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## **On the Ballot for Nov. 2, 2021: the Constitutional Amendment on Redistricting**

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## [GUEST COMMENTARY: On the Ballot for Nov. 2, 2021: the Constitutional Amendment on Redistricting](#)

[Commentary](#) • [Redistricting](#) • [Statewide](#)

08/27/2021 • [\(2\) Comments](#)



Current Congressional district map for New York City.  
Image Credit: New York State Legislative Task Force on Demographic Research and Reappointment.

### **The Redistricting Schedule**

On November 2, 2021, New York State voters will be asked to approve a constitutional amendment revising the redistricting process to be based on the 2020 census. If the constitutional amendment is approved, the changes will take effect on January 1, 2022. This amendment is necessary to address delays in the census created by the pandemic and to accommodate New York State's change from a September primary to an earlier June primary for both federal and state elections. These changes compressed the time needed to complete the redistricting. Without these changes, it is possible that the new districts will not be ready in time for the political process to function.

For example, the first day for circulating designating petitions to qualify candidates for the primary election ballot is usually set in late February or early March. Under current law, if the State Redistricting Commission is not required to submit its final plan to the Legislature until February 28, and the Legislature can only then vote on it (possibly amending it as provided in the 2014 constitutional amendment) and send it to the Governor, an orderly process for the June primary will be nearly impossible.

Taking account of the disruption of the 2020 census by the pandemic and recognizing that the amendment cannot take effect until January 1, 2022, the amendment provides one set of revised deadlines for future redistrictings beginning in 2031-32, and more modest revisions for 2022. In future decades, the Commission would have to submit its first plan to the Legislature by November 1st of the year numbered '1,' e.g., November 1, 2031, with January 1, 2032 as the final deadline for the second plan, if the Legislature or the Governor rejects the first plan.

The amendment preserves the January 1, 2022, deadline for the current Commission to send its first plan to the Legislature, eliminating only the potential flexibility of an extension to January 15 that is allowed by the 2014 constitutional amendment.

Eliminating a flexible initial deadline for the Commission's first set of maps provides a reasonable time frame for a June primary. The members of the Commission will know well before January 1, 2022, whether the voters have approved the amendment.

The major proposed change to the current redistricting schedule is the substitution of January 15, 2022, for February 28, 2022 as the deadline for the Commission to submit its final plan. This provides the Legislature, the Governor, and the boards of elections time to perform their duties, while maintaining an orderly election process for a June primary.

Even with the proposed constitutional amendment's adjustment of the redistricting deadlines, the Legislature could still consider a legislative adjustment of the 2022 political calendar. The Legislature could delay the first day for circulating designating petitions, shorten the petitioning period, and reduce the number of required signatures.

Opponents of the constitutional amendment have argued that changing the redistricting schedule, through an amendment that will take effect on January 1, 2022, will produce "chaos." But the opposite is true. The amendment is designed to avoid the chaos that would result if the redistricting process were not completed until March for a June primary.

### **The Number of Senators**

The proposed amendment sets the number of senators at 63. This sets a fixed number, not a cap, and prevents continuing partisan abuse of the old provision for varying the number of districts.

In proposing this change, the Senate Majority are limiting their ability to vary the number of senate districts for their own benefit. It can be shown – from statistical analysis, and confidential memos brought to light in court-ordered discovery – that in the 2002 and 2012 redistrictings, the Republican Senate Majority first determined the number of senate districts that would best serve their purposes, and then supplied an interpretation of the Constitution's senate-size formula that produced the desired number.

A challenge to this practice (*Cohen v. Cuomo*, 969 N.E.2d 754 (N.Y. 2012)) failed in 2012, even though the New York County Supreme Court justice who heard the case found the constitutional interpretation contrived by the Senate Majority to be "disturbing."

If the proposed amendment is not adopted, the current Democratic Senate Majority could be in a position to manipulate the formula in the same way. Instead, they have chosen to set the number of senators at 63, and to do so before the census data become available from which they might reckon whether this number works to their benefit.

### **Re-enumeration of Prison Populations**

The proposed amendment requires that, insofar as possible, prison populations be re-enumerated to the incarcerated individuals' prior home addresses, *i.e.*, added to the total population counts of the census blocks of the individuals' prior home addresses, and subtracted from the population counts of the census blocks of the places of incarceration. This writes into the Constitution a reform adopted by statute in 2010 and followed in the 2012 legislative redistricting.

It would be possible to provide, as did the law enacted in 2010, that all prison populations be subtracted from their places of incarceration, even if their prior home addresses cannot be determined or are out-of-state. As also provided in the statute, the subtraction should also include inmates in federal prisons, even though it is, at least for the present, impossible to obtain a list of prior home addresses from the U.S. Bureau of Prisons. The

subtraction of prison populations from the places of incarceration has a greater effect on the apportionment of districts than the re-enumeration to prior home addresses.

The proposed amendment does not require subtraction of prison populations that cannot be re-enumerated. Nothing in the proposed amendment, however, would preclude the Legislature from requiring the subtraction of all state and federal prisoners, just as the 2010 statute did when the Constitution was silent on the subject.

The amendment improves on the existing law by applying the reallocation of prison populations to congressional redistricting. In 2010 it was not clear that the U.S. Constitution would permit the state to apply such a rule to congressional redistricting, and the Legislature chose a cautious approach. Maryland applied its reallocation law to congressional redistricting and survived a challenge in federal courts, and it is well that New York is now following Maryland's example.

### **The Population Basis for Redistricting**

The total population, rather than citizen population, has been the basis for New York legislative redistricting during the last five decennial redistrictings, 1972 through 2012. Section 5-a was added to Article III by popular vote in 1969, becoming part of the Constitution on January 1, 1970. This change was not controversial and enjoyed bi-partisan support. It received first approval by the Legislature in 1967 or 1968, when the Assembly had a Democratic majority and the Senate a Republican majority, and second approval in 1969, when both houses had Republican majorities.

While Section 5-a leaves in place the phrase "excluding aliens," it negates that phrase and stipulates that it be read to mean something else. This aspect of the proposed amendment merely clarifies what was done in 1969, repealing Section 5-a, but also deleting the language ("excluding aliens") that had been negated by Section 5-a. The total population basis for redistricting that was in effect during the previous five decades is not changed.

### **Making Commission and Legislative Approval Votes More Uniform**

The proposed amendment eliminates the 2014 constitutional amendment's differing rules for legislative approval of a redistricting plan, which now depend on whether the Assembly Speaker and Senate President Pro Tempore (Majority Leader) are members of the same political party, the only provision of the Constitution that provides such varying rules. The amendment would permit approval of the Commission's plans with simple majority votes instead of making passage requirements dependent on party control of each legislative chamber. In the event the Commission fails to recommend plans to the Legislature, a 60% vote in each chamber would be required for approval.

When the 2014 amendment was drafted in 2012, the drafters were confident that there would still be a Democratic majority in the Assembly in 2022, while they assumed that the senate districts adopted in 2012 would guarantee continued control of the Senate by the Republicans, or by a coalition of Republicans and a few allied Democrats (the 'Independent Democratic Conference' or 'IDC'). The 2014 amendment was intended to guarantee that the Republicans would again be able to draw the senate districts as they like in 2022, while the Democrats would again be able to do the same with the assembly districts. But just in case the 2012 senate plan did not work as intended – as indeed it has not – a partisan legislative conference was given the extra protection of the only party-based voting rules in the Constitution.

But these rules depend on the party memberships of the Speaker and President Pro Tempore, not the party memberships of majorities of the assembly members and senators. For the 2013-14 session, a senate majority coalition was formed by the Republicans and those Democrats who organized themselves as the IDC. The Senate adopted rules under which the Republican leader and the enrolled Democrat who led the IDC alternated from day to day as President Pro Tempore.

Suppose this coalition had survived subsequent elections, and that the same arrangement prevailed in 2022. Under the voting rules in the 2014 amendment, if the Assembly were debating a redistricting bill on a day when an enrolled Democrat was President Pro Tempore of the Senate, a two-thirds majority would be required to approve the bill. But they could keep talking until midnight. Then at 12:01 a.m. they could approve the bill with either a simple majority or 60%, depending on the votes that had been cast in the Commission. The Senate, too, could wait until a minute past midnight to call the roll.

Currently the Democrats have a two-thirds majority, with seven votes to spare, in the Assembly (107 out of 150, including one Independence Party member who caucuses with the Democrats), and a two-thirds majority, with one vote to spare, in the Senate (43 of 63). Even if the proposed amendment is not approved, the Democrats in both houses will be able to reach the two-thirds threshold to adopt redistricting plans.

Common Cause New York, the New York Public Interest Research Group (NYPIRG), and Reinvent Albany have stated, as one reason for their support of the proposed amendment, that “it reduces the voting thresholds for approval by the legislature, eliminating convoluted rules that changed depending on the partisan makeup of the legislature.” These organizations also approve other aspects of the proposed amendment, including the adjustment of the redistricting schedule to accommodate the June primary, and making the elimination of prison-based gerrymandering a part of the Constitution. But in noting their support for some aspects of the proposed amendment, it is only fair to quote their reservations: “However, while improving on the current redistricting requirements, the proposal falls short of the full reforms we believe would provide truly independent commission and, most importantly, establish stringent limits on permissible district population deviations (*e.g.*, congressional districts are virtually identical in population). Moreover, it keeps in language that requires mapmakers to construct political boundaries using the core of existing districts – a major failing of the existing constitution.”

### **Other Provisions of the Proposed Amendment**

Several other provisions in the proposed amendment include:

- eliminating partisan Redistricting Commission co-directors;
- removing the ‘block-on-border’ rule that protects towns, but not cities, from being divided by senate district boundaries;
- cleaning up and removing some of the out-of-date provisions from the 1894 Constitution that have already been found to violate the Equal Protection Clause of the 14<sup>th</sup> Amendment;
- authorizing the Legislature to enact redistricting legislation if the Redistricting Commission fails to complete action and develop plans; and
- providing for the taking of a state census if the federal decennial census fails to report the whole number of state residents.

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Mr. Breitbart worked on redistricting for the Democratic Leaders of the NYS Senate from 1980 until his retirement in 2005. He was responsible for marshalling the evidence in the unsuccessful challenges, in state and federal courts, to the constitutionality of the Senate redistricting plans adopted in 1992, 2002, and 2012 and was the principal consultant to the NYC Bar Association Election Law Committee in the development of its 2007 report on reforming the state's redistricting process.