The Empire Center Redistricting Plans: A Review and Evaluation
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In a republic or representative democracy, unlike a direct democracy, the deliberate sense of the people is its defining characteristic. Choosing representatives who will govern is, perforce, a task of the highest order. Tasks indispensable to selecting individuals who will represent the citizens include deciding how, when, and how often elections are held. Providing the substantive part of the community with the right to vote is a sine qua non for ensuring that the deliberative sense of the community is the basis for public policy.

Organizing voters for the election of their representatives involves the related tasks of reapportionment, the process by which the number of seats in a legislative body is divided among constituent entities of the polity, and redistricting, the process of redrawing the lines that form the boundaries of the districts from which representatives are elected. Both are necessary on a periodic basis to maintain the connections between representatives and the community.

The task of reapportionment is formulaic: the census department tabulates the population of the United States every ten years and then apportions the 435 seats in the House of Representatives. Redistricting, on the other hand, is intrinsically political. It involves the electoral fortunes of political parties, bears directly on the fate of incumbents and aspiring candidates, and determines the influence or lack thereof of diverse—racial, ethnic, economic, and religious—segments of the population. Ultimately, it affects the kind of policies adopted by the government in the name of the people.

Redistricting Under the Equality Principle

Before 1960, the redistricting process in New York occurred largely without supervision by the state or federal courts. The New York Constitution, adopted in 1894, contains a number of rules designed to manage how districts would be drawn. Although the New York Court of Appeals invalidated two apportionment acts of the state legislature as violating specific requirements of the state constitution,[1] inequality in the districts in the New York legislature were ensconced in the constitution itself. As an example, with one exception, any county having less than 1 percent of the state's population was entitled to one seat in the 150-member assembly. Every other county was apportioned two members. The remaining seats were apportioned among those counties having over 1.33 percent of the state's population. This led to significant inequalities in population: by 1960, assembly members representing 37.1% of the State's citizens constituted a

[1] See, e.g., Sherrill v. O'Brien, 188 N.Y. 185 (1907) (holding that scheme violated the compactness rule); Matter of Dowling, 219 N.Y. 44 (1916) (holding that scheme violated the "block-on-border" rule). For an excellent history of New York's redistricting experience, see Jeffrey Wice and Todd A. Breitbart, "These Seats May Not Be Saved: A Fair and Rule-Bound Legislative Reapportionment Process" in *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness*, ed. Peter J. Galie, Christopher Bopst, and Gerald Benjamin (Albany: State University of New York Press, 2016), 113-121.

majority in the Assembly, and the most populous assembly district had 11.9 times as many citizens as the least populous one.[2]

In the 1960s, the federal courts began accepting suits challenging various aspects of reapportionment and redistricting, abandoning an earlier reluctance to enter this arena. In 1960, the Court held that an electoral district drawn to disenfranchise African Americans violated the Fifteenth Amendment.[3] In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that the Equal Protection Clause of the Fourteenth Amendment limited the power of state legislatures to design electoral districts. Apportioning and redistricting, though profoundly political decisions, must be done consistent with the principle of equality, which, in the context of drawing congressional or state legislative districts, is understood to mean that "each vote be given as much weight as any other vote."[4]

Over the next fifty years the Court retreated from the rule that state legislative districts must be as nearly equal as possible.[5] Starting with G*affney v. Cummings*, 412 U.S. 735 (1973) the court initiated a line of cases that would lead to a bright line rule that maximum population deviation of less than 10% among such districts would be insufficient to state a prima facie case of invidious discrimination requiring justification by the State.[6]

Racial Gerrymandering and the Fourteenth Amendment

In addition to mandating some degree of population equality, the Equal Protection Clause of the Fourteenth Amendment prohibits states from drawing district lines with the goal of racial segregation of voters. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court held that state redistricting plans that distinguish among citizens by race—either explicitly or in a manner that is "unexplainable on grounds other than race"—must be narrowly tailored to further a compelling state interest. In determining whether lines have been drawn with the goal of segregating voters based on race, courts may look at things such as whether the government failed to abide by traditional districting principles and the shape of the district itself. Citing *Gomillion*, the *Shaw* Court noted that "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race. Id., at 646-47.

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[2] This provision was held unconstitutional by the U.S. Supreme Court in WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). In a sign of the slowness of legislatures to respond, even the unconstitutional language in the state constitution remains.

[3] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[4] Wesberry v. Sanders, 376 U.S. 1, 7 (1964) (requiring population equality in the drawing of congressional districts); see also Reynolds v. Sims, 377 U.S. 533 (1964) (requiring population equality in the drawing of state legislative districts).

[5] In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that there are no de minimis population variations in congressional districts, and that the only population variances permitted are those which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

[6] *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) describes these cases.

However, in *Miller v. Johnson*, 515 U.S. 900 (1995), the court made clear that a plaintiff challenging a redistricting scheme as an unconstitutional racial gerrymander need not demonstrate that the district's shape is so bizarre that it is unexplainable other than on the basis of race. Rather, the test is whether race was the "predominant factor" in drawing the district lines.

The Voting Rights Act and its Impact

In 1965, Congress passed the Voting Rights Act of 1965 (VRA). The operative provision prohibiting the denial or abridgement of the right of any U.S. citizen to vote on account of race, color, or language preference, section 2, currently provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title [prohibiting practices that deny or abridge the right of any citizen of the United States to vote because he or she is a member of a language minority group], as provided in subsection (b).
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> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

Section 2 is designed to address both vote denial and vote dilution. Practices and procedures involving redistricting that may violate the VRA may include adopting redistricting plans that either pack communities of color into a small number of districts with unnecessarily high minority populations or crack a cohesive group of voters of color across an unnecessarily large number of districts. Intent to discriminate is not required to establish a violation of the VRA.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court identified three necessary preconditions to prove a claim that a districting plan constitutes vote dilution in violation of section 2: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive", meaning that its members tend to vote similarly; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Id.,

at 50-51. When the initial conditions are satisfied, the court must determine whether the plaintiffs have established an actual violation of section 2. In a subsequent case, *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court held that a minority group must constitute a numerical majority of the voting-age population of an area before the VRA requires the creation of a majority-minority district. In other words, the act does not require the redrawing of a district where a racial minority makes up less than 50 percent of the voting age population despite the fact that enough "crossover" majority voters may exist to allow the minority's candidate of choice to be elected.

Political Gerrymandering

As noted above, Federal law requires electoral districts to be drawn of approximately equal size (with more equality for congressional districts than for state legislative districts), in a manner in which voters are not improperly segregated based on race, and in a manner that complies with the Voting Rights Act. These factors are not easily balanced, and the Supreme Court acknowledged that fact: Redistricting is "a most difficult subject for legislatures, and . . . the States must have discretion to exercise the political judgment necessary to balance competing interests."[7]

Given this backdrop, it is not surprising the U.S. Supreme Court declined an opportunity to place restrictions on partisan, or political gerrymandering. In *Rucho v. Common Cause*, 588 U.S. ____ (2019), the Court tackled two partisan gerrymanders—one which allegedly discriminated against Democrats and one that allegedly discriminated against Republicans. Despite previously noting that partisan gerrymandering is "incompatible with democratic principles",[8] the Court held that allegations of this type of gerrymandering present non justiciable political questions outside the scope of the federal courts: "Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." Id., at 30 (slip op.).

Although the *Rucho* opinion closed the Federal Courts to claims of political gerrymandering, it noted that reform in this area was available in other fora:

> Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. League of Women Voters of Florida v. Detzner, 172 So. 3d 363 (2015). The dissent wonders why we can't do the same. See post, at 31. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply . . . Indeed, numerous other States are restricting partisan considerations in districting

[7] Miller v. Johnson, 515 U.S. at 915.

[8] Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 576 U. S. ___, ___ (2015) (slip op., at 1)).

through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, §3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have explicitly prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, §3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Cite as: 588 U. S. ____ (2019). The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§2401, 2411 (2019).[9]

Redistricting in New York: The Role of the Court of Appeals

Good faith attempts to redistrict in compliance with the requirements of the federal and state constitutions and statutory law were complicated in New York by the fact that there are multiple and conflicting requirements found in the state and national constitutions.[10] It is no surprise that legislatures have not been able to devise, and courts have not demanded, plans that can satisfy all the requirements of Federal law and of the state constitution. Decisions of the Court of Appeals involving recent redistricting plans have shown a deference to the legislature and an unwillingness to undo the work of that body. In *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992), the

[9] Rucho v. Common Cause, 588 U.S. ____, _____ (2019) (slip op., at 32-33).

[10] In New York, some rules, though they conflict with the equal protection clause of the Fourteenth Amendment, remain in the state constitution; other that are "wholly or partly consistent with the equal protection clause… are neither followed nor enforced." Wice and Breitbart, "These Seats May Not Be Saved", 119.

New York Court of Appeals was asked to review the state senate redistricting plan that had been struck down by two separate courts—one on the grounds that it "excessively, gratuitously and without supervening need dictated by federal law, disregard[ed] the integrity of county boundaries in the creation of Senatorial districts"[11] and another on the grounds that it unnecessarily fragmented counties throughout the state and created districts that were neither compact nor contiguous.

In deciding the case, the Court of Appeals readily admitted that the plan violated the dictates of the state constitution:

> The issue before us on these appeals is not whether the Senate redistricting plan technically violates the express language of the State Constitution. No one disputes that such a technical violation has occurred, and in *Matter of Orans,* we recognized that such violations were inevitable if the Legislature was to comply with Federal constitutional requirements. Indeed, each of the four alternative plans submitted by the petitioners technically violates the State Constitution as well. Rather, we examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements. The test is whether the Legislature has "unduly departed" from the State Constitution's requirements regarding contiguity, compactness and integrity of counties (*Matter of Schneider v. Rockefeller,* 31 N.Y.2d 420, 429, 340 N.Y.S.2d 889, 293 N.E.2d 67) in its compliance with Federal mandates. "[I]t is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions" (*id.,* at 427, 340 N.Y.S.2d 889, 293 N.E.2d 67).

Wolpoff v. Cuomo, 80 N.Y.2d at 77-78. While conceding that a "technical violation" of the constitution had occurred, the court proceeded to make it difficult, if not impossible, to challenge a redistricting plan on state constitutional grounds:

> A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional " 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Fay,* 291 N.Y. 198, 207, 52 N.E.2d 97).

Id., at 78. This language was repeated in a case allowing an increase in the size of the state senate from 62 to 63 members following the 2010 census.[12]

Requiring parties who challenge redistricting plans to demonstrate that such plans were adopted in bad faith and mandating that alleged violations be proven "beyond a reasonable doubt" are thresholds that reduced, if they did not eliminate, the likelihood of judicial intervention.

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[11] Wolpoff v. Cuomo, 80 N.Y.2d at 76.

[12] Cohen v. Cuomo, 19 N.Y.3d 196, 201-202 (2012) (quoting *Wolpoff*, 80 N.Y.2d at 78).

New York Establishes a Redistricting Commission

In 2014, five years before *Rucho* was decided, New York joined the ranks of states that addressed partisan gerrymandering in their state constitutions. That year, voters adopted an amendment to the New York Constitution providing for a bipartisan redistricting commission that would meet every ten years, beginning in 2020, to draw the congressional and legislative districts for the state. N.Y. Const., art. III, secs. 4 and 5-b. The commission consists of ten members, with two members appointed by each of the four legislative leaders[13] and the remaining two members selected by the eight legislative appointees. N.Y. Const., art. III, sec. 5-b(a). Persons currently serving or having served during the prior three years as legislators, members of Congress, statewide elected officials, state officers or employees, registered lobbyists, or spouses of legislators, members of Congress or statewide elected officials are ineligible to serve. Id. Submission of a redistricting plan and enabling legislation[14] by the commission to the legislature requires the approval of at least seven members of the commission.[15] In the event the commission is unable to obtain the requisite majority, it must submit to the legislature that redistricting plan securing the highest number of votes from the commission.

Upon submission of a plan by the commission, the legislature must take an "up-or-down" vote without amendment. If the plan fails to win the requisite support in the legislature or is vetoed, the commission must come up with a second plan, which is also subject to a vote in the legislature without amendment. After a legislative rejection or gubernatorial veto of the second plan, the legislature is free to implement its own plan. The majority required in the legislature to approve a plan submitted by the commission is dependent on control of the body and the method by which the plan got to the legislature. If control of the houses is split between the parties, any plan that received the required supermajority of the commission must be approved by a majority of the elected members of each house;[16] any plan submitted by the commission that did not attain the necessary supermajority of the commission must be approved by at least sixty percent of the elected members of each house.[17] If the same party controls both houses of the legislature, any plan submitted by the commission (regardless of whether it reaches the seven-member supermajority in commission) requires the approval of at least two-thirds of the elected members of each house.[18]

The 2014 amendment also specified the "principles" that would govern drawing of legislative and congressional districts:

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[13] The four legislative leaders are the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, and the minority leader of the assembly.

[14] For ease of reference, the term "plan" in this section of the report includes the requisite enabling legislation.

[15] As an additional hurdle, when one party controls both houses of the legislature, approval is required by at least one commission member appointed by each of the four legislative leaders. If the two houses are controlled by different parties, any plan must garner the approval of at least one member appointed by the speaker of the assembly and one member appointed by the temporary president of the senate. N.Y. Const., art. III, sec. 5-b(f)

[16] Currently, this fraction would require 32 senators and 76 assembly members, regardless of how many legislators actually vote on the plan.

[17] This provision would require the approval of at least 38 senators and 90 assembly members.

[18] This provision would require the approval of at least 42 senators and 100 assembly members.

(c) Subject to the requirements of the federal constitution and statutes and in compliance with state constitutional requirements, the following principles shall be used in the creation of state senate and state assembly districts and congressional districts:
(1) When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights. Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice.
(2) To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists.
(3) Each district shall consist of contiguous territory.
(4) Each district shall be as compact in form as practicable.
(5) Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest.
(6) In drawing senate districts, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants. The requirements that senate districts not divide counties or towns, as well as the 'block-on-border' and 'town-on-border' rules, shall remain in effect.

N.Y. Const. art. III, sec. 4(c).

Unlike some states, such as Florida, which provide rank order criteria that redistricting plans must follow,[19] the criteria in section 4(c) are not listed in rank order. The priorities of the section

[19] See Fla. Const., art. III, secs. 20 and 21. Section 20 concerns congressional districts, while section 21 provides for state legislative districts. Otherwise, the sections are identical. Section 20 provides:

SECTION 20. Standards for establishing congressional district boundaries.—In establishing congressional district boundaries:
(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

are not difficult to discern. The equal population requirement found in subsection (2) and the prohibition against racial or ethnic gerrymandering amounting to a codification of the VRA in subsection (1) are mandated by federal law and must be enforced regardless of whether they were included.[20] Contiguity and compactness, required by the New York Constitution since 1894, but not required under federal law, were retained in the 2014 amendment. Political gerrymandering, tolerated under federal law, is prohibited. In carrying out this mandate, the commission is required to consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest—causing one to wonder whether the "maintenance of cores of existing districts" will allow the preservation of existing gerrymanders. Finally, the so-called "block-on-border" and "town-on-border" rules are preserved for senate districts. The block-on-border requirement is an anti-gerrymandering device mandating that senate districts adjoining within a county must differ by no more than the population of the least populous city block within the more populous district and on the border between the districts. The town-on-border rule similarly provides that no district shall contain a greater excess population over an adjoining district in the same county than the population of a town on the border of the two districts.[21]

In addition to the requirements specifically listed in section 4(c), other requirements exist. As noted in that section, the constitution explicitly provides that "No town, except a town having more than a full ratio of apportionment . . . shall be divided in the formation of senate districts." N.Y. Const. art. III, sec. 4(a). Section 4(c) states that the requirement that senate districts not divide counties shall remain in effect but the explicit language providing for same was deleted from the constitution in the same amendment.[22] The 2014 amendment deleted a prior requirement that towns could not be divided in creating assembly districts and made no mention of that in section 4(c). Presumably that requirement has been removed.

It is uncertain how New York courts, and in particular the Court of Appeals, will approach cases in light of the new redistricting amendment. Approximately forty years ago, the Appellate Division of the New York State Supreme Court stated that it was "powerless to review a challenge to a reapportionment plan on the ground that it amounts to a partisan political gerrymander."[23] Equipped with this new amendment, that is no longer the case. But questions still remain. How rigorously will political gerrymandering be policed? Although the Florida Supreme Court, in a decision referenced in the *Rucho* majority opinion, struck down that state's redistricting plan as an improper political gerrymander, critical differences exist between that state's provision and the relevant New York provision. For one, Florida makes political and

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(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

[20] See U.S. Const., art. VI, cl. 2. At a minimum, by adding the language of the VRA, the new provision brought the text of the redistricting sections of the New York Constitution at least partially in compliance with federal law. See Wice and Breitbart, "These Seats May Not Be Saved", 113-121 for all the ways in which the current language does not comport with current federal law.

[21] Prior to the 2014 amendment, the "block-on-border" and "town-on-border" rules also applied to assembly districts. The 2014 amendment eliminated these requirements.

[22] Prior to the 2014 amendment, the provision included language stating: "no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county." N.Y. Const. of 1894, art. III, sec. 4 (deleted).

[23] Bay Ridge Community Council, Inc. v. Carey, 103 A.D.2d 280, 284 (2d Dep't 1984).

incumbency neutrality a first order criteria, along with compliance with the VRA and contiguity. Equality of population (beyond the threshold allowed by federal law), compactness of districts, and maintenance of existing political and geographic boundaries is only required when consistent with first order criteria. That differs from the comparable provision in the New York Constitution, which lists all the criteria willy-nilly. Moreover, the New York provision immediately qualifies its gerrymandering provision by mandating that the commission consider "the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest." In contrast, Florida makes these items second order criteria. The Florida provision specifically requires an intent to politically gerrymander, while the New York provision requires no specific intent. As of this writing, the courts have not had occasion to construe New York's 2014 amendment.

What is clear:

- the pursuit of certain requirements in the redistricting area has meant the derogating or ignoring of others;
- that whatever plans are proposed--in good faith or otherwise--inevitably will be vulnerable to criticisms and attack based on one or more constitutional or statutory grounds; and
- in the past, judicial approval has been forthcoming so long as a plan does not "unduly depart" from the requirements of the state constitution.

The layering of reapportionment and redistricting provisions stretching back to the 1894 constitution has created a motley that has not been successfully addressed by constitutional convention or constitutional commission. The 2014 amendment added requirements without any corresponding guidance as to how the competing goals of a redistricting system could be rank ordered or reconciled. These unordered requirements are a recipe for further legislative discretion. It is in this environment that the redistricting commission began its operations.

The Redistricting Commission

At the conclusion of its deliberations (January 2022), the Independent Redistricting Commission issued two sets of congressional and legislative district plans—Those submitted by the Democrats on the commission are referred to as the Plan A plans, and plans submitted by the Republicans as the Plan B plans. Neither set of plans obtained the requisite supermajority or plurality in the commission to be the sole submission to the legislature. The two sets of plans received the same number of votes, so they both will be submitted to the legislature as required by section 5-b(g). With both houses under control of the same party, either set will require the approval of at least two-thirds of the elected members of each house.[24]

Empire Center Plan

[24] The legislature may, but is not required, to include the congressional districts in the same bill as the legislative apportionment. N.Y. Const. art. III, sec. 4(b).

In light of the current stalemate, the Empire Center for Public Policy, an independent, non-partisan, non-profit think tank located in Albany, has developed congressional and legislative redistricting plans that it has submitted to the writers to determine whether they comply with the constitutional requirements of the 2014 amendment.

Before we undertake to provide our comments on the plans, a few caveats are in order:

1. Our expertise: We have written extensively about the New York Constitution, including numerous books and articles and are familiar with the constitution and associated case law interpreting the redistricting provisions of the state constitution. We do not profess to be redistricting experts.

2. Our analysis consists of a comparison of the plans submitted by the Empire Center, the plans currently in force, and the plans submitted by the redistricting commission.

3. We posed a number of follow up questions of the Empire Center, to which the Center provided answers. In some cases, we were able to independently verify the information provided.

4. We relied almost entirely on the Empire Center for data concerning population sizes of the districts, as well as demographic and election data for the district populations. We did not independently verify any of this data.

5. As noted above, the 2014 amendment is new and may trigger a change in the approach taken by the New York Court of Appeals to redistricting cases. Current case law calls for deference to the legislature in the area of redistricting and requires litigants challenging a redistricting scheme prove its unconstitutionality beyond a reasonable doubt.

Conclusions

The plans proposed by the Empire Center are an attempt to break the redistricting impasse and the tight grip political parties have had on the state legislature for over a century. The stated intent of the Empire Center is to follow all constitutional and legal requirements for redistricting; produce districts that preserve municipal borders to the extent practicable; and create non-partisan maps that give no consideration to their political ramifications.

We have examined the redistricting plans proposed by the Empire Center along with the data underlying the plans. We have also examined the plans proposed by the commission designated the "Plan A" plans and the "Plan B" plans,[25] also with the underlying data provided by the commission. We have also reviewed the redistricting scheme now in effect in New York, also with some underlying data.

Here are our conclusions:

[25] Earlier versions of the plans submitted by the commission were titled the "Letters" plans, submitted by the Democrats, and the "Names" plans, submitted by the Republicans.

- The Empire Center plan offers an independent approach to political redistricting. It balances population equality with political neutrality and the preservation of counties, municipalities, and existing communities of interest. On the basis of our review, we believe it is in substantial compliance with the criteria mandated by the New York State Constitution and federal law.

- Concerning population equality, the congressional districts plan submitted by the Empire Center has a deviation not greater than one person per district. Regarding the senate districting plans, the Empire Center plan has a greater equality in terms of population than either the current plan or either of the plans proposed by the Commission. The Empire Center plan has a mean deviation in the senate districts of 0.29% and a maximum deviation of 3.01% (ranging from a deviation of +1.62% to -1.39%). The current plan has a mean deviation in the senate districts of 3.67% and a maximum deviation of 8.8% (ranging from a deviation of +3.83 to -4.97). The Plan A plan has a mean deviation of 0.52% and a maximum deviation of 2.53% (ranging from a deviation of +1.38% to -1.15%). The Plan B plan has a mean deviation of 0.61% and a maximum deviation of 4.64% (ranging from a deviation of +3.28% to -1.36%). Concerning the assembly plan, the Empire Center plan has a mean deviation of 1.194%, with a maximum deviation of 4.92% (ranging from a deviation of +2.28% to -2.64%), which is more favorable than the current redistricting scheme or Plan A's plan, and is comparable to Plan B's assembly redistricting plan. The current redistricting scheme for the assembly has a mean deviation of 2.56%, with a maximum deviation of 7.94% (ranging from a deviation of +4.06% to -3.88%). Plan A's plan as applied to assembly districts has a mean deviation of 1.47%, with a maximum deviation of 7.98% (ranging from a deviation of +3.99% to -3.99%). The Plan B plan as applied to assembly districts has a mean deviation of 1.17%, with a maximum deviation of 4.74% (ranging from a deviation of +2.42% to -2.32%).

- The lines were drawn with a commendable degree of neutrality concerning political outcomes and the plan has produced district maps that have been drawn without considering the political ramifications of those decisions, in contrast to the state legislative district plans currently in existence. In drawing the maps, the Empire Center has represented to us that they did not even look at political data. Rather its primary considerations were preserving counties, municipalities, and existing communities of interest. Regarding county splits, the following information was provided to us by Empire Center:

  Congressional districts:
  Current Plan—19 counties split 55 different ways
  Plan A—25 counties split 71 different ways
  Plan B—24 counties split 68 different ways
  Empire Plan—17 counties split 49 different ways

  Senate districts:
  Current Plan—30 counties split 103 different ways

Plan A—40 counties split 136 different ways
Plan B—25 counties split 98 different ways
Empire Plan—23 counties split 87 different ways

Assembly districts:
Current Plan—38 counties split 197 different ways
Plan A—41 counties split 221 different ways
Plan B—48 counties split 228 different ways
Empire Plan—38 counties split 197 different ways

As noted above, the Empire Plan divides fewer counties in creating the congressional districts than all the other plans that were evaluated, divides fewer counties in fewer ways than all the other senate district plans, and ties the current plan for fewest counties divided in the creation of assembly districts, albeit dividing those counties in fewer ways than the current plan.

The intent of the Empire Center proposals was not partisan. An examination of the results of the last presidential election was compared between the Empire Center plans and the draft plans that preceded the Plan A plans (known at that time as the Letters Plan). We found no evidence of partisan intent nor do the likely consequences of the plan result in partisan advantages not warranted by the demographics.

- A visual review of the district maps in the Empire Center Plans show that they are contiguous and do not appear to be unusually shaped or unreasonably lacking in compactness.

- The senate districts comply with the applicable block-on-border and town-on-border rules.

- Finally, our analysis found no intent to dilute or diminish the influence of African Americans, Hispanic or Asian denizens. In comparing the citizen voting age population numbers across the Empire Center, Plan A and Plan B plans, we note the following:

  Congressional Districts:
  Empire: 18 White majority; 1 Black majority; 1 Hispanic majority; 6 majority-minority with no individual majority (2 Black plurality, 2 Hispanic plurality, 1 White plurality, 1 Asian plurality)
  Plan A: 17 White majority; 2 Black majority; 1 Hispanic majority; 6 majority-minority with no individual majority (1 Black plurality, 2 Hispanic plurality, 3 White plurality)
  Plan B: 17 White majority; 2 Black majority; 1 Hispanic majority; 6 majority-minority with no individual majority (1 Black plurality, 2 Hispanic plurality, 3 White plurality)

  Senate Districts:
  Empire: 43 White majority; 7 Black majority; 4 Hispanic majority; 9 majority-minority with no individual majority (2 Hispanic plurality, 4 White plurality, 2 Asian plurality, 1 Black plurality)

Plan A: 45 White majority; 7 Black majority; 4 Hispanic majority; 1 Asian majority; 6 majority-minority with no individual majority (1 Black plurality, 3 White plurality, 2 Hispanic plurality)
Plan B: 44 White majority; 7 Black majority; 4 Hispanic majority; 1 Asian majority; 7 majority-minority with no individual majority (2 Hispanic plurality, 4 White plurality, 1 Black plurality)

Assembly Districts:
Empire: 100 White majority; 14 Black majority; 10 Hispanic majority; 1 Asian majority; 25 majority-minority with no individual majority (9 Black plurality, 6 Hispanic plurality, 7 White plurality, 3 Asian plurality)

Plan A: 102 White majority; 16 Black majority; 9 Hispanic majority; 2 Asian majority; 21 majority-minority with no individual majority (2 Black plurality, 9 Hispanic plurality, 7 White plurality, 3 Asian plurality)

Plan B: 104 White majority; 16 Black majority; 11 Hispanic majority; 3 Asian majority; 16 majority-minority with no individual majority (2 Black plurality, 7 Hispanic plurality, 5 White plurality, 2 Asian plurality)

We did not undertake a detailed review of every district. However, when viewed on a whole, the Empire Center plan is comparable to the other proposed plans in terms of preserving voting rights for minorities.

Will the Empire Center plan satisfy everyone? We do not think any plan would. The requirements of the national and state constitutions and statute law that must be taken into account when redistricting inevitably mean that choices must be made. All that can be expected is that those choices be made in good faith consistent with the federal requirement concerning population numbers; that they do not constitute a racial gerrymander; that a genuine effort has been made to reduce, if not eliminate, the partisan gerrymander; and that they have, to the extent possible, kept municipal borders intact and preserved communities of interest. In that respect, the Empire Center plan has succeeded.

Hoping for a plan that meets all criteria equally and satisfies everyone is like “waiting for Godot”: We do not have to wait.