New York Redistricting Memo Analysis

March 1, 2010

This briefing memo explains the current redistricting process in New York, describes some of the current reform proposals being considered, and outlines four basic principles that the Brennan Center believes should be part of any meaningful redistricting proposal. The bulk of this memo is drawn from a February 2010 presentation at the New York State Bar Association; the full presentation is available on our website here.

The Current Process

In New York, the state legislature has primary control of the redistricting process, both for its own districts and for those of Congress. For the last 30 years, the legislature has delegated initial responsibility for drafting advisory maps to the Legislative Task Force on Demographic Research and Reapportionment, known as LATFOR, *see* N.Y. Legis. Law § 83-m. The Task Force consists of six members: one legislator and one non-legislator appointed by the Temporary President of the Senate, one legislator and one non-legislator appointed by the Speaker of the Assembly, and one legislator appointed by each of the Senate and Assembly minority leaders. N.Y. Legis. Law § 83-m.

In 2001, during the last round of redistricting, the Task Force held hearings at various locations around the state to receive input on district bounds. *See, e.g.*, Legislative Redistricting Hearings, at http://www.latfor.state.ny.us/docs/20010507/. 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.

After give and take with LATFOR, the legislature passes final redistricting legislation as a standard statute, by majority vote and subject to gubernatorial veto. *See, e.g.*, 2002 N.Y. Laws ch. 35. The legislature is not bound by LATFOR's recommendations, but because LATFOR is heavily influenced by the preferences of the legislative leadership, the final redistricting legislation often mirrors LATFOR's recommendations closely. The map for state Assembly districts and state Senate districts must be passed in one single bill. N.Y. Const. art. III, § 5; *Orans v. Rockefeller*, 257 N.Y.S.2d 839 (N.Y. Sup. Ct. Special Term 1965). Historically, this has amounted to something of a tacit agreement between the chambers, in which each chamber determines the lines for its own members independently.

Two other entities are important actors in New York's redistricting process. First, the judiciary: any citizen may petition the courts for review of a redistricting plan, N.Y. Const. art. III, § 5, and if redistricting is not completed promptly, or if it is completed in a manner deemed unfair under the criteria below, the map will likely be challenged in court. Although both federal and state

courts prefer to leave the map-drawing process to the state legislature, *see, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (White, J., joined by Stewart, J.); *Bone Shirt v. Hazeltine*, 700 N.W.2d 746 (S.D. 2005), as the time remaining before the proximate election grows shorter, the courts will be increasingly inclined to draw redistricting plans of their own.

The second additional entity to consider is the Department of Justice: Kings County, New York County, and the Bronx are subject to a requirement under section 5 of the Voting Rights Act to have districts, like all other voting regulations, "precleared" by the U.S. District Court for the District of Columbia or the U.S. Department of Justice. (See below for a more detailed discussion of Section 5). As a practical matter, redistricting plans are generally submitted to the Justice Department to ensure that the plans do not amount to retrogression in the ability of protected racial or language minorities to elect candidates of their choice. If the Justice Department does find retrogression — or, more accurately, finds that New York has not proved a lack of retrogression — it will object to the district plan, and the challenged redistricting map will have no legal effect.

Federal Law

As described above, the legislature has the primary responsibility for redistricting in New York, with much of that power exercised at the behest of the leadership. But two critical federal principles constrain the legislature's discretion in determining where to draw the lines.

1. Equal population

The first federal rule is a constitutional equal population requirement. A series of "one person, one vote" Supreme Court cases established that population should be approximately equal for each state and federal district within a state, and each local district within its corresponding jurisdiction. The bar for congressional districts is quite high, with equal population required "as nearly as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). In practice, this means that states must make a good-faith effort to achieve absolute mathematical equality for each district within the state, with the district size pegged to the mathematical average, or "ideal," population.

The standard for state and local legislative districts follows the 14th Amendment's Equal Protection clause, and permits a bit more flexibility. The population in these districts must be "substantially" equal. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The courts have not defined the phrase precisely, but over a series of cases, it has become accepted that the difference in population between the largest and smallest state legislative districts, the "total deviation," becomes constitutionally suspect when it exceeds ten percent of the ideal population. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

2. Race

Many redistricting techniques have been abused in order to dilute racial minorities' electoral strength. One such ploy is called "cracking": splintering minority populations into small pieces of multiple districts, so that their voting power is diluted. Another tactic is called "packing":

consolidating as many minority voters as possible into a few concentrated districts, leaching the population's voting power from the surrounding areas. Others abound.

The federal Voting Rights Act of 1965 was designed to combat practices used to deny minorities the right to an effective vote, including redistricting techniques like those above. Two sections of the Act are particularly important to New York redistricting: section 2 and section 5.

Section 2 of the Voting Rights Act blocks district lines that deny minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It applies whether the denial is intentional, or an unintended end result. Courts applying the Act in the redistricting context essentially test whether the way that a district is drawn takes decisive political power away from a cohesive minority bloc that has otherwise suffered discrimination in the region.

While section 2 of the VRA applies all over the country, section 5 only applies in jurisdictions in which fewer than half of the eligible voters either registered or voted in 1964, 1968, or 1972. Much of the deep South is made up of "covered jurisdictions" under section 5, but parts of other states outside of the South — including Kings County, New York County, and the Bronx — are also covered.

In a jurisdiction covered under section 5, which will include any New York statewide redistricting map, the government may not implement any change to a voting procedure without first submitting the change to the Department of Justice or the U.S. District Court for the District of Columbia, in a procedure known as "preclearance." New district lines will be precleared if the plan is not intended to dilute minority votes, and if it does not result in "retrogression" in minority political opportunity. A new plan has caused retrogression if it presents a diminished opportunity for minorities to elect their candidates of choice, as compared to the former redistricting map. *See* 42 U.S.C. § 1973c. In order to assess retrogression, it is necessary to assess minority political opportunity given the most recent demographic information available, under both the existing redistricting map (the "baseline") and the proposed revision.

Where to Draw the Lines

Even after accounting for the requirements of the Voting Rights Act, there remain countless ways to divide New York into districts of roughly equal population. For Congressional lines, the remaining choices are completely up to the legislature: other than the requirement that each federal district be drawn for a lone Representative, *see* 2 U.S.C. § 2c, there are no additional limitations under federal or state law on how the lines are to be drawn. For the state legislative districts, on the other hand, the state constitution provides a few additional constraints governing the legislature's discretion.

1. Contiguity. The state constitution requires that state legislative districts be composed of "contiguous territory." N.Y. Const. art. III, §§ 4-5. A contiguous district is one in which it is possible to travel from any point in the district to any other point in the district without crossing the district boundary. Most observers understand contiguity to require portions of a district to be

connected by more than a single point, but there is no further general agreement that a district be connected by territory of a certain area.

2. Compactness. The state constitution also requires that state legislative districts be "in as compact form as practicable," although the term "compactness" is not further defined. N.Y. Const. art. III, §§ 4-5. Most courts and commentators understand compactness to refer to a district's geometric shape: generally, a district in which constituents generally live near each other is usually considered more compact than one in which they do not, and a district with a relatively geometrically regular convex shape is usually considered more compact than one with multiple extended tendrils. Absent districts reflecting a "complete departure" from any understanding of compactness, *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972), the courts seem likely to give great deference to the legislature's choices.

3. Political boundaries. The remaining requirement in New York is to heed county and municipal boundaries. As with compactness, the courts have showed extremely broad deference to the legislature. They have been particularly forgiving of legislative plans that violate county boundaries in the name of limiting population deviation, even below the 10% deviation threshold generally permitted by the federal constitution. *See, e.g.*, *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 428 (1972).

Possible Reform

Several legislators, advocates, and observers of New York's redistricting process have noted room for reform, from state constitutional amendments to amendments to the procedures used by LATFOR and the legislature in passing redistricting legislation.

1. Constitutional amendment. Changing the state constitution is certainly the most durable method, but consequently the most difficult to achieve. Two successive legislatures must vote for a proposed constitutional amendment, which must then be ratified by popular vote, N.Y. Const. art. XIX, § 1; in the alternative, the legislature may call for a constitutional convention, and if the public approves, elected delegates must have their handiwork again approved by the public before it becomes binding. N.Y. Const. art. XIX, § 2.

2. Statutory change. There is some debate about whether a statutory change could effectuate change, particularly if it delegated control of the redistricting process to a body other than the legislature, given the state's constitutional command that the districts be redrawn "by law." If changing the decision-maker is the goal of statutory reform, the safest legal route would be to delegate *primary* control of the process, with a requirement that the legislature ratify the result, with or without amendment, or with amendment constrained to a certain quantum of change. Even though such a statutory change could be repealed by subsequent legislatures, the repeal would still be subject to gubernatorial veto.

Many of the recent reform proposals have focused on the identity of the decision makers, seeking a form of greater independence in those who draw the lines and/or attempting to ensure bipartisanship in the process. *See, e.g.*, A.5279, 2009-2010 Reg. Sess. (N.Y. 2009); S.6240, 2009-2010 Reg. Sess. (N.Y. 2009); Ass'n of the Bar of the City of N.Y., Comm. on Election

Law, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders* (2007), at http://tinyurl.com/NYCBarRedistrict. Others have focused to a greater extent on modifying the criteria governing where the lines should be drawn. *See, e.g.*, A.6721, 2009-2010 Reg. Sess. (N.Y. 2009).

Still other reform proposals have addressed a particular portion of the redistricting process: the counting of incarcerated populations. The New York Constitution provides that "For the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while confined in any public prison." N.Y. Const. art. II, § 4. Yet in calculating the population of legislative districts, the State does precisely the opposite, deeming incarcerated persons to reside in the prison facility in which they are confined. Districts are thus constructed on the backs of "ghost voters," packing in prisoners who count toward the district size but who are not permitted to vote, and who are not connected to the other residents of the district. This inflates the political power of voters in prison districts, and deflates the vote of citizens elsewhere, so that votes in prison districts are worth far more than others. One bill would correct the skew by counting prisoners for state legislative redistricting purposes based on their residence prior to incarceration. S.1633, 2009-2010 Reg. Sess. (N.Y. 2009).

Core Principles

Among the calls for reform, the Brennan Center has endorsed four basic principles that we believe should be part of any meaningful redistricting proposal.

First, an independent process. When legislators are intimately involved in drawing their own district lines, there arises an irresistible temptation to conflate the public interest with personal or partisan gain. The authority responsible for redistricting in New York State – and just as important, the staff supporting that process – should be meaningfully independent from undue legislative influence: free from obligation, and possibly even free from ex parte contact. This does not simply mean bipartisanship, though bipartisanship may be desirable as well. Nor does it mean a process devoid of politics, or one that eliminates entirely politicians' roles. The difference is that, in a body with independence, those with a particular incentive to lock out competent challengers are not given unfettered access to the keys.

Second, a diverse representative body. The need to reconcile the competing and complementary interests involved in the redistricting process means that to gain the confidence of the public, the redistricting body must be meaningfully diverse. Those responsible for drawing district lines should reflect ample geographic, racial, ethnic, and political diversity, so as to prevent charges of self-dealing similar to those that have found a foothold in the current system, but on a group level rather than an individual level.

Third, meaningful redistricting criteria. There are many available guiding principles. Some present affirmative requirements, such as the mandate to further the representation of discrete communities of interest. Others are negative injunctions, such as the obligation to avoid drawing lines in order to disadvantage a particular incumbent or challenger. One stands out as particularly important: given a commitment to the principle of majority rule, it is beneficial to pay some attention to the likely partisan balance of a redistricting map, so that a minority of the

state's population does not reliably and durably control the majority of the legislature. The need for clear governing criteria should not be confused with a demand that the criteria in question dictate a particular result. Rather, the criteria should retain enough flexibility to allow trusted decision makers — the diverse and independent redistricting body mentioned above — to apply overall state priorities to peculiar local circumstances, sensibly and in the broader public interest.

Fourth, meaningful transparency. At the moment, most citizens are excluded from the redistricting process, which concerns not merely public policy, but the aggregation of group interests that are the foundation of all policy discussions. Communities are splintered and electoral fortunes tailored, by and large, without meaningful opportunity for input. A commitment to basic transparency requires not only public hearings, but the opportunity to submit draft maps, and the opportunity to respond to drafts before they are enacted.