REPORT ON NEW JERSEY’S ELECTORAL REDISTRIBUTION PROCESS AND ITS RELEVANCE FOR SOUTH AUSTRALIA

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REPORT ON NEW JERSEY’S ELECTORAL REDISTRIBUTION PROCESS AND ITS RELEVANCE FOR SOUTH AUSTRALIA

This paper reports on a study trip to New Jersey to investigate that state’s electoral redistribution methodology, which includes a fair outcomes requirement. I spoke with members of the New Jersey Apportionment Commission, representatives of both parties and academic commentators.

Summary of Findings

An understanding of New Jersey’s redistribution process puts South Australia’s into perspective. It indicates that South Australia’s Electoral Districts Boundaries Commission (EDBC) should continue to maintain that it is not responsible for a fair outcome, but only responsible for drawing a set of districts that will provide a level playing field at a subsequent election. Because parties must be allowed to campaign, tight election contests can be expected to show the effect of those campaigns, and it would be inappropriate for the Commission to attempt to compensate one party for the other’s campaign.

The methodology used by New Jersey’s Apportionment Commission is remarkably similar to the methodology used by South Australia’s EDBC, although the two jurisdictions appear to have developed their methodology separately.

There is scope for change in South Australia in one area. Here, a set of proposed districts is assessed using the results of just one election. New Jersey uses several, to neutralize the effects of different campaigns in the data. Results from just one election - even if it is the most recent election - may be misleading because one set of results cannot be assumed to be representative of all results. South Australia’s new set of House of Assembly districts should be assessed against more than the 2010 election results.

Wrong winner results have occurred in both New Jersey and South Australia but because they are understood to have been caused by campaign effects – specifically turnout differences - they have not called the electoral system or the redistribution methodology into question. At New Jersey’s redistribution in early 2011, fair outcome criteria were used for the fourth successive time.

Other US jurisdictions share the EDBC’s understanding that the task of designing a level playing field involves ensuring that the system will respond when voters change their allegiance, as well as ensuring that the system contains no advantage to either party.

Apart from New Jersey, US jurisdictions do not address geographically-induced bias. However, if or when the US Supreme Court does formulate a standard that will enable it to invalidate gerrymanders, the standard seems likely to include a requirement that a fair plan must reward both parties with a similar share of seats for any given share of the vote, and that in particular one party must not be more likely to win a majority of the seats if there is a 50:50 result. That is also the intent of South Australia’s fairness clause.
Introduction

When South Australia’s state election results were finalised in 2010, it became clear that the Labor government had retained a majority of seats, and government, but had not won the support of a majority of voters across the state. That prompted questions about fairness in our House of Assembly electoral system: whether the Electoral Districts Boundaries Commission (EDBC) had complied with the requirements of the fairness clause in the Constitution Act; how possible it will be for the Commission to draw a fair set of districts next time; and whether there might be another model that the Commission could use.

New Jersey’s experience is a helpful comparison because that jurisdiction has, on four occasions, used a criterion similar to our fairness requirement. Wrong winner election outcomes have occurred but have not discredited their fair outcomes requirement. Neither have those skewed election results been considered important enough to prompt change to the electoral system.

This paper reports on my study trip to New Jersey during which I spoke to representatives of both parties, members of the New Jersey Apportionment Commission and academic commentators. I also learned about attempts in other US states to address bias and to improve the way that their districts will respond when voters increase or withdraw their support. Finally the paper considers the US Supreme Court’s efforts to derive from the US Constitution a standard that will differentiate between a level of advantage that must be accepted and egregious gerrymandering that must not.

South Australia

South Australia’s House of Assembly electoral district boundaries are drawn by the Electoral Districts Boundaries Commission (EDBC) which is independent of both Parliament and political parties. The EDBC adjusts district boundaries after every state election, in accordance with criteria specified in the Constitution Act 1934 (SA). As in other Australian states and territories, and federally, the process is designed to be transparent and accountable and to treat the parties impartially while elevating the public interest over party interests. The redistribution process in every Australian jurisdiction requires that districts have equal numbers of electors, and almost all jurisdictions also require contiguous and compact districts which reflect communities of interest.

In addition to these requirements, South Australia has a unique criterion which responds to our state’s geography and the way that party support is spread across the state.

The geography of South Australia’s complicated coastline, and the concentration of population in Adelaide and a small number of regional centres, naturally produces a set of districts that would disadvantage a party with a rural support base. One of the techniques of gerrymandering is to “pack” the opposing party’s support into a series of very safe seats, while “cracking” one’s own support out of very safe seats, allowing it to strengthen vulnerable seats or bring opposition marginals within reach. In South Australia a large proportion of Liberal support is concentrated in country areas and the 1976 and 1983 redistributions had the effect of packing Liberal and cracking Labor support. The disadvantage to the Liberal Party seems to have been of the order of two seats. The traditional redistribution criteria required commissions to retain existing boundaries where possible and were understood to prevent commissions from considering the party-political effect of the boundaries they draw, so the fairness clause was introduced in 1990 to make it

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1 WA and Queensland have wider tolerances for districts that cover very large areas, and some jurisdictions need equality at the time of the redistribution. SA asks for equality at the time of the subsequent election.
possible for the EDBC to design a set of districts that will be fair to the parties going into a subsequent election:

In making an electoral redistribution the Commission must ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed.\(^2\)

Opinions differ on whether the fairness clause requires the Commission to produce a level playing field or whether it requires the Commission to guarantee a fair election outcome.

The Electoral Districts Boundaries Commission has never accepted the responsibility for providing a fair election outcome, given that parties must be able to compete at an election and their campaigns may not be equally effective. Instead, the Commission considers that its task is to produce a level playing field — a set of districts that will not advantage either party going into the subsequent election, and that will also be responsive to changes in voter sentiment.

Still, the Commission has interpreted the words “must ensure” to imply a stringent assessment of any set of district boundaries, to the extent that there should be no advantage to either party remaining in the district boundaries. The Commission understands that it must do all it can (“as far as practicable”) to ensure it is not the electoral boundaries but the voters who decide which party wins government. So the Commission addresses bias by ensuring that neither party has a much greater share of its support locked into safe seats, and it addresses the need for the set of districts to respond when voters change their support by ensuring an appropriate number of districts are marginal. All else equal (“so that”) this should create a level playing field and neither party should need to win more than 50 per cent of the two party preferred vote across the state, to win a majority of seats, and government.\(^3\)

Most commentators and even many Members have assumed that the electoral system is robust enough that a level playing field will produce an election outcome which would be fair in the terms of the Act — a party which wins the support of a majority of voters will be likely to win a majority of seats. There has been a general assumption that swings produced by the parties’ campaigns or by a widespread change in voter sentiment would be fairly uniform and that the statewide result would not usually be close. On those grounds it was then assumed that party competition on the Commission’s level playing field would produce a fair election outcome. The 2010 state election results show that this assumption will sometimes be wrong: campaigns can skew the translation of votes into seats and produce elections where a party with majority support will not win a majority of the seats.\(^4\)

However, it was exactly the concern that a party might win the support of a majority of voters and still not win government, which led to the fairness clause being introduced. If a level playing field still cannot guarantee fair election outcomes, several obvious questions arise. How do we know if the Commission is really producing a level playing field if subsequent elections cannot be used to confirm that? How important are wrong winner elections? If they are not important, is the fairness clause worth the efforts of the Commission and the parties? Or, if they are important, is there another way to draw districts that might be a better guarantee of fair election outcomes?

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\(^2\) Constitution Act 1934 (SA) s.83(1)

\(^3\) For more on how the Commission has implemented the fairness requirement, see Newton-Farrelly 2009. The “so that” link was emphasised by Justice White in the EDBC’s 1991 hearings (see for example EDBC 1991:31).

\(^4\) For more on the 2010 election outcome, see Newton-Farrelly 2010.
These questions show that the Commission has an immediate challenge, and the Parliament has a longer term challenge. The Commission’s challenge is to establish that it can draw a set of districts that will create a level playing field, and will not build in a bias against either party on the basis of a pattern of voter support that no longer exists. The Parliament’s challenge is to know whether the possibility of other wrong winner elections in the future is important enough to make other changes to the electoral system such as top-up seats or multi-member districts.

New Jersey

Q: How does the way South Australia operationalises its fairness requirement compare with New Jersey’s methodology?

An outcomes criterion similar to our fairness clause has been used four times in New Jersey. Redistribution of New Jersey’s state legislature’s districts (“legislative redistricting”) is conducted by the New Jersey Apportionment Commission which is independent of the state legislature but not of the parties. Five members are appointed to the Commission by the Democratic Party’s state chairman, five by the Republican Party’s state chairman, and one – the Eleventh Member – by the Chief Justice of the Supreme Court. The Apportionment Commission chooses a new set of districts by majority vote, and on each occasion the Eleventh Member’s vote has been decisive.

Professor Alan Rosenthal, Eleventh Member of the 2011 Commission, underlined the political nature of redistricting:

This may come as a big surprise. Republicans seem to want a map that advantages Republicans and Democrats seem to want a map that advantages Democrats. But we have in the United States and New Jersey a competitive two-party system. And it’s understandable that the two parties compete in the processes of redistricting and reapportionment.5

Given the importance to both parties of securing the Eleventh Member’s vote, each Eleventh Member has been able to negotiate changes to the parties’ proposed maps, and each has understood his role as bringing the two parties towards a map that would be fairer than they would otherwise have agreed to. To do that, Eleventh Members have assessed the parties’ maps using a series of criteria6 including a two-test fairness criterion developed by the 1981 Commission’s Eleventh Member, Professor Donald E Stokes:

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 one of the parties is more likely than the other to win a majority of the seats – although accidental factors will usually keep the actual division 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 seats7.

5 “N.J. redistricting commission struggles over redrawing legislative districts”, Star Ledger, 10 March 2011.
6 The over-riding criterion in Australia is equality of electors. In the US there are two: population equality and compliance with the Voters’ Rights Act 1965 which prohibits a redistricting plan that would give “minority voters less opportunity than non-minority voters to elect their preferred candidate to the New Jersey Legislature” (Bartels 2001:2). In addition New Jersey requires that the largest cities not be split more times than necessary.
7 Stokes 1991:13-14, added emphasis.
These two tests are almost identical to South Australia’s fairness clause. Together they aim for a set of districts that provides no advantage to either party going into subsequent elections, and require that the new set of districts will respond - and districts can change hands - when voter support changes.

One difference between South Australia and New Jersey, is that in New Jersey a level playing field will be assumed to have been created by adherence to the Stokes standard. If, at a subsequent election, unusual patterns of voter support skew the way that votes translate into seats - to the extent that one party wins a majority of the seats even if it does not win a majority of the votes - that is not considered to be problematic. Indeed Stokes thought it would usually be the case in a tight election. By contrast, South Australia has hoped that a level playing field would produce a fair outcome. South Australia’s wrong winner outcomes in 2010 and New Jersey’s in 2003 and 2009 show that this hope will not always be fulfilled.

Summary: The tests for fairness used by the EDBC are remarkably similar to New Jersey’s, although the two jurisdictions developed their methodology separately.

Q: How does the New Jersey commission establish that it has produced a level playing field, without reference to the results at subsequent elections?

In South Australia the EDBC assesses its map continuously as it draws each district’s boundaries. The assessment uses just one set of election data - those from the most recent House of Assembly contest – because those data are assumed to be the most up-to-date representation of voters’ underlying orientation towards the parties. The data are adjusted from the election’s actual two party preferred outcome to a hypothetical 50:50 outcome by regular amounts. For example, the statewide two party preferred result in 2010 was LIB 51.6 percent, so each district’s Liberal two party preferred result would be reduced by 1.6 percentage points (and the ALP result in each district would be increased by 1.6 percentage points) as if a uniform swing of 1.6 percent was moving each district around the pendulum. The outcome would then be that each party would have a statewide two party preferred vote of 50 percent.

Interestingly, New Jersey uses a similar regular adjustment to bring its data to a hypothetical 50:50 result. The difference between the two Commissions is that New Jersey does not rely on one set of data, but instead uses several.

In 1993 Professor Stokes, who had been Eleventh Member in both 1981 and 1991, described the adjustment process as follows:

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

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8 Stokes 1993:14.
Professor Stokes used this process in 1981 and 1991, and it was followed in 2001 by Professor Larry Bartels\(^9\) and in 2011 by Professor Alan Rosenthal.\(^{10}\) It is identical to the method used by South Australia’s EDBC.

This regular, or uniform, adjustment of results in each district to produce the results at a hypothetical 50:50 statewide result probably has its origins in Butler’s 1947 analysis of bias in the UK electoral system, in which he adjusted each constituency’s result by an equal amount\(^{11}\) This uniform adjustment is simply a way to generate a hypothetical set of district results that will be consistent with a 50:50 statewide result. It does not mean that Butler, nor New Jersey’s Apportionment Commission nor South Australia’s EDBC assume that actual swings will be uniform. Neither is the methodology invalidated when actual swings from one election to the next are decidedly non-uniform. When a series of election results are used, in their adjusted form, they show a range of probable outcomes.

While both South Australia and New Jersey assess proposed sets of districts against hypothetical election results generated by this adjustment process, there are two areas where New Jersey’s methodology differs from South Australia’s. First, New Jersey uses several sets of results, and second, the Stokes methodology makes an extra adjustment which is popularly understood to be for turnout but which is essentially made necessary by the fact that districts are drawn to have equal population, not equal numbers of electors.

On the matter of using several elections, it is understood that each will provide a different assessment on whether the set of proposed districts will provide a level playing field. US redistricting takes place every ten years, and the New Jersey legislature has a two-year term, so New Jersey’s maps stay in effect for five state elections.

New Jersey’s election results show a different pattern of support for the parties across the state from one election to the next, because voting is not compulsory. Only one in three eligible electors would be expected to attend to vote for a state election in New Jersey and an election at which public interest was very high might call out one in two.\(^{12}\) There is no requirement to enrol, nor to vote once enrolled, so turnout depends on how important voters think the election is: the elections at which the governor is being elected as well as the members of the state’s legislature, show turnout of over 40 percent whereas turnout is roughly 30 percent where the election is just for members of the legislature. Those figures vary from district to district as well, and particularly in safe seats because the parties often do not contest seats that are safe for the opposing party. On this basis there is little reason to be confident that the voting data from one election will have much to say about the results that could be expected at the next. When the New Jersey Apportionment Commission’s Eleventh Member assesses alternative maps, using the results of several elections allows the effect of turnout differences to be taken into account.

This range is important because low turnout elections are understood to favour Republican candidates. Non-compulsory elections mean that the electors who do turn out to vote will not always be the same voters from one election to the next, but electors who support Republican candidates are understood to be more likely than Democrat electors to vote regularly. This means that turnout differences from one election to the next are likely to show bigger changes in the Democrat vote than in the Republican vote.

\(^9\) Bartels 2001:4 “Because none of these recent elections actually produced a statewide ‘tie’, the observed results had to be normalized to reflect a 50-50 election.”
\(^{10}\) Conversation with Emeritus Professor Ernest Reock, 5 May 2011, Rutgers Centre for Government Services, New Brunswick, NJ. Professor Reock has assisted each of the Eleventh Members.
\(^{11}\) Butler 1947.
Consequently, in New Jersey when parties go into an election with a set of unbiased and responsive districts the final result is still always expected to be skewed by the importance that the electors attach to participating. The focus of parties’ and individual members’ campaigning is to increase turnout as much as to convince swinging (“Independent”) voters, and the success of those campaigns is very visible as high or low turnout.

In Australia there are no uncontested seats and minimal differences in turnout and informality. Here, campaign effects are understood as swings, where electors move their support from one party to another. Here, the major focus in campaigning has been to encourage electors to focus on party or policy, generating swings across the state or even the country that have been assumed to be fairly uniform. Commentators have assumed that the influence of individual candidates’ campaigns or local campaigns has an amplifying or modulating effect on these larger party-oriented swings, but there have been just enough results in particular districts to show that swings are not, in fact, uniform. Still, a uniform swing assumption has been useful for the commentators and even for the parties, because it is a simplification that makes general predictions possible.

It has already been noted that when redistribution commissions adjust a set of election data to a hypothetical 50:50 outcome by adjusting each district’s results by the same amount, they follow an established methodology that does not require an assumption that actual swings at a subsequent election will be uniform. Still, if actual swings from one election to the next actually were uniform then the pattern of support shown in each set of election results would be identical once they were adjusted to a 50:50 outcome, and maps could be assessed as fair or biased against just one set of election results – any one set. The unusual pattern of swings at South Australia’s most recent election produces a pattern of support around the pendulum at a hypothetical 50:50 result that is quite different from previous results, so it would be unhelpful for the Commission to base its assessment of its new districts on just this most recent set of election data. New Jersey’s experience in always using several sets of data is something South Australia could make use of.

A second difference between South Australia’s and New Jersey’s methodology is not relevant for South Australia but is sometimes criticized as biasing the map towards the Democrats, so it needs explanation here. Stokes built an adjustment into his measure to allow for the fact that US districts must be drawn on the basis of equal population, not equal numbers of electors. Minority groups (especially African Americans and people of Hispanic or Asian background) are overwhelmingly aligned to the Democratic Party, so districts that have high levels of minority population are Democrat safe seats. However, these districts also have more children and more ineligible or unenrolled adults, and in addition Democrat voters are less likely to turn out at any given election. Therefore, with the same share of voter support, a safe Democrat district with a high minority population will register fewer Democrat votes than a safe Democrat district with mostly non-minority population, and both will register fewer votes overall than a safe Republican district. This means that when each district’s votes are aggregated to a statewide vote, individual Democrat districts will always add fewer votes to the statewide total than Republican districts, and as a result it would be harder for the Democrat party to win a majority of the votes across the state. Professor Stokes’ survey work\(^\text{13}\) led him to assess the disadvantage to the Democrats across New Jersey to be of the order of 4%, and that adjustment continues to be used, although it is intensely resented by the Republican Party which sees it as a “thumb on the scales”\(^\text{14}\).

South Australia needs no such adjustment because Australian legislation requires that districts be drawn with equal numbers of electors.

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\(^{13}\) Especially Campbell, Converse, Miller, and Stokes 1960 \textit{The American Voter} and 1966 \textit{Elections and the Political Order}.

\(^{14}\) Conversation with Assemblyman Jay Webber, Republican Chair on the New Jersey Apportionment Commission, 17 May 2011, Trenton, NJ.
Summary: There is scope for change in South Australia in one area of our methodology. Here, a set of proposed districts is assessed using the results of just one election. New Jersey uses several, to neutralize the effects of different campaigns in the data. Results from just one election - even if it is the most recent election - may be misleading because just one campaign cannot be assumed to be representative. South Australia’s new set of House of Assembly districts should be assessed against more than the 2010 election results.

Q: How does the New Jersey methodology ensure responsiveness?

Even when there is a level playing field, a campaign can be prevented from having any effect and voters can be prevented from holding a government to account or endorsing an opposition if there are too few marginal seats to change hands.

An electoral system that is unresponsive might be inevitable if there are only a small number of districts (like Tasmania’s set of five federal divisions, for example) but drawing a set of 47 House of Assembly districts or 40 NJ General Assembly districts allows scope to design districts that will be arranged more evenly around the pendulum. In particular, when the map is assessed against a 50:50 hypothetical result, it can only constitute a level playing field that will be responsive if there are enough marginal seats on each side of the pendulum that could change hands to give either party government if it wins the support of a majority of voters.

Stokes recognised this in his second test (“when a tide moves strongly toward one of the parties, this party should fairly quickly win an effective majority of seats”). It is also recognised by the EDBC:

> Section 83 cannot guarantee that an election result will be fair, but the purpose of the section is most likely to be achieved if there is an evenly graded series of marginal seats on both sides of the pendulum. That has been our object in this redistribution, as it was in 1994.15

Where a system is designed to be unresponsive it will have few government marginals, entrenching the government against negative swings. A design that contains few opposition marginals but many government seats at risk (at a hypothetical 50:50 result) would advantage the opposition. Neither of these would provide a map that is equally responsive to swings in either direction, and neither should be considered fair. In the US, legislatures in all but 12 states retain responsibility for drawing their own districts, so unresponsive maps that entrench the majority party are very common. In response public interest groups have campaigned for a mandatory minimum number of competitive seats.16 As yet, even where these campaigns have been successful, they have produced little change because they can be subverted by strict adherence to other criteria such as community of interest.

Increasing responsiveness without making sure that the set of districts is unbiased may seem dishonest, but increasing responsiveness per se does have a positive effect. For a start, poor responsiveness just on one side of the pendulum can generate advantage for one party, but poor responsiveness overall prevents voters from making it clear that they have changed their views. In jurisdictions where support for the parties is not close, voters may not understand each election as an opportunity to change government (or in US terms the

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16 The League of Women Voters, Fair Vote and Common Cause have all campaigned for increasing the number of competitive districts.
17 In the US competitive districts are sometimes understood narrowly as having a 2 percent margin, but more often as having a 5 percent margin. In Australia marginal districts are understood as having a 6 percent margin.
majority party); instead what is important for them is that a message of support or of its withdrawal can be conveyed by a few seats changing hands. If there are simply no seats available to change hands, the message cannot be sent.

**Summary:** Other jurisdictions share the EDBC’s understanding that the task of designing a level playing field involves ensuring that the system will respond when voters change their allegiance, as well as ensuring that the system contains no advantage to either party.

**Q: Do wrong winner elections mean that the fairness clause is not worth the effort?**

The term “wrong winner election” is a political science concept and refers to elections where one party wins the support of a majority of voters but another party wins a majority of seats.

In the US, district boundaries are intended to stay in place for a decade, and two of the five elections for New Jersey’s state legislature which were held on the districts established by the 2001 map produced wrong winner results: at both the 2003 and 2009 elections for the state General Assembly the Republican Party’s candidates won a majority of the votes cast but not a majority of the seats. These results are locally understood to have been caused in 2003 by low turnout by Democrat supporters and in 2009 by a strong surge in the Republican vote in districts they already held.

In a search of New Jersey or New York newspaper articles written at the time of these elections, I could find none that called these results unfair or “wrong winner” elections. The results were clearly not understood by the public or the media as representing a major challenge to democracy nor to the Democratic Party’s legitimacy as the majority party in the House. Neither did individual elected members feel that the result reflected on the electoral system. However, the Republican Party organization did. At public meetings conducted by the Apportionment Commission in 2011, Assemblyman Webber (chair of the Republican Commission members) argued that these two wrong winner lower house elections in 2003 and 2009 showed that the 2001 map had been biased towards the Democrats. Neither the Eleventh Member nor the Commission’s Democrats engaged with the argument other than to point to measurement difficulties in making the claim (Webber 2011).

A few weeks later, I asked Assemblyman Webber how important wrong winner elections are. He said that the average New Jersey voter couldn’t name his or her representatives, and really doesn’t get upset by the results. An exception was the Bush v Gore presidential result of 2004 which he said had “ticked people off” but even then the general attitude of voters seems to have been that Bush won according to the rules, even if Gore had a majority of the votes. (Gallup Polls from the time show that over 80 percent of voters would have accepted either presidential candidate as legitimately elected once the Supreme Court made its decision.) Still, he said, when the party told Republican supporters this year about the effect of using the Stokes method to assess the map, they were “livid”. This may be an instance of methodology being used to make a political point. The primary point that the Republicans objected to was the adjustment to equalize elector-to-population ratios between Democrat and Republican districts, which they understood to be building in a bias against Republican support.

While the parties did feel aggrieved, voters did not see the wrong winner elections of 2003 and 2009 in New Jersey, or 2010 in South Australia, as problematic. There was a level of

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18 Conversation with Assemblyman Jay Webber, May 17th 2011, Trenton, NJ.
disquiet expressed in the press in South Australia, but no mass demonstration like the marches against malapportionment during the 1960s. In New Jersey, Professor Murray said that voters see the legitimacy of the election as a function of the electoral system so that if parties win according to the rules then they are seen as legitimate winners. Why then should our Commissions be so concerned to prevent these sorts of outcomes? The answer can only be that the legitimacy of the electoral system depends on a public understanding that misfortune will be equally likely to befall both parties. If the electoral system is so biased that it consistently prevents one party from winning a majority of the seats even when it has won the support of a majority of voters (as malapportionment did in both jurisdictions in the first half of the twentieth century), or if the system is so unresponsive that once a party wins a majority of the seats it is able to entrench itself and retain power for several elections after a majority of the voters have withdrawn their support, then it is not one election outcome that is called into question but the electoral system itself. So Commissions, correctly, address bias and lack of responsiveness, not wrong winner outcomes.

Summary: Wrong winner results have occurred in both New Jersey and South Australia but because they are understood to have been caused by campaign effects they have not called the electoral system or the redistribution methodology into question. At New Jersey’s redistribution earlier this year its fair outcome criteria were used for the fourth successive time.

Q: Is there another model? Do other jurisdictions address these problems in a different way?

South Australia developed its fairness clause, and the EDBC developed its methodology, in the late 1980s without any knowledge of Professor Stokes’ criteria or of New Jersey’s process. That two jurisdictions have independently and in seeming ignorance of each other, developed the same methodology, speaks to its rationality.

But is there a different model that would work with our single member districts? South Australia’s original problem lay in unintentional bias generated by the way that the pattern of support for the parties was affected by this state’s geography so that a larger proportion of Liberal Party votes than of Labor Party votes were almost inevitably tied up in safe seats. Any acceptable different model would need to address this problem.

No other US state, nor any Canadian province, uses a criterion that considers the political effect of the map as a whole. As noted earlier, several US states do now ask for marginal seats to be drawn where that is possible, but bias due to the differential concentration of support in safe seats needs to be remedied in the safe seats, where it occurs, not in the marginals.

A different source of inspiration might be the US Supreme Court, which has never defined what would make a map fair, but has considered whether it could find that a map is not fair at all. Given that most state legislatures retain the responsibility for drawing their own districts, and some advantage to the majority party is therefore accepted as inevitable, the Supreme Court has considered how it might derive a “judicially manageable standard” from the Constitution to differentiate between legitimate advantage and bias that would have such an effect it would amount to unconstitutional gerrymandering. Although academics have offered various standards over the years, the Court has not yet found a link to the Constitution.

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20 Conversation with Professor Patrick Murray, May 23rd 2011, Monmouth University, NJ.
However, the Supreme Court has given its protection to maps that are drawn with an intention to be fair. In *Gaffney v Cummings*\(^ {21}\) the Supreme Court was presented with a map that had been designed to award seats to both parties in proportion to their voter support, and although its proposed districts had population disparities that could have been reduced, the court refused to intervene.

Plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.\(^ {22}\)

In 1986, in *Davis v Bandemer*,\(^ {23}\) the Supreme Court first decided that a gerrymandering case could be justiciable under the Equal Protection Clause of the Constitution. The opinion in that case was handed down nine months after it was argued, and in the interim a UCLA conference was held to discuss possible standards.\(^ {24}\)

Various standards were offered. They included a symmetry standard - a fair plan should award parties the same seat share if they won the same vote share. A second outcome would have required only that no bias was artificially imposed. Other proposed tests would require a fair map to treat incumbents similarly regardless of their party, or to provide an evenly graded series of marginal seats on both sides of the pendulum or a minimum number of marginal seats, or translation of a party’s vote majority into a majority of seats in the legislature (fairness at a 50:50 outcome), or proportionality between vote share and seat share for major parties.\(^ {25}\) Grofman combined several, to propose a 15-item list that included disregard for due process (especially transparency), disregard for traditional redistricting criteria (including compactness, existing boundaries, community of interest, equal population), and violation of outcome criteria (evidence of packing and cracking, pitting incumbents against each other, fragmenting districts and wrong winner election outcomes).\(^ {26}\) Grofman’s tests would show whether a plan was biased and unresponsive.

A wrong winner result had in fact been at issue in Bandemer but Grofman had argued in the lower court that one disproportionate lower house result should not by itself be proof of gerrymandering, on the grounds that single member district systems never do produce proportional outcomes. With the benefit of the UCLA conference discussions, a majority of the Supreme Court justices agreed in their *Bandemer* judgment that political gerrymandering questions were justiciable, but that a standard was not yet discernable. Still, a majority opinion found that to be unconstitutional, bias would need to be so all-encompassing it would “consistently degrade a voter’s or a group of voters’ influence in the political process as a whole.”\(^ {27}\)

The Court set the bar so high that although it has since considered two major cases of obvious gerrymandering\(^ {28}\) it has not been able to invalidate any maps. However, the academic advice has gradually firmed to one preferred option: partisan symmetry.\(^ {29}\) Parties should win the same share of the seats if they win the same share of the votes, and a plan should be considered unfair if it consistently produces results that advantage one party. As for how much advantage is too much, the academics leave that question to the Court.\(^ {30}\) Not only is this now the preferred standard in the academic world, in the most recent landmark

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\(^{21}\) *Gaffney v Cummings* 412 U.S. 735 (1973).

\(^{22}\) 412 U.S. 753-4.

\(^{23}\) *Davis v Bandemer* 478 U.S. 109 (1986).

\(^{24}\) Papers presented to the conference were published in the *UCLA Law Review* vol. 33, no. 1, October 1985.

\(^{25}\) For more on the alternative standards proposed see Newton-Farrelly 2011.


\(^{27}\) *Davis v Bandemer* 478 U.S. 134.


\(^{29}\) Grofman and King (2007) "We are aware of no published disagreement or even clear misunderstanding in the scholarly community about partisan symmetry as a standard for partisan fairness in plurality-based American elections …

\(^{30}\) I have covered this subject in more detail in Newton-Farrelly 2011.
case of LULAC v Perry it was also the standard used by both the expert for the plaintiffs and the expert for the State.  

Although no recognition has been given to New Jersey’s methodology in these cases, in LULAC the academics considered that a map could be evaluated prospectively by adjusting the result in each district by a uniform amount to find the number of seats won by each party at a hypothetical 50:50 election outcome. Given that this is exactly what New Jersey does (and so does South Australia), and that New Jersey’s (and South Australia’s) methodology requires partisan symmetry in order to address bias in the safe seats, ensure responsiveness in the marginals and produce a fair outcome at a 50:50 result, the Stokes standard and South Australia’s fairness requirement have effectively operationalised the partisan symmetry standard.

Summary: Apart from New Jersey there are no comparable jurisdictions where geographically-induced bias is addressed. If or when the US Supreme Court agrees to a standard it seems likely to include a requirement that a fair plan must reward both parties with a similar share of seats for any given share of the vote, and that in particular one party must not be more likely to win a majority of the seats if there is a 50:50 result.

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References

Legislation

Constitution Act 1934 (SA) s.83(1)  

Cases

Davis v Bandemer 478 U.S. 109 (1986)  

Gaffney v Cummings 412 U.S. 735 (1973)  


Interviews

Professor Patrick Murray, 23 May 2011, Monmouth University, NJ.

Emeritus Professor Ernest Reock, 5 May 2011, Rutgers Centre for Government Services, New Brunswick, NJ.

Assemblyman Jay Webber, Republican Chair on the New Jersey Apportionment Commission, 17 May 2011, Trenton, NJ.

Publications

Bartels L, 2001, Certification of Professor Larry Bartels to the United States District Court, District of New Jersey, in the matter of Page v Bartels (civil action No.01-1733), United States District Court, District of New Jersey.


**Websites**
