



**A Proposed New York State Constitutional Amendment to
Emancipate Redistricting from Partisan Gerrymanders:
Partisanship Channeled for Fair Line-Drawing**

Committee on Election Law

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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**A Report of the Special Committee on Election Law
of the New York City Bar**

- I. Introduction**
 - II. Summary: a Proposed Amendment to Article III of the NYS Constitution**
 - III. A Fair Process: Non-Partisan or Bi-Partisan?**
 - IV. Competitiveness: Goal or Rule?**
 - V. Issues Still To Be Resolved**
 - A. What Is the Correct Standard of Population Equality?**
 - B. Where Should Prison Populations Be Counted?**
 - C. May a Commission Draw Congressional Districts that Are Not Subject to Legislative Approval?**
 - VI. The Redistricting Process; Judicial Review; Qualifications of Legislators**
 - § 2 – The Number of Legislators**
 - § 3 (a) – Appointment of the Commission**
 - § 3 (b) – Commission Procedure**
 - § 3 (c) – Other Tasks of the Commission**
 - § 3 (d) – Databases**
 - § 4 – Judicial Review**
 - § 7 – The Candidate Residence Requirement in Redistricting Years**
 - VII. Criteria for Districts**
 - § 5 (a) – The Population Equality Standard for Legislative Districts**
 - § 5 (b) – The Population Standard for Congressional Districts**
 - § 5 (c) – Contiguity; Division of Census Blocks**
 - § 5 (d) – Definition of Population; the Question of Prison Populations**
 - § 5 (e) – Fair Representation for Minority Groups**
 - § 5 (f) (1) – County Integrity**
 - § 5 (f) (2) – Integrity of County Subdivisions**
 - § 5 (f) (3) – Integrity of Villages**
 - § 5 (f) (4) – Compactness**
 - § 5 (f) (5) – Communities of Interest and Convenience of Administration**
 - § 5 (f) (6) – Incumbency**
 - VIII. The Amendment Process and the 2012 Redistricting – Time Constraints**
- Appendix A: Text of the Proposed Amendment**
- Appendix B: Cases on Legislative Authority over Congressional Redistricting**
- Appendix C: Criteria for Districts – Legal and Technical Issues**
- 1. The Population Equality Standard for Legislative Districts**
 - 2. Exclusion or Reattribution Prison Populations**
 - 3. Compactness**
 - 4. Communities of Interest and Convenience of Administration**

- Appendix D: An Alternative Population Standard for Legislative Districts**
- Appendix E: Critique of Proposals for Reform Introduced in the Legislature**
- 1. A05413 and S01155 (Proposed Statutes)**
 - 2. A02056 / S7976 (Proposed Constitutional Amendment)**

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I. INTRODUCTION

The Special Committee on Election Law proposes a comprehensive amendment of the reapportionment and redistricting provisions of the New York State Constitution. The proposed amendment comprises three analytically distinct elements:

1. The decision-making process: the method for appointing a districting commission, and the procedures it is to follow.
2. Criteria and standards for the apportionment and form of legislative and congressional districts.
3. The standard for judicial review.

An amendment to the State Constitution incorporating these elements is long overdue. New Yorkers have experienced repeated cycles of self-interested redistricting. The majority party in each house of the Legislature makes an agreement with that of the other house, whereby each majority designs a plan to shield itself from electoral challenge in its own house, and approves the other's self-serving plan without question. Both houses abdicate their constitutional responsibility to craft districts for the entire Legislature, and for Congress, that are compact, contiguous, equal in population, respectful of municipal boundaries, and fair in their treatment of minority groups. Under the current system of redistricting, as practiced during the last three decades of divided partisan control of the Legislature, individual legislators find themselves more beholden to their leaders for re-election than to their constituents. This form of incumbency protection produces noncompetitive elections, permanent legislative deadlock, and a Legislature unresponsive to the will and interests of the voters. A constitutional amendment is necessary to mandate redistricting criteria, and to guarantee a process for decennial redistricting, that will foster electoral competition and responsive government.

The redistricting provisions of New York State Constitution are obsolete. In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), the Supreme Court found many of the provisions in Article III, §§ 4-5, to violate the Equal Protection Clause of the 14th Amendment. Those provisions, adopted in 1894, had produced a 21 to 1 population ratio between the most and least populous districts in the Assembly, and a four-to-one ratio in the Senate¹. Such disparities did not result from legislative caprice, but were the necessary effect of the reapportionment provisions of the 1894 Constitution.²

The extensive constitutional revision placed before the voters by the Constitutional Convention of 1967 would have brought the State Constitution into

¹ Reapportionment pursuant to Article III according to the 1960 census figures, which had not yet been undertaken when *WMCA* was decided, would still have produced a 12.7 to 1 ratio in the Assembly and a 2.6 to 1 ratio in the Senate.

² The *WMCA* majority opinion provides a thorough and lucid account of how the apportionment rules produced these disparities (377 U.S. 633, 641-651).

conformity with the rule that equal populations are entitled to equal representation. But controversy over other issues led to that proposal's defeat. Thus, the State Constitution still includes redistricting provisions long ago declared invalid. The redistricting provisions should now be brought up to date in order to establish rational and constitutional redistricting criteria, and also to eliminate the opportunity for manipulation that arises from the ambiguous patchwork of judicial interpretation of many of the existing provisions.

Further, the authority over redistricting should be removed from the Legislature, whose members have an inescapable personal interest in the redrawing of the districts from which they will seek re-election. The drafters of the 1894 Constitution sought to entangle the reapportionment and redistricting of Senate and Assembly, by requiring that both be in the same law, and that assembly districts be nested within senate districts. But the nesting provision can no longer be followed, since it cannot be reconciled with the supervening equal population requirements established in *WMCA*. Thus, the majority in each house can now draw its own districts, and, under the terms of their usual agreement, remain quite indifferent to the districts drawn by the majority in the other house. The result has been to make New York legislative elections among the least competitive in the nation. And, in the only arena where the mutual accommodation of the two majorities does not rule, the Legislature has consistently failed to agree on congressional districts without judicial intervention and supervision.

As the Legislature cannot, by enacting a law, bind itself as to the substance of future legislation, or change the obsolete provisions that remain in the State Constitution, effective and lasting reform must be accomplished by constitutional amendment, not by statute.

II. THE PROPOSED AMENDMENT – A SUMMARY

The Committee's proposed amendment mandates a permanent districting commission whose members would be appointed to ten-year terms, beginning one year prior to the decennial census. A permanent staff with technical expertise is also mandated. Each of the four legislative leaders would appoint two commission members, who may not be sitting legislators or judges. Six commissioners, including at least one from each appointing authority, would then have to agree on a chairperson as the ninth member. Their choice would also require the assent of the Governor. The authority of the Legislature and the Governor would end with the appointment of the commission.

Plans for legislative and congressional redistricting could be adopted by a majority of the commission, but only if the plans receive the affirmative vote of the chair. This configuration should result in a process that resembles a last-best-offer-arbitration, with the chair in the center forging a deciding majority.

The amendment lists by priority the criteria on which any plan must be based and requires the commission to issue a report showing how the criteria have been satisfied. Highest are population equality and fair representation of minority groups, as required by the U.S. Constitution and federal law, with contiguous territory also an absolute requirement for all districts; lowest is incumbency protection; and respect for the borders of counties and local subdivisions, compactness, recognition of communities of interest, and administrative efficiency, are arrayed in between.

Although the Supremacy Clause elevates all federal constitutional and statutory requirements, including those of the Voting Rights Act, above rules established in the State Constitution, we are mindful of the Equal Protection principle that racial considerations may not predominate over traditional, race-neutral redistricting criteria. The proposed amendment therefore provides that the subordinate criteria "*be used* to create districts that will afford fair representation to the members of those racial and linguistic minority groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be able to elect representatives of their choice." (Emphasis added.)

The plans for both legislative and congressional districts would be wholly insulated from legislative review. A commission plan may be overturned by the state courts if it is clearly erroneous under the criteria of the amendment. Any plan would still, of course, be subject to review in federal courts.

The amendment would repeal §§ 2, 3, 4, 5, 5-a, and 7 of Article III, and substitute new §§ 2, 3, 4, 5, and 7. (References to sections of the proposed amendment or of the existing Constitution use the '§' symbol. The title 'Section' – *e.g.*, 'Section V-A' – is used for cross-references to sections of this report.)

III. A FAIR PROCESS: NON-PARTISAN OR BI-PARTISAN?

Proposals to replace legislative authority with a districting commission divide over a fundamental principle: should the commission be structured to achieve a non-partisan process, or a bi-partisan compromise?

The Arbitration Model

We have chosen the bi-partisan approach, seeking not to suppress, but to channel the energy of opposing political passions into a fair, even-handed redistricting framework. Under our proposal the four legislative leaders would have equal authority to appoint two commissioners each, their best advocates, to the commission. This configuration would force a last-best-offer arbitration. With a chairperson selected by a supermajority, including at least one representative from each appointing authority, and subject to the Governor's approval, the partisan representatives would compete to satisfy the chair that their respective proposed plans best satisfy the constitutional norms clearly articulated in § 5. The commission members would have to curb their partisan designs, and their hopes for partisan advantage, for fear that a competing plan would be judged more acceptable. This process will achieve a significant degree of compromise without requiring agreement.

We can foresee circumstances under which any redistricting process, including our own proposal, might produce a result inimical to the public interest. But we believe the present proposal is more likely to achieve the goal of competitive, fair elections than the alternatives we have considered.

Fundamental Differences from the Present System

The dynamics of the proposed redistricting process would be fundamentally different from the present system in several respects.

1. The leaders of the majority and minority conference in each house of the Legislature would appoint equal numbers of commission members. (There are two majority representatives from each house, and one minority representative, on the current Legislative Task Force on Demographic Research and Reapportionment.) Most significantly, the current system gives each majority the power to pass a redistricting bill in its own house, leaving the legislative minorities powerless. Under the proposed amendment, majority control of the Senate or Assembly would be irrelevant, since the Legislature (and the Governor) would have no further role after the appointment of the commission and chair. The supermajority requirement for choosing a chair would require the agreement of at least one representative of each legislative minority (or, for that matter, of at least one representative of each legislative majority), and the assent of the Governor. The chair would play the key role in the adoption of a plan, and the process for selecting the chair is designed to

ensure the appointment of a person of unquestioned integrity and non-partisanship.

2. The majority in each house would no longer find that its only useful ally is the majority of the other house, regardless of party. Under the present system, with divided partisan control of the Legislature, the Assembly Democrats need the cooperation of the Senate Republicans, and vice versa, to further their interests, but the cooperation of the Senate Democrats is of no value to the Assembly Democrats, and the cooperation of the Assembly Republicans is of no value to the Senate Republicans. Under the system we propose, the incentive for an alliance of the legislative majorities would disappear.
3. With the power to appoint two commission members each, the legislative minorities would no longer be compelled to accept the self-serving plans of the majorities. Many Republican assembly members and Democratic senators supported the final 2002 redistricting bill – the bi-partisan deal that ensured continued Republican control of the Senate and Democratic control of the Assembly. Under the present system, the majority in either house can say to members of the minority: “We have the votes to pass a bill that serves our purposes, with or without your vote; you can vote for it, and get the district you want for yourself, or you can vote your principles and take what we give you.” Under the proposed amendment, the majority and minority parties would have equal power, even if the same party held the majority in both houses and the governorship. Without being subject to the sort of threat described here, it is unlikely that the leaders or members of the minority parties would acquiesce in a deal designed to ensure that they will be unable to contend for the majority.

Reasons for Rejecting a Supermajority Requirement for Adoption of Redistricting Plans

Some members of the Committee have expressed a fear that the commission chair would be unable to resist the influence of the legislative majorities, regardless of the formal structure of the redistricting process, and they have suggested that a supermajority – for example, the chair plus five other members – should therefore be required for the adoption of redistricting plans. There is also reason to fear that, if the majority in one or both houses were so lopsided that the minority party had little hope of contending for control, the minority leaders, concerned only to preserve the perquisites of public office for their members and themselves, might acquiesce in a bi-partisan incumbent-protection plan. These are real possibilities, but we conclude that the measures to ensure a powerful and independent chair would preclude such a subversion of the process. A supermajority requirement, on the other hand, would actually be more likely to produce a plan that elevates incumbent protection above all other considerations, because it would doom the arbitration model that gives partisan factions a strong incentive to compete and to moderate their self-serving designs.

If a simple majority that necessarily includes the chair can adopt a plan, the factions will, in all likelihood, compete for the chair's approval of their respective plans. The process will be played out in alternating offers of plans by which each faction would hope to serve its own interests as far as possible, while showing that its plan best preserves counties and other municipalities, is most compact, provides the most appropriate representation for minority groups and communities of interest, etc. Each faction can only hope to gain an advantage in the eyes of the chair by 'outbidding' the other side in complying with the constitutional criteria. Each must always fear that it will lose influence if it, in turn, is 'outbid.' The ever-present incentive to seek advantage in this manner will make it difficult to revive the bi-partisan mutual accommodation of the legislative majorities, and, we believe, is likely to produce a plan that shows considerable respect for constitutional principle, even though each faction's underlying motive will be to hold or gain seats.

On the other hand, a supermajority requirement would give each partisan faction a veto, and effectively deprive the chair of the critical power to forge a competitive plan. In practical reality, there would be no way for the chair to overcome that partisan veto, except by agreeing to a plan that protected more incumbents at the expense of the constitutional mandates. The ability of the chair to play off one side against the other, in an arbitration process that serves constitutional principles, would be lost.

It has been suggested that, even if a supermajority were required for adoption of plans – thereby substantially reducing the power of the chair and weakening the arbitration model – the commission members would still have to fear that the disapproval of the chair would leave redistricting to the courts. There are two problems with this reasoning. First, we believe that the incentive to subordinate partisan and incumbent interests to constitutional principle should be intrinsic to the commission process, guarded primarily by the chair, and should not rely on the courts. Second, this suggestion ignores the fundamental argument that was offered for requiring a supermajority, namely that the chair may, despite all the institutional precautions, turn out to be the agent of the legislative majorities. If that premise were valid, however, then with or without a supermajority requirement the chair could not be counted upon to block a plan that serves legislators' interests at the expense of constitutional mandates.

The critical component in this matrix for decision-making is the chair. To ensure that the chairperson is not a pliable tool of legislative majority interests, we require the appointment to be approved by a supermajority of the eight other members, with the assent of at least one appointee of each legislative leader – effective unanimity of the legislative leaders. As a further precaution against the selection of a complicit chairperson, we also propose that the commission members' selection be subject to the approval of the Governor. We believe that the checks in this appointment process are adequate to protect the integrity and independence of the chair.

We considered the possibility of giving the Court of Appeals, or the Chief Judge, a role in the appointment process. But we believe that the Court, when called upon to

review a redistricting plan, should not be in the uncomfortable position of reviewing the decisions of its own nominee.

Why a Process Designed To Be Non-Partisan Would Probably Not Work As Well

Although we have offered sound reasons to believe that our proposed commission would function as intended, there can be no certainty that the system will not fail in some of the ways discussed above. For this reason, the proponents of non-partisanship seek a districting commission whose members would be insulated from the influence of legislators and party leaders, ignorant of the consequences of their decisions for parties and specific politicians, and oblivious to any considerations except objective, neutral principles. The method for approaching this ideal is exemplified by the extremely intricate two-tier nomination and appointment process in Assembly Bill A06287A, introduced in the 2005-2006 legislative session by Assembly Member Michael Gianaris.³

We believe, however, that the goal of non-partisanship is illusory, and more risky than a bi-partisan approach. In an appointment process designed to create a non-partisan commission, one party may gain a decisive advantage by chance, or by successfully gaming the system. The system would then provide no institutional check whatever on such an advantage.

In 1992 and 2002, when redistricting plans for New York were drawn by presumably non-partisan state supreme court referees or federal district court special masters, they did not ignore the interests of parties and incumbents, but tried to fashion the sort of bi-partisan compromise the Legislature initially failed to achieve on its own. The results, even when honest and fair, have been far from the politically neutral non-partisan ideal.

Worse can happen. Although non-partisanship is nowhere more important than in the courts, decisions in election law and redistricting cases across the country have often been characterized by partisan bias. The possibility of such bias is a constant concern to lawyers in such cases, although Republicans and Democrats may disagree about where to identify it.

Moreover, if a commission were produced whose members were truly ignorant of the political consequences of their decisions, we fear they might be incapable of making the sophisticated judgments necessary to achieve fair, competitive redistricting, especially concerning the effect of their plans on the ability of minority group voters to elect representatives of their choice. In these matters, ignorance is not necessarily innocence and does not result in a utopian election process.

Finally, a bi-partisan, rather than a non-partisan, redistricting reform is much more likely to be palatable to current and future legislative leadership. If any reform is to be adopted, by either legislative enactment or constitutional amendment, the Legislature

³ A full discussion of this bill appears in Appendix E.

will be critical to the adoption process. It is hard to imagine that the legislative leaders will cede all control to a commission over which they have no influence.

IV. COMPETITIVENESS: GOAL OR RULE?

Although competitive elections are one of our chief goals, we have not proposed competitiveness as a specific constitutional rule. Each major party has sometimes made itself non-competitive, statewide or in a specific region, by its policies or choice of candidates. It should not be the function of redistricting to compensate for such failure. When one party or another is broadly favored by the voters, a specific competitiveness criterion could amount to a constitutional mandate for a kind of gerrymandering, which would contravene the purpose of reform.

The proposed amendment attempts, instead, to curb the devices that have usually been employed to suppress competitiveness, such as population inequality, biased apportionment, promiscuous splitting of existing political subdivisions, and extremely non-compact districts. It establishes a highly rule-bound redistricting process, and leaves parties and candidates to make themselves competitive in the resulting districts.

Similarly, we do not propose an express prohibition of gerrymandering. Any specific prohibition should be clearly defined, so as to be judicially enforceable, and gerrymandering is elusive and difficult to define.⁴ Prohibition of partisan manipulation is more likely merely to hide it. Like prohibition of incumbency considerations, it might operate, in effect, only as an admonition to “keep your mouth shut” about it. We have thought it best to limit the methods of gerrymandering, as explained above, and to give partisans a strong incentive to moderate their designs, as explained in the previous section.

⁴ See, *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

V. ISSUES STILL TO BE RESOLVED

Three important, unresolved issues require special attention.

A. What Is the Correct Standard of Population Equality?

We tentatively propose that the difference in population between the most and least populous senate or assembly districts – what statisticians call the range, and courts usually call total or maximum deviation – not exceed 2% of the mean population for all districts. This standard is much more strict than the rule for state legislatures that the U.S. Supreme Court has erected in enforcing the Equal Protection Clause of the 14th Amendment. As explained below in our discussion of § 5 (a) of the proposed amendment, the more narrow standard is intended to prevent a cumulative population deviation, aggregating small deviations in many districts, that may skew the apportionment in favor of one region over another.

We believe, however, that no such rule should be adopted until its possible effect on minority group representation has been thoroughly studied. It will be necessary to create experimental plans of senate and assembly districts under the 2% rule, and under possible alternatives (*e.g.*, 4% or 5%), and to have those plans evaluated by academic experts in racial bloc voting analysis – the statistical methods that are central to Voting Rights Act litigation. The amendment would be subject to preclearance under § 5 of the Voting Rights Act, with respect to its effect on minority group voters in Bronx, Kings, and New York counties; and the State would have to undertake such a study to meet its burden of proof in the preclearance process. But the effect on minority group representation state-wide should be a central concern, regardless of the limits of VRA § 5 jurisdiction, and no conclusion should be reached without thorough study.

As we indicate below in the discussion of proposed § 5 (a), the possibility of keeping a significantly larger number of counties and county subdivisions intact, within a 4%-5% total deviation, should also be studied.

In Appendix D, we also discuss an alternative population standard that is designed to prevent a significant cumulative regional deviation, while allowing a total deviation of 10%.

B. Where Should Prison Populations Be Counted for Purposes of Legislative Redistricting?

The Census Bureau reports prisoners as residents of the census block in which the prison is located.

We propose to apply to legislative redistricting, a principle parallel to that which existing Article II, § 4, applies to the electoral franchise: “no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence ... while

confined in any public prison.”⁵ See § 5 (d) of the proposed amendment. Several members of the Committee object, asserting that this provision exhibits a distinct bias in favor of the Democratic Party, and that this provision, rather than our proposed reform of the redistricting process, will become the principal focus of debate.

They cite two indisputable facts. First, this provision would diminish the upstate proportion of the state population and expand New York City’s. Even excluding the prisoners from the redistricting database altogether, without reattributing them to their home addresses, would change the proportions in this direction, to the undoubted benefit of the Democratic Party. Second, the existing districts with substantial prison populations – some of which would have constitutionally insufficient populations if the prisoners were excluded – generally have, nevertheless, more actual voters than the New York City districts to which many of the prisoners would be reattributed.

We believe, however, that this aspect of the proposal is reasonable and does not exhibit a partisan bias.

Several upstate counties where the Republican Party is strong – exclude prison populations from the database used to draw their local legislative districts or to apportion weighted votes in the board of supervisors. The upstate Republicans who do not wish the apportionment of their local legislatures to be distorted by counting state prisoners in the town in which they are incarcerated, would presumably recognize the justice of applying the same principle to the State Legislature.

At the request of the Census Bureau, the National Research Council assembled a panel of academic experts to examine this question, as well as other issues relating to the definition of residence. Their report, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census*,⁶ was issued this year. They find that “[t]he evidence of political inequities in redistricting that can arise due to the counting of prisoners at the prison location is compelling.”⁷ They recommend that the prison populations be identified in the PL 94-171 redistricting data set – the first release of block-level data from the decennial census – instead of waiting for the publication of Summary File 1 a few months later, so that states may easily exclude these populations from their redistricting database if they so choose.⁸ They also recommend that the Bureau

⁵ Art. II, § 4, as written, also states that, for purposes of voting, no one is to be deemed to have gained or lost a residence while a student residing at a school, or an inmate of a charitable or publicly funded institution; but there are good reasons to distinguish the situation of prisoners, including the fact that Art. II, § 4, is still effective with respect to prisoners. Proposed § 5 (d) also differs from Art. II, § 4, in that the phrase in the latter, “any public prison,” has been understood to refer both to prisons and jails, while proposed § 5 (d) refers specifically to “incarceration in a federal or state correctional facility.” Inmates of jails are confined, for the most part, within their county or city of residence, and their presence at the site of the jail does not skew the apportionment of districts as prison populations do.

⁶ D.L. Cork and P. R. Voss, eds., *Once, Only Once, and in the Right Place* (National Academies Press, Washington), 2006; available at: <http://www.nap.edu/catalog/11727.html>.

⁷ *Ibid.* at 248.

⁸ *Ibid.* at 248-250.

experiment, in the 2010 census, with methods for defining and identifying prisoners' home addresses, to evaluate the possibility of assigning them to those addresses in future censuses.⁹

Our proposal also reflects the fact that legislators, as they will readily acknowledge,¹⁰ do not represent the prisoners who are incarcerated in their districts, whose presence nevertheless counts toward the population complement of those districts. With regard to the principle of equal *representation* for equal populations, therefore, prisoners are in quite a different category from other non-voters, such as children, whose interests are represented by the legislators from their districts.

Several alternative approaches to this issue are discussed in Appendix C.

C. May a Commission Draw Congressional Districts that Are Not Subject to Legislative Approval?

We propose to vest the districting commission with authority over congressional redistricting, a subject on which the NYS Constitution is now silent. This raises constitutional questions of potential significance.

Article I, § 4, of the U.S. Constitution reads in part:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The U.S. Code provides only that representatives are to be elected from single-member districts, and that such districts are to be established by law (2 U.S.C. § 2c); and 2 U.S.C. § 2a refers in several places to “districts ... prescribed by the law of such State.”

May a state, then, by constitutional provision, vest a commission with the authority to establish congressional districts, without leaving final authority with the legislature, in a procedure quite distinct from the state's ordinary legislative process? Four states already do so: Arizona, Hawaii, Idaho, and New Jersey.¹¹ Washington, too, has such a commission, but allows the legislature to alter the commission's plan by a

⁹ Ibid. at 245 ff.

¹⁰ See, for example, Emily Bazelon and Peter Wagner, “Census’ Cell Count Steals Voting Power,” *Newsday*, September 8, 2004: “In theory, the Attica prisoners are represented by Sen. Dale Volker (R-Depew). Yet the former police officer says that he ignores letters from inmates in order to spend his time on the corrections workers he sees as his real constituents.”

¹¹ Montana also has such a provision in its constitution, but it functions only as an expression of hope, since the state has a single representative.

two-thirds vote in both houses. There seems to have been no litigation in federal courts, and only one state court case, questioning the compliance of these procedures with Article I, § 4.¹²

In 1992 and again in 2002, the Legislature initially failed to agree on a congressional redistricting plan. In 1992 the Legislature finally adopted the plan proposed by supreme court referees, and in 2002 they adopted a slightly modified version of the plan proposed by a district court's special master. Thus, the seemingly inevitable abdication of the partisan congressional redistricting process to the courts recommends a systemic solution that parallels legislative redistricting pursuant to our proposal.

If Article I, § 4, is thought, however, to bar the State from vesting congressional redistricting authority in a commission, it would be appropriate to mandate the districting commission to recommend a congressional redistricting plan to the Legislature, perhaps with some restriction on the Legislature's discretion to amend the plan. Some members of the Committee have suggested that such a provision be included contingently in the proposed amendment, to take effect in the event of a court order barring the establishment of congressional districts by the commission.

¹² The U.S. Supreme Court has addressed related issues only twice. See Appendix B.

The authority of the New Jersey Redistricting Commission to draw congressional districts was challenged in the state courts and upheld by the Supreme Court of New Jersey in *Brady v. New Jersey Redistricting Comm'n*, 31 N.J. 594, 622 A.2d 843 (1992). The Court found 1) that the redistricting power granted by the U.S. Constitution, Art. I, § 4, is "further described" by the provision of 2 U.S.C. § 2c that congressional districts be established by the laws of the state, *Id.* at 607, 2) that the Commission, which was established by statute, constituted a valid delegation of legislative authority under the New Jersey Constitution, *Id.* at 607-609, and 3) that it therefore also satisfied federal constitutional and statutory requirements: "The State could use any constitutionally-sanctioned method of creating law, including, as in this case, a proper delegation of lawmaking power. Therefore, the plan was developed 'by law,'" *Id.* at 609. Reviewing decisions by federal courts (including *Smiley v. Holm*, discussed below in Appendix B) that had "refused to give effect to a redistricting plan that has bypassed a necessary party to the lawmaking process," the Court found that "[t]hose cases are clearly distinguishable from the present challenge: both houses of the New Jersey Legislature passed the Act [establishing the Commission] by the necessary majorities, and the Governor signed the bill into law on January 21, 1992. The Act does not attempt an 'end run' around a required participant in the lawmaking process." *Id.* at 609-610.

VI. REDISTRICTING PROCESS; JUDICIAL REVIEW; QUALIFICATIONS OF LEGISLATORS

The amendment would repeal §§ 2, 3, 4, 5, 5-a, and 7 of Article III, and substitute new §§ 2, 3, 4, 5, and 7. Appendix A gives the full text of the proposed amendment. Here we offer commentary on each separate section and subsection.

§ 2. Number and terms of senators and assembly members

The senate shall consist of sixty-two members. The assembly shall consist of one hundred and fifty members. The members of the senate and assembly shall be elected in even-numbered years for terms of two years.

The Size of the Senate

We propose to fix the size of the Senate at the current number of 62 seats rather than let the size of the Senate float as it has for more than a century.

The provision for determining the size of the Senate – originally 50 – in existing Article III, § 4, reflected the fear of the drafters of the 1894 Constitution that the cities of New York and Brooklyn, which then accounted for one third of the state population (one quarter in New York County alone), would grow until they overwhelmed the rest of the state. They provided, therefore, that whenever one of the more populous counties (those entitled to at least three senate districts out of fifty) became entitled to an additional district, that district would not be reapportioned from elsewhere, but would be added to the total number of districts. The result was that, as certain large counties gained an increasing share of the state population – not New York and Kings, as it turned out, but Nassau (which did not exist in 1894), Queens, Richmond, and Suffolk – the *less* populous counties obtained a greater share of the senate districts, relative to their share of the state population. The more populous counties, collectively, saw their apportionment of seats decline, not in absolute numbers, but in proportion to their share of the total population.

This was one of the rules that produced a four-to-one population ratio among senate districts by 1964, when the system was overturned in *WMCA, Inc. v. Lomenzo*.¹³ Since *WMCA*, the size-of-the-senate formula no longer produces a malapportionment of districts. It simply determines the number of districts, which are then apportioned according to the prevailing equal population standard.¹⁴

¹³ See n.2, above.

¹⁴ The malapportionment alleged by the unsuccessful plaintiffs in *Rodriguez v. Pataki* (2004) related to the application of the population standard. Plaintiffs alleged that a sixty-second senate district had been added to make it easier to manipulate the population standard, not that the size-of-the-senate rule was a direct cause of malapportionment (as it would have been prior to *WMCA*).

The formula no longer serves any purpose, good or bad, but it is subject to political manipulation because of uncertainty about its interpretation. The uncertainty arises in part out of a dispute over how the rounding of “ratios of apportionment” is to be performed, and in part because county boundaries have changed since 1894. Nassau County was created in 1899 from part of the territory of Queens County. Bronx County was created in 1912, with territory taken from both New York and Westchester counties. And in 1894 Richmond and Suffolk counties shared a senate district, and have therefore been treated as a single county for the purpose of applying the formula.¹⁵

In 1982 and 1992, the Legislature followed, without question, the interpretation that had been followed in 1972 and upheld in *Schneider*. If the same interpretation had been applied to the 2000 census counts, 61 senate districts would have been drawn in 2002. The Senate Majority decided, however, that their political purposes would be served in the 2002 redistricting cycle by adding a seat,¹⁶ and their outside counsel duly produced a memorandum supporting exactly the interpretation advocated unsuccessfully by the plaintiffs in *Schneider*.¹⁷ The *Schneider* court, however, had not found that the 1972 interpretation was the one true formula, only that it resulted from an appropriate exercise of legislative discretion. The new 2002 formula would presumably have been accorded the same deference if challenged. If this provision of Article III, § 4, remains, it will therefore permit result-oriented district-drawers to pick and choose among a variety of constitutional theories to create a politically convenient number of senate districts. To avoid such manipulation of a constitutional ambiguity, a fixed number of districts should finally be set.

The Question of Nesting

We considered, and rejected, the possibility of nesting assembly districts wholly within senate districts, on the model of the nesting rule in existing Article III, § 5, with each senate district divided into the same number of assembly districts (either two or three).¹⁸

¹⁵ The formula evolved through a series of four cases: *Matter of Dowling*, 219 N.Y. 44 (1916), *Matter of Fay*, 291 N.Y. 198 (1943), *Matter of Orans*, 15 NY2d 339 (1965), and *Schneider v. Rockefeller*, 31 NY2d 420 (1972).

¹⁶ Memorandum titled “Size of the Senate,” July 20, 2001, at 1, *Rodriguez v. Pataki* SDNY 02 Civ. 618.

¹⁷ Memorandum from Michael Carvin to Sen. Joseph Bruno and Sen. Dean Skelos, “Re: Senate Size,” March 7, 2002, available at: <http://latfor.state.ny.us/docs/20020308>.

¹⁸ The nesting requirement in existing Art. III, § 5, is now ignored because it is inconsistent with the population equality rule established by *WMCA*. Art. III, § 5, requires that, where a county has been apportioned more than one senate district, the assembly districts apportioned to that county shall be nested within the senate districts. If the assembly districts cannot be divided evenly among the senate districts, then the largest senate district gets the extra assembly district (or the smallest senate district gets one less assembly district than the others). Suppose a county has two senate districts, one of which has one person more than the other, and five assembly districts. The more populous senate district would get three assembly districts, and the less populous (even by one person), two. The population inequality consequences are obvious. Moreover, even if one were to ignore the connection between the nesting rule and the paramount importance assigned to county integrity by the apportionment rules of the 1894

Leaving aside the likely opposition of the affected incumbent senators, reducing the Senate to 50 districts, each with three assembly districts, would reduce the opportunities for minority group voters to elect senators of their choice. Systems of 60 senate districts with 180 assembly districts, or 75 senate districts with 150 assembly districts, would seem to be more reasonable, but we rejected these for two reasons.

Most importantly, any nesting rule is likely to interfere with minority group representation. In areas where minority group voters are sufficiently numerous to form an effective majority in an assembly district, but not in a more populous senate district, nesting may result in the fracturing of minority group populations at the assembly level. Conversely, where minority group voters can form a majority in a senate district, nesting may result in the packing of minority group voters into a small number of assembly districts, in percentages far above an effective majority, thus limiting the total number of assembly districts in which they can elect candidates of their choice.

We also fear that if a proposed constitutional amendment created 30 additional assembly districts, or 13 additional senate districts, the public debate would focus on the expense of increasing the size of the Legislature, and not on the essential reform of the redistricting process.

We therefore propose to fix the senate at its present size, without a nesting requirement, as the most straightforward approach.

§ 3. Establishment and alteration of senate, assembly and congressional districts

- a. There shall be a districting commission to draw senate, assembly and congressional districts, so that all the people of New York may be fairly represented. The districting commission shall consist of nine members. No person shall be a member of the districting commission who is not a registered voter in the state of New York, and who has not been, at the time of appointment, a resident of the state of New York for five years. No member of the senate or assembly, no member of congress, and no person holding judicial office, shall be a member of the districting commission. The temporary president of the senate, the minority leader of the senate, the speaker of the assembly, and the minority leader of the assembly shall each appoint two members for a term of ten years commencing on the first day of April of the year preceding the year in which the federal decennial census is taken, except that, if this subsection shall become effective after such date, the terms of the members shall commence on**

Constitution, there is no way to make 150 assembly districts go evenly into 62 senate districts. A nesting rule would now require that the number of assembly districts be an integral multiple of the number of senate districts.

the first day of March of the year in which this subsection shall become effective. If a seat on the commission shall fall vacant, the officer of the legislature who appointed the original member shall appoint a member to complete the unexpired term; except that, if more than two members appointed by the officers of either house would then have been appointed by an officer of the same party, then the other officer of the same house shall appoint a member to fill the vacancy. The ninth member, who shall be the chair of the commission, shall be appointed, subject to the assent of the governor, by a vote of at least six of the other eight members, including at least one appointed by each appointing authority, to a term that shall expire at the same time as the terms of the other members.

Appointment Authority

The leader of each of the four legislative conferences would appoint two members to the districting commission.¹⁹ The appointment of the chair must be approved by six of the eight partisan appointees, including at least one appointed by each legislative leader, to ensure that there is genuine bi-partisan agreement on this critical appointment. The choice of the chair would also require the assent of the Governor. Our fundamental decision to seek a bi-partisan, rather than non-partisan, commission is discussed above in Section III.

A Permanent Commission

The districting commission would be a permanent institution, whose staff could devote many years to preparing databases and making other preparations for each redistricting cycle. These tasks are discussed further, below, in relation to § 3 (c) and (d). The commissioners' ten-year term will begin far enough in advance, so that they and their staff will be fully prepared when the decennial census data become available in March of the year following the census year. But the term is intended to begin as late in the decade as this consideration permits, so that the selection of commissioners will reflect the judgment of the legislative leaders who are in office as the census approaches.

Qualifications of Commission Members

Members of the Legislature and Congress would be barred, not because they would be partisan – it is assumed that the legislative leaders' appointees would be partisan – but because they would have a personal interest in the drawing of their own districts. We wish to avoid a conflict between their peculiar personal interests and the partisan interests they are expected to advocate. If the legislative leaders were permitted

¹⁹ The Constitution provides for a Speaker of the Assembly and Temporary President of the Senate, but not for minority leaders. Note, however, that Article VI gives the minority leaders the power to appoint members of the Commission on Judicial Nomination and Commission on Judicial Conduct.

to appoint members of their own legislative conferences, they might face irresistible political pressure to do so. Members of the judiciary would be barred because sitting judges should not be directly engaged in an essentially legislative function. There would be no bar to retired legislators or judges.

Diversity

Each legislative leader is to appoint two members, because a racially and ethnically diverse commission is more likely to command public trust. Each leader will want to appoint his or her best advocate. That person will sometimes be a member of a minority group, and sometimes not. There should be room to achieve diversity, even when a legislative leader's choice of the one best advocate happens not to be a member of a minority group.²⁰

Vacancies

The provision for filling vacancies is designed to deal with the effect of a turnover in partisan control of a house, between the time the original appointment is made and the occurrence of the vacancy. We avoid the problem that could be posed if the Majority Leader of the Senate, for example, becomes Minority Leader, and one of the previous Minority Leader's appointees resigns, in which case the new Minority Leader would wind up with three of the four Senate appointees if he or she were permitted to fill the vacancy.

§ 3. [continued]

- b. The senate, assembly, and congressional districts shall be established by a vote of at least five members of the districting commission, including the affirmative vote of the chair of the commission. The plans of senate, assembly, and congressional districts established by the districting commission shall have the effect of law. The districting commission shall establish the senate, assembly, and**

²⁰ We do not assume that the one best advocate will not be a member of a minority group, but only allow for those occasions when that may not be the case. It would not be advisable to write specific racial and ethnic representation requirements into the constitution. (Even the proposed § 5 (e) provides, like the Voting Rights Act, only for the ability to elect representatives of choice. The racial or ethnic identity of those elected is, at most, only an evidentiary issue.) It is also unclear how such requirements could work, when the appointment authority is divided among four officials acting independently. In this case, however, the past practice of the legislative leaders indicates that the system would work. Hispanic or black Assembly members have several times been appointed as the Assembly co-chair of the Legislative Task Force on Demographic Research and Reapportionment: Angelo Del Toro, David F. Gantt (who was co-chair during the 1991-92 redistricting round), and Adriano Espaillat (the current co-chair). The current non-legislator appointee of the Senate Majority, Mark A. Bonilla, is Hispanic (no Republican senator from a minority group is available). The Democratic legislative leaders, in particular, would be under strong political pressure, from within their conferences and without, to provide minority representation on the commission.

congressional districts at the same time, and no later than the last day of January of the second year following the year in which the federal decennial census is taken, and shall at that time issue a report explaining how the districts comply with the requirements of § 5 of this article. Such districts shall become effective for the next ensuing general election of senators, assembly members, and members of congress. The senate, assembly, and congressional districts shall remain unaltered until after the subsequent federal decennial census, except that, if an alteration of such districts shall be ordered by a court of competent jurisdiction, or if such districts shall be prevented from taking effect pursuant to this article or to any provision of the constitution and laws of the United States, the districting commission shall make the alterations necessary to provide a remedy. All votes of the commission shall be taken at public meetings, and the commission shall cause transcripts of all meetings and hearings, including all testimony submitted in writing, to be made publicly available. The commission shall promote informed public understanding of, and participation in, the process of redistricting, by such means as providing information to the public, holding hearings, and encouraging submission of proposals.

The Arbitration Model

As discussed above, in Sections II and III, and also in reference to proposed § 3 (a), the leaders of the four legislative conferences will have equal authority to appoint members of the districting commission, and the selection of the chair will require bi-partisan agreement. The two majorities will no longer be able to impose a bi-partisan gerrymander on their respective minorities, nor would a single party's control of both houses, and the governorship, enable that party to dictate redistricting plans. Proposed §3 (a) and (b) lay the basis for a kind of last-best-offer arbitration by the chair of the commission.

As a further check on bi-partisan gerrymandering, no plan may be approved, even with the unanimous concurrence of the other members of the commission, without the affirmative vote of the chair.

Section III, above, presents a full discussion of the arbitration model, its possible defects, and the alternatives.

The Effect of Law

The “effect of law” provision is intended to avoid having to amend the constitutional provisions that say only the Legislature can make laws,²¹ while avoiding any complications arising from other constitutional or statutory provisions that refer generally to the laws of the state – a term that currently includes the senate, assembly, and congressional districts.

The Deadline: Allowing time for Public Participation Prior to Establishment of Districts, and for Litigation and VRA § 5 Review Afterward

The January 31 deadline is intended to be late enough to allow for extensive public hearings and other forms of public participation, including the proposal of plans to the commission, while being early enough so that both the review under the preclearance requirement of § 5 of the Voting Rights Act, and any litigation in federal or state courts, can be resolved without disrupting the election process – and also to allow time for the courts to give a fair hearing to any challenge. A specific deadline would also give guidance to the courts, state and federal, as to when the time would be ripe for judicial intervention in case of the commission’s failure to act.

Districts to Remain Unaltered for a Decade

The proposed amendment would retain the rule in existing Article III, §§ 4-5, that legislative redistricting is to occur only once in a decade, and would extend that rule to congressional districts.

The language, “prevented from taking effect,” other than by court order, contemplates the possibility of denial of preclearance under § 5 of the Voting Rights Act, should the State seek preclearance from the Department of Justice, as New York has usually done.²² It seems best, however, to use general language, rather than to refer to a specific federal statute in the State Constitution.

§ 3. [continued]

- c. The legislature shall make necessary appropriations for the expenses of the districting commission, provide for compensation and reimbursement of expenses for the members and staff of the commission, assign to the**

²¹ Article III, § 13, provides that “no law shall be enacted except by bill,” and Article III, § 14, states, “nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature.”

²² Any change of election procedure in Bronx, Kings, or New York County is subject to the preclearance requirement. The state may choose to seek preclearance from the District Court for the District of Columbia or from the Department of Justice.

commission any additional duties that the legislature may deem necessary to the performance of the duties stipulated in this article, and require other agencies and officials of the state of New York and its political subdivisions to provide such information and assistance as the commission may require to perform its duties.

Other Tasks of the Commission

The Legislature would presumably assign to the districting commission the tasks now performed by the permanent staff of the Legislative Task Force on Demographic Research and Reapportionment, including participation on behalf of the state in the Census Bureau's Redistricting Data Program (RDP). Phase I of the RDP is the Block Boundary Suggestion Program. This permits the state to suggest, as boundaries for census blocks, physical features (*e.g.*, street segments) that the state uses, or hopes to use, for ED boundaries, or for boundaries of legislative or congressional districts, and that are not already part of the Census Bureau's geographic database. Phase II is the drawing of voting tabulation districts (VTD's).²³ This project entails several years of painstaking work. In connection with it, the Legislative Task Force staff has also created statewide map 'layers' of election districts, including all the various ED configurations employed in each county throughout the decade, for use with geographic information systems (computerized cartography – 'GIS'). The districting commission will presumably wish to engage the services of the Legislative Task Force staff who have previously performed these functions.

The information that other agencies and political subdivisions might be required to provide to the districting commission would include election canvasses, enrollment

²³ The VTD is the smallest level of census geography at which census data (population, race, Hispanic origin, etc.) and political data (enrollment figures and election returns) can be exactly matched. Census data are tabulated at the block level, and political data at the ED level. The VTD should therefore be the smallest unit consisting both of a whole number of undivided census blocks (one or more), and of a whole number of undivided ED's (one or more). The possible combinations are as follows:

- A single block coterminous with a single ED.
- A single block comprising several whole ED's.
- A single ED comprising several blocks, with no part of any such block belonging to another ED.
- A cluster of several ED's, coterminous with a cluster of several blocks (where none of the three more simple combinations is possible).

VTD's make it easy to perform the bivariate linear regressions and other statistical analyses that are essential to any evaluation of a redistricting plan under the Voting Rights Act. The Census Bureau reports the demographic data (including the racial breakdown) by VTD, and anyone with a table showing the correspondence between VTD's and ED's can easily aggregate political data from the ED level to the VTD level. Under proposed § 3 (d) the districting commission would be required to make the correspondence table publicly available – as the Legislative Task Force has done.

The VTD's are drawn by the state and submitted to the Census Bureau. The Bureau then reports all the PL 94-171 data – the redistricting data set, which is the first release of block level data from the decennial census – by VTD, as well as by block, tract, etc.

data, and ED maps – all in electronic format where available. The Department of Transportation might be required to provide information and assistance in connection with the commission’s geographic tasks. The Department of Correctional Services might be required to provide the necessary information (which would not include confidential personal information) for reattributing prison populations to the prisoners’ home addresses, as discussed in Appendix C.

§ 3. [continued]

- d. Subject to such reasonable regulations as the legislature shall enact, the districting commission shall, as may be necessary to perform its duties, hire staff, enter into contracts, conduct research, hold hearings, and communicate with the public; shall assemble and maintain such geographic, demographic, election, and voter registration data as may be necessary for the analysis and evaluation of proposed and established plans of senate, assembly, and congressional districts, including, but not limited to, the compliance of such plans with the provisions of this article and with the constitution and laws of the United States; and shall cause all such data, and all expert reports, results of any other research conducted under a contract entered into by the commission, and proposals for districts submitted by the public, to be made publicly available.**

The Appropriateness of a Political Database

A challenge to legislative or congressional districts under § 2 of the Voting Rights Act requires an extensive database of election data for the statistical analysis of racial bloc voting, and of the likely outcomes in various district configurations. The same sort of analysis is necessary to determine whether a plan would be retrogressive under the VRA § 5 preclearance standard, and whether it would satisfy the requirements of § 5 (e) of our proposed amendment.

Public Availability of Data

Without a publicly available political database, potential plaintiffs may find voting rights litigation prohibitively expensive. Between the date new districts are established, and the beginning of the election calendar in a reapportionment year, it would be virtually impossible to assemble the data to prove a complaint. The people of New York do not necessarily have an interest in sustaining a redistricting plan. They do have an interest in being able to seek judicial relief when their rights are violated. This is why proposed § 3 (d) makes it clear that the maintenance, and publication, of a political database is not only permissible, but required. The availability of a good political database would also put everyone on an equal footing in determining the partisan and other political consequences of any redistricting plan. What you don’t know *can* hurt you.

§ 4. The senate, assembly, and congressional districts shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe. Any court before which a cause may be pending involving the establishment and alteration of such districts, 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. Such court shall have authority to appoint referees, to engage the assistance of experts, and to compel the assistance of the districting commission and its staff, as it may deem necessary to the disposition of a suit brought under this section. If the districting commission shall fail to establish senate, assembly, or congressional districts by the date specified in § 3 (b) of this article, or if a court reviewing districts pursuant to this section finds the establishment or alteration of any such districts to be clearly erroneous under any provision of this article, or of the constitution and laws of the United States, the court shall order the commission to establish such districts or make such alterations as necessary to provide a remedy, within such time as the court may require, or shall itself establish such districts or make such alterations as the court deems necessary.

Procedure

The procedure for judicial review in existing Article III, § 5, would be retained. Our proposed § 4 would ensure that a court reviewing districts, whether at the trial or appellate level, could marshal the necessary resources to deal with the evidence and, if necessary, fashion a remedy. The provision authorizing the court “to compel the assistance of the districting commission and its staff” is intended to give the court the same authority that a District Court would exercise, to commandeer the resources of the commission for the use of its referees and experts. The proposal is intended to give an appellate court, including the Court of Appeals, authority to assume responsibility for the remedy phase of the litigation if it seems expeditious to do so, as the Court of Appeals did in *Matter of Orans*, 17 N.Y.2d 107, 216 N.E.2d 311 (1966). (Volume 17A of the N.Y.2d Series consists entirely of the district maps prepared by the Judicial Commission appointed by the Court of Appeals. For the liability phase of *Orans*, see n.37, below.)

A New Standard: Clearly Erroneous

In its most recent review of a legislative redistricting plan, the Court of Appeals concluded:

The Senate plan indeed compromises the integrity of 23 counties, as petitioners have noted. But respondent has countered petitioners’ allegations with a detailed defense of the proposed plan that is grounded in a complex analysis of population trends and voting patterns, and the way

in which both must be accommodated in order to comply with federal requirements. 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 (*Schneider*, supra, at 428-29).

We have considered the petitioners' compactness and contiguity claims, and we find them to be without merit.²⁴

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, and rejected the compactness and contiguity claims without discussing, or even mentioning, the trial courts' decisions on those issues. We cannot imagine how any plaintiff could overcome the burden of the good faith standard first erected by the Court in *Schneider*, and later invoked in *Wolpoff*. The difficulty harkens to the intentional discrimination requirement faced by Voting Rights Act plaintiffs after *City of Mobile v. Bolden*, 446 U.S. 55 (1980), prior to the 1982 amendments that allowed a complaint to be sustained by proving only discriminatory effect. Whatever may be said for the good faith standard, the rationale for it should pass away when the State Constitution is finally amended to make its redistricting rules compatible with the federal requirements that have been established since 1964.

We believe that a legislative or congressional plan that is "clearly erroneous" in its application of constitutional requirements to the demographic and other available facts should not be permitted to stand. Plaintiffs should not have to sustain the far heavier burden of proving that redistricting decisions were arbitrary and capricious, or were made in bad faith. 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.

§ 7. No person shall serve as a member of the legislature unless he or she is a citizen of the United States and has been a resident of the state of New York for five years and, except if elected a senator or member of the assembly at the first election in which a readjustment or alteration of the senate or assembly districts becomes effective, of the senate or assembly district for the twelve months immediately preceding his or her election. No member of the legislature shall, during the time for which he or she was elected, receive any civil appointment from the governor,

²⁴ *Wolpoff v. Cuomo*, 80 NY2d 70, 80 (1992), citing *Schneider v. Rockefeller*, 31 NY2d 420, 428-429 (1972).

the governor and the senate, the legislature or from any city government, to an office which shall have been created, or the emoluments whereof shall have been increased during such time. If a member of the legislature be elected to congress, or appointed to any office, civil or military, under the government of the United States, the state of New York, or under any city government except as a member of the national guard or naval militia of the state, or of the reserve forces of the United States, his or her acceptance thereof shall vacate his or her seat in the legislature, providing, however, that a member of the legislature may be appointed commissioner of deeds or to any office in which he or she shall receive no compensation.

Existing Article III, § 7, is reproduced as it stands, except to eliminate the requirement that, in a redistricting year, legislative candidates be residents of the county in which they are running (*i.e.*, a county that includes at least part of the district in which they are running). This made more sense under the 1894 Constitution, which placed county integrity above all other considerations, and always allotted at least one assembly district to each county (but counting Fulton and Hamilton as a single county). It now presents a problem. If all the criteria are strictly followed, incumbents may find themselves paired with other incumbents – merely as the result of a conscientious application of the principles in proposed § 5 (a) and (f). A Kings County assembly member in that situation would have a choice of more than 20 districts to run in. Assembly members from many upstate counties would have only one, and it could be the same one for two or more of them.²⁵ It is unlikely that relaxing the residence rule for redistricting years will produce an epidemic of carpetbagging.

²⁵ The problem can also arise downstate. During the last redistricting cycle, Sen. Ada Smith, who was a Kings County resident representing a bi-county district with most of its population in Queens County, was warned that her district was likely to be drawn entirely into Queens County in 2002. She moved to Queens County early in the fall of 2001, a little more than a year before the 2002 election. Had she waited a little longer, she would have been barred from running in anything resembling her previous district. Sen. Ruth Hassell-Thompson, a Mount Vernon resident who represents a district that is mostly in Bronx County, with about half the city of Mount Vernon, could conceivably find herself in the same predicament. Before *WMCA*, such bi-county districts could not have been created in the first place. But Bronx voters, having chosen a Westchester resident to represent them, or Queens voters having chosen a Brooklyn resident, should not be constitutionally barred from re-electing her.

VII. CRITERIA FOR DISTRICTS

Some subsections of proposed § 5 are fully discussed here. Where a full discussion of legal or technical issues would have been unwieldy in the main body of the report, a more complete discussion is to be found, as indicated, in Appendix C.

§ 5. Criteria for Districts

- a. **The difference in population between the most and least populous senate districts shall not exceed two percent of the mean population of all senate districts, and the difference in population between the most and least populous assembly districts shall not exceed two percent of the mean population of all assembly districts.**

As discussed above in Section V-A, proposed § 5 (a) would not only bring the State Constitution into compliance with the population equality standard arising under the Equal Protection Clause, but is also designed to prevent a cumulative or aggregate population deviation. Small deviations in many districts, when multiplied over a large number of similarly under- or overpopulated districts, may skew the apportionment in favor of one region at the expense of another. Appendix C discusses the issue of regional bias in more detail, and Appendix D indicates an alternative approach.

§ 5. [continued]

- b. **All congressional districts shall be as nearly equal in population as is practicable.**

The equal population requirements for legislative and congressional districts have different constitutional foundations. For legislative districts, it is the Equal Protection Clause of the 14th Amendment. For congressional districts, however, it is the provision in Article I, § 2, that “The House of Representatives shall be composed of Members chosen ... by the People of the several States” The Supreme Court has interpreted this to mean that congressional district populations must as nearly equal in population as is practicable, and that no deviation is so small as to be *de minimis*.²⁶ In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court found that

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. *Id.* at 740-741.

²⁶ *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), *White v. Weiser*, 412 U.S. 783 (1973).

The Court found, however, that New Jersey had failed to meet the burden of proving that its deviations were necessary to achieve any such purpose. It is clear that any population deviation that might be permitted among congressional districts would be very small; and any deviation would be almost certain to invite litigation.

New York has never attempted to make use of the leeway that it might claim under *Karcher*. New York's congressional districts in recent decades have always had a deviation of no more than one person. Since this policy has never been controversial, we propose to make it permanent.

§ 5. [continued]

- c. Each district shall consist of contiguous territory; no district shall consist of parts entirely separated by the territory of another district of the same body, whether such territory be land or water, populated or unpopulated. A populated census block shall not be divided by a district boundary, unless it can be determined that the populated part of such block is within a single district.**

The contiguity provision is designed to elaborate upon, and give new force to, the requirement in existing Article III, §§ 4-5, that legislative districts consist of “contiguous territory,” and to apply the same requirement explicitly to congressional districts. The definition of contiguity is designed to revive the definition established by the Court of Appeals in 1907: “not territory near by, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other territory.” *Matter of Sherrill v. O’Brien*, 188 N.Y. 185, 207. In *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 80 (1992), the Court upheld a senate district (District 57) that was clearly not contiguous by this definition, but did not explain how the trial court had erred in finding the district discontinuous, offered no other reason for this part of the decision, and substituted no new definition.

Our proposed definition of contiguity is minimal. It does not, for example, require that land masses be connected by bridges, tunnels, or regularly scheduled ferry services. But we believe that incorporating the *Sherrill* definition into the constitution, and establishing the ‘clear error’ standard for judicial review (see § 4 of the proposed amendment), will once again give New York an unambiguous and enforceable standard of contiguity.²⁷

²⁷ It should be noted, however, that it would not bar the creation of a district much like existing Senate District 60 (the nearly identical successor to the previous District 57), since the division of towns, as distinct from cities, would no longer be strictly prohibited. See proposed § 5 (f) (2). Indeed, the proposed § 5 (f) (2) would require the division of the more populous *town* of Tonawanda, rather than the less populous adjoining *city* of Tonawanda, while the current Art. III, § 4, requires just the opposite. It would also be possible to keep a district like Senate District 60 contiguous by including some of the unpopulated territory of the town of Tonawanda, adjoining the Niagara River, which would, incidentally, create a connection by way of arterial highways and bridges.

The provision on division of census blocks arises from the need to have precisely defined district populations. The current provisions in Article III, §§ 4-5, prohibiting the division of blocks, have been routinely ignored when the blocks are unpopulated – for example, to extend a district boundary along the visual extension of a street into an adjoining body of water, even when the boundary must pass through a block of land lying between the end of the street and the shoreline. We believe this provision is the most reasonable way to deal with the issues that gave rise to *Brooklyn Heights Assoc. Inc. v. Macchiarola*, 82 N.Y.2d 101 (1993), which turned on the question of whether the New York City Districting Commission might reasonably divide, or be required to divide, a populated block.

§ 5. [continued]

- d. The whole number of persons reported in the federal decennial census shall be the basis for determining populations for the purposes of this article, except that, for the purpose of determining the populations of senate and assembly districts, no person shall be deemed to have gained or lost a residence by reason of conviction and incarceration in a federal or state correctional facility.**

The controversy over proposed § 5 (d) is discussed above in Section V-B. The technical issues, and alternative formulations, are discussed in Appendix C.

§ 5. [continued]

- e. Senate, assembly, or congressional districts shall not be established that result in a denial to members of racial and linguistic minority groups of an equal opportunity with other citizens to participate in the political process and to elect the representatives of their choice. The principles stated in subsection (f) of this section shall be used to create districts that will afford fair representation to the members of those racial and linguistic minority groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be able to elect representatives of their choice.**

With respect to minority voting rights, the proposed § 5 (e) incorporates the essential standard of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 [b]). It also ensures that districts drawn in accordance with this standard will not run afoul of the *Shaw/Miller* doctrine that undue weight not be given to racial factors.²⁸

²⁸ *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

Relation to the Voting Rights Act

Since proposed § 5 (e) is closely modeled on § 2 of the Voting Rights Act, we expect that it will be given a parallel interpretation, and that the state courts will be guided by federal precedent in this area. Any interpretation that falls short of providing the same protection as § 2 of the Voting Rights Act would, of course, be barred by the Supremacy Clause. The need for preclearance of new districts in Bronx, Kings, and New York counties, either by the District Court for the District of Columbia or by the Department of Justice, under § 5 of the Voting Rights Act, would not be affected.

Avoiding an Illegitimate Reliance on Racial Factors

Minority voting rights, as protected by the 14th and 15th Amendments and the Voting Rights Act, stand above state redistricting rules under the Supremacy Clause; but “traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,” may not be subordinated to “racial considerations.”²⁹ Proposed § 5 (e) is therefore placed ‘side-by-side,’ so to speak, with the population equality standard, § 5 (a) and (b), and contiguity, § 5 (c). It is not placed within the rank-ordering of the § 5 (f) criteria. The latter are to be employed, not ignored, in creating districts in which minority group voters will be able to elect representatives of their choice. § 5 (e) would not require that the number of such districts be maximized, but allows the exercise of discretion as to what is fair and reasonable.

The second sentence of proposed § 5 (e), is adapted from language in *UJO v. Carey*³⁰ that is quoted approvingly in the majority opinion in *Shaw*.³¹ It departs from that language, however, at the end of the sentence. Where the original speaks of “districts in which they will be in the majority,” the proposed § 5 (e) says, “districts in which they will be able to elect the representatives of their choice.” Minority groups may be able to achieve a significant ability to elect, even where a majority of the voting-age population is not achievable.³² Since an ‘effective voting majority,’ even in the face of a significant

²⁹ *Miller v. Johnson*, supra, at 916.

³⁰ “... we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.” 430 U.S. 144, 168.

³¹ 509 U.S. 630, 651-652.

³² This is obviously the case in Senate District 60 (corresponding to former Senate District 57), a white-majority district where, for the second time in four elections, an African-American candidate, strongly supported by black voters, has defeated a white incumbent in the Democratic primary, and proceeded to win the general election. The successful candidates were Byron Brown in 2000 (who later vacated the seat after his election as Mayor of Buffalo), and Antoine Thompson in 2006. In another white-majority district, Senate District 35, Andrea Stewart-Cousins, an African-American candidate strongly supported by both black and Hispanic voters, defeated a white incumbent in the 2006 general election, after coming within 18

degree of racial polarization, can be achieved through – and only through – an interracial coalition of like-minded voters, this adaptation of the *UJO* language is consistent with the values and principles that the Supreme Court majorities in *Shaw* and *Miller* hoped to promote.³³

§ 5. [continued]

- f. Subject and subsidiary to the requirements of subsections (a), (b), (c), (d), and (e) of this section, the following principles shall be followed in the creation of senate, assembly, and congressional districts. A principle with a lower number shall have precedence over a principle with a higher number.**
 - 1. To the extent practicable, counties shall not be divided in the formation of districts, except to create districts wholly within a county. Where such division of counties is unavoidable, more populous counties shall be divided in preference to the division of less populous counties.**

Preservation of local political subdivisions within legislative and congressional districts constrains partisan gerrymandering and provides a basis for coherent

votes of doing so in 2004. It is significant that the predominantly black neighborhoods of Buffalo and Niagara Falls are not fractured, but are wholly within Senate District 60 (as in former Senate District 57), and that the predominantly black and Hispanic neighborhoods of Yonkers are also not fractured, but are wholly within Senate District 35. If the minority communities in the towns of Hempstead and North Hempstead had not been fractured in 2002, another senate district might arguably have been created in which black voters would be able to elect their preferred candidate, even without a voting-age majority, and the prospects for such a district in Nassau County will probably improve after the 2010 census.

Examples can be found in the Assembly, too, even without an exhaustive review of recent elections. When Assembly District 6 was created in Suffolk County in 2002, with an Hispanic voting-age plurality (39.7% Hispanic, 17.0% non-Hispanic black, and 38.0% non-Hispanic white), both major parties nominated Hispanic candidates. Both parties did so again in 2004 (the Democratic incumbent, Philip R. Ramos, ran without a Republican opponent in 2006). In Monroe County, Assembly District 133, with a black plurality (43.3% non-Hispanic black, 11.4% Hispanic, 41.3% non-Hispanic white) has given strong support since 1982 to Assembly Member David F. Gantt, an African-American.

³³ See, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2624 (2006):

As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a §2 claim for a racial group that makes up less than 50% of the population. See *De Grandy*, 512 U.S., at 1009, 114 S.Ct. 2647; *Voinovich v. Quilter*, 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Gingles*, 478 U.S., at 46-47, n. 12, 106 S.Ct. 2752. Even on the assumption that the first *Gingles* prong can accommodate this claim, however, appellants must show they constitute ‘a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes.’ *Voinovich*, *supra*, at 158, 113 S.Ct. 1149 (emphasis omitted).

The first and third cases cited are: *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Thornburg v. Gingles*, 478 U.S. 30 (1986).

representation of citizens with common interests.³⁴ It is the chief justification for deviation from strict equality of population.³⁵ In *Miller v. Johnson*, it is cited as one of the “traditional race-neutral districting principles” that must not be subordinated to racial considerations.³⁶

The Court of Appeals has repeatedly upheld the principle that the requirements of Article III, §§ 4-5, including the mandate to keep counties and towns intact, survive insofar as they do not unavoidably conflict with the population standards established in *Reynolds*, *WMCA*, and their progeny. After taking a firm stance at the outset,³⁷ however, the Court has allowed the Legislature broad discretion to depart from the incompatible rules of the unamended State Constitution while complying with supervening federal requirements.³⁸ Without announcing a rule, the Court’s opinions have also suggested that it is more important to preserve the less populous counties – the ‘minor counties,’ each of which could fit undivided into a single district – although it might be impossible to do so with all such counties within an acceptable total population deviation.³⁹

The *Wolpoff* majority found “that in balancing state and federal requirements, the [Legislature] has complied with the State Constitution as far as practicable,” in drawing the 1992 senate districts.⁴⁰ The dissent contended that “the plan the Legislature adopted departs dramatically from State constitutional mandates and was not necessitated by

³⁴ See, *Reynolds v. Sims*, 377 U.S. 533, 578-581 (1964).

³⁵ See, with respect to legislative districts, *Mahan v. Howell*, 410 US 315, 328-329 (1973); *Gaffney v. Cummings*, 412 US 735 (1973); *White v. Regester*, 412 US 755 (1973); *Brown v. Thompson*, 462 US 835 (1983). See also, with respect to congressional districts, *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983).

³⁶ See n.29, above.

³⁷ *Matter of Orans*, 15 NY2d 339 (1965), ruling that the Legislature cannot create more than 150 assembly seats (the statutes under review provided, variously, for 165, 180, 186, and 174 districts, in an attempt to save some incumbents from the vast initial reapportionment required by *WMCA*), *Id.* at 345-350; that assembly districts must continue to be “compact ... convenient and contiguous,” *Id.* at 351; that the formula that developed in *Dowling* and *Fay* (see n.15, above) for determining the size of the Senate remains in effect, although not with respect to the apportionment of districts, *Id.* at 351; and that the requirements that senate districts be contiguous and compact, and that they not divide counties or towns, as well as the ‘block-on-border’ and ‘town-on-border’ rules, remain in effect to the degree that the population equality standard permits, *Id.* at 351-352.

³⁸ *Schneider v. Rockefeller*, 31 NY2d 420 (1972); *Wolpoff v. Cuomo*, 80 NY2d 70 (1992).

³⁹ *Schneider* refers to the number of ‘minor’ counties divided in the enacted senate and assembly plans (“While it is true that the legislative plan segments 9 minor counties in the Senate and 11 minor counties in the Assembly....” [footnote omitted]), and to the division of no minor counties in one alternative plan (“This plan divides no so-called ‘minor’ counties or towns in either the Senate or Assembly....” [n.2]), but never refers to the number of major counties divided, or to the total number of counties divided (31 NY2d 420, 427). *Wolpoff* cites the numbers of ‘major’ and ‘minor’ counties divided, and the total number of counties divided, without placing more emphasis on one measure than on another (80 NY2d 70, 78).

⁴⁰ *Wolpoff*, *supra*, at 80.

federal law,” and expressed concern “that 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.”⁴¹

Whichever view one takes of the recent history, the rules for preserving local political subdivisions should obviously be rationalized to eliminate the conflict with federal requirements, to provide clear guidance to whatever authority draws the districts, and to limit the opportunities for manipulation provided by vague and inconsistent rules.

The proposed amendment would make preservation of counties subordinate only to the absolute requirements of contiguity and the population equality standard. The relation of all the § 5 (f) criteria to fair representation of minority groups is discussed above in relation to § 5 (e). Preservation of lesser political subdivisions – towns, cities, Indian reservations, and villages – would yield to the principle of county integrity.

Compactness must also yield to preservation of political subdivisions. Counties, towns, cities, and villages, like the state itself, frequently have irregular shapes. They also have different populations, and an aggregation of contiguous subdivisions, with the appropriate population for a district, is likely to be even more irregular in shape than the individual units. If compactness were given priority, the rules for keeping local subdivisions intact would lose all meaning.

Taking a cue from the major/minor distinction in *Schneider* and *Wolpoff*, § 5 (f) (1) prefers the division of more populous counties, where a choice is to be made.

⁴¹ *Wolpoff*, supra, at 85.

§ 5. (f) [continued]

- 2. To the extent practicable, county subdivisions shall not be divided in the formation of districts, except to create districts wholly within a county subdivision. For the purposes of this article, a county subdivision shall be a city, except the City of New York, a town, or an Indian reservation whose territory is exclusive of the territory of any city or town. County subdivisions with larger populations shall be divided in preference to division of those with smaller populations.**

Every part of the state is in one county or another, and every part of every county is in a county subdivision (also called a minor civil division, or MCD, in census terminology) as defined here: either a city, a town, or an Indian reservation. These never overlap. (Some Indian Reservations, however, are not county subdivisions, but occupy some of the territory of one or more towns. The proposed § 5 (f) (2) would apply only to those Indian reservations that are county subdivisions.)

There are several Indian reservations, of the county subdivision type, that straddle county boundaries. There is also one city, apart from New York City, that does so: the city of Geneva straddles the boundary between Ontario and Seneca counties, although the entire population is in the Ontario County part. The order of precedence of the redistricting criteria in proposed § 5 (f) means, however, that each county's part of an Indian reservation (or city) would be treated, in effect, as a separate county subdivision, since priority would be given to keeping counties intact.

Eliminating Favoritism to Towns over Cities

The current rules prohibit the division of towns except, in the case of Senate districts, towns having “more than a full ratio of apportionment,” or in the case of the assembly districts, “a town having a ratio of apportionment and one-half over.” On the other hand, there is no rule against dividing cities, however small, and Article III compels the division of cities to comply with the ‘block-on-border’ rule (see below).

The preference for keeping towns intact may have made some sense in an era when towns, or at least their unincorporated parts, were presumably rural, and any urbanized areas could be assumed to be within cities, or at least within villages. In our time of extensive suburbs and exurbs, however, with many towns that have large and dense populations, there is no reason why populous towns should be kept intact in preference to less populous cities, and no reason why the smaller cities should not be kept intact to the extent that is possible to do so.

Accordingly, § 5 (f) (2) treats cities, towns, and Indian reservations equally, with the requirement that more populous units be divided in preference to the less populous. So for example, if adherence to the population equality standard presented a choice

between dividing the city of Buffalo or the town of Tonawanda, Buffalo would be divided, not because it is a city, but because it is the more populous county subdivision. But if the choice lay between the town of Tonawanda and the city of Tonawanda, the same principle would dictate the division of the town, not – as at present – the city.

The End of ‘Block-on-Border’

The rules for senate districts in existing Article III, § 4, state:

nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, 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

....

Article III, § 5, imposes a similar rule regarding towns and blocks in relation to assembly districts.

This means that if two districts share a boundary within a county, and if the district boundary is not also the boundary line between two towns, the two adjoining districts must be almost exactly equal in population. If the two adjoining districts differ in population by two persons, and if there is a block within the more populous district, lying on the district boundary, that has a population of one person, that block must be reassigned to the less populous district. This is referred to as the ‘block-on-border’ rule. Where a county is divided, but towns are kept intact, the same principle applies to the placement of towns in adjoining districts, and is referred to as the ‘town-on-border’ rule.

The ‘block-on-border’ rule never requires the division of counties or towns that would otherwise remain undivided, but it may require the division of cities. If the district boundary coincides with a city boundary (that is not also a county boundary), and the city lies within the more populous district, blocks within the city must be reassigned to the less populous district to comply with the ‘block-on-border’ rule.

There is no good reason to require the division of cities – or of towns, if we are now to treat all county subdivisions alike – that might otherwise be left intact within a permissible total deviation. The ‘block-on-border’ rule may also lead to the creation of inconveniently small election districts, by preventing the alignment of assembly, senate, and congressional district boundaries, and it frequently tends to produce ragged district boundaries.

Even the more cumbersome ‘town-on-border’ rule does not serve its intended purpose of curbing political manipulation. The discovery phase of *Rodriguez v. Pataki* yielded a confidential memorandum describing how “[b]ecause of manipulation of town combinations in Dutchess and Westchester [the plan’s creators were] able to take advantage of the NYS Constitution’s ‘town-on-border’ rule” to underpopulate two

Hudson Valley districts, while increasing the populations of all districts in lower Westchester and New York City.⁴²

The proposed amendment drops the ‘block-on-border’ and ‘town-on-border’ rules, allowing some local flexibility within a rather strict total deviation standard. This will eliminate the need to draw zig-zag boundaries to equalize the populations of adjoining districts. It will also provide the flexibility to draw boundaries along major roads (*e.g.*, along 14th Street in Manhattan, instead of 13th Street). And it will make it easier to avoid overlaps of assembly, senate, and congressional districts that would necessitate the creation of inconveniently small election districts.

§ 5. (f) [continued]

3. To the extent practicable, incorporated villages shall not be divided in the formation of districts.

Most of the territory of towns is unincorporated, and the governmental powers of villages are inferior to those of towns and counties. It is reasonable, however, to extend the principle of preserving local government subdivisions to villages, in order to create a highly rule-bound redistricting process, to create districts that will be coherent from the voters’ standpoint, and to provide common representation to citizens with shared interests.

There are many incorporated villages that straddle town boundaries, and at least four that straddle county lines, but the same ordering principle would apply as with counties and county subdivisions. Keeping the villages intact would be subordinated to keeping the towns intact, which would in turn be subordinated to keeping the counties intact.

§ 5. (f) [continued]

4. The senate, assembly, and congressional districts shall be as compact in form as is practicable.

Proposed § 5 (f) (4) retains the compactness requirement of existing Article III, §§ 4-5. The technical aspects of measuring compactness, and possible alternative statements of the compactness requirement, are discussed in Appendix C.

§ 5. (f) [continued]

5. To the extent practicable, a senate, assembly, or congressional district shall unite communities defined by actual shared interests, taking account of geographic, social, economic, and other factors that indicate commonality of interest, and districts shall be formed so as

⁴² Memorandum titled “‘The 135’,” December 18, 2001, at 2, *Rodriguez v. Pataki* SDNY 02 Civ. 618.

to promote the orderly and efficient administration of elections.

Proposed § 5 (f) (5) authorizes, and encourages, the commission to take account of many reasonable considerations in drawing districts, and would give the chair authority to choose among plans on the basis of such considerations, provided that the superior criteria did not indicate a clear choice. Some of the factors that might be considered are discussed in Appendix C.

§ 5. (f) [continued]

- 6. To the extent practicable, the residences of two or more incumbent members of the same body shall not be placed in the same district of such body, and the residences of incumbent legislators and members of congress shall be included in the district with the largest number of their existing constituents, but the requirements of subsections (b), (c), (d), (e), and (f) of this section, and of paragraphs (1), (2), (3), (4), and (5) of this subsection, shall always take precedence over, and shall never be subordinated to, the requirements of this paragraph or the preservation of the cores of existing districts.**

The incumbency provision is intended principally to keep incumbency in its proper place: subordinate to every other requirement. Paradoxically, this is best accomplished by addressing it explicitly, instead of leaving it out entirely. The possibly redundant emphasis added at the end of § 5 (f) (6) – “ but [all other] requirements ... of this section ... shall always take precedence” – is intended to make the principle unmistakable.

§ 5 (f) (6) would not preserve an existing gerrymander. All the other principles – the population equality standard, contiguity, minority representation, preservation of local government units, compactness, etc. – would have to be applied *de novo* to the new demographic facts after each census, and incumbency protection would have constitutional sanction only to the degree that it did not compromise those superior principles. But the chair, in particular, would have a constitutional basis for rejecting a plan that subjected incumbents to arbitrary mischief.

Giving constitutional sanction to a reasonable consideration of incumbency, but explicitly and emphatically giving it the lowest priority, will help to keep it in its proper place. Such a constitutional ranking will be binding on the state courts, and should influence federal courts’ interpretation of New York tradition.⁴³

⁴³ In *Rodriguez v. Pataki*, a challenge to the Senate districts enacted in 2002, the plaintiffs cited various alternative Senate plans, either previously proposed to the Legislature or introduced as evidence by the plaintiffs, to demonstrate how various constitutional requirements might be better satisfied than they were in the 2002 Senate plan. The defendants replied by pointing to the pairing of incumbents in the alternative

VIII. THE AMENDMENT PROCESS AND THE 2012 REDISTRICTING: TIME CONSTRAINTS

NYS Constitution Article XIX, § 1, provides that an amendment must be approved by both houses of the Legislature, then approved again by a newly elected Legislature. It is then submitted to the people, and if approved becomes effective on the following January 1st. As of this date, an amendment could be approved by the Legislature during the regular session of 2007 or 2008 (it does not matter which), approved again in 2009, and placed on the ballot in the 2009 general election. If approved by the voters, it would become effective on January 1, 2010.⁴⁴ Assuming that the Legislature provided for continuing the technical preparations now being made by the Legislative Task Force on Demographic Research and Reapportionment, a commission could be appointed early in 2010, and be well prepared for the release of the redistricting data from the 2010 census in March 2011.

plans, arguing that the plans submitted to the Legislature were therefore bound to be ignored, and that all the alternative plans were mere partisan ploys. This was very effective rhetoric. In upholding the geographically skewed apportionment of senate districts, the District Court found that “[t]he plan promotes the traditional principles of maintaining the core of districts and limiting incumbent pairing” – neither of which is a federal or state constitutional mandate. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 370 (S.D.N.Y. 2004), *aff’d.*, 125 S. Ct. 627 (2004). The effect of the defendants’ argument was to raise incumbency considerations above constitutional principle.

⁴⁴ Art. XIX, § 2, provides another method to amend the constitution. The Legislature could also propose to the voters that a constitutional convention be convened. If the voters approve the convention, they would elect delegates at the following general election. The convention would meet the next spring, and could place its proposals on the ballot for popular approval at the next general election. As of this date, a proposal for a convention could be submitted to the voters in 2007, the delegates could be elected in 2008, and the convention could meet and place its proposed amendments on the ballot in 2009. If approved, such amendments would take effect on January 1, 2010. Even absent a proposal from the Legislature, the people must decide in 2017 whether to convene a constitutional convention. The last such question was voted down in 1997.

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3 Dissents from judicial review recommendation (in Part VI) and portions of report addressing where prison populations should be counted (in Parts V, VII, and Appendix C)

4 Dissents from judicial review recommendation (in Part VI)

5 Abstains

6 Not voting

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APPENDIX A

THE PROPOSED AMENDMENT

Sections 2, 3, 4, 5, 5-a, and 7 of Article III are hereby repealed. The following Sections 2, 3, 4, 5, and 7 are added. The senate, assembly, and congressional districts in use at the time that this amendment takes effect shall continue in use at the general election of the year 2010, and at any special election during the years 2010, 2011, or 2012, at which a vacancy arising within any such district is to be filled.

§ 2. Number and terms of senators and assembly members

The senate shall consist of sixty-two members. The assembly shall consist of one hundred and fifty members. The members of the senate and assembly shall be elected in even-numbered years for terms of two years.

§ 3. Establishment and alteration of senate, assembly and congressional districts

- a. There shall be a districting commission to draw senate, assembly and congressional districts, so that all the people of New York may be fairly represented. The districting commission shall consist of nine members. No person shall be a member of the districting commission who is not a registered voter in the state of New York, and who has not been, at the time of appointment, a resident of the state of New York for five years. No member of the senate or assembly, no member of congress, and no person holding judicial office, shall be a member of the districting commission. The temporary president of the senate, the minority leader of the senate, the speaker of the assembly, and the minority leader of the assembly shall each appoint two members for a term of ten years commencing on the first day of April of the year preceding the year in which the federal decennial census is taken, except that, if this subsection shall become effective after such date, the terms of the members shall commence on the first day of March of the year in which this subsection shall become effective. If a seat on the commission shall fall vacant, the officer of the legislature who appointed the original member shall appoint a member to complete the unexpired term; except that, if more than two members appointed by the officers of either house would then have been appointed by an officer of the same party, then the other officer of the same house shall appoint a member to fill the vacancy. The ninth member, who shall be the chair of the commission, shall be appointed, subject to the assent of the governor, by a vote of at least six of the other eight members, including at least one appointed by each appointing authority, to a term that shall expire at the same time as the terms of the other members.
- b. The senate, assembly, and congressional districts shall be established by a vote of at least five members of the districting commission, including the affirmative vote of the chair of the commission. The plans of senate,

1 assembly, and congressional districts established by the districting
2 commission shall have the effect of law. The districting commission shall
3 establish the senate, assembly, and congressional districts at the same time,
4 and no later than the last day of January of the second year following the year
5 in which the federal decennial census is taken, and shall at that time issue a
6 report explaining how the districts comply with the requirements of § 5 of this
7 article. Such districts shall become effective for the next ensuing general
8 election of senators, assembly members, and members of congress. The
9 senate, assembly, and congressional districts shall remain unaltered until after
10 the subsequent federal decennial census, except that, if an alteration of such
11 districts shall be ordered by a court of competent jurisdiction, or if such
12 districts shall be prevented from taking effect pursuant to this article or to any
13 provision of the constitution and laws of the United States, the districting
14 commission shall make the alterations necessary to provide a remedy. All
15 votes of the commission shall be taken at public meetings, and the
16 commission shall cause transcripts of all meetings and hearings, including all
17 testimony submitted in writing, to be made publicly available. The
18 commission shall promote informed public understanding of, and participation
19 in, the process of redistricting, by such means as providing information to the
20 public, holding hearings, and encouraging submission of proposals.

21
22 c. The legislature shall make necessary appropriations for the expenses of the
23 districting commission, provide for compensation and reimbursement of
24 expenses for the members and staff of the commission, assign to the
25 commission any additional duties that the legislature may deem necessary to
26 the performance of the duties stipulated in this article, and require other
27 agencies and officials of the state of New York and its political subdivisions
28 to provide such information and assistance as the commission may require to
29 perform its duties.

30
31 d. Subject to such reasonable regulations as the legislature shall enact, the
32 districting commission shall, as may be necessary to perform its duties, hire
33 staff, enter into contracts, conduct research, hold hearings, and communicate
34 with the public; shall assemble and maintain such geographic, demographic,
35 election, and voter registration data as may be necessary for the analysis and
36 evaluation of proposed and established plans of senate, assembly, and
37 congressional districts, including, but not limited to, the compliance of such
38 plans with the provisions of this article and with the constitution and laws of
39 the United States; and shall cause all such data, and all expert reports, results
40 of any other research conducted under a contract entered into by the
41 commission, and proposals for districts submitted by the public, to be made
42 publicly available.
43

1 § 4. Judicial review of districts
2

3 The senate, assembly, and congressional districts shall be subject to review by the
4 supreme court, at the suit of any citizen, under such reasonable regulations as the
5 legislature may prescribe. Any court before which a cause may be pending involving the
6 establishment and alteration of such districts, shall give precedence thereto over all other
7 causes and proceedings, and if said court be not in session it shall convene promptly for
8 the disposition of the same. Such court shall have authority to appoint referees, to engage
9 the assistance of experts, and to compel the assistance of the districting commission and
10 its staff, as it may deem necessary to the disposition of a suit brought under this section.
11 If the districting commission shall fail to establish senate, assembly, or congressional
12 districts by the date specified in § 3 (b) of this article, or if a court reviewing districts
13 pursuant to this section finds the establishment or alteration of any such districts to be
14 clearly erroneous under any provision of this article, or of the constitution and laws of the
15 United States, the court shall order the commission to establish such districts or make
16 such alterations as necessary to provide a remedy, within such time as the court may
17 require, or shall itself establish such districts or make such alterations as the court deems
18 necessary.

19
20 § 5. Criteria for districts
21

- 22 a. The difference in population between the most and least populous senate
23 districts shall not exceed two percent of the mean population of all senate
24 districts, and the difference in population between the most and least populous
25 assembly districts shall not exceed two percent of the mean population of all
26 assembly districts.
27
- 28 b. All congressional districts shall be as nearly equal in population as is
29 practicable.
30
- 31 c. Each district shall consist of contiguous territory; no district shall consist of
32 parts entirely separated by the territory of another district of the same body,
33 whether such territory be land or water, populated or unpopulated. A
34 populated census block shall not be divided by a district boundary, unless it
35 can be determined that the populated part of such block is within a single
36 district.
37
- 38 d. The whole number of persons reported in the federal decennial census shall be
39 the basis for determining populations for the purposes of this article, except
40 that, for the purpose of determining the populations of senate and assembly
41 districts, no person shall be deemed to have gained or lost a residence by
42 reason of conviction and incarceration in a federal or state correctional
43 facility.
44
- 45 e. Senate, assembly, or congressional districts shall not be established that result
46 in a denial to members of racial and linguistic minority groups of an equal

1 opportunity with other citizens to participate in the political process and to
2 elect the representatives of their choice. The principles stated in subsection (f)
3 of this section shall be used to create districts that will afford fair
4 representation to the members of those racial and linguistic minority groups
5 who are sufficiently numerous and whose residential patterns afford the
6 opportunity of creating districts in which they will be able to elect
7 representatives of their choice.
8

9 f. Subject and subsidiary to the requirements of subsections (a), (b), (c), (d), and
10 (e) of this section, the following principles shall be followed in the creation of
11 senate, assembly, and congressional districts. A principle with a lower number
12 shall have precedence over a principle with a higher number.
13

- 14 1. To the extent practicable, counties shall not be divided in the
15 formation of districts, except to create districts wholly within a county.
16 Where such division of counties is unavoidable, more populous
17 counties shall be divided in preference to the division of less populous
18 counties.
19
- 20 2. To the extent practicable, county subdivisions shall not be divided in
21 the formation of districts, except to create districts wholly within a
22 county subdivision. For the purposes of this article, a county
23 subdivision shall be a city, except the City of New York, a town, or an
24 Indian reservation whose territory is exclusive of the territory of any
25 city or town. County subdivisions with larger populations shall be
26 divided in preference to division of those with smaller populations.
27
- 28 3. To the extent practicable, incorporated villages shall not be divided in
29 the formation of districts.
30
- 31 4. The senate, assembly, and congressional districts shall be as compact
32 in form as is practicable.
33
- 34 5. To the extent practicable, a senate, assembly, or congressional district
35 shall unite communities defined by actual shared interests, taking
36 account of geographic, social, economic, and other factors that indicate
37 commonality of interest, and districts shall be formed so as to promote
38 the orderly and efficient administration of elections.
39
- 40 6. To the extent practicable, the residences of two or more incumbent
41 members of the same body shall not be placed in the same district of
42 such body, and the residences of incumbent legislators and members
43 of congress shall be included in the district with the largest number of
44 their existing constituents, but the requirements of subsections (a), (b),
45 (c), (d), and (e) of this section, and of paragraphs (1), (2), (3), (4), and
46 (5) of this subsection, shall always take precedence over, and shall

1 never be subordinated to, the requirements of this paragraph or the
2 preservation of the cores of existing districts.
3

4 § 7. Qualifications of members of the legislature
5

6 No person shall serve as a member of the legislature unless he or she is a citizen
7 of the United States and has been a resident of the state of New York for five years and,
8 except if elected a senator or member of the assembly at the first election in which a
9 readjustment or alteration of the senate or assembly districts becomes effective, of the
10 senate or assembly district for the twelve months immediately preceding his or her
11 election. No member of the legislature shall, during the time for which he or she was
12 elected, receive any civil appointment from the governor, the governor and the senate, the
13 legislature or from any city government, to an office which shall have been created, or
14 the emoluments whereof shall have been increased during such time. If a member of the
15 legislature be elected to congress, or appointed to any office, civil or military, under the
16 government of the United States, the state of New York, or under any city government
17 except as a member of the national guard or naval militia of the state, or of the reserve
18 forces of the United States, his or her acceptance thereof shall vacate his or her seat in the
19 legislature, providing, however, that a member of the legislature may be appointed
20 commissioner of deeds or to any office in which he or she shall receive no compensation.

APPENDIX B

CASES ON LEGISLATIVE AUTHORITY OVER CONGRESSIONAL REDISTRICTING

The Supreme Court has twice addressed the question of whether Article I, § 4, of the U.S. Constitution permits a state to invest power over congressional redistricting in an authority other than the state legislature.

Davis v. Hildebrant, 241 U.S. 565 (1916), concerned a congressional redistricting plan that had been enacted by the Ohio legislature in 1915, then overturned through an initiative and referendum. Under the Ohio constitution, any legislative enactment could be subjected to review by initiative and referendum, and the constitution expressly vested its legislative power by this means not only in the legislature and the governor, but in the people. The Court found that the initiative and referendum were part of the legislative power of the state, and that the application of this process to a congressional redistricting law was sanctioned by an act of Congress providing “that the redistricting should be made by a state ‘in the manner provided by the laws thereof.’”

Smiley v. Holm, 285 U.S. 355 (1932), concerned a congressional redistricting bill that had been approved by both houses of the Minnesota legislature and vetoed by the governor in 1931. The principal question was whether Article I, § 4, precluded the governor from any exercise of authority with respect to congressional redistricting. The Court held that ‘Legislature,’ in the context of Article I, § 4, referred to the legislative power of the state, and was to be distinguished from the authority granted to the legislature alone to ratify amendments to the U.S. Constitution (Article 5) and, before adoption of the 17th Amendment, to elect Senators (Article I, § 3), actions that do not involve lawmaking. Citing *Davis*, the Court held that Minnesota had authority to vest its legislative power in the legislature jointly with the governor, just as Ohio had had authority to vest its legislative power jointly in the legislature, the governor, and the people.

The districting commission we propose may be distinguishable from the procedures upheld in *Davis* and *Smiley*, in that the commission is to exercise none of the legislative power of the state, except over redistricting.

In *Smiley*, the Court observed:

The subject-matter [of Article I, § 4] is the ‘times, places and manner of holding elections for senators and representatives.’ It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience

shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect. (285 U.S. 355, 366)

If the grant of authority in Art. 1, § 4, is to be construed as belonging not to the Legislature narrowly defined, but to the usual legislative power of the state, because it necessarily involves all the above aspects of lawmaking, there may be grounds for separating the specific process of redistricting, and vesting it neither in the Legislature *per se*, nor in the general lawmaking process.

APPENDIX C

CRITERIA FOR DISTRICTS – LEGAL AND TECHNICAL ISSUES

1. The Population Equality Standard for Legislative Districts – § 5 (a)

In 1964, the U.S. Supreme Court ruled that the Equal Protection Clause requires substantial equality of population among state legislative districts (*Reynolds v. Sims*, 377 U.S. 533), and in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, decided the same day, the Court applied that principle to the New York State Legislature. The Equal Protection doctrine was further elaborated in rulings establishing that a total deviation up to 10%, between the largest and smallest districts, is presumptively constitutional, and that a state may be able to justify a larger deviation, especially for the purpose of keeping local government subdivisions intact.⁴⁵

These decisions, and most others addressing the same issues, have focused on the *total* deviation: the difference between the single most and least populous districts. It is possible, however, while maintaining a suitably small total deviation, to manipulate the population deviations so as to produce, cumulatively, a regional bias in the apportionment of districts.

Currently, the 29 contiguous senate districts in New York City, Rockland County, and lower Westchester County all have populations above the statewide mean (positive deviations). The 24 contiguous districts to the north all have negative deviations. The relatively small individual deviations, multiplied over such large numbers of districts, produce a cumulative result giving the upstate region seven-tenths of a district more than its proportional share of the state population, and the downstate region seven-tenths less. By aggregating the deviations in this manner, and changing the size of the Senate, the Senate Majority was able to preserve all of the upstate senate seats, rather than acceding to the shift of one senate seat downstate that would otherwise have resulted from the population shifts revealed in the 2000 census.⁴⁶

The 2002 assembly districts provide another example of how district population deviations can be manipulated. Nassau and Suffolk counties, taken together, had almost exactly the same percentage of the state population in 1990 (14.50%) and 2000 (14.51%). But in 1992, 22 assembly districts were apportioned to Long Island, and in 2002, only 21. Both apportionments are compatible with a total deviation below 10%.

The 2002 apportionment of senate districts was upheld by a three-judge District Court in *Rodriguez v. Pataki*, 308 F.Supp.2d 346 (S.D.N.Y. 2004), *summarily aff'd.*, 125

⁴⁵ See n.35, above.

⁴⁶ An internal memo from one of the drafters of the plan states: “our redistricting areas upstate are already configured in such a manner as to draw districts *light*, to avoid migration downstate.” (Emphasis in original.) “Migration” refers here to the “migration” (*i.e.*, reapportionment) of districts, not of population. See n.16, above.

S. Ct. 627 (2004). In Georgia, however, use of the same device to the advantage of inner city Atlanta and rural areas, at the expense of the Atlanta suburbs, was found by a three-judge District Court to be a denial of Equal Protection (*Larios v. Cox*, 300 F.Supp.2d 1320 [N.D.Ga. 2004], *summarily aff'd.*, 542 U.S. 947 [2004]). Since both rulings were summarily affirmed, it is not clear what rule, if any, will ultimately emerge under the Equal Protection Clause. We believe, however, that this sort of manipulation of redistricting standards, even if permitted by the U.S. Constitution, ought to be prevented by the NYS Constitution.

Preventing Manipulation of District Population Deviations that Could Produce Regional Bias

We propose to limit the permissible total deviation to 2%, so that when individual district deviations are multiplied over a large number of districts, any cumulative deviation will necessarily be small.⁴⁷ The 2% total deviation standard has generally applied to court-ordered legislative redistricting plans.⁴⁸ The State is not obliged, of

⁴⁷ In the limiting case, congressional districts of perfectly equal populations, a regionally skewed apportionment is impossible. For any cluster of congressional districts, however grouped, the cluster's percentage of the total number of districts will necessarily be exactly equal to the cluster's percentage of the total state population.

⁴⁸ The U.S. Supreme Court has made it clear that court-ordered legislative plans "must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *see also*, *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Connor v. Finch*, 431 U.S. 407, 414 (1977); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 627, 631 (D.S.C. 2002) (three-judge court).

The courts generally have adopted a 2% standard to implement this mandate. In *Colleton County Council*, *supra*, for example, the three-judge federal district court rejected plans for the South Carolina House submitted by the House, and by the Governor, on the basis that their ranges of 4.86% and 3.13%, respectively, did not satisfy the *de minimis* requirement, *see id.* at 652, and adopted instead plans that were within +/- 1% of the ideal district populations, *see id.* at 655 (House districts), 660 (Senate districts).

Similarly, in *Baumgart v. Wendelberger*, Case No. 01-C-0121 (E.D. Wis., May 30, 2002) (available at: <http://www.legis.state.wi.us/ltsb/redistricting/Decision/decision.pdf>), the three-judge federal district court followed the lead of *AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 634 (E.D. Wis. 1982) (three-judge court), which defined *de minimis* as below 2%, and of *Prosser v. Elections Board*, 793 F. Supp. 859, 865-66 (W.D. Wis. 1992), which apparently used an even more stringent 1% standard. *See Baumgart*, slip op. at 6-7. The *Baumgart* court's plan had an overall range of 1.48%. *Id.* at 17.

In *Zachman v. Kiffmeyer*, No. C0-01-160, Order Stating Redistricting Principles and Requirements for Plan Submissions (Minnesota Special Redistricting Panel, Dec.11, 2001) (available at: http://www.courts.state.mn.us/documents/CIO/redistrictingpanel/orders/criteria_order.doc), the court adopted criteria for adopting legislative redistricting plans that included a requirement that plans submitted to the court "not exceed a maximum population deviation of plus or minus 2%." Slip op. at 3. The court explained: "Because a court-ordered redistricting plan must conform to a higher standard of population equality than a legislative redistricting plan, *de minimis* deviation from the ideal district population will be the goal. *Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)." *Id.* at 3-4. Later in its decision, the court stated that "we have adopted a 2% overall deviation not as a level under which all population deviations will be presumed acceptable, but as a maximum deviation that no plan should exceed." *Id.* at 9-10. The panel eventually adopted plans in which "[n]o house

course, to adopt such a standard for its own redistricting process, but it seems a reasonable approach as a mechanism to prevent regional bias. Our proposed amendment differs from the prevailing rule for court-ordered plans, however, in that proposed § 5 (a) would require no specific justification for deviations within the 2% range.

Research Needed on the Effect of the Population Equality Standard on Minority Voting Rights

We cannot state too strongly, however, that our suggestion of a 2% total deviation rule is tentative, and must not be adopted until its possible effect on minority representation has been tested by the drawing of experimental plans of senate and assembly districts, and by the appropriate expert statistical analysis of such plans. The effect of a somewhat less restrictive total deviation standard (*e.g.*, 4% or 5%) should also be studied.

Research Needed on the Trade-off Between Population Equality and Preservation of Local Political Subdivisions

There is a trade-off between population equality and adherence to local political subdivision boundaries. Preservation of local subdivisions is the principal justification recognized by the U.S. Supreme Court for a large total deviation, even above 10%.⁴⁹ It should be determined whether a significantly larger number of counties and county subdivisions could be kept intact with a 4% or 5% total deviation.

Appendix D presents an alternative population equality standard that is designed to prevent a significant cumulative regional deviation, while allowing a total deviation of 10%. It would permit more counties to be kept intact than a 2% total deviation rule, and is unlikely to have an adverse effect on minority representation.

or senate district has a population deviation greater than .80%,” which would translate into a range of less than 1.60%. *Zachman v. Kiffmeyer*, No. C0-01-160, Final Order Adopting A Legislative Redistricting Plan (Minnesota Special Redistricting Panel, March 19, 2002), at 3 (available at: http://www.courts.state.mn.us/documents/CIO/redistrictingpanel/legislative_redistricting_plans.htm).

⁴⁹ See n.35, above. “Respecting municipal boundaries” is also one of the possible justifications offered in *Karcher* for some population deviation among congressional districts; see the discussion, above, of proposed § 5 (b).

2. Exclusion or Reattribution of Prison Populations – § 5 (d)

As noted above in Section V-B, the Census Bureau reports prisoners as residents of the census block in which the prison is located. Members of the Committee have suggested several different approaches to dealing with the populations reported for state and federal prisons:

1. State the general principle in § 5 (d) of the proposed amendment, and leave the districting commission, and ultimately the courts, to determine what action would be an appropriate application of the principle.
2. Specify that the prisoners be reattributed, to the extent practicable, to their permanent home addresses, and that those for whom a permanent home address cannot be identified be excluded from the legislative redistricting database.
3. Exclude the prisoners entirely from the legislative redistricting database, without reattributing them to their permanent home addresses. Proponents of this approach argue that the prisoners should not be counted at their places of incarceration, for the reasons discussed above in Section V-B, but that they should also not be counted at their permanent home addresses, since they are not actually present in those communities on Census Day.
4. Specify that district populations be defined by the Census Bureau's block-level population tabulations, without adjustment. The prisoners would thus be counted, for all redistricting purposes, at their places of incarceration, unless the Census Bureau changes its practice.
5. Leave population undefined, with the issue to be resolved by the districting commission, the Legislature, or the courts.

The treatment of prison populations has a significant bearing on the standards for apportioning legislative seats. The 2002 Senate plan, with its consistently underpopulated upstate districts and overpopulated downstate districts, would have had a total deviation exceeding 10% – giving the State the initial burden of justifying it⁵⁰ – if the prison populations had been reattributed or excluded. Without the prison populations, it would have been difficult to skew the regional apportionment to the same degree, within a 10% total deviation. And it is unlikely that the Senate Majority would have taken the legally risky course of drawing a plan with a total deviation exceeding 10%.

We discuss above, in Section V-B, our reasons for believing that prisoners should be attributed to their permanent home addresses, if possible, and should at least be excluded from the population counts at their places of incarceration. Something further should be said about the technical problems this may present.

⁵⁰ See, *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983).

The National Research Council report, cited above,⁵¹ contains an extensive discussion of the complex question of defining residence for census purposes, not only for prisoners and other ‘group quarters’ populations, but also for many households and individuals. The Council’s panel of scholars takes a cautious approach, and rather than recommend any reattribution in the 2010 census, they suggest that the Census Bureau experiment with methods that may permit a comprehensive resolution of these issues for the 2020 census. The complexity of the problem arises in large part from the Census Bureau’s duty to adopt definitions and procedures for nationwide application. It is possible, however, that a ready solution may be available for New York State alone.

The Department of Correctional Services provides the Census Bureau with the necessary information to tabulate prisoner populations. If the Department compiled a list of the home addresses of all inmates who are in state prisons on Census Day (*i.e.*, every inmate the Department reports to the Census Bureau), it would be a simple matter – a few hours’ work with readily available software – to determine the census block number of each such address, and thus the number of prisoners to be reattributed to each census block. The latter tabulation could then be made available to the districting commission, without the prisoners’ names, addresses, or other personal information. This would be sufficient to revise the redistricting database received from the Census Bureau.

If such a list of home addresses cannot be compiled, excluding the prison populations would be a simple matter, as the NRC report indicates. The necessary data, identifying prison populations by tract and block, are published in Summary File 1, which becomes available a few months after the redistricting data set (the PL 94-171 data). In 2001, SF1 was released on a flow basis, and was available for every state by August of that year. The recent report by the NRC recommended that this information be included in the PL 94-171 data, precisely for the purpose of permitting states and local governments to subtract the prisoners if they so choose.⁵² Even if the Census Bureau did not follow this recommendation, New York would have plenty of time to subtract the prison populations, as identified in SF1, from the state’s redistricting database.

The feasibility of reattributing prisoners to their permanent home addresses has been demonstrated by the Justice Mapping Center and the Columbia University Spatial Information Design Lab. They have mapped, at the block level, the home addresses of all persons from New York City who were inmates of state prisons in 2003. The geographic information system (GIS) program that generates such a map also identifies the census block number of each address.⁵³

⁵¹ See n.6.

⁵² See n.8, above.

⁵³ Lauren MacIntyre, “Rap Map,” *The New Yorker*, Jan. 8, 2007, pp. 24-25, available at: http://www.newyorker.com/talk/2007/01/08/070108ta_talk_macintyre. The Justice Mapping Center web site can be found at: <http://www.justicemapping.org/>. Click on ‘NYC Analysis’ in the ‘Project Gallery’ on the right side of the page.

3. Compactness – § 5 (f) (4)⁵⁴

Compactness is traditionally regarded as a reasonable objective requirement, tending to produce coherent districts. Compactness is a significant restraint on gerrymandering, which is often regarded specifically as the creation of non-compact districts to achieve a political advantage.⁵⁵ Compactness and population equality are the two “sound districting principles” cited by the plurality opinion in *UJO v. Carey*, to be employed in drawing districts that will afford fair representation for members of minority groups.⁵⁶ This is the passage from *UJO* that is quoted approvingly in the majority opinion in *Shaw v. Reno*,⁵⁷ and adapted in § 5 (e) of the proposed amendment. In *Miller v. Johnson*, compactness is mentioned as one of the “traditional race-neutral districting principles” not to be subordinated to racial considerations.⁵⁸

It is desirable to create a redistricting process that is as rule-bound as possible. Compactness is one rule that can be given a precise definition – even a precise quantitative definition. Compactness would be made subordinate to the preservation of local political subdivisions, for the reasons discussed above in relation to proposed § 5 (f) (1). Preservation of communities of actual shared interests would be subordinated to compactness, because it is less subject to precise definition, and could make the compactness standard meaningless if allowed to take precedence.

Proposed § 5 (f) (4) retains the broadly stated compactness requirement of existing Article III, §§ 4-5. It would be up to the commission, perhaps under the influence of the chair, who must approve any redistricting plan, to adopt suitable specific measures of compactness. We discuss below the technical questions that bear on the choice of suitable measures, and suggest more specific requirements that might, as an alternative, be included in proposed § 5 (f) (4).

Choice of Definitions: the Three Dimensions of Compactness

Compactness is not a quality about which we are reduced to saying, “I don’t know how to define it, but I know it when I see it.” We may not know it when we see it, but it can be precisely defined. Without a precise definition, compactness is likely to be

⁵⁴ The following discussion relies heavily on, and borrows freely from, Richard G. Niemi, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, “Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering,” *The Journal of Politics*, Vol. 52, No. 4 (Nov., 1990), 1155-1181. URL for JSTOR account holders and users of participating libraries: <http://links.jstor.org/sici?sici=0022-3816%28199011%2952%3A4%3C1155%3AMCATRO%3E2.0.CO%3B2-%23>

⁵⁵ See, *Reynolds v. Sims*, 377 U.S. 533, 578-579 (1964).

⁵⁶ See n.30, above.

⁵⁷ See n.31, above.

⁵⁸ See n.29, above.

reduced to a matter of vague impressions, and may ultimately be ignored or accorded only *pro forma* respect. If the principle is taken more seriously, the lack of definition may result in the use of rules that are inconsistent or internally incoherent, or that produce an unintended bias. There are, however, several sound, precise definitions available, although no one definition is adequate by itself.

The compactness of districts has three dimensions: a) geographic (or geometric) dispersion; b) shape, or the relation of perimeter to area; and c) dispersion of population. Since a circle is the figure that encloses a given area within the smallest perimeter, several measures of compactness compare a district to a circle. It does not matter that no plan of circular districts could be drawn. The point is to produce measures to compare the relative compactness of districts or of whole plans. When districts are drawn with computer-based geographic information systems (GIS), many measures of compactness are easily calculated.⁵⁹ The difficulty and expense of calculation discussed by Niemi *et al*⁶⁰ have largely been overcome with the latest GIS-based redistricting software.

a. Dispersion

Dispersion measures how tightly packed or spread out the territory of a district is. One common measure of dispersion is the Roeck test: the ratio of the area of the district to the area of the smallest circle that completely encloses the district.⁶¹ A district's Roeck test score is always between 0 and 1; the higher the score, the more compact the district. The plan that achieves, as a whole, the highest degree of compactness by this measure would have the highest mean score.

But dispersion (as measured, for example, by the Roeck test) does not tell us everything we would want to know about the compactness of a district. The Roeck score has nothing to do specifically with the shape of the district, and nothing at all to do with the district perimeter. The distinction is best understood by considering a simple example. The example does not depend on the specific distances and areas that will be used, which have been chosen just to make the arithmetic easy to follow. All the calculations are rounded off to the second decimal place.

Imagine a square circumscribed by a circle. The square has an area of 5 square miles, which means that each side of the square has a length equal to $\sqrt{5}$ (2.36 miles). The minimum enclosing circle has a diameter equal to the diagonal of the square, which is equal to $\sqrt{10}$ (3.16 miles). (The diagonal of the square is the hypotenuse of a right triangle

⁵⁹ The specific compactness measures discussed here are among those available as menu items in the Caliper Corporation's *Maptitude for Redistricting*, the redistricting software that was most widely used during the last decennial redistricting cycle. This is an 'off-the-shelf' product, and other such products would have a similar capacity.

⁶⁰ Op. cit. at 1167.

⁶¹ The smallest enclosing circle is the smallest circle that contains the whole territory of the district. It is not necessarily the same as the circumscribing circle, although for many regular figures, such as a square or rectangle, the two will be the same.

that includes two sides of the square. From the Pythagorean Theorem, $(\sqrt{5})^2 + (\sqrt{5})^2 = 10$, so the length of the diagonal is $\sqrt{10}$.) The radius (r) of the minimum enclosing circle is therefore $\sqrt{10}/2$ (1.58 sq. miles), and the area of the minimum enclosing circle (πr^2) is $\pi(\sqrt{10}/2)^2$ (7.85 sq. miles). The Roeck score for the square is therefore $5/7.85 = 0.64$ (this is the Roeck score for *any* square).

A square would generally be regarded as an admirably compact configuration for a district. It would be possible, however, to create a figure with the identical area, and the identical minimum enclosing circle, but a much longer and less regular perimeter. Imagine a cross formed by five identical squares: a central square (a mile on each side), with an additional square (also a mile on each side) attached to each of its sides. The cross has an area of five square miles, the same as the square described above. The smallest circle enclosing this cross is identical to the smallest enclosing circle for the 5-square-mile square: a circle with a diameter equal to $\sqrt{10}$. (Think of one arm of the cross as a rectangle one mile by three miles. The diagonal of the rectangle is also the diameter of the minimum enclosing circle. $1^2 + 3^2 = 10$, so the diagonal of the rectangle, identical to the diameter of the circle, is equal to $\sqrt{10}$.) Since the square and the cross have identical areas and identical minimum enclosing circles, they have identical Roeck scores: 0.64. It would actually be possible to construct any number of figures, with any desired perimeter length, that have the same area and minimum enclosing circle as a square, and therefore have the same Roeck score.

If we are not prepared to accept the square and the cross described above (or an even more complex figure) as equally compact, then there must be a dimension of compactness that is not captured by a measure of dispersion, such as the Roeck test. That dimension is perimeter.

b. The Relation of Perimeter to Area

Shape and perimeter length matter. A district with a very long, convoluted perimeter would generally be considered non-compact, and highly suspect, no matter how tightly its area was packed together. Dispersion measures must therefore be supplemented with measures of the relation between a district's area and its perimeter.

One such measure, which also compares the district to a circle, is the Polsby-Popper test: the ratio of the area of the district to the area of a circle with the same perimeter (*i.e.*, the circumference of the circle has the same length as the perimeter of the district, no matter how irregular the latter may be.) The Polsby-Popper score can be calculated without actually constructing the comparable circle. The formula is: $4\pi\text{Area}/(\text{Perimeter}^2)$, referring only to the area and perimeter of the district. As with the Roeck test, the score is always between 0 and 1; the higher the score, the more compact the district. And the plan that achieves, as a whole, the highest degree of compactness by this measure would have the highest mean score.

The Polsby-Popper test can be understood intuitively by imagining a string, tied together at the ends, that has been placed on a table to form a highly irregular figure.

Now imagine that the string is pushed out and reshaped until it forms a circle. The circle will cover a larger area than the original irregular figure. The Polsby-Popper test is the ratio of the original, irregular area to the area of the circle.

Consider again the square and the cross. Both have the same area (5 sq. miles), so the numerator of the Polsby-Popper formula is the same for both: $4\pi(5) = 62.84$. But the square has a perimeter of $4\sqrt{5}$, so the denominator for the square is 80. The Polsby-Popper score for the square is therefore $62.84/80 = 0.79$ (as with the Roeck test, this is the score for *any* square). The cross has perimeter of 12 miles, so the denominator for the cross is 144, and the Polsby-Popper score for the cross is $62.84/144 = 0.44$.

By the Polsby-Popper test, the square is much more compact than the cross, although their Roeck scores are identical. This does not mean, however, that the Polsby-Popper test is better than the Roeck test. They measure different dimensions of compactness. The following example demonstrates the inadequacy of a perimeter-area measure, such as Polsby-Popper, when used alone.

Imagine a rectangle, one mile by five miles. The rectangle would have a perimeter of 12 miles and an area of 5 sq. miles, just like the cross described above. Since the Polsby-Popper score is simply a function of area and perimeter, the two figures would have identical scores by this test: 0.44. But the Roeck score for the cross would be 0.64, as we saw above, while the Roeck score for the rectangle would be only 0.24. The Roeck score for the cross described here is equal to that of a square.⁶² But the territory of the elongated rectangle is much less closely packed together. One way of looking at the difference, is to observe that the distance between the two most distant points on the perimeter of the cross is 3.16 miles, while the distance between the two most distant points on the perimeter of the rectangle is 5.10 miles.⁶³

c. Dispersion of Population

The Roeck and Polsby-Popper tests are concerned only with geometry. But it can be misleading to ignore the dispersion of a district's population. Imagine a district that is perfectly square, but suppose that the whole population is concentrated within a narrow corridor (along a road, perhaps) running diagonally between opposite corners of the square. On one side of the populated strip is a large unpopulated triangle consisting entirely of railroad yards and tank farms. On the other side is another large unpopulated triangle containing a public park. Now redraw the district to remove the two unpopulated

⁶² This provides a second example of the inadequacy of the Roeck test considered alone. The cross in this example has the same Roeck score as a square, which means that it has the same area (five square miles) as a square with the same minimum enclosing circle. But a square has a Polsby-Popper score of 0.79, compared with 0.44 for the cross.

⁶³ These distances are, in fact, the diameters of the respective minimum enclosing circles for the figures in this example, but that would not be case for all figures. The distance between the two most distant points on the perimeter of an equilateral triangle, for example, is shorter than the diameter of the smallest enclosing circle.

triangles. The Roeck and Polsby-Popper scores for the remaining elongated figure will be much lower than for the square. But from the standpoint of the people actually living and voting in the district, the two versions of the district are identical.

One compactness measure that takes account of population dispersion is the Population Circle test: the ratio of the population of a district to the population of the minimum enclosing circle for the district. As with the Roeck and Polsby-Popper tests, the score is always between 0 and 1; the higher the score, the more compact the district. And the plan that achieves, as a whole, the highest degree of compactness by this measure would have the highest mean score.⁶⁴

Why Compactness Measures Should Be Applied to a Plan as a Whole

Compactness measures should be applied comparatively, using average numerical measures, to plans as a whole, not to individual districts. There are several reasons. Every numerical measure of compactness will produce anomalous results in some circumstances.⁶⁵ The average score for a whole plan is less likely to be distorted by such an anomaly than the score for a single district. Niemi *et al* observe that:

there is abundant evidence that the three major types of measures sometimes vary widely in their evaluation of the compactness of a given *district*. There is some support, however, for the hypothesis that multiple measures yield similar measures of districting *plans*.⁶⁶

There will sometimes be a trade-off between the compactness of one district, and the compactness of other districts in the same plan. The different populations and shapes

⁶⁴ The population calculated for the minimum enclosing circle will be approximate, since the circumference of the circle will bisect some census blocks. But so long as the same base layer (*e.g.*, all New York State census blocks) is used consistently, and the same software is employed, the calculation will produce a valid comparison between plans.

⁶⁵ Niemi *et al* show an example of how adding an unpopulated area to a district could alter the Population Circle score – just what the Population Circle test is supposed to avoid. *Op. cit.* (see n.54, above) at 1166. This does not invalidate the test, but illustrates a problem intrinsic to compactness measures as such.

Niemi *et al* also call attention to the city of Rochester: “... the city of Rochester is relatively circular with its northern-most point a few miles south of Lake Ontario – except that a narrow corridor along the Genessee River extends the city’s boundary to the lake. Because of this extension, a circumscribing or longest axis circle would be very large and the city therefore judged noncompact.” (*Ibid.* at 1163).

There is another circle-based measure of dispersion, called the Ehrenburg Test, which is the ratio of the area of the largest *inscribed* circle (*i.e.*, wholly contained within the district) to the area of the district. In the Ehrenburg Test, the area of the circle is the numerator, and the area of the district the denominator; the score, as in the tests described above, is always between 0 and 1, with a higher score indicating greater compactness. A district will be relatively compact by this measure if much of its territory is contained in a broad convex area, within which a large circle can be inscribed.

⁶⁶ *Ibid.* at 1157 (emphasis in original).

of local government subdivisions, and even of different parts of the state (*e.g.*, Long Island vs. upstate), make it easier to fashion compact districts in some places than in others. In particular places, a less than maximally compact district may further substantive representation goals, such as fair representation for minority groups, preservation of communities of interest, and convenience of election administration. This should be acceptable, if the average measures for the plan as a whole show it to be as compact as comparable plans.

How the Use of Multiple Definitions Would Work

Niemi *et al* explain how the use of multiple measures should promote understanding, rather than confusion:

Areal dispersion, perimeter length, and population dispersion are not substitutable. When multiple measures coalesce in support of a single plan, the evidence in its favor is strong. Our analysis suggests that that will often be the case, especially when the number of plans has been narrowed down to two or three. When there is lack of complete agreement, it is still likely that that certain plans will be identified as especially compact or noncompact. There will, of course, be situations in which use of multiple measures indicates “no decision,” that no single plan is most compact. But that is inherent in the concept, not a defect in the measurements as such. When multiple measures show genuine ambiguity, it is precisely because no one district, or no single plan, has all of the characteristics of compactness.⁶⁷

There is no virtue in being given a clear choice when the clarity is illusory. It is as important to know when different plans are more or less equally acceptable from the standpoint of compactness, as to know when one is definitely preferable.

Inappropriate Definitions of Compactness

It is best to avoid measures that are scale-sensitive, such as the aggregate perimeter measure that is often proposed because it is easy to understand.⁶⁸ It would also

⁶⁷ Ibid. at 1177. In *Zachman v. Kiffmeyer*, Order Stating Redistricting Principles and Requirements for Plan Submissions, at 7, the Minnesota Special Redistricting Panel required plan submissions to include reports of the Roeck, Polsby-Popper, and Population Circle, as well as aggregate perimeter, measures of compactness. See n.48, above.

⁶⁸ This measure would identify the most compact plan as that in which the aggregate length of all district boundaries is smallest. The perimeter test attaches more importance to the relative compactness of districts in sparsely populated rural areas than in densely populated urban areas. To understand this, imagine two districts, equal in population, both perfect squares. The rural, upstate district is 50 miles square, while the urban, downstate district is 1 mile square. Now suppose that a way can be found to keep the populations the same, while altering the aspect ratios of both districts, from one-by-one to two-by-one. We replace the mile-square district with a rectangle two miles by one mile, and the 50-mile-square district with a rectangle 100 miles by 50 miles. The relative changes in compactness are the same. But in the case of the urban district we have added only four miles to the aggregate boundary length of the plan as a whole (two miles

be inappropriate to calculate simply the ratio of the area to the perimeter of each district. This, too, is a scale-sensitive measure, yielding different values for identically shaped districts that differ only in absolute size. (The Polsby-Popper test provides a method for comparing area and perimeter that is not scale-sensitive.)

A New York City council district may be “no more than twice as long as it is wide.”⁶⁹ This seems straightforward, but it is not clear how the length and width of a highly irregular polygon are to be defined; and a district could be brought into compliance with this rule by adding a long, narrow extension, so as to lengthen whatever axis is defined as width – hardly what the drafters of the provision intended. Iowa legislative districts must be as nearly as possible square, rectangular, or hexagonal in shape. A quick glance at a map of Iowa county boundaries will show why this definition may make more sense there than here. Some measures of compactness that are often mentioned, especially in press accounts, are mathematically incoherent, such as counting the number of sides of a district.⁷⁰

Alternative Formulations of Proposed § 3 (f) (4)

The language we propose, taken from existing Article III, §§ 4-5, has the advantage of seeming to be simple, and easy to understand. But it may be argued that it has so many possible meanings, some reasonable and some not, that its simplicity is illusory, and that no one really knows what it means. As we note above, in the absence of a definition, the compactness requirement may ultimately be ignored or accorded only *pro forma* respect, as has happened in New York during the last several decades.

The measures recommended above may seem intimidating at first sight, but they really involve no more mathematics than one needs to survive the first semester of 10th Grade.⁷¹ Everyone reading this has mastered it at one time.

If it seems advisable for § 3 (f) (4) to provide a better defined compactness requirement, it might be formulated thus:

to the district in question, and two miles to the boundaries of adjoining districts); while in the case of the rural district, we have added 200 miles to the aggregate boundary length of the plan as a whole (100 miles to the district in question, and 100 miles to adjoining districts).

⁶⁹ New York City Charter § 52 (d).

⁷⁰ A highly noncompact district may have many sides, but there is no necessary connection. Consider a square, and then a regular pentagon of the same area. The pentagon has a shorter perimeter than the square. Then substitute a regular hexagon, a heptagon, an octagon, etc., always keeping the area constant. As the number of sides increases, the figure will become more compact, by both the Roeck and Polsby-Popper measures. On the other hand, an isosceles triangle with a base a hundred yards long, and sides of five miles, would have the minimal number of sides, but would hardly be considered compact.

⁷¹ The ratio of the area to the radius of a circle ($A = \pi r^2$), the ratio of the circumference to the radius ($C = 2\pi r$), the Pythagorean Theorem ($X^2 + Y^2 = Z^2$, where X and Y are the sides, and Z the hypotenuse of a right triangle), plus a bit of elementary algebra and plane geometry.

The senate, assembly, and congressional districts shall be as compact in form as is practicable. Plans of senate, assembly, or congressional districts shall be compared, using average numerical measures, for each such plan, of: i) geographic dispersion, the degree to which the territory of districts is either tightly packed or widely spread out, ii) the relation of the perimeter lengths to the areas of districts, and iii) the dispersion of the populations of districts; but no measure shall be employed that is scale-sensitive, according different weight to the compactness of districts in rural, as compared with urban areas, or yielding different measures for identically shaped districts that differ only in absolute size.

Without specifying the formulas, this version would clearly require that compactness be evaluated using the three appropriate *categories* of measures described above, by comparing average measures for entire plans, and without employing scale-sensitive measures.

Alternatively, the Polsby-Popper, Roeck, and Population Circle tests might be mandated as the measures of compactness. § 3 (f) (4) would read as follows:

The senate, assembly, and congressional districts shall be in as compact a form as is practicable. Plans of senate, assembly, or congressional districts shall be compared, using the following three measures of compactness.

- i. Perimeter measure. That plan of senate, assembly, or congressional districts shall be deemed to achieve the greatest compactness, by this measure, which has the greatest mean value of the ratio of the area of each district to the area of a circle with the same perimeter as such district.**
- ii. Geographic dispersion measure. That plan of senate, assembly, or congressional districts shall be deemed to achieve the greatest compactness, by this measure, which has the greatest mean value of the ratio of the area of each district to the area of the smallest circle that completely encloses such district.**
- iii. Population dispersion measure. That plan of senate, assembly, or congressional districts shall be deemed to achieve the greatest compactness, by this measure, which has the greatest mean value of the ratio of the population of each district to the population of the smallest circle that completely encloses such district.**

4. Other Criteria: Communities of Interest and Convenience of Administration – § 5 (f) (5)

The districting commission would have discretion to consider a number of factors under § 5 (f) (5). These factors might enter into the choice among competing plans. The commission and the courts would also be on notice that incumbency considerations, § 5 (f) (6), are to be subordinated to all of these factors.

Geography

Communities of actual shared interest may be indicated by geographic factors other than county, county subdivision, and village boundaries. School districts and New York City community board districts may reasonably be considered. Census Designated Places may also be used. In most of the state, only incorporated places – cities and villages – are Census Designated Places. In Nassau and Suffolk counties, however, the Long Island Regional Planning Council has prevailed on the Census Bureau to designate as Places, not only the cities and villages, but the many unincorporated hamlets that most Long Islanders think of as their village of residence. In Long Island it would make good sense to try to keep Census Designated Places intact.

Physical features could also be considered, for example whether districts straddle the Hudson River in its lower, broader reaches.

Statistical Analysis

A wide range of social and economic data from the census – population density, age, income, sources of income, job category, years of school completed, household structure, number of rooms per household, race (as one variable among many), etc. – may be analyzed as indicators of a community of actual shared interest. Under the Census Bureau’s plan to replace the ‘long-form’ sample survey of the decennial census with the ongoing American Community Survey, up-to-date tract-level social and economic data will be available even before the release of the redistricting data set. Other data sources, such as the State Education Department data set on school districts – expenditure per pupil, class size, dropout rate, students with limited English proficiency, students qualifying for free/reduced price lunch – may also be included. Geographers and sociologists have developed statistical techniques – called principal components analysis and cluster analysis – that are now standard methods for measuring the similarity or difference among geographic units, such as census tracts, with respect to an entire data set of many variables. The summary variables generated by these techniques can be displayed on a map, and used as a basis, among others, for drawing districts.

Cognizability

Prof. Bernard Grofman has suggested that legislative districts ought to have the quality of “cognizability,” which he defines as “the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the

district in common sense terms based on geographical referents.”⁷² Besides local government subdivisions, easily understood geographic referents might include arterial highways, major streets, railroad lines, and rivers.

Preserving Election Districts

The commission could promote the orderly and efficient administration of elections in a number of ways (in addition to the most important one, completing its work on time). One of these is to minimize the splitting of existing election districts, so that there is little room for the errors that can arise when voters have to be sorted into new ED’s, and so that fewer voters will have to be reassigned to new polling places.

Inspecting District Overlaps to Avoid Inconveniently Small Election Districts

When senate, assembly, and congressional plans are drawn without reference to each other, or without reference to other electoral boundaries, such as civil court districts, a small area – even a single block with one voter – may be isolated by overlapping district boundaries so that it can share a ballot with no other adjoining or nearby area. That small area must then be an ED unto itself. Avoidance of such anomalies could be considered a redistricting criterion under this paragraph.

Preventing Isolation of Small Populations

Small populations may be inconveniently isolated in other ways than by overlapping districts. If an area with small population is separated from the rest of a legislative or congressional district by an arterial highway or similar barrier, either it must be made a separate ED, or the voters in the area will be forced to cross the barrier to vote. Avoiding such configurations could also be considered a redistricting criterion under this paragraph.

⁷² *Cardozo Law Review* 14 (1993) at 1262, quoted in Mark Monmonier, *Bushmanders and Bullwinkles* (Chicago, 2001) at 154.

APPENDIX D

AN ALTERNATIVE POPULATION STANDARD FOR LEGISLATIVE DISTRICTS

There is an alternative approach that would strictly limit any cumulative, regional deviation, while permitting a 10% total deviation. This would allow many more counties to be kept intact than a 2% total deviation, and avoid a possible threat to minority representation. In the alternative, § 5 (a) would read as follows:

All districts of a house of the legislature shall be as nearly equal in population as is practicable, except as necessary to satisfy the requirements of subsections (c), (e), and (f) of this section, but the difference in population between the most and least populous senate districts shall not exceed ten percent of the mean population of all senate districts, and the difference in population between the most and least populous assembly districts shall not exceed ten percent of the mean population of all assembly districts. For any contiguous group of senate or assembly districts, the percentage of the total number of such districts contained within such group, and the percentage of the total population of the state contained within such group, both expressed as two-digit numbers followed by two-digit decimals, shall not differ by an amount greater than 0.50.

Although it may seem complicated at first sight, the arithmetic is really quite simple, and it employs one of the classic ways of describing a biased apportionment: ‘X% of the population is represented by Y% of the legislators.’⁷³ The rule would not

⁷³ For example, in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 648-49, the Supreme Court observed:

According to 1960 census figures, the six counties where the six individual appellants reside had a citizen population of 9,129,780, or 56.2% of the State's total citizen population of 16,240,786. They are currently represented by 72 assemblymen and 28 senators - 48% of the Assembly and 48.3% of the Senate. When the legislature reapportions on the basis of the 1960 census figures, these six counties will have 26 Senate seats and 69 Assembly seats, or 45.6% and 46%, respectively, of the seats in the two houses. The 10 most heavily populated counties in New York, with about 73.5% of the total citizen population, are given, under the current apportionment, 38 Senate seats, 65.5% of the membership of that body, and 93 Assembly seats, 62% of the seats in that house. When the legislature reapportions on the basis of the 1960 census figures, these same 10 counties will be given 37 Senate seats and 92 Assembly seats, 64.9% and 61.3%, respectively, of the membership of the two houses. The five counties comprising New York City have 45.7% of the State's total citizen population, and are given, under the current apportionment, 43.1% of the Senate seats and 43.3% of the seats in the Assembly. When the legislature reapportions on the basis of the 1960 census figures, these same counties will be given 36.8% and 37.3%, respectively, of the membership of the two houses.

Since the pre-*WMCA* senate and assembly districts were strictly apportioned by county, the Court's comparison of the percentage of seats in a group of counties with the percentage of the state population in

require inspection of every possible cluster of districts, because it would only affect a group of districts sufficiently large to produce a cumulative discrepancy equal to about 0.5% of the state population – approximately 95,000 persons in the 2000 census. To put it another way, it would take a contiguous cluster of at least one-tenth of the whole number of districts (seven senate districts or 15 assembly districts) for the rule to come into play.

The apportionments of senate districts in 1972, 1982, and 1992 would have passed muster under this rule, but the assiduously manipulated apportionment of 2002 would not. The 29 contiguous overpopulated downstate districts (Senate Districts 10-38) contain 47.88% of the state population, and constitute 46.77% of the total of 62 districts. The difference between the two numbers – 1.11 – is more than twice the 0.50 difference allowed by the formula. Similarly, the 24 contiguous underpopulated upstate districts (Senate Districts 39-62) contain 37.60% of the state population, and constitute 38.71% of the total of 62 districts – again, a difference of 1.11 between the two numbers.⁷⁴

If the formula had been applied to the apportionment of assembly districts in 2002, Long Island would have 22 districts instead of 21, and New York City would have 64 districts instead of 65. There is also a contiguous group of 39 overpopulated Westchester County and upstate assembly districts (Assembly Districts 87, 92-122, 124, 126-129, and 137) containing 26.55% of the state population, and 26.00% of the 150 assembly districts. That would yield an impermissible difference of 0.55 under the proposed formula. These districts could be brought into compliance with the formula, however, by some transfer of population between the over- and underpopulated districts within Westchester County or within the upstate region. No reapportionment of districts would be needed between these regions and either New York City or Long Island.

that group of counties, is no different from a comparison of the percentage of districts in a group of districts with the percentage of the state population in that group of districts.

⁷⁴ In 1992 by contrast, the 24 upstate districts, comprising approximately the same territory, contained 39.22% of the state population, and represented 39.34% of the total of 61 districts – a difference of only 0.12 between the two numbers. The 28 downstate districts in 1992 – comprising much the same territory as the 29 overpopulated districts of 2002 – contained 46.28% of the state population, and constituted 45.90% of the total of 61 districts – an acceptable difference of 0.38 under the formula.

APPENDIX E

PROPOSALS FOR REFORM INTRODUCED IN THE LEGISLATURE

Several proposals for reform of the redistricting process have been before the Legislature during the 2005-06 and 2007-08 sessions. Only three, however, are sufficiently worked out so that they might receive serious consideration. Two attempt to achieve reform through enactment of a statute, the other through a constitutional amendment.

The authors of the proposals deserve high praise for stimulating public debate on this subject. But we believe that the proposals, as they now stand, are deeply flawed. Our criticism of these bills should not be seen as personal criticism of the sponsors. We believe that they introduced their bills to provide a framework for just such discussion as follows below.⁷⁵

Assembly Bill A05413 and Senate Bill S01155

A05413, of which Assembly Member Michael Gianaris is the principal sponsor, and S01155, of which Senator David Valesky is the principal sponsor, would establish, by law, an 11-member commission to propose redistricting plans to the Legislature, two members to be appointed by each of the four legislative leaders, and three by the other eight members. A complex two-tier procedure – for the appointment, first, of a nominations committee, and then of an apportionment commission from the committee’s nominees – is designed to give the legislative leaders limited control over the composition of the commission. The Legislature would first have to vote the commission’s redistricting plans up or down, without amendment, but could make unrestricted amendments after rejecting the commission’s first two proposals. The bills contain criteria for redistricting plans, covering such matters as population equality, compactness, contiguity, preservation of existing political subdivisions, protection of minority voting rights, and prohibition of gerrymandering.

In case of legislative deadlock, S01155 authorizes the Court of Appeals to choose a redistricting plan to become law, from among those previously introduced in the Legislature. The 2005-06 version of the Gianaris bill, A06287A, contained a similar provision, but it has been dropped from A05413. That is now the principal difference between the two bills, which in other respects are nearly identical.

A05413 and S01155 attempt to reform the redistricting process by statute, rather than by constitutional amendment. We believe this approach is fundamentally unsound.

The redistricting provisions of Article III, §§ 4-5, of the NYS Constitution, insofar as they have not been overridden by supervening federal requirements, can be altered only by amendment. The process of amendment is supposed to be slow, difficult,

⁷⁵ Page and line number references below beginning with the abbreviation ‘p.’ refer to the bill texts.

and deliberate. Unlike the redistricting provisions, that is one of the admirable features of our State Constitution. The Legislature cannot, by enacting a law, bind itself as to the substance of future legislation. And some of the desirable features of A05413 and S01155 would be unconstitutional without an amendment.

Advocates of A05413 and S01155 argue that only by enacting a statute can a reformed process be established in time for the 2011-12 redistricting cycle. But timing is not the obstacle to a constitutional amendment. If an amendment is approved by the Legislature any time during the sessions of 2007 or 2008 (it makes no difference which), and approved again in 2009, it can be placed on the ballot in the 2009 general election and become effective on January 1, 2010. That will leave ample time for a commission to be appointed and to prepare for its work before the redistricting data are reported to the State by the Census Bureau in March 2011. The Legislature would presumably provide for the staff of the present Legislative Task Force to continue the technical preparations then in progress. Our proposed amendment gives the Legislature the authority to do so.

The barrier to an amendment is that the Legislature, and the leadership of the majority conferences in particular, would be unwilling to surrender their control over redistricting. If an amendment proves impossible, but A05413, S01155, or some similar bill does pass, it can only be because the Legislature or the majority leaderships have concluded, as we do, that they will not surrender control over redistricting by passing such a bill.

Constitutional Defects in A05413 and S01155

The apportionment criteria in A05413 and S01155 are constitutionally problematic. The bills provide, properly, that the Commission's plans shall comply with Article III, §§ 4-5 (A05413 p. 7:3-6, S01155 p. 6:41-44), but the next paragraph comes into conflict with Article III by providing that "for Senate and Assembly districts, no [population] deviation shall exceed one percent of the average population deviation of all Senate and Assembly districts." (A05413 p. 7:17-19, S01155 p. 6:49-51.) Presumably this would allow a 'total deviation' up to 2% between the most and least populous districts (since the 1% deviation of a given district might be either positive or negative), and counties and their subdivisions would have to be divided where necessary to meet this standard. The difficulty here is that Article III gives the preservation of county and town boundaries priority over population equality. This rule survives, except to the extent that it conflicts with supervening federal requirements,⁷⁶ and the Supreme Court has not interpreted the Equal Protection Clause to require such an exacting standard of population equality among legislative districts. A total deviation up to 10%, between the largest and smallest districts, is presumptively constitutional, and a state can justify a larger deviation, especially for the purpose of keeping local government subdivisions intact.⁷⁷

⁷⁶ See the discussion above, in Section VII and Appendix C, of § 5 (f) (1) of our proposed amendment, and n.37 and n.38.

⁷⁷ See n.35, above.

Existing Article III, §§ 4-5, as limited by the supervening federal requirements, would therefore seem to trump the narrow deviation standard in A05413 and S01155.⁷⁸

Persuasive arguments can be made in favor of a different rule, requiring the division of more counties in order to achieve a higher standard of population equality. The strict population equality standard in A05413 and S01155 would prevent the regional gerrymandering that was the subject of the *Rodriguez* complaint. For that reason we suggest a similar rule in § 5 (a) of our proposed amendment.⁷⁹ But given the tension between lower deviations and the constitutional imperative to preserve county lines, this reform requires a constitutional amendment.⁸⁰

Moreover, as we note in Section I, the Legislature cannot, by enacting a law, constrain its own law-making authority. That, too, can only be done by constitutional amendment. Even assuming that the procedures and criteria provided in the reform bills were all constitutional, if the Legislature were not satisfied with the choices presented to it under these procedures, it would still have full authority to ignore the work of the commission and to enact its own redistricting plan, any provision of A05413 or S01155 notwithstanding. The Legislature's plan would only have to satisfy the federal constitutional and statutory requirements, and the surviving requirements of Article III, §§ 4-5. This problem is discussed further below.

⁷⁸ In *Rodriguez v. Pataki*, the defendants argued that the population deviations of the 2002 senate districts – which had a total deviation of 9.78% – were justified by the county integrity rule of Article III, § 4. The plaintiffs argued that the defendants' reliance on this state constitutional principle was merely pretextual, but they did not question the validity of the principle. See, "Brief in Support of Defendants' Motion to Dismiss," March 7, 2003, at 19-20, "Memorandum of Law in Support of Defendants' Motion for Summary Judgment," October 3, 2003, at 9, and "Plaintiffs' Memorandum of Law in Opposition to the Plaintiffs' Motion for Summary Judgment," October 23, 2003, at 6-8, *Rodriguez v. Pataki* SDNY 02 Civ. 618.

⁷⁹ See the discussion of our proposed § 5 (a), above, in Section V-A and Appendix C. Our proposed population equality standard differs from A05413 and S01155, in that ours calls for a 2% total deviation limit, not plus or minus 1%. Our proposal would allow, for example, a negative deviation of up to 1.5%, if the largest positive deviation were 0.5%, which would still leave a total deviation of 2%. Such flexibility may permit more counties and county subdivisions to be kept intact. Note also our cautions about the need to study the effect of a more strict deviation limit on minority representation and the preservation of counties and county subdivisions.

⁸⁰ In *Wolpoff v. Cuomo* (1992), the Court of Appeals found that the Legislature may adopt a more stringent standard of population equality than the Equal Protection Clause requires, and divide more counties in consequence, but did not cite any constitutional authority for this principle (80 NY2d 70, 79). The Court did not find a constitutional principle requiring a more strict population equality standard, with the concomitant division of counties, but merely found that the Legislature had exercised permissible discretion in choosing to make that trade-off in 1992. In 2002, however, both the Senate and Assembly plans were ostensibly based on preserving county integrity as much as possible within a 10% total deviation: essentially the position taken by Judge Titone in his *Wolpoff* dissent (Id. at 80-84). Opponents of the plans saw no basis in *Wolpoff* for challenging this doctrine. If reform is intended to make the redistricting process more transparent and accountable, and to reduce the opportunity for self-serving manipulation of ambiguous constitutional principles by the Legislature, it should rely upon strict adherence to the State Constitution, appropriately amended, and not on the exercise of the greatest latitude that the Court of Appeals might allow the Legislature.

S01155 and the Separation of Powers

The New York State Constitution, Article III, §§ 4-5, provides that the legislative districts shall be altered by the enactment of a law, and that both Senate and Assembly districts be established by the same law (§5).⁸¹ Article III, § 13, provides that “no law shall be enacted except by bill,” and Article III, § 14, states, “nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature.”

S01155 provides, however, that if none of the redistricting bills introduced under its procedures is enacted, “the Court of Appeals shall review all legislation submitted pursuant to this section to determine which apportionment plan should be enacted into law.” (p. 8:29-32) Such authority, which is distinct from the judicial review of a reapportionment law under existing Article III, § 5, cannot be granted to the Court of Appeals by law; it would require a constitutional amendment.⁸² It is also quite possible that, by the time the Court of Appeals is called upon to break a legislative deadlock, a

⁸¹ The NYS Constitution provides for the redistricting law to “alter” the senate districts and “apportion” the assembly districts, since the assembly district boundaries in the larger counties, where not entirely determined by the apportionment of assembly districts among the counties and by the senate district boundaries, are to be drawn by the legislative authority of each county. Since *WMCA*, the county integrity requirements of Art. III, §§ 4-5, have had to yield to the equal population requirement arising under the 14th Amendment. There are now many bi-county assembly districts, previously an impossibility. It has not been practicable, therefore, to leave the drawing of some assembly districts to the counties, and the State Legislature has had to assume that responsibility. *See, Matter of Orans*, 15 N.Y.2d 339, 351-352 (1965); *Bay Ridge Community Council v. Carey*, 103 A.D.2d 280, 289 (1984), *aff’d* 66 N.Y.2d 657 (1985).

⁸² We are indebted to Justin Levitt, of the Brennan Center for Justice, for the following observation:

[I]f the court's action is considered not to be judicial review, but rather drawing the lines in the first instance, there is ... a fairly serious separation of powers / nondelegation issue. Just last May, the Appellate Division said that “[t]he doctrine of the separation of powers is so fundamental to our system of government that the Legislature is precluded from enacting legislation charging the judiciary with the mandatory performance of nonjudicial duties.” *Campaign for Fiscal Equity, Inc. v. State*, 814 N.Y.S.2d 1, 8 (N.Y. App. Div. 2006), *aff’d in relevant part* 2006 WL 3344731 (N.Y. Nov. 20, 2006). The contemplated role for the Court of Appeals here would most likely qualify as a nonjudicial duty. Indeed, even asking the Court of Appeals to “recommend” the best plan to the legislature might be problematic. *See CFE v. State*, 2006 WL at pt. III (“Supreme Court should not have provided a panel of referees with a mandate to make *recommendations* as between compliance proposals – the State’s, the plaintiffs’, the City’s, the Regents’. The State, not Supreme Court, was ordered to ascertain the cost of a sound basic education in New York City.”) (emphasis in original). [Memorandum to the Subcommittee on Redistricting of the Committee on Election Law, December 8, 2006.]

The Legislature does customarily make a delegation of its redistricting authority, authorizing either the Secretary of State or (in recent decades) the State Board of Elections to correct minor errors in the redistricting legislation, or anomalies arising from street closings, etc. The delegated authority only extends to minor, marginal changes in district boundaries enacted by the Legislature, and it has rarely been exercised. By contrast, when the 1982 redistricting law was found to contain significant violations of the ‘block-on-border’ rule, these were corrected, in 1984, by legislation.

challenge to the existing districts (enacted in the previous decade), may already going forward in Supreme Court, and working its way toward the Court of Appeals, pursuant to the judicial review provisions of Article III, § 5.

Even if the S01155 were reframed as a constitutional amendment, it would still raise a serious constitutional concern, by compromising the principle of separation of powers. A separation of powers among the three branches of government is deeply rooted in American notions of legitimate government, drilled into us from our earliest civics lessons. We should hesitate to compromise that principle by giving a legislative role to the Court of Appeals; especially when it might have to rule as the State's highest court on the constitutionality of the very same enactment it adopted.

The bill states that the Court is to choose from the proposed legislation previously submitted. What does the Court do if it deems all of the available choices constitutionally flawed? Existing Article III, § 5, makes specific provision for judicial review of a legislative reapportionment law. Is that provision to be repealed? What happens when litigation challenging a reapportionment plan chosen by the Court of Appeals reaches that Court, on appeal?

This point may seem to be somewhat overstated, since a court hearing a challenge to a reapportionment plan, or acting in the case of a legislative impasse, may have to appoint referees to devise or choose a plan to be imposed by the court itself. But under the present system such judicial intervention only arises out of litigation, where there are parties at interest with standing to present evidence and legal arguments to the court. The courts maintain their normal position as a separate branch of government, reviewing the constitutionality of a legislative enactment – whether it be a newly enacted reapportionment plan, or the previous decade's plan left unaltered after the latest census. S01155 draws the judiciary rather too deeply into the original process of legislation.

An Even More Opaque Redistricting Process Under A05413 and S01155

The redistricting process would have three phases under A05413 and S01155. First, the commission submits its initial plan to the Legislature, to be voted down without amendment. Second, the commission submits its revised plan, presumably taking account of the Legislature's objections, to be voted down without amendment. Third, the commission submits its newly revised plan, and “the implementing legislation *with any amendments the Legislature shall deem necessary* shall be introduced in both houses of the Legislature.” (A05413 p. 8:38-40, S01155 p. 8:22-24; emphasis added.)

That is when the real plan comes out of the drawer. This is certainly not what the sponsors of A05413 and S01155 intend. But it is impossible to imagine that the members of the Legislature, faced with a redistricting plan that puts their re-election in doubt, or leaders of the legislative majorities, faced with the loss of the majority or of the loyalty of their members, and possessing perfectly legitimate means to solve their problems, would not employ the available solution.

While the Legislature cannot bind itself by legislation, it can bind the commission it creates. Under A05413 and S01155, the commission would be bound to present plans with populations deviations of no more than 1%, plus or minus, with whatever divisions of counties and towns that deviation standard would necessitate. The members of the Legislature, if they take their constitutional responsibilities seriously, would then be bound to reject the commission proposal and to substitute plans that, at the very least, preserve counties and towns as much as possible within a 10% total deviation. Some Legislators may lose more sleep than others over constitutional issues, but be assured that they will all defend the Constitution like tigers (or enraged elephants) if that is also the best way to ensure their re-election.

It has been suggested that the Legislature might be restrained by the provisions in A05413 and S01155 requiring a statement of the reasons for its actions. But the Legislature does give reasons for its redistricting decisions. See the transcript of the meeting at which the Legislative Task Force on Demographic Research and Reapportionment adopted its proposal to the Legislature on April 8, 2002, the subsequent debates in the Assembly, on April 9, and in the Senate, on April 10, on Assembly Bill A11014, and the well-reasoned memorandum of law justifying (retrospectively) the increase of the Senate from 61 seats to 62.⁸³

Just as now, the Legislature would have complete discretion to enact any constitutional plan on which both houses agree and which the Governor is willing to sign. The only difference from the current procedure is that the process of drafting the real plan would be even more obscured from public view.

We agree that the existing process, conducted by the Legislative Task Force on Demographic Research and Reapportionment, is hardly transparent. Nevertheless, under the current system, there is some connection between the public redistricting process, conducted by the Task Force, and the drafting of the plan actually adopted by the Legislature. The Task Force is run by some of the principal drafters of the actual plan, and they are on the platform at the public hearings. This connection led the *Rodriguez* Court, while recognizing a broad claim of legislative privilege, to order disclosure of documents (including those discussed in this report) that revealed a great deal about how the senate districts were actually drawn.⁸⁴

Under the A05413 and S01155 procedure, however, there might be no connection at all between the actions, public or secret, of the reapportionment commission, and the plan eventually adopted by the Legislature (“any amendments the legislature shall deem necessary”). The elaborate procedures in A05413 and S01155 for nominating and appointing the members of the commission are designed to keep the commission honest by isolating it from legislative influence. But the more these procedures succeed in

⁸³ See n.17, above.

⁸⁴ See, for example, the memoranda dated May 4, 2001, June 21, 2001, July 20, 2001, and December 18, 2001, *Rodriguez v. Pataki* SDNY 02 Civ. 618. See n.16 and n.42, above.

achieving that isolation, the more obscure the real redistricting process will be when the Legislature finally acts to secure its own interests.

Advocates of A05413 and S01155 argue that the Legislature would also be restrained by the willingness of the Governor then in office to veto a redistricting bill that substantially ignores the commission's proposal. But that only means that, after enactment of A05413 or S01155, the Legislature will be subject to the same constraint that might have been imposed by the three previous Governors, had they chosen to do so. The majority leaderships will be able to exact a heavy political price from a Governor whose veto does not merely frustrate some element of their legislative program, but threatens their very standing as leaders. They can offer a choice between the Governor's redistricting policy, and everything else he or she needs from the Legislature. They can also manage matters so that the Governor must defy the congressional delegation as well, by agreeing to a congressional plan and including it in the same bill. There is no bar to their doing so.

The problem here is not merely that the Legislature might get its way after all. As explained above, if the Governor is not willing in the end to pay the price for a veto, we will have been left with an even less transparent redistricting process than we have now.

If, however, the Governor in 2012 is willing to exercise a veto to prevent the regional malapportionment of districts, to obtain fair representation for minority groups in both houses, or to prevent any of the other abuses of recent decades, he or she will be able to do so without A05413 or S01155.

A bi-partisan gerrymander produced by agreement of the two majorities may also survive a veto. 108 Democratic assembly members were elected in 2006. As in 2002, many members of the minority would also sign on when given a choice between districts of their own, and districts shared with their Republican colleagues. It would be more difficult to override in the Senate, but the 2002 redistricting bill passed 40-18, with one Republican and two Democrats marked excused. The missing Republican would have made it a two-thirds vote. The same process for obtaining votes from the minority members could work in the Senate as in the Assembly.

Moreover, as discussed above in Section III, the elaborate appointment procedure in A05413 and S01155 would not necessarily produce a commission free of partisan bias; and a commission that really is politically unsophisticated, if it can be achieved, may be unable to judge the effect of its decisions, especially on the representation of minority groups.

Assembly Bill A02056 (2005-06 Legislative Session) – Concurrent Resolution of the Senate and Assembly for a Constitutional Amendment (Same as S7976)⁸⁵

The resolution, of which Assembly Member Sandra R. Galef was the principal sponsor, avoids some of the essential problems with A05413 and S01155: it is framed as a constitutional amendment, not as a statute; it does not compromise the separation of powers by entangling the courts in the initial process of redistricting, but leaves them in their traditional role of ruling on litigation over redistricting plans established by another authority; and it avoids the complexity of the procedure in A05413 and S01155 for appointing the commission. Moreover, it would vest full authority in the commission, rather than leaving final authority to the Legislature.

The approach is fundamentally sound, with one major caveat. The proposal does not require that the chair of the commission support the final redistricting plan. Were the chair required to approve the plan (as it would seem was actually intended though omitted), the commission, as constituted under A02056, would probably conduct a kind of ‘last-best-offer’ arbitration with the fifth member, the chair, as the final arbiter. The other four members would undoubtedly consult their partisan interests,⁸⁶ but they would be in a competition to satisfy the chair – a person whom both parties would presumably trust to act without partisan bias.

We also believe that A02056 has several other serious flaws, which we discuss below.

Retention of Obsolete Constitutional Language in A02056

Although A02056 incorporates the federal constitutional standard of a 10% total deviation, it retains the provisions that once served to produce population deviations far in excess of that, and that now serve no purpose at all. If Article III, §§ 4-5, is to be amended, then it ought to be thoroughly cleaned up and rationalized.⁸⁷

⁸⁵ These are 2005-06 bill numbers. No version of this resolution has yet been introduced for the 2007-08 session. There was another, nearly identical, Senate bill in 2005-06 proposing a constitutional amendment: S01588. We do not discuss it separately, but most of our observations apply to both versions.

⁸⁶ A02056 provides that the four partisan appointees shall not be present or past public or party officials. Why? The legislative leaders will undoubtedly appoint persons who can be counted on to defend their partisan interests. This provision might give a considerable advantage to the party that is able to find effective advocates who, by chance, have never even been members of the county committee (the most humble party office). Retired judges and those who have held even an appointive public office would also be barred. But public *employees*, even present or past partisan appointees, even those who have served in a partisan capacity, would be permitted – provided that they happen not to have held party office. (With respect to some party offices – especially county committee – records of past membership may be nonexistent.) Why not let the Legislative leaders appoint the best advocates they can find? They will still have to compete to satisfy the chair, provided that the chair’s affirmative vote is required.

⁸⁷ The language basing apportionment on “the number of inhabitants, excluding aliens” is retained throughout A02056. Article III, § 5a, already provides that this phrase is to be read to mean “the whole number of persons.” The obsolete language, although without effect, ought to be eliminated from §§ 4-5.

Examples of such obsolete language include the following:

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators. (p. 3:1-5)

Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly... (p. 3:36-38)

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens. (p. 3:44-55)

In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. (p. 4:29-36)

These provisions, along with others, not only permitted, but required, the extreme population disparities that were ruled unconstitutional in *WMCA*. They have already been rendered inoperative by federal Equal Protection doctrine, and they would be explicitly overridden by the language added in A02056. But if Article III, §§ 4-5, is to be amended, it ought to be thoroughly rewritten to say only what it will now be intended to say. Retaining the obsolete language will at best confuse the public, both when they are called upon to vote on an amendment, and afterward when they try to understand and participate in the redistricting process. At worst, it creates constitutional ambiguity and opportunities for manipulation.

Retention in A02056 of the Obsolete Provision for Determining and Changing the Size of the Senate

A02056 retains the provision for determining, and changing, the size of the Senate, depending on population changes in certain populous counties:

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent. (p. 3:6-13)

Lord Palmerston is supposed to have said that only three people ever understood what the Schleswig-Holstein dispute was about: one was dead, the second had gone mad, and he himself had forgotten. The same might almost be said of this sentence from Article III, § 4. Its original purpose was to skew the apportionment in favor of the less populous counties, as explained above in Section VI, in the discussion of our proposed § 2. If Article III, § 4, is to be amended, there is no reason not to settle on a permanent number of senate, as of assembly, districts.

Retention in A02056 of the Obsolete Provision for a Separate State Census

A02056 preserves the extensive provisions in Article III, § 4, for the State to conduct its own census in the event that the federal census fails to provide the data required by that section. (p.p. 1:10 – 2:5) Given the current federal constitutional rules on reapportionment and redistricting, the failure of the federal census to provide the necessary information is inconceivable. This provision should be deleted.

Retention in A02056 of the Obsolete Deadlines for Redistricting

A02056 retains the provision in Article III, § 4, that legislative redistricting may be done as late as the sixth year of each decade (p. 2:8-14). The District Court in *Flateau v. Anderson*, 537 F. Supp. 257 (SDNY 1982) made it clear that the Equal Protection Clause would be violated if legislative districts were not redrawn for the general election of the year following receipt of the decennial census counts (*i.e.*, the second year of the decade). A02056 also fails to establish a deadline for the commission to adopt a redistricting plan within the constitutional two-year redistricting cycle.

Ambiguous Redistricting Criteria in A02056

A02056 places most of the new language establishing redistricting criteria in Article III, § 4, which deals with senate districts. Some or all of this language is intended also to apply to the assembly redistricting, but it is difficult to follow which provisions refer specifically to the Senate, and which to both houses, especially since most of the obsolete language is retained in both § 4 and § 5. This confusion is likely to produce ambiguity, and judicial interpretations at odds with the sponsors' intent. The requirement that assembly districts be wholly nested within senate districts is retained, but without changing the number of senate or assembly districts to make that requirement conform with the rules for equality of population. It appears that population equality and compactness are to yield to preservation of counties and towns, subject to a maximum

population deviation, but this is not quite clear, and it seems that population equality (within the maximum limit) and compactness are to yield to each other.

It would be better to redraft the redistricting criteria entirely, eliminating all the obsolete language, and establishing a clear rank ordering of criteria. We take this approach in our proposed amendment, as explained in Sections II and VII.

An Unintended Bias in the Compactness Standard of A02056

A02056 makes the aggregate perimeter test the standard for judging compactness. The most compact plan is that in which the aggregate length of all district boundaries is smallest. (p. 2:34-45) See n.68, above, for an explanation of why this compactness measure is scale-sensitive. There may be arguments for attaching more importance to the relative compactness of rural districts (the distances to be traveled are longer, etc.), but that is probably not the intention of the sponsors of A02056.

A02056 attempts to address this problem by applying the same compactness standard, not only statewide, but within each political subdivision that has two or more districts, but it is not clear how this would work. See also our discussion in Appendix C, in relation to § 5 (f) (4) of our proposed amendment, of the reasons for relying on no single numerical definition of compactness.

Possible Conflicts with the Voting Rights Act in A02056

A02056 adds a constitutional requirement that:

Such districts shall not be drawn for the purpose of diluting the voting strength of any language or racial minority group. (p. 3:23-24)

This seems to be intended to incorporate the requirements of the Voting Rights Act of 1965. But as amended in 1982, the Voting Rights Act prohibits any procedure that has the “purpose or effect” of denying the members of a minority group an equal opportunity to participate in the political process and to elect candidates of their choice. It is not clear why A02056 incorporates the purpose standard of the Voting Rights Act, but not the effects standard. It should be noted that Congress added the effects standard because of the difficulty of proving a malicious purpose.

A02056 also provides:

The Commission shall not use the political affiliations of registered voters, previous election results ... and demographic information other than population head counts for the purpose of favoring any political party, incumbent legislator or other person or group. (p. 3:17-22)

Would this prohibit the use of political data, and census data on race and Hispanic origin, to draw districts that are designed to give minority group voters an effective

voting majority? We are certain that is not the intention of the sponsors, but the language is ambiguous. One could begin right now to draft the briefs for both sides in the litigation that would arise from this provision.

In some circumstances, the Voting Rights Act requires the use of such data to create districts in which minority group voters will have an effective voting majority. It also requires the use of such data in statistical analyses to make sure that the effects standard of the Voting Rights Act has not been violated, and, in Bronx, Kings, and New York Counties – the most populous single jurisdiction covered by the preclearance provisions of § 5 of the Voting Rights Act – that the plan does not produce a retrogression in the ability of minority group voters to elect the candidates of their choice. The anti-gerrymandering provisions of A02056 need to be carefully studied to ensure compliance with both the Voting Rights Act and the *Shaw/Miller* doctrine, and to avoid ambiguity that would unnecessarily give rise to litigation.