

IMPROVING NEW JERSEY'S LEGISLATIVE APPORTIONMENT PROCESS

Recommendations to increase transparency, accountability,
and representation

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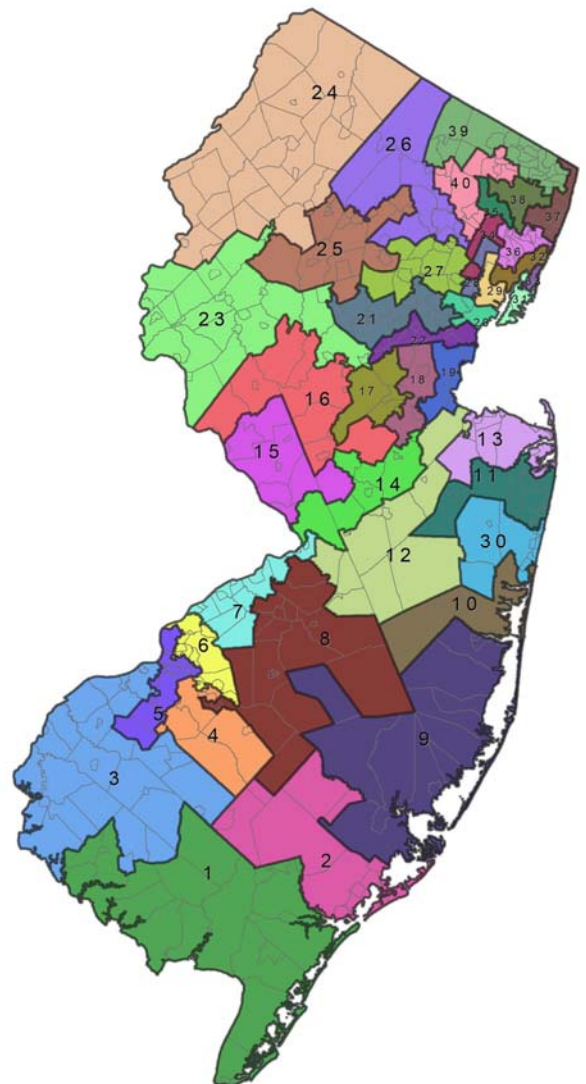
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I. INTRODUCTION

Recent efforts to change New Jersey's legislative apportionment¹ process as well as high profile cases before the U.S. Supreme Court have brought welcome attention to this fundamental component of our representative democracy, generating a significant amount of feedback from good government advocates across the political spectrum.

New Jersey's existing bipartisan commission structure is considered to be superior to a redistricting process controlled by the legislature itself. However, there is room to enhance transparency, accountability, and representativeness in the Legislative Apportionment Commission which was established more than fifty years ago. This report is the product of a group of academics who have been involved in redistricting reform efforts both at a national level and in New Jersey. Their combined familiarity with a large body of redistricting theory and research is distilled here in recommendations that are directly relevant for New Jersey. The objective of this report is to provide a roadmap for improving the state's legislative apportionment process in line with emerging best practices while recognizing the unique realities of New Jersey's political structure and environment.

Major Recommendations:

- Retain the bipartisan commission structure, ensuring that commissioners appointed by the parties reflect the state's diversity.
- Increase the number of independent commissioners to three and appoint them at the start of the apportionment process.
- Create apportionment guidelines that prioritize communities of interest and partisan fairness but avoid formulaic requirements that impinge on the commission's ability to balance and reconcile competing principles.
- Increase opportunities for public comment and extend the period for comment.
- Facilitate informed public comment with disclosure of precinct and voting data, including digital tools to allow all citizens to offer comment in a timely manner.

¹ The New Jersey Constitution uses the term "apportionment" to describe the process for drawing the state legislative map and "redistricting" to describe the process for drawing the congressional district map. Please note that this report uses the terms "apportionment" and "redistricting" interchangeably to describe the legislative process. Readers should also note that this report is concerned solely with redrawing the legislative map and does not touch upon the congressional redistricting process.

II. BACKGROUND

Every decade following the latest U.S. Census, states are required to redraw their legislative boundaries to ensure that each district is “substantially equal” in population. In most states, the process of drawing and approving new legislative maps rests with the legislature itself. New Jersey is one of a now growing number of states that grants this power to an extra-legislative body. In fact, the state’s bipartisan Legislative Apportionment Commission was at the forefront of redistricting reforms when it was first created in the 1960s. Today, some states are moving beyond the bipartisan model and entrusting redistricting to politically independent commissions.

Regardless of the process used to draw new maps, legislative redistricting in every state is constrained by the following federal requirements:

1. Each district must be “substantially equal” in population, which is defined as requiring less than a 10 percent population variance between the largest and smallest districts in a legislative map [*Reynolds v. Sims*, 377 U.S. 533 (1964); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973)].
2. Districts cannot be drawn with race as the predominant factor absent a compelling justification. [*Cooper v. Harris*, 137 S. Ct. 145 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017)].
3. Districts cannot be drawn in ways that dilute the ability of minority groups “to elect representatives of their choice” [Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(b)].

In New Jersey, the state constitution adds the following requirements:

1. Legislative districts “shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible” [N.J. Const. Art. IV, Sect. II, par. 3].
2. “[N]o county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State” [NJSC: Art. IV, Sect. II, par. 3].²

² New Jersey state courts have upheld the need to adhere to a strict interpretation of the constitutional requirement to limit the division of municipalities, but have permitted contravention of the same language as it

New Jersey's redistricting process is undertaken by a bipartisan commission comprised of five (5) Democrats and five (5) Republicans appointed by the respective state party committee chairs. The commission is given one month after the new U.S. Census count is delivered to agree upon a new legislative map [NJSC: Art. IV, Sect. III, par. 1].

When the two sides cannot come to an agreement on a new map – which has been the case in every apportionment cycle since 1981 – the chief justice of the state supreme court appoints an independent member [NJSC: Art. IV, Sect. II, par. 2]. The constitution does not describe the responsibilities of this individual, but since this appointment brings the commission to an odd number of members, the implicit role of this person has been to serve as a tie-breaking vote. Each of the independent members over the past four apportionment cycles has attempted to act as an arbiter who brings the two partisan contingents together.³ Each has defined this role as a “referee” by laying out ground rules for the cycle's process, attempting to move both sides to create revised maps that adhere to these rules, and hopefully achieving compromise and consensus. In practice, though, the independent member must choose between maps developed by one or the other of the commission's two party contingents.

As implemented, New Jersey's redistricting process poses serious problems because there are no consistent guidelines that independent members are required to apply. Other than the federal and state constitutional guidelines mentioned above, the independent member is free to create new “rules” in each decennial process by choosing to prioritize different standards of redistricting, such as partisan fairness, communities of interest, competitiveness, continuity of representation, and so on. Because the independent member comes to the process later than the partisan members, that person historically has been relegated to the role of arbiter, rather than having the ability to potentially build consensus by working with the partisan members from the outset of deliberations. Furthermore, the constitution does not provide any guidance on either qualifications or restrictions for who can serve as the commission's independent member.

This lack of guidance leads to a redistricting process that is subject to a single person's notion of which standards matter most. This is problematic no matter how well-informed or well-intentioned that independent member may be.

applies to counties [*Scrimminger v. Sherwin*, 60 N.J. 483, 487 (1972); *Gonzalez v. State Apportionment Com'n*, 428 N.J. Super. 333, 353 (App. Div. 2012)].

³ For an overview of the New Jersey process and how the first independent commission member defined his role, see [Legislative Reapportionment in New Jersey](#) by Donald E. Stokes (The Fund for New Jersey, 1991).

III. COMMISSION MEMBERSHIP

The National Conference of State Legislatures identifies 14 states, including New Jersey, that assign primary responsibility for legislative apportionment to a commission and another 11 states that have advisory or “backup” commissions.

Most state commissions are bipartisan although not necessarily equally balanced between the two major parties. Most states give both the majority and minority parties slots on their commissions that are appointed either by legislative leaders or party officials. Some also include statewide elected officials such as Governor and/or Secretary of State, which will impact the commission’s partisan balance. Some of the states with independent commissions (e.g. California, Colorado, Michigan) create a pool of eligible members and then select equal numbers of members from the two largest parties as well as a contingent of unaffiliated voters.

At least four of the 14 commission states will be new or have a substantially different process in 2021. This includes the two independent commissions in Colorado and Michigan. Missouri has also changed its commission structure so that a designated state demographer will draw the initial map, with any changes to that map requiring the approval of a supermajority of the commission.

While creating a truly independent commission is an aspirational goal for New Jersey, making improvements to the existing bipartisan commission structure is a more realistic strategy at this time. Recommended changes are discussed below and include:

- **Increasing the size of the commission to thirteen (13) members.**
- **Maintaining the current five (5) Democratic and five (5) Republican partisan members and specifying that, each party’s members should represent the state’s diversity.**
- **Increasing the number of independent members from one (1) to three (3), appointed by the chief justice of the New Jersey Supreme Court, one of whom is named chair of the commission.**
- **Appointing independent members at the beginning of the process.**
- **Establishing a “majority+1” standard for final map approval.**

Appointment of partisan members

Some states do not allow elected or appointed officials to serve on their commissions and a few also include a short-term prohibition on any commission member subsequently running for the legislative office. The purpose of these proscriptions is to prevent legislators or those aspiring to be legislators from being able to “choose their voters.” While New Jersey’s current process could in theory allow this sort of approach – with incumbent legislators on the commission

being able to ensure that any new map includes district lines beneficial to them – New Jersey’s political structure provides a check on those who put their own personal interests ahead of the party as a whole. Specifically, the strength of the state’s party organizations means any such commission member will be answerable to the party in subsequent elections, including the loss of official organizational support in primary contests.

Because New Jersey’s process involves a bipartisan – as opposed to an independent – commission, it is not unreasonable to leave the determination of who can best serve the interests of each party to the respective leadership of those parties. This applies not only to who can serve, but which party leaders are granted the authority to appoint those members. As such, we are not taking a position one way or another on the process of appointing partisan members to the New Jersey Legislative Apportionment Commission. However, **we recommend that the state constitution should include a stipulation that partisan members be appointed “with due consideration to geographic, gender, ethnic and racial diversity.”**

Appointment of independent members

The New Jersey legislative map has been framed in large part by the priorities of a single independent member over the past four redistricting cycles. This includes an independent member who developed a partisan fairness criterion in 1981 and 1991, one who focused on racial representation in 2001, and another who prioritized continuity of representation in 2011. An independent member may come to the table with a clear idea of which principles should be prioritized or that member can be successfully lobbied by one partisan contingent or the other to elevate certain redistricting criteria. New Jersey’s process has been subject to both dynamics.

Expanding the number of independent members and setting forth qualifications for the appointment of those members will lessen the likelihood that idiosyncratic priorities of one member will be able to dominate. Furthermore, having multiple “referees” who can confer on matters will help ensure that agreed-upon rules are applied consistently and will result in a more deliberative process rather than have a dynamic where the two parties vie to meet one individual’s personal preferences. **Given the size of the partisan delegations in the current system, appointing three (3) independent members to serve alongside the 10 partisan members would set the right balance for a constructive working relationship among all groups in the commission.** Other state commissions range in size from 3 members in Arkansas to 16 members for the lower house commission in Missouri. Increasing New Jersey’s commission to 13 members would keep its commission size within the range of other states.

In addition to increasing the number of the independent members, there is also the issue of the qualifications, or disqualifications, that should determine who is eligible to serve in this capacity. The New Jersey Constitution is currently silent on the qualifications for the legislative

commission's independent member. **This should be modified to be more in line with requirements for serving on the state's congressional commission, specifically referencing their experience and knowledge and also prohibiting officeholders.**

Bipartisan commissions have been criticized for excluding politically independent voters in the appointment process. In New Jersey specifically, some have claimed that the 4-in-10 registered voters who are not affiliated with either major party lack a voice in the process. This is contrasted with citizen commissions that set aside slots for non-partisan members, such as in California where just over one-quarter of registered voters are not affiliated with any party.

The idea that the largest bloc of voters in New Jersey is politically independent, though, is contradicted by the reality of how voters behave. The relatively large number of unaffiliated voters in New Jersey is almost entirely a byproduct of the state's registration process, where the act of affiliating with a political party generally occurs only when a voter participates in a party primary. However, primary election turnout in New Jersey is low relative to many other states. This is due in large part to a lack of competitive primary races and the late date of the state's primary in presidential election years. The large number of unaffiliated voters on the registration records masks the underlying partisan tendencies of those voters. Polling data shows that most unaffiliated voters do in fact identify with one of the two major political parties and exhibit consistent partisan voting patterns.⁴ Requiring that all independent members of New Jersey's bipartisan commission be unaffiliated voters is neither practical nor a guarantee that they would actually be nonpartisan in their political views.

Finally, specifically requiring that an independent member be nonpartisan could place unreasonable expectations of political "purity" and unwarranted scrutiny on the motivations of independent members on a bipartisan commission. Past partisan associations of such members or the political activity of a member's relatives could be used by those who disagree with the decisions of such members to undermine the credibility of the commission as a whole both in judicial proceedings and in the court of public opinion, as occurred in Arizona after the most recent round of redistricting. Absent the establishment of a true citizens commission, there is more downside than upside to requiring that independent members on New Jersey's bipartisan commission be unaffiliated voters. Independent members on a bipartisan commission should be chosen largely for their expertise and demonstrated ability to be independent arbiters

⁴ A stark illustration of latent partisanship among unaffiliated voters in New Jersey is the sudden shift in party registration that occurred in 2008 when the state temporarily moved its presidential primary from June to February, spurring a record high turnout for a primary election. Immediately prior to that primary, 57% of registered voters were not affiliated with any party. This number plummeted to 45% the day after the primary as many voters who had historically supported a party in general elections (but never voted in a primary) became registered with that party as a result of having voted in the competitive 2008 contest.

notwithstanding their party affiliations. However, it would be prudent to stipulate that **no more than two (2) independent members may be affiliated with the same political party.**

A final concern with the appointment of independent members is about the timing of those appointments. Under the current process, the independent member is not appointed until one month after the partisan members begin to meet. This has been the case in every cycle since 1981, delaying any substantive deliberations by the commission. There is no reason for this interval. **Independent members can and should be appointed to the commission at the very start of the process.**

As such, **we recommend the following changes to the appointment of independent members for the New Jersey Legislative Apportionment Commission:**

- There shall be three (3) independent members appointed by the chief justice of the New Jersey Supreme Court.
- The chief justice shall appoint one of the independent members to chair the commission.
- Independent members “shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State” and shall be “qualified by education and occupational experience, and by demonstrated ability to represent the best interest of the people of this State.” This language reflects the independent member qualifications for New Jersey’s congressional redistricting commission.
- No more than two independent members may have been registered as affiliated with the same political party at any time for two years prior to appointment to the commission.
- The independent members, along with the partisan members, shall be appointed by October 15 and certified by November 1 in the year the decennial census is taken.
- Sufficient resources for legal and staff support should be made available for independent members so they are on equal footing with the two parties, who historically start formulating their strategies, legal positions, and potential maps well before the commission is appointed.

Majority vote requirement for map adoption

Increasing the size of the commission to 13 members also raises the question of what type of majority vote would be required to adopt a new legislative map. Most bipartisan commissions require a simple majority of the membership to approve a new legislative map. Some

independent commissions require multipartisan supermajorities. For example, the California process requires the approval of 9 out of 14 members with at least 3 affirmative votes from each group (i.e. Democrats, Republicans, and unaffiliated voters).

Considering the realities of a bipartisan commission, a compromise between these two types of majority models is appropriate. As such, **we recommend that the affirmative vote of 8 of the 13 commission members be required for the adoption and certification of a new legislative map.** This “majority + 1” requirement means that a final map would have to garner either bipartisan support or the unanimous support of the independent members and one partisan delegation. This provision will help reinforce the legitimacy of the final plan in the public’s view and ensure that one party cannot use the process to steamroll the other.

If at least 8 members of the commission cannot agree on a final map and the process deadlocks, the decision would revert to the New Jersey Supreme Court. The prospect of having the legislative apportionment process referred to the Supreme Court, who can choose to accept, adapt, or ignore draft maps developed by the commission, will serve as an incentive for commission members to reach consensus.

At least 12 states explicitly involve their supreme court as a back-up for a failed redistricting process. In some states, map drawers send two or more maps to the court so justices can choose one of the options. In others, courts have discretion to consider proposed maps or to bring in an expert to draw districts from scratch. In New Jersey’s congressional redistricting process, the supreme court must decide between two maps submitted by the commission. This provision asks the court to side with one party over the other and could lead to the two parties submitting gerrymandered maps in the expectation of a 50/50 chance of having their map adopted. Because this possibility is antithetical to the aims of the expanded commission proposed here, **we recommend that the constitution give the state supreme court discretion to consider preliminary commission-drawn maps or to create their own in the event of a deadlock.**

IV. CRITERIA AND PRIORITIES FOR THE NEW JERSEY PLAN

The New Jersey Constitution is largely silent on the criteria that should be used in drawing legislative maps. This has led to wide variations on which principles have been prioritized by each decennial commission. Redistricting case law acknowledges that states can have legitimate reasons for applying different priorities for drawing legislative maps. However, these priorities should be fairly consistent across time for each individual state.

Some may argue that these priorities should be codified into specific formulas and left to a computer or some other “objective” instrument to calculate. However, each decennial period presents a new political environment and thus a unique set of challenges in how even previously agreed-upon criteria should be applied. This requires human deliberation and decision-making.

While we acknowledge the vital discretionary role of the members of each commission, it is important to provide guidance on overarching principles that should be applied in the redistricting process. Each decennial commission may in fact choose to operationalize those principles with statistical models. However, it would be neither practical nor advisable to prescribe mathematical formulas for every subsequent redistricting cycle, because those formulas can be flawed or only applicable in a certain context. This report recommends constitutional language that provides guidance for the apportionment process while still offering flexibility for each decennial commission to apply those principles within the political environment of its time.

Recommended changes include:

- **Codifying current standards for population equality and racial representation as core principles in the New Jersey State Constitution.**
- **Including the preservation of communities of interest and partisan fairness alongside the protection of municipal boundary integrity as high priority criteria.**
- **Establishing compactness, and competitiveness as secondary criteria.**

The following describes common standards used in redistricting plans, with recommendations for how they should be applied in New Jersey.

Equal population

As discussed elsewhere in this report, the U.S. Supreme Court has established parameters for the equal population requirement as it applies to legislative redistricting. The state Constitution as amended in 1966 includes specific language defining equal populations that has been superseded by federal law. **We recommend that New Jersey’s constitutional language be amended to reference federal standards on population equality and the 1966 language be deleted.**

Racial representation

As discussed elsewhere in this report, all states must adhere to the racial representation provisions of the Voting Rights Act (VRA). In fact, New Jersey’s 2001 legislative map contributed to the federal court’s directives on how those provisions can be applied [see *Page v. Bartels* (2001)]. Some states have gone beyond the requirements of the VRA to ensure that racial

minorities have an equal opportunity to participate in the political process and to elect candidates of their choice, either alone or in coalition with others. **We recommend that New Jersey's constitutional language be amended to provide express protections for communities of color.**

Contiguity

Nearly every state requires legislative districts to be contiguous. This is one of the few traditional redistricting principles specified in New Jersey's constitution. Contiguity should be a fairly straightforward concept in New Jersey, where all populated areas are accessible by land, road or bridge. Ideally, different portions of a district should be connected by more than a single point. The 2011 New Jersey map pushed the concept of contiguity to its limit with the 34th Legislative District, where the northern and southern portions of the district are connected by one lane of a roadway and part of an adjacent cemetery. However, developing a definition of nonpoint contiguity may be impractical and ineffective given other higher priority criteria. **We recommend that current contiguity definitions be maintained.**

Political boundaries

Aligning legislative districts with existing political boundaries where possible will make elections less complicated, less costly to administer, and less confusing for voters. Counties and municipalities can also serve as an indicator of shared interests among individuals living within their boundaries, although this can be imperfect. On the other hand, given the very large variations in population across New Jersey's 565 municipalities, political boundary lines may actually divide communities with shared interests, particularly in large suburban townships where residents of one section of a municipality may share more common interests with residents of an adjacent municipality than they do with residents elsewhere in their own municipality. However, we recognize that identification with one's home municipality is a compelling force in New Jersey's political culture.

The maintenance of political boundaries was clearly a priority for the framers of the 1966 commission plan. This consideration, along with contiguity and compactness [28 U.S.C. 294], were the only criteria included in the constitutional language establishing the Legislative Apportionment Commission. While the constitutional restriction on limiting the division of municipalities has largely been adhered to and upheld by the courts in each new map, the same restriction on dividing counties has largely been ignored. **Acknowledging this political reality, we recommend maintaining the protection of municipal boundaries but deleting reference to county boundaries.**

Communities of interest

Communities of interest are subsets of the population bound by common concerns or social characteristics. These communities can be captured by existing geographic or administrative

boundaries, such as counties or cities, but sometimes they are not. Preserving communities of interest is not a new concept in redistricting. Thirty states consider communities of interest in legislative redistricting. Seventeen of these states currently have provisions relating to keeping people with shared concerns together and numerous courts have leaned on the principle when stepping in to draw district boundaries.

Identifying communities of interest is a fact-intensive process. Not only must map drawers consider demographic data, but the process should also seek input from the community members themselves. Through in-person public hearings and electronic public comment, citizens can provide testimony explaining where their communities are located and how their interests are relevant to legislative representation.

Drawing districts around communities of interest produces many benefits. Such maps allow organic political competition at both the primary and general election levels with candidates and parties competing with each other to advance proposals that address the common needs and concerns of each particular community. Further, when districts coincide with preexisting networks, it is easier for citizens to organize and engage with their elected officials, raising civic participation and improving the quality of representation. The community of interest approach also limits the discretion of the map drawers to carve up populations based on partisanship and skew plans in favor of particular political parties or incumbents. **We recommend that New Jersey's constitutional language be amended to make communities of interest a central organizing principle for drawing the legislative map.**

Partisan fairness

The creative drawing of lines can systematically shut one party out of power, reducing its opportunities to win races. This can be done by cracking voters of one party between districts, while packing them densely in others. A fairer approach would be to aspire for the balance of partisan control of districts to broadly correspond to each party's relative strength in the electorate. However, the operationalization of this concept is anything but simple.

One concept of partisan fairness equates a party's share of legislative seats directly with its statewide share of the vote. This principle was applied by Donald Stokes when he served as the New Jersey commission's independent member in 1981 and 1991 and was utilized by subsequent apportionment commissions. Stokes documented his use of the partisan fairness standard as a check on the map once other principles were met. Stokes used prior legislative election data to gauge whether the new map was likely to produce a fair result, but his procedure tacitly acknowledges that a definitive assessment of any redistricting plan's fairness cannot be made until after an election has been held under the new legislative map.

Proportional party representation, though, is an inexact standard. Past voting is a commonly accepted way to evaluate the fairness of a map because most voters have consistent partisan voting habits. However, the resulting share of either party's legislative seats tends to exceed – or fall short of – its statewide share of the vote. This arises from the winner-take-all nature of single-member districts. In a given district, a candidate may win only 50%-plus-1 of the two-party vote, yet will win the “entire” seat. Thus strict proportionality, while conceptually appealing, often does not occur even in a neutrally drawn map.

Superior measures of partisan fairness are available. One way to gauge fairness is to ask whether the major parties have similar opportunities to win competitive races. For example, if Party A's likely win margins are much smaller than Party B's likely wins, then Party B may have been packed into a few districts [Wang, “Three Tests for Practical Evaluation of Partisan Gerrymandering,” *Stanford Law Review*, 2016]. On the other hand, if Party A's winning margins are highly similar in size, then the map may have been engineered to the maximum number of wins for Party A. The right test for detection can depend on a state's particular political circumstances. It should also be noted that measures of fairness may be specific to federal versus state elections and for executive versus legislative positions, because voter preferences can vary depending on those circumstances.

It is important that New Jersey's legislative map is not drawn to give one party an advantage, or disadvantage, that is out of line with the overall preference for that party among the state's electorate. Rather than write a specific test into the state constitution, a suitable reform is to require that a map should avoid conferring “inequality of opportunity” [Wang, Remlinger, Williams, “An Antidote to Gobbledygook,” *Election Law Journal*, 2018]. This type of approach allows for flexibility to respond to future changes in New Jersey's political environment. Measures of fairness can be applied as needed by the commission as a check on the map after other priority criteria have been met. **We recommend that a statement restraining the commission's ability to favor or disfavor a political party at a statewide level be included as a primary criterion after communities of interest.**

Compactness

Compactness is a traditional redistricting principle that is currently included in the New Jersey Constitution. When this provision was devised five decades ago, compactness was seen as a protection against partisan gerrymandering of districts. With current technology it is entirely possible to gerrymander a map while maintaining compact districts. It may be necessary and even justifiable to sacrifice some degree of compactness to comply with higher-priority criteria. Furthermore, there are many different ways to measure compactness (e.g. Reock, Convex Hull, Polsby-Popper, Schwartzberg) and undoubtedly more will be developed. By elevating communities of interest as a priority, compactness as a principle for its own sake becomes less

of an imperative in guarding against gerrymandering. **While compactness remains a desirable outcome, we recommend that compactness be a secondary criterion.**

Competitiveness

The number of competitive elections nationwide has been declining over the past few decades. Many good government advocates see electoral competitiveness as a positive attribute for legislative bodies. For example, competitive districts may incentivize political representatives to compromise on issues, leading to improved outcomes for most citizens. Some observers link declining voter turnout to the growing lack of competitive elections. Research also suggests that competitive elections play a critical role in curbing corruption among public officials. On the other hand, competitive districts have become more difficult to draw as existing geographic units (such as counties) have become more polarized in their partisan voting preferences. Also, having too many competitive districts could lead to wide swings in the legislature's partisan balance based on small shifts in the statewide vote. As such, prioritizing competitiveness could pose a conflict with meeting high priority racial representation and community of interest standards. Like partisan fairness, competitiveness seems like a principle where an agreed upon objective metric can be achieved, but in reality it is as open to interpretation as any other redistricting concept. **We recommend that competitiveness be listed as a secondary consideration after higher priority criteria have been met.**

Incumbency

A redistricting plan that is drawn to protect incumbents entails both advantages and disadvantages. Experience in office can be a good thing as it may take time for a politician to learn about their district and constituents. Incumbents may be better able to perform their representative function as they gain insight into the preferences of their electorate and experience advocating for them in the legislative process. On the other hand, prioritizing the protection of incumbents would likely be at odds with higher priority criteria that would provide emerging communities of interest with effective representation. In fact, some states, including California, Iowa, Montana, and Nebraska, prohibit using political data, such as incumbency residence, to develop redistricting plans. Like the related concept of continuity of representation, the benefits of this principle will likely be derived by the constitutional requirement of respecting municipal boundaries, and thus there is little need to duplicate it as an independent principle. **We recommend that incumbency not be included among the priorities for legislative apportionment.**

Preserving geographic cores

Preserving the core geography of existing districts in the apportionment process, sometimes referred to as continuity of representation, is another common principle. The benefits of this approach is that voters maintain familiarity with their districts and their fellow voters' interests. However, this principle can be used as a de facto incumbency protection plan. In New Jersey,

respecting municipal boundaries offers many of the positive effects of preserving core portions of existing districts while allowing for the application of other high priority criteria. **We recommend that preservation of geographic cores not be included among the priorities for legislative apportionment.**

V. PUBLIC INPUT

New Jersey has no requirements for public participation and transparency in the legislative apportionment process.⁵ Providing the opportunity for public input, particularly as it pertains to the communities of interest standard, should be an imperative at the very start of the process - even before the census is complete.

Public comment may begin with hearings and online requests for information. Citizens should have ample opportunity to tell commissioners about their particular communities of interest. This can occur at public hearings or electronically. In other states, commissioners have said that they preferred input in the form of maps. This can be done online with inexpensive or even free software tools, whether on a home computer, on a handheld device, or in a public library or community center. The commission should provide guidance to standardize input from the public on relevant criteria, as well as the submission of potential maps. These initial hearings will help guide commission priorities even before the census count is certified.

The commission will have access to preliminary census data that will indicate the probable challenges in drawing a new map (e.g. the areas where population has been gained or lost as well as shifts in the concentration of different racial and ethnic groups). This information should be made available to the public prior to the initial public hearings.

Public hearings should continue after the census count is published. Once municipal-level census data have been released, the commission should provide public access to the total population counts, including the voting age population by racial and ethnic groups for each municipality in a format easily accessible to the layperson. Additionally, the commission should provide voter registration and vote history data for each municipality. A process for further public input, including the submission of maps, should be allowed for an adequate period of time after the census count is certified.

Prior to adoption of the plan, the commission should distribute to the public all “final” draft maps that have received the preliminary support of at least three (3) commission members. The commission should then hold public hearings to allow for input on these maps. The

⁵ In contrast, the New Jersey Constitution requires that the Congressional Redistricting Commission “shall hold at least three public hearings in different parts of the State. The commission shall, subject to the constraints of time and convenience, review written plans for the establishment of Congressional districts submitted by members of the public.”

commission may then choose to adopt one of the draft maps or make subsequent alterations based on public input. The final vote should be taken in a public hearing.

Starting the public input process prior to the census count being released should not be problematic. However, allowing for further public input once the commission has developed draft maps can run up against time constraints with the state's current election calendar. New Jersey's candidate filing deadline for legislative seats occurs in early April. Municipal census data is generally not available until February, giving the commission a very limited window in which to deliberate and decide on a final map. However, this is a somewhat arbitrary deadline driven by the June date of New Jersey's primary election. It is worth noting that New Jersey is not alone in facing this challenge. Virginia also holds legislative elections in odd-numbered years and has solved this problem by moving its primary election from early June to mid-August in redistricting years. Allowing for additional public input and transparency would necessitate another 4 to 6 weeks for the commission to deliberate. Considering the decade-long impact of the legislative map, providing additional time in the final stages of the redistricting process should take precedence over a single year's primary election calendar. **We recommend that New Jersey, by statute, move its primary election in redistricting years to mid-August to facilitate greater public input, transparency, and deliberation in the legislative apportionment process.**

VI. PROPOSED CONSTITUTIONAL CHANGES

The following is proposed language for amending the state constitution to apply the recommended legislative apportionment criteria discussed above. The full text of the proposed revised constitutional language can be found in Appendix B.

-- Amend Article IV, Section II as follows:

- Paragraph 1, delete [Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.].
- Paragraph 2, delete [, except that if the Senate district is composed of two or more counties and two senators are apportioned to the district, one senator shall be elected by the legally qualified voters of each Assembly district].
- Paragraph 3, delete [to which only one senator is apportioned] and delete from [Each of the remaining Senate districts shall be divided...] to the end of that paragraph.

-- Amend Article IV, Section III as follows:

- Paragraph 1, replace [ten] with "thirteen".
- Paragraph 1, replace [representation of the various geographical areas] with "geographical, gender, ethnic and racial diversity".
- Paragraph 1, after [... of the State.] insert "Three members shall be appointed by the Chief Justice of the Supreme Court of New Jersey to serve as independent members, who shall be qualified by education and occupational experience, and by demonstrated ability to represent the best interest of the people of this State. Each independent member shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State. No more than two independent members may have been registered with the same political party as one another for the preceding two years. The Chief Justice of the Supreme Court of New Jersey shall designate one of the independent members to chair the Commission."
- Paragraph 1, replace [November 15] with "October 15" and replace [December 1] with "November 1".
- Paragraph 1, delete text from [The Commission, by a majority of the whole number...] to the end of that paragraph and replace with "Vacancies in the membership of the commission occurring prior to the certification by the commission of legislative districts or during any period in which the districts established by the commission may be or are under challenge in court shall be filled in the same manner as the original appointments were made within five days of their occurrence."
- Paragraph 2, replace entire paragraph to read: "The Commission so constituted, by a majority of at least eight of its members, shall, on or before June 1 of the year following the year in which the census is taken, certify to the Secretary of State the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly. Such vote will take place with the Commission convened in open public meeting, of which meeting there shall be at least 72 hours' public notice, including with the notice the proposed plans for legislative districts that will be voted on at the meeting, and shall provide the public an opportunity to comment at the public meeting. Any vote by the commission upon a proposal to certify the establishment of a legislative district plan shall be taken by roll call and shall be recorded, and the vote of any member in favor of any legislative district plan shall nullify any vote which that member shall previously have cast during the life of the Commission in favor of a different legislative district plan. If the Commission is unable to certify the establishment of districts by the time required due to the inability of a plan to achieve eight votes, the Supreme Court, shall certify a plan, and in so doing may consider any of the plans submitted and voted at the Commission's final public

meeting or may appoint a special master to develop a plan that conforms to the requirements of this Constitution and the Constitution and laws of the United States.”

- Insert new Paragraph 3 as follows: “The Commission, in all circumstances, shall only certify a plan in which all districts comply with federal law regarding equal population of the districts and all districts are comprised of contiguous territory with the boundary of each district being a single nonintersecting continuous line. No district plan shall be drawn to deprive racial minorities of an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice whether alone or in coalition with others.
- a. The plan shall maximize compliance with the following criteria as set forth in the following order of priority:
 - i. No municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the municipality by one-fortieth of the total number of inhabitants of the State.
 - ii. The Commission shall preserve communities of interest within the same district to the extent possible. A community of interest shall mean a geographically contiguous population sharing common interests relevant to the legislative process such as trade areas, communication and transportation networks, media markets, or social, cultural, or economic interests. A community of interest shall not include common relationships with political parties, officeholders, or political candidates.
 - iii. No district plan, when considered on a statewide level, shall be drawn to unduly favor or disfavor a political party.
 - b. To the extent that is compatible with other criteria,
 - i. The plan shall draw each district to be as compact as possible.
 - ii. The plan shall attempt to maximize the number of competitive districts.”

- Insert new Paragraph 4 as follows: “The Legislative Apportionment Commission shall meet to organize as soon as may be practicable, but not later than two weeks after certification of the appointment of the members. At the organizational meeting the members of the Commission shall determine such organizational matters as they deem appropriate. Thereafter, a meeting of the Commission may be called by the chairman or upon the request of seven members, and seven members of the Commission shall constitute a quorum at any meeting thereof for the purpose of taking any action other than the meeting at which the establishment of districts is certified as prescribed by paragraph 2 of this section. Meetings of the Commission shall be held at convenient times and locations and, with the exception of public hearings required by paragraph 2 and paragraph 5 of this section, may be closed to the public. The Commission shall, subject to the constraints of time and convenience, review written plans for the establishment of legislative districts submitted by members of the public.”

- Insert new Paragraph 5 as follows: “The Legislative Apportionment Commission shall hold at least six public hearings in different parts of the State and shall provide at least 72 hours’ notice of any public meeting.
 - a. Prior to receipt by the Governor of the official decennial census of the United States for New Jersey, the Commission shall hold at least three public hearings in different parts of the State at times and locations convenient to the public.
 - b. The Commission shall hold at least three additional public hearings, in different parts of the State at times and locations convenient to the public, between four weeks and six weeks following receipt by the Governor of the official decennial census of the United States for New Jersey.
 - c. The Commission shall establish a website, to be administered by the Office of Legislative Services, or its successor, starting on December 1 of the year in which the census is taken. The website shall:
 - i. describe, in plain language, the process of the Commission; provide notice of all public meetings; provide access to transcripts and recordings of public hearings and all materials submitted to the Commission; and provide such other information as the Commission deems appropriate.
 - ii. provide the total voter registration by party in each municipality and the total votes received in each municipality by candidates in all general elections in the preceding decade for the offices of United

States President, United States Senator, Governor, State Senator and State General Assembly.

- iii. as soon as practicable after the official decennial census is available, provide the total population and voting age population counts by race and ethnicity for each municipality.
- iv. provide a process for members of the public to submit written plans and digital maps for the establishment of legislative districts and more general comments to the Commission.”

-- Insert new Paragraph 6 as follows: “The Legislature shall appropriate the funds necessary for the efficient operation of the Legislative Apportionment Commission.”.

-- Renumber existing Paragraph 3 to Paragraph 7.

APPENDIX A: Current Constitutional Provisions for Legislative Apportionment

NEW JERSEY STATE CONSTITUTION, ARTICLE IV

SECTION II

1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.

2. Each senator shall be elected by the legally qualified voters of the Senate district, except that if the Senate district is composed of two or more counties and two senators are apportioned to the district, one senator shall be elected by the legally qualified voters of each Assembly district. Each senator shall be elected for a term beginning at noon of the second Tuesday in January next following his election and ending at noon of the second Tuesday in January four years thereafter, except that each senator, to be elected for a term beginning in January of the second year following the year in which a decennial census of the United States is taken, shall be elected for a term of two years.

3. The General Assembly shall be composed of eighty members. Each Senate district to which only one senator is apportioned shall constitute an Assembly district. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the Senate district. The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

4. Two members of the General Assembly shall be elected by the legally qualified voters of each Assembly district for terms beginning at noon of the second Tuesday in January next following their election and ending at noon of the second Tuesday in January two years thereafter.

Article IV, Section II, paragraphs 1, 2, 3, 4 amended effective December 8, 1966

SECTION III

1. After the next and every subsequent decennial census of the United States, the Senate districts and Assembly districts shall be established, and the senators and members of the General Assembly shall be apportioned among them, by an Apportionment Commission consisting of ten members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election. Each State chairman, in making such appointments, shall give due consideration to the representation of the various geographical areas of the State. Appointments to the Commission shall be made on or before November 15 of the year in which such census is taken and shall be certified by the Secretary of State on or before December 1 of that year. The Commission, by a majority of the whole number of its members, shall certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly to the Secretary of State within one month of the receipt by the Governor of the official decennial census of the United States for New Jersey, or on or before February 1 of the year following the year in which the census is taken, whichever date is later.

2. If the Apportionment Commission fails so to certify such establishment and apportionment to the Secretary of State on or before the date fixed or if prior thereto it determines that it will be unable so to do, it shall so certify to the Chief Justice of the Supreme Court of New Jersey and he shall appoint an eleventh member of the Commission. The Commission so constituted, by a majority of the whole number of its members, shall, within one month after the appointment of such eleventh member, certify to the Secretary of State the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly.

3. Such establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor.

Article IV, Section III, paragraphs 1, 2, 3 amended effective December 8, 1966.

APPENDIX B: Proposed Constitutional Provisions for Legislative Apportionment

NEW JERSEY STATE CONSTITUTION, ARTICLE IV

SECTION II

1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions.

2. Each senator shall be elected by the legally qualified voters of the Senate district. Each senator shall be elected for a term beginning at noon of the second Tuesday in January next following his election and ending at noon of the second Tuesday in January four years thereafter, except that each senator, to be elected for a term beginning in January of the second year following the year in which a decennial census of the United States is taken, shall be elected for a term of two years.

3. The General Assembly shall be composed of eighty members. Each Senate district shall constitute an Assembly district.

4. Two members of the General Assembly shall be elected by the legally qualified voters of each Assembly district for terms beginning at noon of the second Tuesday in January next following their election and ending at noon of the second Tuesday in January two years thereafter.

SECTION III

1. After the next and every subsequent decennial census of the United States, the Senate districts and Assembly districts shall be established, and the senators and members of the General Assembly shall be apportioned among them, by an Apportionment Commission consisting of thirteen members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election. Each State chairman, in making such appointments, shall give due consideration to the geographical, gender, ethnic and racial diversity of the State. Three members shall be appointed by the Chief Justice of the Supreme Court of New Jersey to serve as independent members, who shall be qualified by education and occupational experience, and by demonstrated ability to represent the best interest of the people of this State. Each independent member shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State. No more than two independent members may have been registered with the same political party as one another for the preceding two years. The Chief Justice of the Supreme Court of New Jersey shall designate one of the independent members to chair the Commission. Appointments to the Commission

shall be made on or before October 15 of the year in which such census is taken and shall be certified by the Secretary of State on or before November 1 of that year. Vacancies in the membership of the commission occurring prior to the certification by the commission of legislative districts or during any period in which the districts established by the commission may be or are under challenge in court shall be filled in the same manner as the original appointments were made within five days of their occurrence.

2. The Commission so constituted, by a majority of at least eight of its members, shall, on or before June 1 of the year following the year in which the census is taken, certify to the Secretary of State the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly. Such vote will take place with the Commission convened in open public meeting, of which meeting there shall be at least 72 hours' public notice, including with the notice the proposed plans for legislative districts that will be voted on at the meeting, and shall provide the public an opportunity to comment at the public meeting. Any vote by the commission upon a proposal to certify the establishment of a legislative district plan shall be taken by roll call and shall be recorded, and the vote of any member in favor of any legislative district plan shall nullify any vote which that member shall previously have cast during the life of the Commission in favor of a different legislative district plan. If the Commission is unable to certify the establishment of districts by the time required due to the inability of a plan to achieve eight votes, the Supreme Court, shall certify a plan, and in so doing may consider any of the plans submitted and voted at the Commission's final public meeting or may appoint a special master to develop a plan that conforms to the requirements of this Constitution and the Constitution and laws of the United States.

3. The Commission, in all circumstances, shall only certify a plan in which all districts comply with federal law regarding equal population of the districts and all districts are comprised of contiguous territory with the boundary of each district being a single nonintersecting continuous line. No district plan shall be drawn to deprive racial minorities of an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice whether alone or in coalition with others.

a. The plan shall maximize compliance with the following criteria as set forth in the following order of priority:

i. No municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the municipality by one-fortieth of the total number of inhabitants of the State.

ii. The Commission shall preserve communities of interest within the same district to the extent possible. A community of interest shall mean a

geographically contiguous population sharing common interests relevant to the legislative process such as trade areas, communication and transportation networks, media markets, or social, cultural, or economic interests. A community of interest shall not include common relationships with political parties, officeholders, or political candidates.

iii. No district plan, when considered on a statewide level, shall be drawn to unduly favor or disfavor a political party.

b. To the extent that is compatible with other criteria,

i. The plan shall draw each district to be as compact as possible.

ii. The plan shall attempt to maximize the number of competitive districts.

4. The Legislative Apportionment Commission shall meet to organize as soon as may be practicable, but not later than two weeks after certification of the appointment of the members. At the organizational meeting the members of the Commission shall determine such organizational matters as they deem appropriate. Thereafter, a meeting of the Commission may be called by the chairman or upon the request of seven members, and seven members of the Commission shall constitute a quorum at any meeting thereof for the purpose of taking any action other than the meeting at which the establishment of districts is certified as prescribed by paragraph 2 of this section. Meetings of the Commission shall be held at convenient times and locations and, with the exception of public hearings required by paragraph 2 and paragraph 5 of this section, may be closed to the public. The Commission shall, subject to the constraints of time and convenience, review written plans for the establishment of legislative districts submitted by members of the public.

5. The Legislative Apportionment Commission shall hold at least six public hearings in different parts of the State and shall provide at least 72 hours' notice of any public meeting.

a. Prior to receipt by the Governor of the official decennial census of the United States for New Jersey, the Commission shall hold at least three public hearings in different parts of the State at times and locations convenient to the public.

b. The Commission shall hold at least three additional public hearings, in different parts of the State at times and locations convenient to the public, between four weeks and six weeks following receipt by the Governor of the official decennial census of the United States for New Jersey.

c. The Commission shall establish a website, to be administered by the Office of Legislative Services, or its successor, starting on December 1 of the year in which the census is taken. The website shall:

i. describe, in plain language, the process of the Commission; provide notice of all public meetings; provide access to transcripts and recordings of public hearings and all materials submitted to the Commission; and provide such other information as the Commission deems appropriate.

- ii. provide the total voter registration by party in each municipality and the total votes received in each municipality by candidates in all general elections in the preceding decade for the offices of United States President, United States Senator, Governor, State Senator and State General Assembly.
- iii. as soon as practicable after the official decennial census is available, provide the total population and voting age population counts by race and ethnicity for each municipality.
- iv. provide a process for members of the public to submit written plans and digital maps for the establishment of legislative districts and more general comments to the Commission.

6. The Legislature shall appropriate the funds necessary for the efficient operation of the Legislative Apportionment Commission.

7. Such establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor.