TO: New York City Charter Revision Commission

FROM: Common Cause and Brennan Center for Justice

RE: Summary of Proposed Revisions to the Redistricting Provisions of the New York City Charter

DATE: July 31, 2018

Thank you for the opportunity to submit recommendations for updating the redistricting provisions of the New York City Charter.

This memo summarizes the principal changes we recommend. We will submit markup language shortly. We are happy to provide further comment and input if it would helpful to members of the charter revision commission.

Executive Summary

Selection Process. At present, members of the districting commission are appointed directly by elected officials. While we would not alter this structure, we recommend introducing a screening process to ensure that commissioners are qualified and sufficiently independent and impartial. To do this, we recommend that the New York City Campaign Finance Board be placed in charge of screening applicants (both for disqualifications and for fitness) and creating a pool of at least 75 diverse and qualified applicants. Elected leaders then would make their commissioner selections from pool created by the board.

If the members of the Charter Revision Commission wish to go further, they could follow the model used in California and Austin, Texas and allow elected officials to strike applicants from the pool but have the selection of commissioners occur through a randomized process. This type of arrangement, however, would require careful structuring to ensure commission is demographically and geographically representative.

Disqualifications. We recommend adding additional restrictions on who can be a member of the commission by excluding from eligibility certain persons who have connections with large donors.

Transparency. At present, there are no restrictions on the ability of commissioners to meet in private with interested stakeholders. We recommend requiring that all communications regarding the business of the commission be during commission meetings or other public forums. If a commissioner or commission staff conduct discussions regarding plans details with anyone not affiliated with the commission, he or she would be required to submit a disclosure form. We also recommend requiring making all comments and testimony, whether submitted formally or informally, available to the public via the internet.

Public Participation. While in 2011, the commission held a robust number of public meetings, it did so voluntarily, and there is no guaranty that future commissions will feel similarly bound. We recommend formalizing a requirement that the commission release a draft plan and hold public hearings relating to the draft plan before the commission adopts its final plan. Likewise, we recommend requiring draft plans to be made available to the public for at least 15 days before the commission takes any action in order to facilitate public input.

Map drawing Criteria. While the charter's map drawing rules are strong overall, they could be updated and enhanced. We recommend, for example, strengthening protections for communities of color in the charter's map drawing criteria, making clear for example that it is legitimate to consider the ability of different minority groups to coalitions with one another. We also recommend adding greater clarity to what constitutes a community of interest for purpose of redistricting and making clear that observing political boundaries and compactness are subordinate to other criteria.

Census Data. At present, the charter requires that districts be draw based on population data from the census. However, because there are growing concerns about a sizeable census undercount, we recommend authorizing city agencies to adjust the data using accepted statistical methods in order to ensure that hard-to-count groups are not underrepresented.

Approval of Maps. At present, maps are adopted by a simple majority of the commission. We recommend requiring a two-thirds supermajority (10 of 15 members). This will serve as an additional check on potential gamesmanship and help foster negotiation among the different stakeholders.

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Redistricting Commissions: What Works

Redistricting reform is in the spotlight more than ever. Voters could see measures to create redistricting commissions on the ballot in 2018 in Michigan, Missouri, Colorado, and Utah, and bipartisan grassroots efforts are underway in other states to fix the mapdrawing process ahead of the next round of redistricting that starts in 2021.

But not all redistricting commissions are equally effective. To assess the strength of earlier redistricting reforms, the Brennan Center interviewed a diverse group of more than 100 stakeholders who were involved with redistricting seven jurisdictions that use some form of commission to draw maps. These included both state-level redistricting commissions (Alaska, Arizona, California, Idaho, Iowa, New Jersey, and Washington) and municipal commissions (Austin, San Diego, and Minneapolis).

The structure, design, and operation of these commissions varied greatly, ranging from commissions that included direct political appointees and, in some cases, even elected officials, as in New Jersey, to commissions, like California's, whose goal it was to have ordinary citizens serve as members. The commissions also varied in size, their map approval processes, and their substantive rules.

What we found was a compelling case that putting commissions in charge of redistricting can significantly reduce many of the worst abuses associated with redistricting and improve outcomes and satisfaction across the stakeholder spectrum – but only if commissions are carefully designed and structured to promote independence and incentivize discussion and compromise.

Findings and Recommendations

Based our research, the Brennan Center recommends that reforms creating redistricting commissions include the following elements in order to maximize their independence and effectiveness:

- An independent selection process that screens applicants not only for disqualifications or conflicts of interest (such as being a lobbyist) but that also makes qualitative assessments about the fitness of applicants to do the job. While not absolutely required, including an element of randomness in the process also can be an important additional safeguard against gaming of the process by interested parties. In our study, the strength and independence of the selection process was, by far, the most important determinant of a commission's success.

- Clear, prioritized criteria for mapdrawing that establish the ground rules that commissioners must follow when designing a map. While the specifics of the rules differed between

successful commissions, these differences ultimately seem to have been less important to the success of the commission than the fact that there were clear and, in most instances, prioritized rules.

- A commission size of between 9 to 15 members to ensure geographic, political, and ethnic diversity. In addition to allowing for greater representativeness, larger commissions in our study also did better in safeguarding against deadlock and the risk of rogue-actor effect by ensuring that no individual commissioner had an outsized say. By contrast, the smaller commissions in our study tended to draw a larger number of complaints both about unrepresentativeness as well as more charges that the process had become tainted or otherwise gamed. On the other hand, too many commissioners can create logistical difficulties and make it harder to reach decisions.

- Map-approval rules that facilitate and incentivize negotiation and compromise, such as a requirement that a map obtain at least some support from each major political block in order to win passage. By contrast, states that used a tiebreaker model popular in earlier reforms experienced much lower levels of satisfaction, mainly because the tiebreaker tended to end up siding with one party or the other, resulting in a winner-take-all effect. Likewise, commissions where one or more sides saw little risk from failure had less success.

- Strong transparency requirements that make commission proceedings as accessible and assessable as possible and encourage public input. These requirements were particularly helpful in large, demographically complex jurisdictions where commissioners are unlikely to have up-to-date, firsthand knowledge of all parts of the jurisdiction. By making sure that the work of the commission does not occur behind closed doors, transparency requirements help ensure that community and civil society groups were able to police the integrity of the process.

- An enforceable guarantee of adequate funding to enable the commission to hire sufficient professional staff, consultants, and experts of its choosing.

- An appointment timeframe that allows new commissioners adequate time to ramp up, hold public hearings, obtain feedback on initial proposed maps, make any necessary adjustments, and draw final maps. Building in sufficient time for commissioners to do their work can be especially important where commissioners are drawing multiple statewide maps (congressional, legislative, etc.)

Our research showed a clear dividing line between satisfaction with commissions that had all or substantially all of these attributes and those that did not. We found:

- Dissatisfaction was especially great with commissions where a map could be approved over the unified objection of a minority based on the vote of a tiebreaker. While in theory, a tiebreaker might function as a mediator and help broker a compromise between major factions, the result in practice has tended to be a dissatisfactory winner- take-all process.

- A wide range of stakeholders also expressed much less satisfaction with, and trust in, the results produced by commissions where elected officials decided who would serve on commissions or played a substantial role.

By contrast, we also found that two concerns that often are raised in debates about creating commissions did not seem to be major factors in the commissions we examined.

- Citizen commissioners who were not closely involved with the political process seem by consensus to have performed competently, despite concerns in some quarters that they would lack the sophistication to navigate the complicated process of redistricting and deal as equals with political actors. Some concerns remain about whether the quality and strength of citizen commissioners this cycle will be repeated every decade absent concerted recruitment efforts, but this cycle at least suggests that where those efforts are undertaken that the result can be commissioners with both high integrity and skills.

- Likewise, the feeling among many stakeholders was that citizen commissioners took the demands and interests of communities of color seriously and made efforts to address them. Although communities of color did not get all that they wanted, concerns that commissioners would prioritize things like compactness or political boundaries over the representational concerns of communities of color were not borne out in this map cycle.

OPENING REMARKS

Thank you for this opportunity to talk to you about the Austin Independent Citizens Redistricting Commission or ICRC.

My name is TJ Costello and I currently serve as Vice-chair of the ICRC.

On November 6, 2012, 61% of Austin voters answered "Yes" to a question, which asked in part:

> ***Shall the city charter be amended to provide for... an independent citizens redistricting commission?***

The passage of this Charter Amendment ensured that 10 single-member districts would be drawn by a commission of 14 "independent citizens."

Serving on this 14-person commission would include:

voluntary eight-year terms; with no pay; and long hours for the first six months at which point the maps would be drawn.

Over 500 individuals applied to serve.

To lessen the possibility of political agenda or conflict of interest the ICRC had strict eligibility requirements placed upon it and a group of 3 independent auditors whittled the applicant pool down to a list of the top 60.

In May 2013 from this pool of 60, the initial eight commissioners were selected at random.

This initial group's first task was to choose the remaining 6 commissioners to achieve specified diversity goals for race, ethnicity, age, gender and geographic representation. In the end,

- **The commission had a very similar demographic make-up to the city as a whole.**
- **Seven Commissioners are women, seven are men. Ages range from 22 to 72, and included a required student representative.**

The Commission met in full for the first time in June 2013 and shortly thereafter chose a Chair and I was selected as Vice-Chair.

The ICRC spent countless hours ensuring that our process was fair and impartial. The process was extremely transparent enabling full public consideration of all comments on the drawing of district lines.

- **We held over 40 open meetings, which included 14 public hearings held throughout the city,**
- **solicited verbal and written testimony,**

- had 532 in-person testimonials given in 3-minute sessions by 418 Austin residents,
- witnessed 7 "invited presentations" involving 22 speakers, and
- received 566 emails or letters from Austinites.

The Commission labored (sometimes excruciatingly so) to underscore its independence from Austin's City Council of the time.

While we did have a city liaison, we also

- hired our own executive director, legal counsel and a mapping consultant.
- established our own website.
- managed our marketing and communications.

Most important, we strictly adhered to the City Charter, upholding the law throughout. We were guided by 8 major principles including the U.S. Constitution; the

Voting Rights Act; and the concept of communities of interest.

On November 18, 2013, just 6 months after the formation of the ICRC, Austin made history! It became the first city in the United States to have city council districts drawn by a completely independent group of ordinary residents not selected by any legislator, judge or other public official.

The ICRC unanimously adopted our final district map for Austin's first ten-member city council.

In the end we had:

- **immediate acceptance,**
- **zero lawsuits or challenges,**
- **72 candidates run for 11 positions, and**
- **the city council has had a 40% turnover rate since.**

I, we, the ICRC considers our work a success.

(for questions – if asked)

The ICRC conducted an open and transparent process enabling full public consideration of comments on the drawing of district lines; with integrity and fairness, independent from influence and representative of the city's diversity; and followed these eight principles:

1. Districts shall comply with the United States Constitution. Each council district shall have reasonably equal population with other districts, except where deviation is required to comply with the federal Voting Rights Act of 1965 or allowable by law. [1]
2. Districts shall comply with the federal Voting Rights Act (42 U.S.C. Sec. 1971 and following) and any other requirement of federal or state law.
3. Districts shall be geographically contiguous.
4. The geographic integrity of any local neighborhood or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subsections. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.
5. District boundaries shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant populations.
6. To the extent practicable, district boundaries shall be drawn using the boundaries of existing election precincts.
7. District boundaries shall be drawn using geographically identifiable boundaries.
8. The place of residence of any incumbent or potential political candidate shall not be considered in the creation of a plan or any district. Districts shall not be drawn for the purpose of favoring or discriminating against any incumbent, political candidate, or political group.

[1] According to the 2010 U.S. Census, Austin had a population of 797,830. To achieve equal population within a maximum deviation of 10%, the Commission's target population range was between 75,794 and 83,771 residents per district.

These Seats May Not Be Saved
A Fair and Rule-Bound Legislative Reapportionment Process
Jeffrey Wice and Todd A. Breitbart
(Chapter from "New York's Broken Constitution" SUNY Press, 2016)

The New York State Constitution mandates that once each decade, after new census counts become available, the legislature must enact a law reapportioning and redrawing the districts from which its members are elected.

The provisions on legislative reapportionment and redistricting, principally sections 4 and 5 of Article III, the Legislative Article, remain largely as they were drafted by the Constitutional Convention of 1894. An amendment approved in 1969 added section 5-a, which makes the whole population the basis for apportionment—ending the practice, dating from the 1821 constitution, of excluding aliens from the apportionment calculus. A 2014 amendment made additional changes to sections 4 and 5, to be discussed below, and added section 5-b, but left the basic framework intact.
It would be impossible, however, from reading the state constitution, to guess at the actual rules that now govern this process. The inequitable apportionment rules of 1894 were overthrown a half-century ago when the U.S. Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment to legislative redistricting, but the state constitution has never been amended to bring it into conformity with the supervening federal requirements. In recent decades, the conflict between federal and state constitutional rules has enabled the legislative majorities to exercise wide discretion in fashioning districts for their own convenience, while providing a rationale for the state courts to retreat from enforcement of constitutional rules. This chapter will give a brief account of this history and suggest some reforms.

The Apportionment Rules of the 1894 Constitution

According to the 1890 federal census, New York County (coterminous with what was then the City of New York, and including much of what is now Bronx County) had one-quarter of the state's population, and Kings County (which became the borough of Brooklyn in 1898) contained another 14 percent.

The Republican majority in the 1894 convention feared that a never ending tide of immigrants would eventually cause the cities of New York and Brooklyn to overwhelm the rest of the state both demographically and politically, giving the urban Democratic machines absolute control of state

government. A relic of this fear is to be found in the provisions in Article III, section 4, that no county—meaning New York County—should ever have more than one-third of the senators, and that no two adjoining counties—meaning New York and Kings—should ever have more than one-half. The 1894 constitution addressed this problem with complex rules apportioning to the less populous, mostly rural, counties a share of senate and assembly districts far exceeding their share of the state population. The rules were also designed to deny the legislature discretion, binding the legislature to the biased apportionment rules and also limiting gerrymandering.2 No county was to be divided by senate districts except to create two or more districts wholly within the county (N.Y. Const., art. III, sec. 4). A county could not have four or more senators unless it had a "full ratio of apportionment" (2 percent of the state population) for each senator. In a county with at least 6 percent of the state population, a fractional ratio was always to be rounded down. Thus a county with 7.99 percent of the state population—3.995 ratios of apportionment—would have only three "full ratios" and receive three seats. A county with exactly 6 percent of the state population, also equal to three "full ratios," would receive the same apportionment of three seats. Moreover, such rounding down did not apply to less populous counties, resulting at times in the apportionment of two senators to counties with 1.2 or 1.5 ratios, and of three senators to counties with 2.1, 2.2, or 2.3 ratios.3 And if new census counts entitled one of the larger counties to more senators than had been apportioned to it in the 1894 constitution, the senate would be enlarged by that number: the seats would not be *re*-apportioned from elsewhere in the state. The average district population was therefore always much smaller for less populous counties than for the more populous ones.

In the assembly, each county was to have at least one seat, except that Hamilton (then as now the least populous) was combined with Fulton for this purpose, and there could be no other multi-county districts (N.Y. Const., art. III, sec. 5). Each county with the population for at least oneand-one-half districts (i.e., 1 percent of the state population) was to receive a second full district before the remaining districts were apportioned according to population among the counties having more than two ratios (with an assembly ratio being 0.67 percent of the state population). Again, the result was a smaller average district population in less populous counties.

The apportionments were also to be based on the number of citizens, not the total population, a great disadvantage to New York City with its

concentration of recent immigrants.

These apportionment rules—which are not fully described here—reliably produced a legislature that was often described as "constitutionally Republican." During the seventy years, 1896–1965, that New York was governed by legislatures elected under the 1894 rules, Republicans controlled the assembly for sixty-six years and the senate for fifty-seven.5 Had the legislature been reapportioned according to the 1894 rules after the 1960 census, New York City, with 46.4 percent of the total state population and 45.7 percent of the citizens, would have been apportioned 36.8 percent of the senate districts and 37.3 percent of the assembly districts. The ten most populous counties, with 74.0 percent of the total state population and 73.5 percent of the citizens, would have received 64.9 percent of the senate districts and 61.3 percent of the assembly districts.6

Equal Protection Comes to New York State Apportionment

The post-1960 reapportionment described above never took place, because the legislature had not yet acted when the U.S. Supreme Court ruled that residents of under-represented counties and overpopulated districts were denied the equal protection of the laws. In 1962 the Court found, in *Baker v. Carr*, that population inequality in legislative apportionment was a justiciable issue under the Equal Protection Clause of the Fourteenth Amendment. In 1964 the Court found, in *Reynolds v. Sims*, that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."7 On the same day, in *WMCA, Inc. v. Lomenzo*, the Court applied this test to New York and found that the 1894 apportionment rules were unconstitutional.

In addition to the regional disparities in apportionment noted above, *WMCA* found impermissibly large population differences among individual districts. If the 1894 rules had been applied to the 1960 census, the population ratio between the most and least populous assembly districts would have been 12.7-to-1, and in the senate it would have been 2.6-to-1.8

The Expansion of Legislative Discretion in Redistricting

In the half-century since *WMCA*, the New York legislature has been much more fairly apportioned. But the legislature has enjoyed far more discretion

in crafting the districts.

The drafters of the 1894 constitution had evidently expected the courts to enforce the rules, providing in Article III, section 5, that "any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same." And indeed, the court of appeals invalidated the reapportionment acts of 1906 (in part for violating the compactness rule) and 1916 (for violating the "block-on-border" rule that is discussed below).9

The court of appeals again asserted that responsibility in *Matter of Orans* (1965), deciding that the rules in sections 4 and 5 of Article III remained in effect except when in unavoidable conflict with the population equality standard of *Reynolds* and *WMCA*. Most significantly, the court overturned the legislature's attempt to enlarge the assembly to preserve some upstate seats (and incumbents) that would otherwise have been lost in the reapportionment mandated by *WMCA*. After reviewing at length the decisions of the U.S. Supreme Court and a three-judge U.S. District Court in *WMCA*, which found no intrinsic constitutional infirmity in the number of 150 assembly seats, the court of appeals ruled that "[t]he only other justification for excising the 150-member constitutional provision would be a showing that the Supreme Court's mandate for equally populated districts could not be obeyed if the assembly districts numbered exactly 150. No such showing is made or can be made."10 The contiguity, compactness, and "block-on-border" rules (and the similar "town-on-border" rule) remained in force. The senate-size formula would still determine the number of districts, but would no longer have a role in apportionment. Since some assembly districts would now have to include parts of more than one county, county legislatures could no longer draw assembly district boundaries, but the state legislature would have to redistrict the assembly as well as the senate. And while the rules apportioning districts by county and prohibiting the division of counties were required to yield to the population equality requirement, "the historic and traditional significance of counties in the districting process should be continued where and as far as possible."11

In recent decades, however, the court of appeals has progressively withdrawn from the responsibility to compel the legislature to abide by the surviving provisions of Article III, sections 4 and 5, while the legislature has continually tested the bounds of its discretion.

In 1982, the Republican bastion in the Bay Ridge neighborhood of Brooklyn was divided among several elongated assembly districts, various pieces of the neighborhood being attached to concentrations of Democratic voters elsewhere in the borough. In finding that this configuration satisfied the rule that districts be "in as compact form as practicable," the appellate division and the court of appeals essentially defined "practicable" to mean that any districts conforming to the other federal and state constitutional rules could be configured in any way the legislature chose.12
The court of appeals went much further in *Wolpoff v. Cuomo* (1992), and *Cohen v. Cuomo* (2012), rejecting challenges to the senate districts enacted in those years. The court required that plaintiffs show not only that a redistricting law departed unnecessarily from the state constitutional rules, but that the legislature **acted in bad faith** in dealing with the conflicts between some constitutional rules and others. And the requirement that they prove this **beyond a reasonable doubt**—a phrase that does not appear in the 1965 *Orans* decision—imposes in reapportionment cases a standard much more demanding than simply overcoming the strong presumption of constitutionality that generally attaches to legislative acts.

The "beyond a reasonable doubt" standard for judicial review of redistricting statutes, first articulated prior to *WMCA*, was relied upon by the court of appeals in *Cohen*:

> It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality "and we will upset the balance struck by the Legislature and declare the [redistricting] 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," the statute will be upheld.13

The "bad faith" test originated in *Schneider v. Rockefeller* (1972) and was relied upon by the court in *Wolpoff*:

> The Majority Leader has marshaled a considerable amount of statistical and demographic data to support his contention that these districts were drawn in a "good faith effort" to comply with *Reynolds v Sims* and the Voting Rights Act and not for

partisan political reasons, as petitioners argue. . . . Although we are troubled by the number of divided counties in the new plan and by the four bi-county pairings, it is not appropriate for us to substitute our evaluation of the relevant statistical data for that of the Legislature. We are satisfied that in balancing State and Federal requirements, the respondent has complied with the State Constitution as far as practicable, and we cannot conclude on this record that the Legislature acted in bad faith in approving this redistricting plan. Having made that determination, our review is ended.14

A full reading of the *Wolpoff* and *Cohen* decisions shows that the "bad faith" test requires such deference to legislative judgment as virtually to preclude judicial intervention. The Election Law Committee of the New York City Bar Association comments about the passage from *Wolpoff* quoted above: "It is notable that the Court relied upon the extent and complexity of the Legislature's statistical apparatus, without evaluating the inferences drawn from it."15 In *Wolpoff* the court also upheld a district that clearly violated the minimal definition of "contiguous territory" that the court had established in 1907,16 offering no explanation as to how the trial court erred in finding the district to be impermissibly discontiguous, and not even noting that it was reversing a lower court's findings on the questions of contiguity and compactness.17

In *Cohen* the plaintiffs carefully avoided any issue that *Wolpoff* had touched on (e.g., county divisions and compactness). They tried only to persuade the state courts that the constitution's senate-size provision is a rule that the legislature must follow, not a smorgasbord from which it may choose after determining the number of seats that would be politically convenient.

The court of appeals found that the plaintiffs had failed to prove beyond a reasonable doubt that the senate majority's continual re-interpretation of the rule could not possibly be reconciled with the constitution.18

It is hard to imagine that anyone would again seek judicial review of a redistricting statute under the New York State Constitution as it now stands. Judge Vito J. Titone was correct when he said, in his *Wolpoff* dissent, "the tolerance the majority has today expressed for a plan that all but disregards the integrity of county borders will be read by many as a signal that our State constitutional provisions no longer represent serious constraints on the

critically important redistricting process."19

During the 1970s and 1980s, the U.S. Supreme Court modified the strict population equality standard for state legislatures established in *Reynolds*, allowing "*de minimis*" population deviations for such purposes as limiting the division of counties. If the population range between the most and least populous districts (the "total deviation") does not exceed 10 percent of the "ideal" district population (i.e., the arithmetical mean), the burden falls on plaintiffs to show that the population inequalities are not justified. Federal courts reviewing the New York reapportionments of 2002 and 2012 have acknowledged that keeping the "total deviation" below 10 percent does not, as a matter of law, create a "safe harbor" for skewing the regional apportionment by manipulating district population deviations.20 But in upholding the senate reapportionments they have created such a safe harbor in practice. We are left with a curious mix of state constitutional rules: some that are entirely void because they conflict with the Equal Protection Clause of the Fourteenth Amendment; and others that are wholly or partly consistent with equal protection, but are neither followed nor enforced. The rule that gives each county at least one assembly seat is wholly void, but has never been excised from section 5 of Article III. The compactness rule is consistent with population equality, but is nevertheless treated as a dead letter; and even the contiguity rule has sometimes been ignored, as noted above. The federal population equality standard requires some departure from the strict rules against splitting counties and most towns.21 But instead of having to minimize such splits, departing from the state constitutional principle only to the degree necessary for compliance with the supervening federal rule, legislators crafting new districts can now be confident that anything goes.

Where We Stand Now

The result of these developments can be seen in the senate districts enacted in 2012: (a) almost all upstate districts are underpopulated, and every New York City district is overpopulated, with the cumulative result that the city is apportioned one district less, and the upstate region one more, than the numbers of districts that would be proportional to their respective shares of the total state population;22 (b) the African-American and Hispanic communities of Nassau and Suffolk counties are systematically split by the district boundaries for the fifth consecutive decade; (c) a district that extends from the extreme northwestern point in the Bronx to the extreme southeast, and then curves northward through Pelham Bay into lower Westchester, is so

configured to achieve a non-Hispanic white plurality of eligible voters, and to avoid the Hispanic majority or plurality that would have resulted from drawing an additional compact district entirely within the Bronx; (d) the requirement that districts be compact is ignored throughout; and (e) county boundaries are virtually erased as the basis for drawing districts, in defiance of the principle articulated by the court of appeals in 1965 that "the historic and traditional significance of counties in the districting process should be continued where *and as far as possible*." (Emphasis added.)

The unconstrained, indiscriminate division of counties can be understood even without looking at a map. Two counties (Albany and Rockland) that each have the population for one whole senate district, and two counties (Onondaga and Orange) that each have the population for one whole district and a fraction, are all divided with no wholly contained district. Of the 48 counties that do not have enough population for a whole district, 16 are divided among two, three, or even four districts. There are seven pairs of districts in which both districts contain parts of the same two counties, even though the necessary distribution of population can always be achieved with a single bi-county district.

The legislature ignored several alternative plans demonstrating that smaller population deviations could be achieved with far less division of counties, a fair regional apportionment, more compact districts, and better representation of minority groups.

Republican senate candidates are favored by the most extreme partisan gerrymander that was consistent with keeping the population range below 10 percent of the mean (and thus avoiding the heightened judicial scrutiny by federal courts that would result from exceeding that threshold). These senate districts were part of a bi-partisan gerrymander, with a malapportionment of the assembly districts—in the opposite direction, although smaller in proportion to the whole number of seats—and other features designed to preserve maximal Democratic control of the assembly.23

Where Should We Go From Here?

The needed reforms would come under three headings: (a) the standards to be applied by state courts in reviewing redistricting plans; (b) the criteria to which the districts must conform; and, (c) the redistricting process. Reforms in all three categories are desirable, but the issues are somewhat separable.

Even if redistricting authority were to remain with the legislature, the criteria for districts should be strengthened and rationalized, and—perhaps most important of all—the standard of judicial review should be revised to make the rules truly binding.

The Standard of Judicial Review

If the rules in Article III, sections 4 and 5, are meant to constrain the legislature, or any other redistricting authority that may be established, the New York State Constitution must be amended to provide that plaintiffs seeking judicial review need only prove that a law is **clearly erroneous** in its application of the rules, not that the error resulted from an act of bad faith, and that they must prove this only by **clear and convincing evidence**, not beyond a reasonable doubt. As Judge Titone argued in his *Wolpoff* dissent, the proper "standard for judicial review in this context is thus one akin to the notion of reasonableness."24

Regarding the "bad faith" test, The Bar Association Report observes: "The difficulty harkens to the intentional discrimination requirement faced by Voting Rights Act plaintiffs after *City of Mobile v. Bolden* . . . (1980), prior to the 1982 amendments that allowed a complaint to be sustained by proving only discriminatory effect. . . . The evidentiary issues can hardly be more complex than in a Voting Rights Act case; in *Wolpoff* there was hardly any factual dispute at all."25

Advocates of the 2014 amendment made much of two new rules: (1) protecting minority voting rights, in language drawn from the federal Voting Rights Act (N.Y. Const., art. III, sec. 4(c)(1)); and, (2) that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (N.Y. Const., art. III, sec. 4(c)(5)). But so long as the precedents remain in place that prevent judicial enforcement even of such simple and easily defined rules as contiguity, compactness, and minimizing division of counties, plaintiffs can expect no relief from state courts in cases involving such complex evidentiary issues as minority voting rights, political gerrymandering, and discouragement of competition. And even if a suitable standard of review is established, it is hard to imagine that any court would grapple with the evidentiary issues in a complaint alleging partisan gerrymandering or discouragement of competition. At most this new rule will require a lack of candor from the designers of the districts. We need clearly defined,

prioritized, enforceable rules to control the various *devices* that are employed to achieve partisan advantage and to suppress competition.

Redistricting Criteria

Whatever redistricting process may be established, the redistricting criteria should be revised in six areas: (a) rationalization and prioritization of the rules; (b) prevention of regional malapportionment; (c) a fixed number of senate districts; (d) a permanent end to prison-based gerrymandering; (e) restoration of some specific rules; and, (f) repeal of obsolete provisions. *Rationalization and prioritization*. The criteria for senate and assembly districts should be rationalized to bring the state constitution into conformity with supervening federal rules arising under the Equal Protection Clause, and to eliminate conflicts among the state constitutional rules. The present welter of contradictory federal and state rules provides an excuse for the legislature to craft any districts that serve the purposes of the legislative majorities, and supports the hands-off posture that the courts have adopted in recent decades. If there are enough conflicting rules, in no clearly established order of precedence, it will always be possible to defend an enacted plan as superior, according to *some* rule, to any demonstrative alternative offered in evidence. The contradictions were compounded by the provision in the 2014 amendment that elevated "maintenance of cores of existing districts" (i.e., preservation of the previous gerrymander) to the status of a constitutional rule that negates the older rules (e.g., population equality, compactness, non-division of counties and towns) that might constrain gerrymandering (N.Y. Const., art. III, sec. 4(c)(5)).

An order of priority should be established among the redistricting criteria, since there is tension even among those rules that are desirable in themselves, for example between the compactness requirement and rules limiting the division of existing political subdivisions. The Bar Association Report provides an example of such prioritization and a discussion of appropriate criteria: standards of population equality, fair representation of minority groups, geographic contiguity, preservation of existing political subdivisions, various measures of compactness, preservation of communities of interest, and convenience of election administration.26 Consideration should be given to the Bar Association's proposal to include a limited incumbent protection rule for the specific purpose of keeping it in its proper place: subordinate to all the other rules. Similarly, that proposal would explicitly

subordinate preservation of the cores of existing districts to the anti-gerrymandering rules with which that practice conflicts.27

A rule preventing malapportionment of senate and assembly districts. A rule should be added to prevent the district-level population deviations from being manipulated to produce such regional malapportionments as in the 2012 senate and assembly plans.

The malapportionment of the senate districts is described above. The recent history of assembly reapportionment provides a further illustration of how population deviations that are acceptable for individual districts (no more than 5 percent from the mean) can be used to produce a regional malapportionment when multiplied over a large number of districts. Long Island (i.e., Nassau and Suffolk counties combined) had 14.50 percent of the total state population in the 1990 census, and in 1992 was properly apportioned 22 of the 150 assembly districts (14.67%). Long Island had 14.51 percent of the total state population in the 2000 census, but in 2002 its assembly apportionment was arbitrarily reduced to 21 districts (14.00%), while New York City received one more district than its population share warranted. Long Island had 14.65 percent of the total population in 2010 (adjusted for the prisoner re-allocation that is discussed below), and was restored to its proper apportionment of 22 districts in 2012. But New York City retained its extra assembly district, this time at the expense of upstate. Such regional malapportionment could be prevented by establishing a maximum population range ("total deviation") substantially below the 10 percent that has been deemed *de minimis* for legislative districts in equal protection cases. A better approach might permit a population range of up to 10 percent to be used for legitimate purposes (e.g., avoiding division of counties or protecting minority-group representation28), while imposing a formula that would prevent a regional malapportionment. Such a formula is discussed in Appendix D of the Bar Association Report.

The requirement that "districts shall contain as nearly as may be an equal number of inhabitants" does not accomplish this. The 2014 amendment merely copied this language from the rules for senate districts in the 1894 constitution. Before *WMCA*, this rule was subordinate to the strict rules apportioning districts by county (which the latest amendment preserves in spite of the conflict with the equal protection population equality standard). As noted above, in a reapportionment using the 1960 census, the *required* result would have been a population ratio of 2.6-to-1 between the

most and least populous senate districts. That was "as nearly as may be."
A fixed number of senate districts. The provision that occasionally increases the size of the senate is now a relic that serves only to determine the total number of senators. But because of historical circumstances that ought by now to be irrelevant—Bronx County was created in 1914 out of territory that in 1894 had been part of New York and Westchester Counties; Nassau County was created out of part of Queens County in 1899; and the counties of Richmond (Staten Island) and Suffolk, as geographically distant from one another then as they are now, were combined as a single senate district in 1894—its meaning is ambiguous, and it is subject to self-serving manipulation by the senate majority. Such manipulation is the only purpose for which the formula has been preserved. The number of senate districts should be fixed, whether at the present 63 or another suitable number.

A permanent end to prison-based gerrymandering. The 2010 law requiring that, for redistricting purposes, prison populations be subtracted from the places of incarceration and re-allocated, where possible, to the prisoners' permanent home addresses, was the only significant reform of New York's redistricting rules in forty years. Legislative apportionment in New York had previously been distorted by counting prisoners in the communities in which the prisons are located, thus giving extra weight to the actual residents of those communities.29 This reform was enacted by statute, and could easily be reversed by the legislature. It should be incorporated into the state constitution.

Stronger constraints on specific practices. The 2014 amendment repealed the "block-on-border" and "town-on-border" rules for assembly districts, and the rule limiting division of towns by assembly district lines.
The "block-on-border" rule, which still applies to senate districts, is a restraint on gerrymandering. It requires that if districts adjoin within a county, and if their boundaries do not merely follow town lines, they must differ by no more than the population of the least populous city block that is within the more populous district and on the boundary between the districts: the "block-on-border." A similar "town-on-border" rule applies where district boundaries dividing a county run along town lines. The "on-border" rules limit the population differences between districts that adjoin within a county (requiring almost exactly equal populations where the "block-onborder" rule applies), and were designed to limit legislators' flexibility in crafting districts in their self-interest or for partisan advantage. The repeal of these anti-gerrymandering provisions for assembly districts will permit

adjoining districts within a county to differ in population by as much as 10 percent (or even more, if the federal courts allow it), making it much easier to include certain voters in a district, and to exclude others. The "block-on-border" rule becomes a nuisance, however, when it prevents a district boundary from following a city line, requiring that some blocks be separated from the city to achieve near-exact equality of population between adjoining districts. The rule could be revised to protect cities from being divided solely because of the rule, as towns have always been protected— and to apply this protection in senate as well as assembly redistricting. And a less strict rule, such as requiring that districts adjoining within a municipality differ in population by no more than 0.5 percent, would serve such purposes as drawing boundaries along major thoroughfares, instead of requiring the ragged boundaries that may result from reassigning the "blockon-border." But merely eliminating the block-and-town-on-border rules and the rule against dividing towns makes it too easy for the assembly majority to craft districts for its own convenience.

Repeal of obsolete provisions. The language of Article III, sections 4 and 5, as amended in 2014, preserves unchanged many provisions that have been void since the fundamental New York redistricting cases were decided in 1964 and 1965. This obsolete language—combined with the failure to rationalize those rules that are only partly in conflict with the equal protection population equality standard, such as the non-division of counties—serves an important, but pernicious purpose: permitting the legislature to fend off judicial enforcement of the redistricting rules, as discussed above. The obsolete provisions also create obscurity. No citizen could even begin to understand, from reading the New York State Constitution, the redistricting rules that are actually in effect. Even to follow the legislative redistricting process knowledgeably now requires a close familiarity with an extensive and complex history of litigation and constitutional revision. The preservation of the obsolete provisions could also have vastly worse consequences. If the U.S. Supreme Court should ever weaken or overturn the principles established in *Baker*, *Reynolds*, and their progeny—that equal protection requires approximate equality of population—then the dormant New York State rules that are preserved word-for-word in the 2014 amendment, including the strict apportionment-by-county rules established in 1894 for assembly districts, would again come fully into effect. The New York State Constitution's population equality rule, which sets no maximum on the population range ("total deviation") between the most and least populous districts, would be negated by the revived rules,

as it was prior to *WMCA*.

The enormous population disparities described in *WMCA* did not result from an exercise of legislative discretion. The decision to leave the 1953 apportionment in place as late as 1964 was the legislature's choice, permitted by the Legislative Article. But the 12.7-to-1 ratio between the most and least populous assembly districts, and the 2.6-to-1 senate ratio, which the *WMCA* court estimated as the likely result of a reapportionment according to the 1960 census, would have been *required*, not merely permitted, by the apportionment rules in sections 4 and 5.
New York should make a reasonable standard of population equality, as the *primary* criterion for legislative districts, a permanent rule of the *state* constitution, instead of continuing to rely for such a rule solely upon the federal courts' interpretation of the Fourteenth Amendment.

The Redistricting Process

The constitutional amendment approved in 2014 creates what is purported to be an "independent redistricting commission," but the legislative majorities will retain control of redistricting, and will be free to pursue their partisan purposes. After the legislature twice rejects the proposals of the redistricting commission, "each house shall introduce such implementing legislation with *any* amendments each house of the legislature deems necessary," and "[i]f approved by both houses, such legislation shall be presented to the governor for action" [emphasis added] (N.Y. Const., art. III, sec. 4(b)). As an Albany County supreme court justice found, in ruling that the commission could not be described as "independent" on the 2014 ballot, "not only can the Legislature disapprove the Commission's decision, but it can do so without giving any reason or instruction for future consideration of these new principles. The plan can be rejected for the purely partisan reasons that this Commission was designed to avoid. . . . [T]he Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines."30
Chapter 17 of the Laws of 2012 appears to limit the legislature to reassigning no more than 2 percent of the population of any district proposed by the commission. But the 2 percent limitation is illusory. Since the legislature cannot, by statute, bind a future legislature as to the substance of legislation, the legislature would be free to make *any* amendments to the commission's proposals, as now provided in the constitution. The new law containing those amendments, and including the phrase "notwithstanding any other

provision of law," would supersede Chapter 17 of the Laws of 2012 and override the "no-more-than-2%" rule. If the drafters of the 2014 amendment had truly intended to limit the legislature to only marginal changes to the commission's proposals, they would have included the "no-more-than-2%" rule in the amendment itself. They chose not to do so, just as they chose not to address the obsolete provisions in Article III, sections 4 and 5. It is evident that the drafters of the 2014 amendment and of Chapter 17 meant to provide only the semblance of reform, adding another facade to what has been referred to elsewhere in this volume as a Potemkin Constitution. The only constraint on the legislature is still the threat of a governor's veto. The last governor to veto a redistricting bill in New York was Franklin D. Roosevelt in 1930.

Two alternatives should be considered:

1. *A bi-partisan commission with final authority and a neutral tie-breaker*. This is the system used in New Jersey, where (a) the final decision on legislative redistricting is made by the commission, not the legislature; (b) there are an even number of partisan Democratic and Republican appointees, and a single neutral tie-breaker appointed by the chief justice of the state's supreme court; and (c) only a simple majority is required to adopt a plan, so the tie-breaker can compel the two parties to compete in offering acceptable plans. The tie-breaking role has repeatedly gone to respected academic experts, and the system has worked well.31 A similar system—explicitly designed to lead to a last-best-offer arbitration—is proposed and discussed at length in the 2007 Bar Association Report.

2. *A commission with final authority and fully independent of the legislature*. Such a system, which also seems to have worked well, was employed in California in 2012. A complex appointment process yields a panel of five Democrats, five Republicans, and four members of neither major party, none of whom may have changed their party affiliation within five years. Recent candidates, party officials, legislative staff, and various other sorts of interested persons are ineligible. Redistricting plans must be approved by at least nine commissioners, including three from each major party and three of the others. A useful description may be found at the "All About Redistricting" website.32 In addition to California and New Jersey, sixteen other states give a commission a more-than-advisory role in establishing legislative districts, either to the exclusion of the legislature or as a back-up if the legislature fails to act. Not all of the commissions are designed to avoid or limit

partisan control. Those that are so designed generally resemble the New Jersey system, rather than that of California. The experience in all of these states should be given further study. See the "Other Resources" listed at the conclusion of the endnotes.

Does a Constitutional Convention Provide a Way Forward?

If the voters choose in 2017 to call a constitutional convention, 189 of the 204 delegates will be elected in 2018 from the senate districts enacted in 2012, three delegates from each of the 63 districts. Whatever may be said for the idea that the malapportionment and gerrymandering of both houses of the legislature create a kind of balance, a constitutional convention will have no lower house to offset the malapportionment, partisan gerrymandering, and racial bias in the senate districts. (The details are described above, under the heading "Where We Stand Now.")

Fifteen delegates will be elected at large, so the convention would be somewhat less distorted by the 2012 senate redistricting than the senate itself. Nevertheless, the authors of this chapter view with alarm the prospect of a convention in which such a large majority of the delegates would be elected on the basis of these districts. This thought adds great weight to the conservative principle that a reconsideration of the entire constitution is to be regarded more with fear of the mischief that might be done than with hope for what may be achieved. Although many delegates from both major parties, perhaps a majority, would have an interest in preserving the reapportionment status quo, the reapportionment provisions could hardly be made worse: "maintenance of cores of existing districts" was already added in 2014. But there are many valuable provisions in other parts of the New York Constitution that ought not to be put at risk.
As there is no other foreseeable route to such reform of the reapportionment rules as we advocate here, New Yorkers who share our views confront a dilemma.

Afterword: A Pending Uncertainty

As this volume was being prepared for the press, the U.S. Supreme Court heard argument in *Evenwel v. Abbott*.33 The plaintiff-appellants in that case assert that the Equal Protection Clause requires that state legislative districts contain roughly equal numbers of eligible voters, as measured by citizen voting-age population or some other metric. As the people of New York chose to do in 1969, when they added section 5-a to Article III of our

constitution, every state now bases legislative apportionment on the whole number of residents (subject to some varying interpretations of the residency of prisoners, college students, and military personnel). If the Supreme Court were to rule in favor of the *Evenwel* plaintiff-appellants, the foregoing discussion would require extensive revision.

Notes

1. The Republican delegates to the 1894 constitutional convention would have been even more alarmed by a tabulation produced by the New York City police in 1890, and the New York State census of 1892, both of which found a substantially larger population in New York County than the 1890 U.S. census. For the history of these enumerations, see Ira Rosenwaike, *Population History of New York City* (Syracuse, NY: Syracuse University Press, 1972), 88–89.
2. See Charles Z. Lincoln, *The Constitutional History of New York* (Rochester, NY: Lawyers Cooperative Publishing Company, 1906), vol. 3, 218, explaining that the constitutional convention of 1894 intended to leave "little room for the exercise of legislative discretion" in reapportionment, and vol. 4, 346, explaining that the framers of the 1894 constitution imposed a "more rigid rule" for reapportionment of senate districts than had existed previously, in order to divest the legislature of "discretionary power" that "was not subject to judicial review." Lincoln was a delegate
to the 1894 convention.
3. Ruth C. Silva, "Apportionment in New York," *Fordham Law Review* 30, no. 4 (April 1962): 607 n.144.
4. For thorough accounts of the apportionment of New York senate and assembly districts, respectively, prior to 1964, and the related constitutional history,
see two articles by Ruth C. Silva: "Apportionment in New York," 581–650; and "Apportionment of the New York Assembly," *Fordham Law Review* 31, no. 1 (October 1962): 1–72.
5. For a discussion of why "[t]he congruence between geography and partisanship, and consequently between geography and reapportionment, cannot be overemphasized," see Gerald Benjamin, "The Political Relationship," in *The Two New Yorks: State-City Relations in the Changing Federal System*, Gerald Benjamin and Charles Brecher, eds. (New York: Russell Sage Foundation, 1988). The sentence
quoted in this note is on page 131. Professor Benjamin traces "constitutionally Republican" to a remark made by Al Smith at the constitutional convention of 1915. Ibid., 129.

6. *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 648–49 (1964); Richard L. Forstall, *Population of States and Counties of the United States: 1790–1990* (Washington, DC: U.S. Bureau of the Census, 1996), 112, 114.
7. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).
8. *WMCA*, 377 U.S. at 648. These ratios are based on citizen population. The exclusion of aliens was not at issue in *WMCA*, and the Court merely deferred to what was then the state's practice in this regard.
9. *Sherrill v. O'Brien*, 188 N.Y. 185 (1907); *Matter of Dowling*, 219 N.Y. 44 (1916). In *Sherrill*, the court described the intentions of the 1894 convention much as Charles Lincoln had: "Can it be doubted that in view of the history of constitutional changes in regard to legislative apportionment which shows a gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon their power relating thereto, and in view of the clear intention of the constitutional convention of 1894 and of the People in adopting the Constitution that this court should now hold that the minimum of discretion necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the Constitution, is left to the legislature?" Ibid., 206.
10. *Matter of Orans*, 15 N.Y.2d 339, 350 (1965).
11. Ibid., 351–52.
12. *Bay Ridge Community Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd.*, 66 N.Y.2d 657 (1985).
13. *Cohen v. Cuomo*, 19 N.Y.3d 196, 201–02 (2012) (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (quoting *Matter of Fay*, 291 N.Y. 198, 207 (1943))). The quotation marks, brackets, and interpolated word "redistricting" are in the original.
14. *Wolpoff*, 80 N.Y.2d at 78–80 (quoting *Schneider v. Rockefeller*, 31 N.Y.2d 420, 428–29 (1972)).
15. Committee on Election Law, Bar Association of the City of New York, *A Proposed Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line Drawing* (New York: The Association, 2007), 23, accessed December 10, 2015, http://www.nycbar.org/pdf/report/redistricting_report03071.pdf (hereinafter "Bar Association Report").
16. "The ordinary and plain meaning of the words 'contiguous territory' is not territory near by, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other territory."

Sherrill, 188 N.Y. at 207.
17. *Wolpoff*, 80 N.Y.2d at 80.
18. The interpretation of the senate-size rule upheld by the court of appeals in *Schneider v. Rockefeller* (1972) was followed without question in 1982 and 1992.
That formula produced 60 districts in 1972, and 61 districts in 1982 and 1992. The increase of one district resulted from changes in population distribution, not from a change in the formula. The same formula would again have produced 61 districts in 2002, and 62 districts in 2012. Internal senate documents, disclosed in the discovery phase of *Rodriguez v. Pataki* (2004), show that the decision to create 62 districts in 2002—not 61 or 63—was determined by a political calculation, partly to skew the apportionment in favor of upstate, with no reference to a constitutional interpretation.

The new reading of the constitution, showing that 62 districts were required, was supplied many months later. After the 2012 reapportionment, there was no such document discovery revealing the political calculation underlying the decision to enlarge the senate to 63 districts. But it can be shown statistically that the regional malapportionment of 2012 required a senate of exactly 63 districts. In a senate of either 62 or 64 districts, such a malapportionment could have been achieved only by raising the population range ("total deviation") above 10 percent, inviting heightened judicial scrutiny. If the new constitutional interpretation finally published in January 2012 had merely applied settled constitutional doctrine to the 2010 census counts, as its author contends, it could have been published in April 2011. See Declaration of Todd Breitbart, July 20, 2012, paras. 91–100 (at pages 39–42), filed in *Favors v. Cuomo*, 11-CV-5632 (E.D.N.Y.), available at: http://moritzlaw.osu.edu/electionlaw/litigation/FavorsvCuomo.php (accessed December 10, 2015).
The document cited in paras. 91–100 as "Docket Entry No. 288-1" is now available at the above Moritz College of Law site as "Documents from Related Case
(filed 4/03/12)." The citation in para. 93 of the July 20 declaration should point to page 119 of Docket Entry No. 288-1 (page 121 of "Documents from Related Case"), not page 115. In para. 100(b), "2001" should read "2011."
19. *Wolpoff*, 80 N.Y.2d at 85 (Titone, J., dissenting).
There is a good faith test in the passage from *Reynolds v. Sims* quoted above. But both *Reynolds*, and numerous cases based on that precedent, make it clear that the U.S. Supreme Court, far from imposing a virtually impossible burden on plaintiffs, or providing license for the malapportionment of legislative districts, was imposing an obligation upon state legislatures to act in good faith, and

applying a standard akin to the notion of reasonableness, as later advocated by Judge Titone but rejected by the court of appeals majority.

Although "[m]athematical exactness" is not required, and states have a modicum of flexibility to tolerate minor population deviations when doing so is demonstrably necessary to further legitimate redistricting goals such as drawing compact districts or maintaining the integrity of political subdivisions (*Reynolds*, 377 U.S. at 577, 578–79), the "overriding objective" must always be population equality, and "careful judicial scrutiny must of course be given" not just to the "degree" of the population deviations but to their "character" as well. (Ibid., 579, 581).

Since *Reynolds*, the Supreme Court has repeatedly reaffirmed that it is unconstitutional to use population deviations, however minor, in a *discriminatory* manner for the purpose of diluting the representation of one class of persons relative to another.

As the Court put it in *Roman v. Sincock*, 377 U.S. 695, 710 (1964), the "proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minordeviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." See also *Brown v. Thomson*, 462 U.S. 835,843–44 (1983); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Mahan v. Howell*, 410 U.S. 315, 325 (1973); *Swann v. Adams*, 385 U.S. 440, 444 (1967).

20. *Rodriguez v. Pataki*, 308 F.Supp.2d 346, 363–365 (2004); *Favors v. Cuomo*, 11-CV-5632 (E.D.N.Y., May 22, 2014), *slip op.* at 11 (citing *Rodriguez*).

21. Article III, section 5, has no language explicitly prohibiting the division of counties by assembly districts; but the strict rule apportioning one or more whole districts to each county would have made such language redundant. The drafters of the 1894 constitution did intend that there be some multi-county senate districts,comprising more than one of the less populous counties, so they specified, in section 4, that multi-county senate districts not split any county.

22. The nine Long Island senate districts have the aggregate population for 9.23 districts of the ideal population; the 26 districts wholly or partly within New York City—including two Bronx/Westchester districts that, respectively, have 94.4 percent and 80.5 percent of their populations within New York City—have the aggregate population for 26.93 districts of the ideal population; and the 28 districts to the north have the aggregate population for only 26.84 districts of the ideal population.

23. See *Favors*, *slip op.* at 16 n.7.

24. *Wolpoff*, 80 N.Y.2d at 81 (Titone, J., dissenting).

25. "Bar Association Report," 23.

26. Ibid., 25–35, A3–A5, C1–C15.
27. Ibid., 35.
28. This is not a question of giving minority groups less populous districts. A larger population range would allow more flexibility in the way districts fit together,
making it easier to *locate* a compact district where it would enable minority-group voters to elect the legislator of their choice, just as such flexibility would make it easier to keep counties intact.
29. For an account of the previous distorting effect, the litigation of the constitutionality of the 2010 law, and the successful implementation of the law (and of a similar law in Maryland), see Erika L. Wood, *Implementing Reform: How*
Maryland & New York Ended Prison Gerrymandering (New York: Dēmos, 2014), accessed December 10, 2015,
http://www.demos.org/sites/default/files/publications/
implementingreform.pdf.
30. *Leib v. Walsh*, 45 Misc.3d 874, 881 (Sup. Ct. 2014).
31. For excellent summaries of the redistricting procedures that have been followed in each state, with citations to the litigation arising from the latest redistricting,
see the "All About Redistricting" website created by Prof. Justin Levitt (Loyola Law School, Los Angeles): http://redistricting.lls.edu. The pages for each state can be found through links on the home page.
The New Jersey page is: http://redistricting.lls.edu/states-NJ.php (accessed December 10, 2015).
32. The "All About Redistricting" California page is: http://redistricting.lls.edu/states-CA.php (accessed December 10, 2015).
33. Links to the many briefs, and other documents, in *Evenwel v. Abbott* are available at two sites: http://www.scotusblog.com/case-files/cases/evenwel-v-abbott/
(accessed December 10, 2015) and http://moritzlaw.osu.edu/electionlaw/litigation/Evenwel.v.Abbott.php (accessed December 10, 2015).

Other Resources

Professor Levitt is also the principal author of an excellent general introduction to the subject, *A Citizen's Guide to Redistricting*, published by the Brennan Center for Justice at New York University School of Law. It includes a good selective bibliography and list of other resources. The latest edition (2010), with a foreword by Professor Erika Wood, is available at:
http://www.brennancenter.org/publication/citizens-guide-redistricting-2010-edition (accessed December 10, 2015).

A brief summary of each state's system is provided in another Brennan Center publication, *A 50 State Guide to Redistricting* (New York: Brennan Center for Justice, 2011), available at: http://www.brennancenter.org/publication/50-state-guideredistricting (accessed December 10, 2015).
National Conference of State Legislatures, *Redistricting Law 2010* (Denver: National Conference of State Legislatures, 2009), prepared for the NCSL by Peter Wattson.