

To: Assemblyman Andrew Zwicker and Senator Kip Bateman
From: Professor Sam Wang, Princeton Gerrymandering Project
Date: December 5, 2018
Re: Partisan gerrymanders allowed by S.C.R. 43/A.C.R. 205

The Princeton Gerrymandering Project has analyzed the redistricting constitutional amendment S.C.R. 43/A.C.R. 205. This constitutional amendment is reputed to ensure a Democratic advantage. It also appears to attempt to prevent a Republican-favoring gerrymander. However, our analysis shows that on both counts, it fails to ensure these goals.

In this memo, I outline weaknesses that Will Adler, Ben Williams, and I have identified - and possible fixes.

General provision: equal division of favorable districts. S.C.R. 43/A.C.R. 205 mandates that of New Jersey's 40 districts, half must be more favorable to Democrats than the statewide average, and half must be more favorable to Republicans. This provision has some merit. Under conditions when the statewide vote is equally divided between the parties, it would be hard to build a strong advantage for either party. However, there are two exceptions.

First, it defines a district's partisan tendency in terms of statewide votes for President, Governor, and Senate. This is a common way to estimate the natural lean of a district. However, this leaves out the effects of local incumbency. We calculate, based on election results since 2011, that New Jersey incumbents have performed up to 10 percentage points better than their district's natural tendency. Because of this, a party can blunt the intent of the law by using its incumbents strategically.

Second, in a partisan-leaning state like New Jersey, the majority party can build itself a systematic advantage by drawing districts that are close to the statewide average. (In fact, the legislation defines such near-average districts as "competitive." This is misleading terminology, since most people would consider "competitive" to mean districts closer to 50–50.) Building many such districts also creates a volatile situation in which the majority party is vulnerable to becoming the minority if voters swing by even a few points.

These exceptions make it possible for either Democrats or Republicans to commit a gerrymander under the radar. If the tiebreaking commissioner, who is appointed by neither party, were persuaded to choose such a plan, one party would be placed at a serious disadvantage.

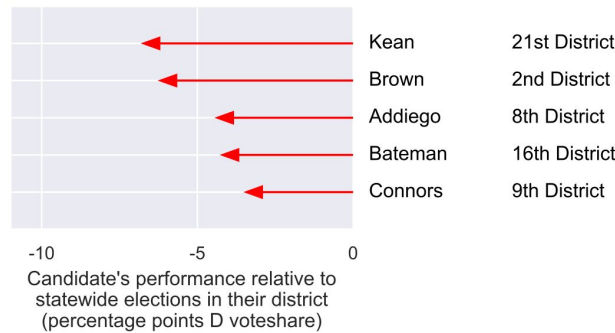
S.C.R. 43 / A.C.R. 205 Still Lets Both Parties Gerrymander

A Republican gerrymander under S.C.R. 43/A.C.R. 205. Republicans can build an advantage for themselves using a two-part strategy: first, by drawing their strong incumbents and weak Democratic incumbents into the competitive zone; and second, by putting their weakest

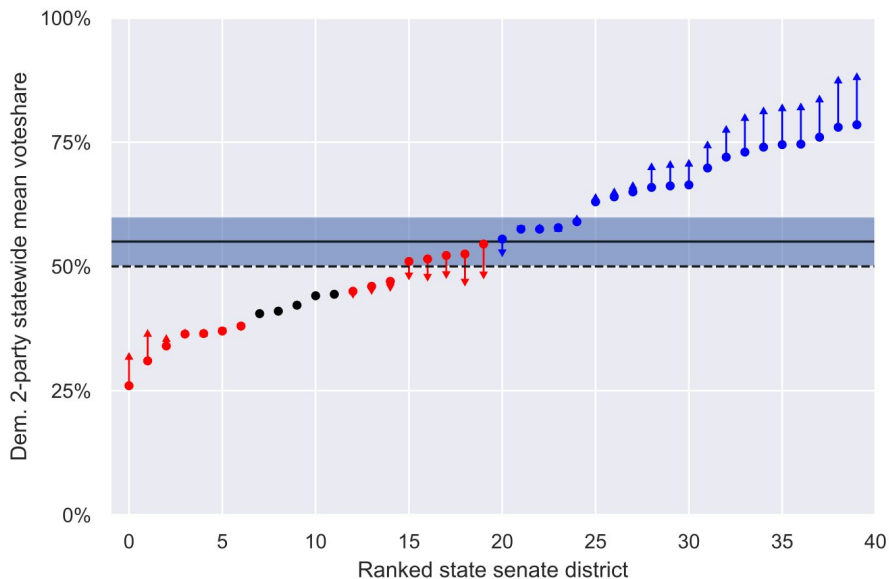
incumbents and the strongest Democratic incumbents into safe seats. The resulting hidden advantage for Republicans can be considerable, since a statewide shift of even 10 points in vote share can flip all of the “competitive” districts to Republican wins.

Such a swing is well within normal bounds. Between the 2008 Presidential election and the 2009 General Assembly election, the statewide vote in New Jersey shifted by nearly 10 points toward Republicans. If a Democrat is elected President in 2020, the general rules of politics predict that 2021 will be a bad year for the President’s party. Under such a “backlash” scenario, we have identified patterns of districting in which **Republicans would be favored to gain control even without winning a majority of the two-party popular vote.**

**POTENTIAL SOURCES OF REPUBLICAN VOTES UNDER S.C.R. 43/A.C.R. 205:
REPUBLICAN SENATORS WHO OUTPERFORM THEIR CURRENT DISTRICT**



**A REPUBLICAN GERRYMANDER:
A 57% DEMOCRATIC STATEWIDE VOTE GIVES 20 R, 20 D SEATS**

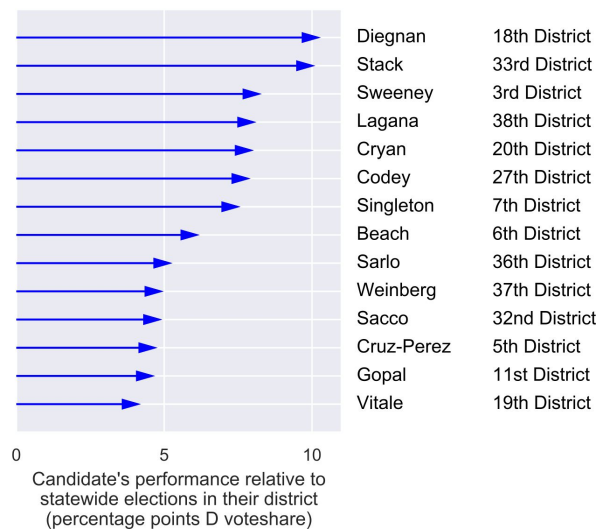


Dot color indicates incumbent party (black=open seat created by pairing Democrats). The vertical position of each dot indicates the district’s partisan tendency; arrows indicate the incumbent’s over/underperformance.

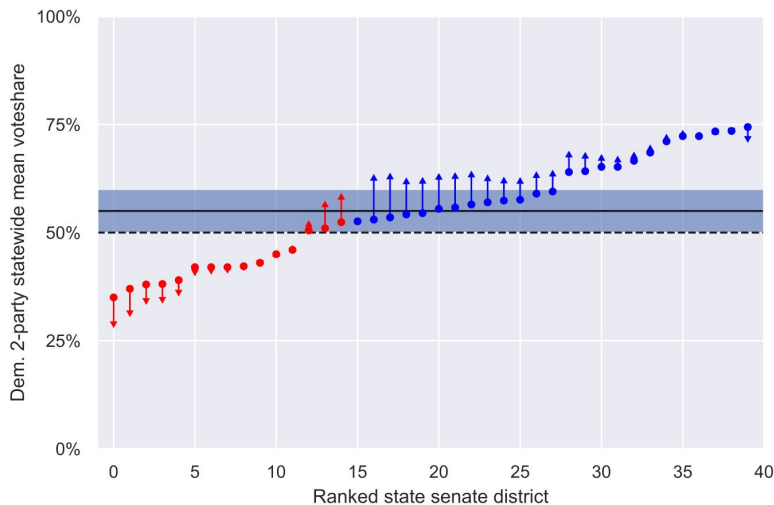
A Democratic gerrymander under S.C.R. 43/A.C.R. 205. Democrats can build an advantage for themselves by drawing many districts as close to the state average as possible. Most of the time, these will be winning districts. Such a plan could convert 57% of statewide popular support to 70% of seats.

Democrats can achieve this by putting their strong incumbents and weak Republican incumbents into the “competitive” zone. **Democrats could even retain their majority in the Assembly with as little as 45% of the statewide vote. Such a map could be drawn by transferring the support of strong Democratic Assembly and/or Senate incumbents to weaker nearby districts. Examples include Districts 6, 7, 18, 19, 20, 27, 37, and 38.**

**POTENTIAL SOURCES OF DEMOCRATIC VOTES UNDER S.C.R. 43/A.C.R. 205:
DEMOCRATIC SENATORS WHO OUTPERFORM THEIR CURRENT DISTRICT**



**A DEMOCRATIC GERRYMANDER:
A 57% DEMOCRATIC STATEWIDE VOTE GIVES 28 D, 12 R SEATS**



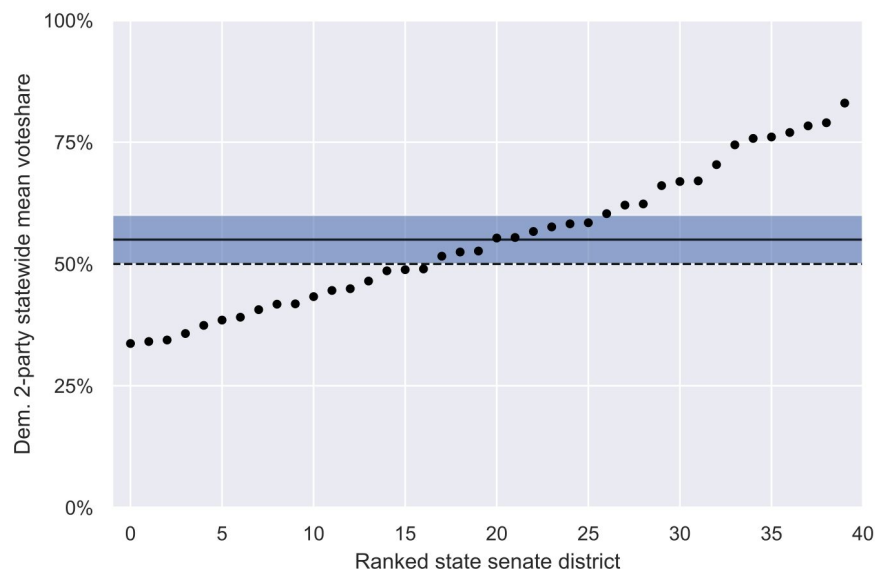
Risks and Opportunities in S.C.R. 43 / A.C.R. 205

Voting Rights Act provisions. Section 5 of the Voting Rights Act is currently inoperative because of the *Shelby County* decision. Section 2 is currently in effect nationwide, but this could change in the future with a hostile Supreme Court. If amended, S.C.R. 43/A.C.R. 205 would present an opportunity to enshrine those rights for New Jerseyans, regardless of federal law.

How the independent commissioner could be persuaded. Republicans or Democrats can argue, accurately, that plans like these build competition *as defined by the law*. They could even argue that they are just making their incumbents work a little harder. In this way they could persuade the independent commissioner to support a plan that distorts outcomes.

What if S.C.R. 43 / A.C.R. 205 doesn't pass? Ironically, if this bill fails to pass, all of the partisan-gerrymandering scenarios above will still be possible. Also, **the current district map is already nearly compliant with the bill as now written**. Currently 9 districts are “competitive” - only one short of the legislation’s goal. Under the current map, 20 districts are now more Democratic than the state average and 20 districts more Republican than the state average - perfect symmetry between the parties, as the bill mandates.

New Jersey’s Current Legislative Map Already Nearly Satisfies S.C.R. 43 / A.C.R. 205



Solutions: Closing The Loopholes

Here are three possible solutions to plug loopholes and create real reform. Together they can address the above situations - and combat criticism that the legislation is a means of entrenching Democratic power.

1. The single best change would be to add text that entirely closes off partisan malfeasance. This can be done by adding language that says that no plan shall be approved which gives either party an undue advantage at a state level, using accepted

measures of partisan fairness. Such measures include “partisan bias” as defined by Gary King, or “[excessively uniform wins](#)” as defined in my 2016 article in Election Law Journal concerning Maryland districting. These measures are suited to states like New Jersey which have a partisan lean. Legislative text:

*Modify the proposed text of A.C.R. 205 Article IV, Section III, paragraph 2(e) by adding a new sentence: “**Notwithstanding any provision of this Article, no plan to establish legislative districts shall have the intent or effect of unduly favoring or disfavoring any political party on a statewide basis as measured using accepted measures of partisan fairness and excessively uniform wins.**”*

2. In a gerrymandered map, both Democrats and Republicans can argue to the independent commissioner that they are maximizing competitiveness. This argument can be countered by redefining “competitive” to mean a 50-50 district. Legislative text:

*Modify the proposed text of A.C.R. 205 Article IV, Section III, paragraph 2(d). In the first sentence, change “the average Statewide percentage” to “**an equally divided percentage.**” Then delete the second sentence entirely and replace it with the following: “For each such district included in the foregoing in which the percentage of the combined two-major-party votes for a major political party exceeds 50 percent in those Statewide elections, there shall be a corresponding district in which that party’s percentage of the combined two-major-party votes is less than 50 percent by approximately the same number of percentage points.”*

3. Instead of mandating that one-fourth of districts be competitive, the language could say that “one-fourth to one-third of districts shall be competitive.” The upper limit would prevent the worst offenses. Legislative text:

*Modify the proposed text of A.C.R. 205 Article IV, Section III, paragraph 2(d). In the first sentence, change “at least 25 percent of all districts” to “**between 25 percent and 33 percent of all districts.**”*

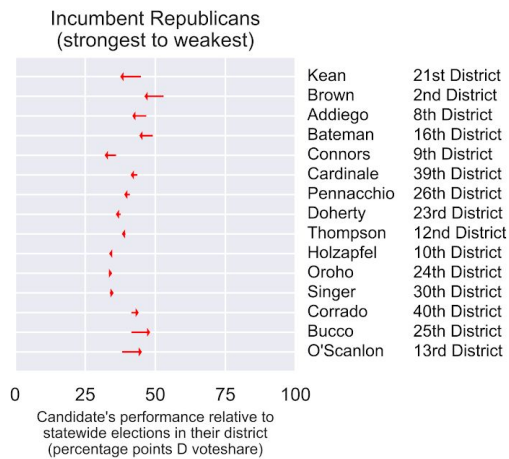
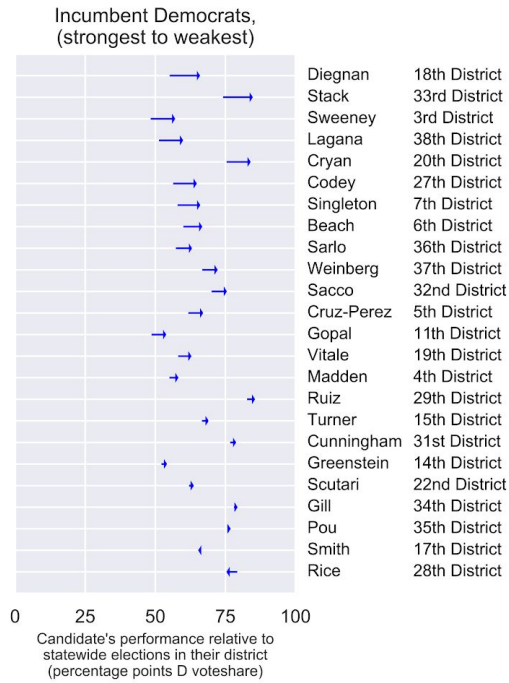
4. To protect racial and language minorities, add the following legislative text:

*After A.C.R. 205 Article IV, Section III, paragraph 2(b), insert a new 2(c): “**The Commission shall only certify a plan to establish legislative districts if such plan ensures that districts provide racial minorities and ethnic minorities with an equal opportunity to participate in the political process and does not diminish their ability to elect candidates of choice, whether alone or in coalition with others.**”*

For purposes of coherence, the current section 2(f), which also addresses communities of interest, could also be moved to this location.

Summary. Through constitutional amendment, New Jersey’s districting process can be made fairer by preventing the worst offenses by either party. Well-crafted amendments to S.C.R. 43/A.C.R. 205 can help achieve this goal. With public attention on redistricting at high levels, it would be wise to perform these repairs. Not doing so gives the appearance of overreach by the majority, which could be risky after the 2020 Presidential election.

APPENDIX: INCUMBENT PERFORMANCE RELATIVE TO STATEWIDE CANDIDATES



Statewide election results from 2017 Governor, 2016 President, 2014 Senator, 2013 Governor, 2013 Senator, 2012 President, and 2012 Senator were averaged to get a two-party vote share for each district, following the formula in S.C.R. 43/A.C.R. 205. This was adjusted to incorporate estimated 2018 results to obtain an estimate of the natural partisan tendency. Vote share for current incumbents was taken from 2017 and averaged with 2013 where the same person won office. Vote share in the 38th District was taken from the 2018 special election.