hispanics are residentially concentrated enough to reach these sorts of numbers).

Professor Levitt also reviewed the various authority structures and criteria in use across the country and noted that 10 states have criteria that prohibit "undue favouritism" to parties or incumbents. California, Delaware, Hawaii, Iowa, New England and Oregon prohibit undue favouritism to a person or party; Florida, Idaho and Massacheusetts prohibit favouritism to an incumbent or party, and Washington prohibits favouritism to a party or group. How the criteria are implemented is another question; Professor Levitt said that these limitations on partisanship can't be enforced. In Florida's case the restriction may never operate: at the 2010 elections voters in Florida endorsed a proposal that would prohibit favouritism in both legislative and congressional redistributions but they also elected a Governor who opposed that resolution; he has since refused to apply for the federal approval that would be needed to put the resolution into effect. 12

Loyola Law School, California
 Levitt, Justin, 2010, A Citizen's Guide to Redistribution, Brennan Centre for Social Justice, New York, pp.68-70. References to the relevant provisions are given at fn. 199 which includes California Constitution Article XXI §2(e) "Districts shall not be drawn for the purpose of favouring or discriminating against an incumbent, political candidate, or political party."

http://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-stalls-new-voter-approved-redistribution-standards/1147578 Under the federal *Voting Rights Act 1965* Florida must have any

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⁹ George Mason University, Virginia

Non-favouritism appears to be regarded as idealistic in the US, so instead some states require their authorities to draw as many marginal districts as is possible. But again, how many marginal districts really are possible is a moot question, as too many marginal seats could be as unhelpful as not enough. In addition, some of these requirements are worded so weakly they can be avoided altogether: Arizona's requirement is simply that "to the extent practicable, competitive districts should be favoured where to do so would create no significant detriment to the other goals." ¹³

Only two of the 50 US states - Idaho and Iowa – specifically exclude previous voting data from the range of information that commissions can take into account. (In Australia voting results are not taken into account by any redistribution commissions apart from South Australia's.)

The next session considered a broader range of considerations that redistribution bodies need to be alert to. These include federal legislation, state legislative resolutions and guidelines adopted by previous redistribution commissions. Peter Wattson¹⁴ noted that criteria can embody different aims: for example eight states recognise that Members are legally required to reside in their districts and specifically require redistributions to protect incumbents¹⁵ while twelve states recognise that incumbency is a powerful factor in increasing a party's vote in a district and specifically require that incumbency *not* be taken into account.¹⁶

Cathy McCully from the United States Census Bureau gave a session on the census output. The census questionnaire is now very short (and quicker to process) so special redistribution census data files will be released to state authorities¹⁷ from early February, in time for each state's scheduled redistribution process. These data files will be available publicly 24 hours later, and are produced in a format that each state specifies, counting prisoners at whatever location the state requires them to be allocated to, including or excluding overseas residents or non-citizens according to that state's requirements.¹⁸ The Supreme Court's One Vote One Vale decisions have meant that population tolerances between districts are very low: for congressional districts they are essentially zero, but for legislative districts a tolerance of 5% may be acceptable to the courts if it is clear that these differences are related to a statemandated aim¹⁹ (by contrast in Australia the tolerances range from 3.5% to 10%, although we use electors rather than population as a whole).

In-depth information akin to our census community profiles is provided in the US through a survey conducted each year - the American Community Survey. The most recent ACS data became available last December so authorities will be able to assess the proposed districts as

changes to its electoral law approved by the federal Department of Justice before they can be brought into effect. The Governor has withdrawn Florida's application for approval of the new criterion.

¹³ Arizona *Constitution* Article 4 pt. 2 section 1(14). http://www.azleg.gov/const/arizona constitution.pdf

¹⁴ Previously Senate Counsel in Minnesota, now Counsel to the Governor.

Arkansas, Georgia, Maryland, New Mexico, North Carolina, South Carolina, Vermont and Virginia. Table 8 of NCSL, 2010, Redistribution Law 2010, Washington, DC

¹⁶ Arizona, California, Delaware, Hawaii, Idaho, Iowa, Kansas, Montana, Nebraska, Oregon, Washington and Wyoming.

Data are required to be released in a non-partisan manner so "governors, majority and minority leaders of both parties, commission directors (when we know who they are), and redistribution committees (when we know who they are)" will receive their information at the same time. The data will be available publicly 24 hours later. Cathy McCully, Chief, Redistribution Data Office, United State Census Bureau, Washington, DC http://www.ncsl.org/documents/legismgt/Census Presentation.pdf

¹⁸ The census redistribution website is at <u>www.census.gov/rdo</u>

Following the "One Vote One Value" decisions of the 1960s the Supreme Court struck down a New Jersey congressional districts plan in 1983 that had an overall range of less than 1% between the largest and the smallest district (*Karcher v Dagett*, 462 U.S. 725 (1983)). For legislative districts the tolerance is greater - a plan is unlikely to be challenged successfully where the population of the largest and smallest districts vary from the average by no more than 10% in total (5% above and 5% below the average, or 7% above and 3% below, etc.) AND where there is no systematic difference such that one party's districts are all smaller or larger than the average: *Larios v Cox* 300 F. Supp.2d 1320 (N.D. Ga. Feb. 10, 2004). Any deviation must be justified on the basis of neutral criteria.

they are drawn, for a range of variables that they might want to recognise as indicators of community of interest (including race, ethnicity, income).²⁰

In Australia the census community profile data are issued on the basis of the electoral districts that were current at the time the census was collected, and if a redistribution occurs after that point the ABS does not re-aggregate the data and re-release figures for the new electoral districts. This can make life difficult in South Australia where our districts can change shape every four years. In the US, boundaries stay in place for ten years and even though the job of re-aggregating data for 50 states must be horrifying, the census bureau will re-release their community profile data on the basis of the new boundaries once those districts are approved.

Debra A Levine²¹ spoke on organising a taskforce to support a redistribution. The logistics and staffing requirements she identified as basic support would cripple our Electoral Commission. Her view on political data required for any redistribution effort was that — "you will need statewide election and enrolment data for years 2006 through 2010, if not earlier and possibly later."²²

In a session on the legal cases which followed the 2001 redistributions across America, Professor Nathan Persily touched on the partisan gerrymandering cases. The Supreme Court has recognised that redistributions are by their very nature political, in the sense that any change of boundaries will have a political effect at a subsequent election. The Supreme Court has said that partisan gerrymandering might be unconstitutional if it was egregious, but the Court has not been able to derive a standard from the Constitution by which it might recognise a level of gerrymandering that might be so egregious as to be impermissible. Considering whether a definitive judgement might be obtained this round, Professor Persily noted that the justices on the Supreme Court have not changed since the most recent partisan gerrymandering decision, so he does not expect that the Court will discover a standard in their examination of plans this round.

Professor Michael McDonald then downplayed the importance of gerrymandering in redistributions, by asserting that even in those jurisdictions where the redistribution of 2001 had implemented a plan that seemed excessively partisan, the new maps only advantaged the majority party for one or two elections before a statewide swing resulted in their defeat. While his point is that even very biased plans are not invincible, it might be argued that two elections is nonetheless evidence of a severe disadvantage.

The final session for Day 2 looked at the advantages of various authority structures. Independent commissions are still a novelty in the US and to keep them independent they are often set up with unwieldy structures and rules (the US cannot rely on senior public sector officials for these commissions because those positions are elected and the candidates run as Democrats or Republicans). Mr Steve Lynn, the former chair of the Arizona Independent Redistribution Authority said that he expected that there will be very few applicants for positions on the authority this time, because the work is unpaid and the public consultation requirements meant long hours and extensive travel, all of which are difficult for private citizens to fund (while the parties would willingly pay, authority members must have no party allegiance). Another member on the panel for this session, Professor Bruce Cain, was also negative about independent commissions – he mentioned that the UK takes a year and a half to come to a result, which would be very long by US standards (but minutes later mentioned that one US state legislature spent five and a half years in court defending its plan).

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²⁰ A presentation on what the ACS collection covers is at http://www.ncsl.org/documents/legismgt/polidata.pdf

New York State Legislative Task Force on Demographic Research and Reapportionment

Debra A Levine, "Last Call: Are you Ready?"
http://www.ncsl.org/LegislaturesElections/Redistribution/LastCallAreYouReadyPresentation/tabid/22104/
Default.aspx

²³ See note 7 above

²⁴ *LULAC v Perry*, 548 U.S. 399 (2006).

Day 3, Sunday January 23, 2011

A legislator from New Hampshire mentioned that his state uses a series of multimember districts to elect roughly 400 Members to their Lower House: the multi-member districts are useful in order to comply with a New Hampshire State Constitution requirement that cities and towns should not be split between districts.²⁵ These districts don't quite give population equality so there is another group of Members who are elected from *floterial* districts, which are overarching districts that cover several ordinary Lower House districts. Floterial districts are less common in the US than they used to be but they still operate for legislative elections in Idaho, New Hampshire, Tennessee and Texas.

On Day 3 there were parallel sessions on the Voting Rights Act (particularly looking at new case law in relation to drawing districts that would not reduce the ability of minority voters to elect a candidate of their choice) and a practical redistribution exercise. I participated in the practical session; our group was required to draw a plan for a segment of Florida, using the software which that state has developed for its redistribution and the criteria which will apply for their state districts. Each person in our group was required to play the role of an incumbent member of the state legislature (in reality some of them were incumbent members although from other states). Roughly half of our group were assigned to be Democrats and half Republicans but the task required that one seat be abolished. I noticed that having incumbents on the committee automatically made the unspoken aim one of incumbency protection: once a central seat was abolished and after the requirements of protecting minority districts were attended to, the group drew safe districts for each sitting Member, within the population tolerances, because a majority of the group's members had to agree to the final plan. Perhaps not surprisingly the members of our group were less concerned with ensuring a fair share of the districts for their parties than with retaining the current share. Another observation was that because we were given the existing district maps (as well as maps showing the concentration of registered black and hispanic voters) we used the existing boundaries as a basis for our new plan, although there was no specific requirement to do so.

In the afternoon, partisan gerrymandering was considered again, by Professor Justin Levitt and Dale Oldham, who is Redistribution Counsel for the Republican National Committee, Washington, DC. Given that the Supreme Court has been unable to develop a standard to show at what point partisan advantage would be considered so egregious that it would be unconstitutional, this session asked how much partisan advantage in a plan might be considered safe from an appeal to the courts. It appears that the increasing stringency of population tolerances for congressional districts has actually developed incrementally in response to plans that seemed to be egregious gerrymanders: the Supreme Court was unable to strike them down for gerrymandering but did invalidate them on the grounds that their district population figures were too far from the average. In Karcher v Dagett²⁶ a plan was rejected although the largest district was less than 1% bigger than the smallest district. At one point Mr Oldham rejected a question about partisan gerrymandering being obvious and measurable, and said that gerrymandering was all about drawing seats for one's own party that would not move. and seats for one's opponents that would. Given that drawing a series of safe seats for one's own party would amount to packing and would be unhelpful in winning extra seats. Mr Oldham was not referring to drawing a series of safe seats, but rather to drawing a series of fairly safe or marginal seats that would nonetheless be possible to hold, given incumbency or other factors that might not be immediately apparent from data such as previous election results.

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Article 9 of the New Hampshire State Constitution requires that "In making (an) apportionment, no town, ward or place shall be divided nor the boundaries thereof altered." Article 11 requires that: In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations.

Jeff Wice, Special Counsel to the New York Senate, gave a brief session on finding balance between conflicting criteria. After compliance with population equality and *Voting Rights Act* requirements there is sometimes a problem balancing criteria such as community of interest or an obligation to retain the core of existing districts. Where the legislation does not specify their priority, Mr Wice's opinion is that reconciling possibly conflicting criteria is a political task and will hinge on whatever agreement can be reached by the parties.

Day 4, Monday 24 January 2011

The first session reviewed each of the redistribution plans that had been drawn on the previous day, by our eight groups. Each group had been given the same base plan as one other group, (so the eight groups worked on four different sections of the Florida state map). Several points became obvious: where groups had split into opposing party-based teams our two-hour limit had been impossible (in South Australian terms, taking the partisan effect of boundaries into account is time consuming). Groups which had paid more attention to creating majority-minority districts were forced to draw districts with non-compact shapes (community of interest requirements can conflict with a desire to keep other areas - such as suburbs or local government areas - intact). Groups that started at different places on the map produced quite different plans - one group produced mostly horizontally-oriented districts while its matching group produced more vertically-oriented districts (my understanding is that in South Australia the commission generally starts at the corners of the state).

The following session considered whether Citizen Voting Age Population data (CVAP) will replace census population counts, as the base population for redistribution. In the absence of any Supreme Court ruling it seems likely that census counts will be the safest course, but the attraction of CVAP is that it relates much more closely to the political function of electoral districts. The problem with CVAP is that a relatively low proportion of hispanics are citizens, so using CVAP would reduce the necessity to draw districts that hispanics could influence. That would be seen to be retrogressive in states covered by the *Voting Rights Act* and could threaten approval of these state's redistributions by the federal Department of Justice.

The argument in favour of retaining the census complete population count as the population base for electoral districts relies on the concept of Members representing all of the people living in their district, young or old, citizen or non-citizen. The argument in favour of CVAP relies on the concept of a vote having equal effect in every electoral district. Australia's compulsory enrolment requirement enables us to draw districts on the basis of electors, which ties the population base to the electoral purpose of the district much more closely than CVAP would.

The conference closed at midday.

I met with Royce Crocker, elections specialist at the **Congressional Research Service** in Washington, DC. The meeting was focussed specifically on how partisan support is measured, and Mr Crocker's opinion is that turnout differences from one election to the next are so variable that the vote at one election is not a reliable indicator of the level of underlying support. His preference is to look at the vote for a down-ballot position — one where the candidate is likely to be unknown to the elector, who can then be assumed to be voting purely on a party basis. These election results are assumed to reflect the statewide campaign without any local campaign component or incumbency effect. Given that South Australian has no down-ballot races, he encouraged me to look carefully at our Legislative Council results.

To assess the underlying level of support, it seems common in the US to consider a series of election results, and not only for the same kind of position: for example, an area might be described as "55% Obama but competitive Republican at state level". I asked whether an average of the results for a given race (results in a particular district for the five elections between redistributions, for example) might sometimes be used; he thought that it might be defensible to look for a statistical trend in a series of results but he was not enthusiastic about using an average.

New Jersey

In New Jersey I met with two people who have been very much at the centre of that state's redistributions: Emeritus Professor Ernest Reock, at Rutgers University²⁷ has been a staffmember or consultant to the last four commissions, and Professor Larry Bartels, at Princeton University²⁸ was the independent member appointed by the Supreme Court last time. Professor Alan Rosenthal who is expected to be appointed later this month as the next independent member (and who has twice been the independent member on New Jersey's *congressional* redistribution authority) was overseas at the time.

<u>Professor Ernest Reock</u> has an intimate knowledge of the aims and outcomes of successive New Jersey Apportionment Commissions. For the 1981 commission Professor Reock and the independent member of the commission, Professor Donald E Stokes, formulated a fair outcomes criterion, which Professor Stokes used again in 1991 and which Professor Bartels adopted for his deliberations in 2001. Professor Reock's description of the fair outcome criterion will be familiar to South Australians:

"The approach described by Don Stokes in the 1990's compares the percentage of seats won by a party with the statewide total of votes cast for candidates of the party. ... Actually, in practice Stokes used a modified approach. We calculated the probable Democratic vote percentage for every proposed district in a past election and, if the total statewide Democratic vote for that election, for example, was 52%, we deducted 2% from the Democratic vote in each district.

The plan was considered fair if this then gave us 20 Democratic districts and 20 Republican districts."²⁹

Two wrong winner elections occurred on the 2001 boundaries (in 2003 and 2009), and challenged the fair outcomes methodology. Professor Reock attributes those results to "large differences in voter turnout between areas with a Republican orientation and areas with a Democratic orientation". ³⁰ By contrast, media reports generally attribute the results to the 2001 plan which they conclude must have been biased towards the Democrats (and some reports hold Professor Bartels responsible).

Professor Reock does not consider that the two wrong winner elections in 2003 and 2009 have discredited the fair outcomes methodology, but he is concerned that the measures required to make a fair outcomes criterion work may simply not exist - election results may not be a reliable-enough measure of underlying partisan support - and he is searching for an alternative to the fair outcomes criterion. As in most US jurisdictions, New Jersey's difficulty comes from the fact that both enrolment and turnout are voluntary, Democrat turnout rates are uniformly lower than Republican rates, parties often do not contest their opponents' safest seats, and districts remain in place for ten years. On the other hand, New Jersey's state lower house elections are held every two years, rather than four, so if results did reflect voter support they would at least remain current for predicting patterns of support at a subsequent election. Still, it is clear that turnout differences act very much like our non-uniform swings, disrupting attempts to use past election results to anticipate future results.

Professor Reock said that he is currently looking at "comparing the percentage of seats won by a party with the percentage of the total population represented by those legislators"; my interpretation of this is that the focus would move to the proportionality of the *actual* election outcome rather than the fairness of a *hypothetical* outcome (the actual result adjusted to a hypothetical 50:50 result using a uniform swing assumption). This is an on-going conversation.

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²⁷ Emeritus Professor, Center for Government Services, Edward J. Bloustein School of Planning and Public Policy, Rutgers University, New Jersey.

²⁸ Donald E. Stokes Professor of Public and International Affairs, Professor of Politics and Public Affairs, and Director of the Center for the Study of Democratic Politics, Princeton University, New Jersey.

²⁹ Personal email dated 29 January 2011.

³⁰ As above.

<u>Professor Larry Bartels</u> was the independent member appointed to New Jersey's otherwise bipartisan commission in 2001. He assessed the plans put forward by both parties using several criteria including the fair outcomes criterion that had been used twice by Professor Donald E Stokes (in 1981 and 1991). When we spoke about the difficulty facing South Australia's commission, Professor Bartels suggested that I look at the persistence of swings at previous elections, and in particular at whether seats have swung back in a proportional way at subsequent elections.

Conclusion

There is no denying that the US system is different from ours. South Australia has the enormous advantages of compulsory enrolment, compulsory turnout, both major parties contesting each seat, electoral districts re-drawn after every election, and district populations based on projected enrolments rather than past voter population counts. So when Australian election results change they do show that voters have changed their minds.

Still, American turnout differences may be more similar to our swings than we have understood, and they have considered the problem of how to judge whether a plan is fair or not, publicly and in some depth. They have not found a single measure or a standard and in the absence of measurement certainty their solution has been a political one – a measure that is acceptable to both major parties. In South Australia it is possible that swings are still just predictable enough that a lower standard of compliance with the fairness requirement might be possible. What needs to be done now is to look at whether results in the Legislative Council ballot could be considered to be a proxy for the House of Assembly ballot stripped of local campaign effects; and whether past elections can show us anything useful about the persistence of swings in individual seats.

The focus of this study tour was measurement; there remains the question of how a jurisdiction might conceptualise a change from a fair outcomes criterion to another ideal. In April, when New Jersey's redistribution process for 2010 has concluded, I will meet with New Jersey authorities again to learn how the parties there will have conceptualised and justified their case to the public. Did the Republicans' attacks on the fair outcomes criterion after the 2001 redistribution totally discredit that way of thinking about what a redistribution should achieve? How will the Republicans argue this month and next, that they should have five more seats?³¹ Would a criterion that aims at proportionality³² be acceptable to the parties, and how would that be measured? What could supersede a fair outcomes criterion?

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³¹ Pizarro, Max, 30 November 2010, "Christie looms over redistricting and coming legislative contests, where GOP craves five seats", *PolitickerNJ*, http://www.politickernj.com/43203/christie-looms-over-redistricting-and-coming-legislative-contests-where-gop-craves-five-seats

³² Professor Reock's

New Jersey redistribution process: background

Redistribution of electoral districts for the New Jersey state legislature is done by a bipartisan committee, initially of five Democrat nominees and five Republican nominees.³³ The process starts officially when the two parties receive the census data (on 1 February 2011 this time). If they have not reached agreement (not necessarily unanimous agreement, a majority will do) after having the census data for one month the Chief Justice of the New Jersey Supreme Court appoints an eleventh member and the augmented committee has one month to reach agreement.

A timetable for the process is laid down in New Jersey's State Constitution. New Jersey is unusual in that it conducts its state elections in November of each odd-numbered year (whereas most states conduct theirs at the same time as congressional elections, in even numbered years), and the redistribution process is constrained by the timetable for pre-selections and elections later in the year.

In 2001 the census data were not received until late in February and when Professor Bartels was appointed as the eleventh member on March 28th 2001, registration to contest the primaries was due to close just five days later on April 2nd. The legislature delayed that date until April 19th but within the time available Professor Bartels was not able to follow the process that his predecessor Professor Donald E Stokes had formulated in 1981 and 1991, which was to create his own plan, and to then ask the parties to approach that. Instead in an atmosphere described in the press as a "10-day behind-closed-doors brawl over the future of the Legislature" he considered several alternative plans that the Democrats and Republicans offered, asked for changes and on 11 April 2001 voted with five other members of the committee (all Democrats) to accept the amended plan which had come closest to his ideal.

The criteria that Professor Bartels used to assess the plans offered by both parties included the constitutional requirement of relative population equality and the legal requirement that minority voting power should not be reduced. Another criterion was one which he drew from Professor Stokes' experience: he ran the results of several previous elections through the new boundaries to assess whether, at a 50:50 outcome, the party which had the support of a majority of voters would have been likely to have won a majority of the seats.

The day after the vote, the plan was challenged in the district court by Republican members of the legislature and representatives of African-American voters, who argued that the plan diluted their minority voting power. The plan was also challenged in federal court because it split two cities — Newark and Jersey City — between three districts rather than two as the state constitution would have specified. Both of these court challenges, and their appeals, failed.

In the media, many reports focused on Professor Bartels' use of the Stokes fair outcomes criterion. The previous map seemed to have been biased towards the Republicans,³⁵ and the leader of the Democrats in the New Jersey Senate called the new 2001 map fair.³⁶ On the other hand the *Star-Ledger* newspaper called it a "Democrat–leaning map."³⁷

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 $^{^{\}rm 33}$ These people need not be current members of the legislature but most are.

Kinney, David, "Democrats win vital vote on districting", *The Star-Ledger* (Newark, NJ) 12 April 2001
 With just under 52% of the vote, Republicans had won 50 of the 80 seats in the state legislature in 1993 and 45 seats in 1999. The Democrats never won a majority of the vote in the 1990s but their 48.2% of the vote in 1993 won them only 30 of the 80 seats, and 35 seats with the same share of the vote in

³⁶ "Its fair. The existing map was not." Kinney, David, "The legislative battle lines", *The Star-Ledger* (Newark, NJ), 12 April 2001

³⁷ Kinney, David, "The legislative battle lines", *The Star-Ledger* (Newark, NJ), 12 April 2001