

## **Redistricting, Democracy, and New York: A Practical Solution**

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### ***Introduction: Why Wisconsin Matters***

Last year Americans went through one of the most divisive election cycles in U.S. postwar history. Given the uneasy push and pull within the Republican camp between an unorthodox populist who won office, and the rise and ongoing presence of a similarly situated candidate under the Democratic umbrella, it might have seemed on the surface that political parties were on the cusp of finally being replaced by candidates' personalities. Nonetheless, there was a critically important vestige of partisanship working its way through the state and federal court system at the very same time. That case is about redistricting -- the drawing of voting district by state legislatures after every decennial census by the winning party to ensure a legislative electoral majority in the respective state.

In this particular case, in Wisconsin<sup>1</sup> the Republican legislative majority used the traditional partisan tactic of redistricting to favor their party. State Democrats triumphed on front of a Federal judicial panel which ordered redrawn lines Since redistricting cases don't get federal appeals, the next stop is the Supreme Court. Whatever the outcome, Wisconsin is just one example of the dangers of gerrymandering. There might be threats to democracy from without in terms of party lines. This one is a very real threat from

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<sup>1</sup> Whitford v. Nichol 15-cv-421-bbc. In 2016 the case name was changed to Whitford v. Gill due to the change in Wisconsin state elections leadership.

within, and ought to be disposed of for the sake of a more secure democratic electoral process.

New York is no exception. The state has been a bi-partisan practitioner of political gerrymandering. Even after voters passed a constitutional amendment in an attempt to get rid of the gerrymander, it still seems to continue its role in protecting elected officials state-wide come the next redistricting. This paper aims to offer a realizable alternative.. If Wisconsin falls, there will likely be a legal domino effect and years of litigation. New York has the chance now to avoid that possibility and adopt a more practice and fair practice.

### ***Redistricting Reform and Democracy***

Free and honest electoral competition is the one indispensable feature of a democracy.<sup>2</sup> The United States constitution, established upon that ideal, demands nothing less of our political system than the maintenance of open and fair contests for public office. An emergent influential alliance of good government activists, scholars, journalists, public figures, and reform minded state legislators in New York suggest in no uncertain terms that this essential American principle has been violated in the state by the way the legislature currently draws district lines for election of candidates to state office.<sup>3</sup>

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<sup>2</sup> Jonathan Winburn, The Realities of Redistricting: Following the Rules and Limiting Gerrymandering in State Legislative Redistricting, Maryland: Lexington Books, 2008, page 2

<sup>3</sup> This alliance refers to *New York Uprising*, a state government reform movement founded and led by late former New York City major Ed Koch. See the “Our Goals” section of the *New York Uprising* website which makes this point explicitly regarding gerrymandering.  
<http://www.nyuprising.org/index.cfm?objectid=DB02861C-C29C-7CA2-F6251D6F74B5AC77>

The New York State Legislature has, in the words of a report by NYU's Brennan Center for Justice, "primary control of the redistricting process...for its own districts... with much of that power exercised at the behest of the leadership."<sup>4</sup> Data clearly supports the conclusion, that due to the legislature's ability to design its own electoral districts, whichever incumbents happen to be in office during redistricting period gerrymander district boundaries to keep themselves in office.

Regardless of Republican or Democratic majority, that is exactly what happened in New York State's bicameral legislature as the party majority in each chamber has historically scrambled to do whatever it could to ensconce itself in power for as long as possible. Partisan gerrymandering is a powerful political force. It is not merely an attempt to preserve a particular electoral status quo; rather, it tries to increase the number of seats the majority party holds.<sup>5</sup> The Democratic Conference Chairman of the New York State once unabashedly proclaimed that his party was "going to draw the lines so that Republicans will be in oblivion in the State of New York for the next twenty years."<sup>6</sup>

This important issue which cuts to the core of democratic behavior has taken on more urgency. State legislatures are now taking up the business of revisiting their district lines. The lofty goal behind such a review is to ensure that electoral districts accurately reflect local population changes that have occurred over the last ten years. Since sitting legislative majorities in the New York State Assembly and Senate determine their own

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<sup>4</sup> Brennan Center for Justice, *New York Redistricting Memo, Analysis*, New York: New York University, 2010, pages 1-2, [http://www.brennancenter.org/content/resource/new\\_york\\_redistricting\\_memo/](http://www.brennancenter.org/content/resource/new_york_redistricting_memo/)

<sup>5</sup> Donald Ostiek, *Congressional Redistricting and District Typologies*, *Journal of Politics*, Vol. 57, Issue 2, Austin: University of Texas Press, May 1995, pps. 533-43

<sup>6</sup> Bill Hammond, *Albany is a city without heroes*, *New York Daily News*, August, 20, 2010

electoral district lines, the Democratic Conference Chairman's contention is already a done deal unless alternative options are presented that remove redistricting from full control by the state legislature.

New York State passed a constitutional amendment in 2012 reorganizing redistricting in the State, but that effort is an empty shell when it comes to reform. That is because its so-called independent redistricting commission has the majority of its members picked by partisan legislative leaders. An even number of members of the commission is picked by each party, leaving room for either gridlock or partisan wrangling. Finally, and most disturbingly, the plan drawn up by any such commission, even if it should prove able to function, is still to be approved by the legislature. Therefore, we are back to majority control of the process.<sup>7</sup>

This policy paper aims to take a step back from regressive legislation by offering a practical alternative separating out redistricting from the state legislature. There are already a small group of states that have taken the leap into this less partisan electoral universe. California and Arizona have implemented independent redistricting commissions. California's effort was initiated in 2008 so it is too new to see whether it is effective in eliminating gerrymandering. Scholars already acknowledge the incremental success that Arizona's 2001 establishment of an independent redistricting commission

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<sup>7</sup> New York Public Interest Research Group, *Voters Guide New York 2014*

has achieved having led to increased Hispanic representation “without paying attention to the concerns of individual incumbents.”<sup>8</sup>

Iowa trumps all such attempts. State legislative district lines are drawn in Iowa by a “non-partisan legislative bureau that by law cannot take into account any information on voting patterns, or even where incumbent legislators live.”<sup>9</sup> In short, Iowa’s redistricting agency is disallowed from access to any information that smacks of partisanship when analyzing district boundaries.

The New York Times put it succinctly when it argued that “New York’s lawmakers should create a nonpartisan, independent redistricting commission to draw lines fairly,” similar to that of Iowa.<sup>10</sup> But New York is not Iowa. For example, Iowa’s politics are made simpler because it does not contain the diversity of New York. This is illustrated most clearly by the fact that Iowa has no substantial Voting Rights Act issues.<sup>11</sup>

This act demands that New York account thoroughly for fair minority representation in any redistricting plan. New York must apply to the federal Department of Justice or the U.S. District Court for the District of Columbia for “preclearance” regarding any possible redistricting before state legislative consideration to make sure district minority votes are

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<sup>8</sup> Florence P. Adams, *Minorities and Representation in the New Millennium*, Redistricting in the New Millennium, ed. Peter F. Galderisi, Maryland: Lexington Books, 2005, p. 163

<sup>9</sup> Peverill Squire, *Iowa and the Political Consequences of Playing Redistricting Straight*, Ibid., page 261

<sup>10</sup> Editorial Desk, *Gerrymandering, Pure and Corrupt*, New York Times, November 12, 2009

<sup>11</sup> Ed Cook, IA, *A Nonpartisan Approach to Redistricting*, The Legislative Lawyer, National Conference of State Legislatures, Vol. 15, Issue 1, Winter 2002, page 4

not diluted.<sup>12</sup> Iowa's lack of significant minority populations eliminates the need for any such preliminary concern.

If we imagine a redistricting process continuum contained on opposite ends by Iowa's exceptionally independent commission, which is actually a state agency even containing the classically neutral public administration term "bureau" in its title, and New York's wholly legislatively controlled one, what comes in between? The reason that is an important question for New York is because both of these extremes are untenable for this state at this moment. Even though Iowa's non-partisan system might be beyond political reach in New York at this time it remains clear that legislative gerrymandering does fundamental harm to democracy through prevention of competitive elections.

This proposal does not suggest the creation of a brand new state entity, which is unrealistic politically and in terms of time since redistricting is now upon us. It also does not focus on arguable constitutional legal issues contained in the redistricting process such as compactness and contiguity. We are advocating here something much more basic and foundational to any meaningful redistricting initiative: the formation of a state redistricting framework that attempts to divorce the legislature from the process.

This would mean that the transformation of the already extant New York redistricting advisory task force LATFOR (Legislative Task Force on Demographic Research and Reapportionment), which still exists in spite of the 2012 amendment, could yet become a bipartisan redistricting commission combined with a more decisive and less advisory role

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<sup>12</sup> Brennan Center for Justice, *Ibid.*, p. 3

that can achieve our goal. Before offering the details of that plan and the criteria within which a revamped LATFOR would function, it is worth surveying the predominantly shared and mildly varying features of the California, Arizona, and Iowa commissions as examples from which to cull ideas for a revamped LATFOR. Recognizing these features will preempt any need to reinvent the wheel in this arena. A distinct pathway has been carved out by these three states. All that has to be done is to adapt these attributes to structures ready to implement them in New York.

### *Alternative Models: Arizona, California, and Iowa*

Arizona has achieved a “substantial degree of independence from the legislature in the redistricting process.”<sup>13</sup> Similar to California, its successful attempt to divorce redistricting from the state legislature was subject to voter referendum, which may serve as an important source of transparency and participation in the public conversation on redistricting.<sup>14</sup> Both Arizona’s and California’s independent commissions contain equal numbers of Democratic and Republican members combined with a minority of non-partisan members.

Arizona nominates potential commission members through its Commission on Appellate Court Appointments. Twenty five nominees are then narrowed down to four, two from each major party, selected by the four state legislative caucus leaders.<sup>15</sup> Those

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<sup>13</sup> Douglas Johnson, Ian Johnson, David Meyer, Redistricting in America: A State-by-State Analysis, Rose Institute of State and Local Government, California: Claremont Colleges, 2010, page 42

<sup>14</sup> The Brennan Center report cited earlier suggests a variety of procedural mechanisms through which the New York electorate can participate in the redistricting process, ranging from ratification of a constitutional amendment to a vaguely delineated public ability to “respond to drafts before they are enacted.” See the Brennan Center for Justice, Ibid., pages 4 and 5

<sup>15</sup> Rose report, Ibid., page 43

four choose a fifth non-partisan member.<sup>16</sup> California nominates commission members through its state auditor's office,<sup>17</sup> thereby removing the selection process from state legislators completely.

After a month long public and legislative discussion for "input and recommendations" the Arizona commission finalizes its redistricting plan. It "submits maps to the secretary of state for enactment" without any formal authority granted to the legislature for emendation or approval.<sup>18</sup> California's final plan requires votes from three of the commission's Democratic members, three of its Republican members, and three commissioners from neither party.<sup>19</sup>

The structure of California's independent commission completely removes it from legislative control. Arizona's plan allows for some involvement during the selection process but is still considered largely non-partisan in its decision-making process.<sup>20</sup>

As previously mentioned, Iowa's redistricting process is viewed as unique by scholars precisely because it is completely non-partisan. Its Legislative Service Bureau cannot, by virtue of regulation, retrieve any partisan information about area political participation as it draws district maps. Though Iowa's redistricting plans do go before the state legislature for a vote, there are strict guidelines limiting the ability of the legislature to amend the

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<sup>16</sup> Rose report, *Ibid.*, page 43

<sup>17</sup> Rose report, *Ibid.*, pages 42 - 44

<sup>18</sup> Rose report, *Ibid.*, page 44

<sup>19</sup> Jennifer Robinson, *Redistricting Laws and Procedures, Policy Perspectives*, Utah: The University of Utah, Center for Public Policy and Administration, Vol. 5, Issue 6, June, 2009, page 2  
[http://www.imakenews.com/cppa/e\\_article001471067.cfm?x=b11,0,w](http://www.imakenews.com/cppa/e_article001471067.cfm?x=b11,0,w)

<sup>20</sup> Rose report, *Ibid.*, page 42

plan, while also holding public hearings and keeping the legislature to a strict timetable for a vote on it.<sup>21</sup>

It is not only that these plans *seem* more democratic. They actually *are* more democratic. While California's has yet to be tested it is confirmed that "the examples of Arizona and Iowa fit within a broader pattern."<sup>22</sup> Redistricting plans designed by independent commissions "produced a larger share of competitive districts than when a legislature designed them."<sup>23</sup>

### ***LATFOR and Democracy***

The Brennan Center reports that "In practice, many observers note that as with many other legislative processes in New York, LATFOR tends to implement the will of the legislative leadership."<sup>24</sup> It is hard to imagine otherwise given that all of LATFOR's members are appointed by the majority and minority leaders of each house, with ultimate control in the hands of the Senate Majority Leader and the Speaker of the Assembly. The partisanship of such a process is underscored by the fact that the majority leaders of the Senate and Assembly appoint one legislator and one private citizen each to LATFOR while the chambers' minority leaders appoint just one legislative member each.<sup>25</sup> Adding to LATFOR's powerlessness as an earnest advisory commission, "It does not actually create a redistricting plan; it serves to advise the legislature as it develops the plan."<sup>26</sup>

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<sup>21</sup> Perell Squire, *Ibid.*, pages 265-266

<sup>22</sup> Charles S. Bullock III, *Redistricting: The Most Political Activity in America*, Maryland: Rowman & Littlefield Publishers, Inc., 2010, page 136

<sup>23</sup> Bullock, *Ibid.*, page 136

<sup>24</sup> Brennan Center for Justice, *Ibid.*, page 1

<sup>25</sup> Rose report, *Ibid.*, page 32

<sup>26</sup> Rose report, *Ibid.*, page 33

Not surprisingly, the legislature passes redistricting legislation by majority vote and is not bound by whatever recommendations LATFOR may make throughout the redistricting process.<sup>27</sup> The sole purpose of LATFOR is ultimately to analyze census figures for a redistricting process in which it has no independent voice. A veneer of advisory efforts is offered by LATFOR's set of recommendations to the state legislature. The Brennan Center redistricting memo points out that those recommendations are actually determined by legislative leadership preferences.<sup>28</sup>

It is hard to imagine a more legislatively entrenched form of partisan control over deciding electoral districts. No wonder incumbents not only win continuously, but win in landslides.<sup>29</sup> Seats open up mostly due to retirement, death, or, corruption charges.<sup>30</sup>

But, LATFOR exists. Instead of creating a new state redistricting instrument from scratch, there is no reason not to refine LATFOR to become all that it might. The basic administrative cues can be taken from the three states profiled above. More importantly, four foundational criteria must be woven into just such reform if any changes within LATFOR are to be effective. These criteria are suggested by redistricting scholar Michael McDonald, who considers them modest in the demands they make on the framework within which state redistricting ought to occur. They are:

1. Independence: a non-partisan selection of commission members

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<sup>27</sup> Brennan Center for Justice, *Ibid.*, page 1

<sup>28</sup> Brennan Center for Justice, *Ibid.*, page 1

<sup>29</sup> New York Times, *Ibid.*, page 34

<sup>30</sup> New York Times, *Ibid.*, page 34

2. Statewide universally objective criteria in drawing districts
3. Transparency of all commission deliberations
4. Public submissions: the commission must solicit public input on possible redistricting maps<sup>31</sup>

Arizona, California, and Iowa all provide variations on just such a theme. They certainly bring to the fore the possibility of real independence from legislative control. That kind of substantive independence has the natural spillover effect of creating a more open, objective setting within which to draw fair and competitive district boundaries.<sup>32</sup>

The challenge in a complex and highly politicized environment like that of New York is to find a way to actually implement an appointment process to an independent commission that is less partisan. An ideal rendering of that prospect would be to utilize the California model, in which commission members are selected through a body other than the legislature. In this way, at least appointees are unbound from direct obligation to legislative leaders and would not feel as if they “report” to them.

Alternatively, commission members could be selected by party leaders once vetted through another state agency such as a court appointee committee. Again, replicating Arizona, those partisan members originally prescreened outside of the legislature can then nominate either fewer, or, better yet, equal numbers of non-partisan members.

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<sup>31</sup> Michael P. McDonald, *Legislative Redistricting*, *Democracy in the States*, eds. Bruce E. Cain, Todd Donovan, Caroline J. Tolbert, Washington, D.C.: Brookings Institution Press, 2008, page 154

<sup>32</sup> McDonald, *Ibid.*, page 154

The end result will be a combination of equal members of both major parties plus a group of at-large members. There can be no doubt that just such a body would devise more universal standards for redistricting than the typical gerrymandering that has become traditional. Such a group would probably not be averse to holding regular open meetings to listen to public concerns and thoughts on its progress. Transparency will flow regularly from a commission honestly curious about what the electorate thinks. The legislature can certainly retain a voice in the selection process, but the point is that it ought not retain the only voice.

Finally, though New York may not yet be fully ready for a referendum culture such as the Sunbelt states of Arizona and California, there is no reason not to adopt the Iowa model of strict guidelines on legislative redrawing of mapping plans alongside a strict timeline on a legislative vote for a new statewide district map. The legislature is no more exempt from regulation for the sake of sustaining democratic behavior than any other private or public institution.

### ***A Threshold for Reform***

If gerrymandering is due to state legislative leaders' control over redistricting, then the problem begins at the start of the process with the way redistricting commission members are appointed. As McDonald concludes, "Redistricting commissions are typically designed to protect, not diminish, the power of party leaders, as commissioners are often either elected officials or their handpicked lieutenants."<sup>33</sup> A commission smacking of patronage cannot but be corrupt. Conversely, a commission comprised of members with

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<sup>33</sup> McDonald, *Ibid.*, page 153

no political obligations to senate and assembly leaders cannot but create a more democratic process and fairer redistricting map, even if that map ends up before the legislature for a final vote.

Therefore, the fundamental plank in this proposal's platform is that LATFOR must be staffed without Senate and Assembly leader involvement in appointments. This can be handled by a neutral state agency as in Iowa and California. If this possibility is currently unrealizable, New York can follow Arizona's lead and at least require a non-partisan state agency to nominate commission members prior to Senate and Assembly leader final selections.

Once a truly independent LATFOR is reconstituted, there ought to be less concern over the legislature's ability to debate and select from among several redistricting options a revamped LATFOR could potentially present. That is because the plans created by these plans would be created by LATFOR without political pressure.

Of course, while this proposal may offer both a normative and practical start, the final arbiter of its success is political will. While scholars, good government groups, and a growing number of voters clearly see that something has to give, our elected officials need also to rise to the occasion. Our state assembly members and senators must fulfill their mandate as local leaders of a democracy in action. Otherwise, they are not democratic leaders.