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ESSAYS

EPIC FAIL: *HARKENRIDER V. HOCHUL* AND NEW YORK'S 2022 MISADVENTURE IN "INDEPENDENT" REDISTRICTING

*Richard Briffault**

In 2014, following passage in two successive legislatures, New York voters ratified amendments to the state constitution to change both the process and substantive rules governing the decennial redistricting of the state's legislature and congressional delegation. The constitution now includes multiple new substantive requirements for districting plans, including a prohibition on the "draw[ing of] [districts] to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."¹ It also directs the creation of an "Independent Redistricting Commission" ("IRC") to draw up, for submission to the legislature, maps that, following an extensive process of public input and comment, would comply with the new constitutional requirements.² Sadly, the new process employed in the 2022 redistricting was an epic fail. This Essay examines the first test of this new constitutional procedure and contends that the IRC, the state legislature, and the subsequent judicial intervention, all flunked it.

I. NEW YORK'S 2022 REDISTRICTING: FROM CONSTITUTIONAL PLAN TO LEGISLATIVE ACTION

The post-2020 census redistricting posed the first test for the new constitutional process and requirements, and it did not go well. The IRC failed to submit the plans required by the constitution. The legislature then ignored the maps the IRC actually did submit and adopted its own maps, as if the constitution had never been amended. That the IRC failed was, perhaps, predictable given the politics built into its structure and the limits the constitution places on its power. Similarly, that the legislature would be partisan is as unremarkable as the sun coming up in the morning. The decision of the court of appeals, the state's highest court, in *Matter of Harkenrider v. Hochul*³ was more striking. In a sharply-worded opinion for a four-member majority by then-Chief Judge Janet

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¹ N.Y. CONST. art. III, § 4(c)(5).

² See *id.* art. III, § 5-b.

³ 38 N.Y.3d 494 (2022).

DiFiore,⁴ the court held that the adoption of the congressional and senate maps violated the constitutional process and that the congressional map was an unconstitutional, partisan gerrymander. To remedy the constitutional violations the court directed that the special master, previously appointed by a single state supreme court justice in a small upstate county, draw new senate and congressional maps.

Under the 2014 amended constitution, a ten-member “independent redistricting commission” must be created to prepare new maps for the state’s congressional, senate, and assembly districts every ten years.⁵ The constitution directs the IRC to hire staff; draft plans; make its “plans, data, and information . . . in a form that allows and facilitates the public to review, analyze, and comment upon such plans;”⁶ hold “public hearings” around the state;⁷ report the results of the hearings and public comments to the legislature;⁸ and, by January 15 of the redistricting year, submit its redistricting plan with implementing legislation to the legislature.⁹ The legislature must vote that plan up or down without amendment. If it is approved, the plan is submitted to the governor. If the legislature rejects the plan, the IRC must submit a second plan—within fifteen days and no later than February 28—for the legislature’s consideration, again subject to a simple no-amendment up-or-down vote.¹⁰ If that plan is not approved, the legislature can adopt its own plan subject to the substantive requirements of the constitution.¹¹

Things began well enough. The IRC began its work in 2021. It released draft plans that fall, held twenty-four public hearings, listened to over 700 speakers, and received more than 3,000 comments.¹² But trouble began with the January 2022 submission of the redistricting plan. Although dubbed by the constitution an “independent” commission, the IRC is only nominally so; it is certainly not non-partisan. Eight of the ten commission members

⁴ Some of that sharp wording was aimed at the dissenters. Chief Judge DiFiore blasted Judge Rivera’s analysis as “remarkable,” *id.* at 512 n.8, and topped that by labelling Judge Wilson’s reasoning “impermissibl[e],” *id.* at 520 n.14, and “nonsensical.” *Id.* at 523 n.20. Judge Troutman got off comparatively mildly—her reasoning was merely “incongruous.” *Id.*

⁵ N.Y. CONST. art. III, § 4(b).

⁶ *Id.* art. III, § 4(c)(6).

⁷ *Id.*

⁸ *See id.*

⁹ *Id.* art. III, § 4(b).

¹⁰ *See id.*

¹¹ *See id.*

¹² David Imamura, Opinion, *New York’s Redistricting Process Is Doomed to Fail*, CITY & STATE N.Y. (May 6, 2022), <https://www.cityandstateny.com/opinion/2022/05/opinion-new-yorks-redistricting-process-doomed-fail/366581> [<https://perma.cc/89SL-7UTN>].

are appointed by the partisan leaders of the legislature—two each by the partisan leaders of each chamber—with the remaining two appointed by the eight partisan members.¹³ Although the constitution imposes some limitations on the appointment of active politicians to the IRC, nothing prevents the appointees from working on behalf of partisan interests.¹⁴ Indeed, the vice-chair of the commission, a Republican former state legislator, ultimately ran for and won a state senate seat that fall.¹⁵ To be sure, the constitution sought to promote bipartisan action.¹⁶ If, as was the case in 2022, the same political party controls both houses of the legislature, then the IRC can adopt a districting plan only with the approval of seven of its ten members, including at least one member appointed by each legislative leader.¹⁷ The constitution, thus, requires the support of at least two minority party appointees.¹⁸

But requiring compromise does not mean it will occur. The IRC deadlocked, with no single plan obtaining the votes of designees of both parties. As a result, its first submission to the legislature on January 3, 2022, consisted of two plans each supported on party lines by five commissioners.¹⁹ The legislature failed to approve either plan.²⁰ Although the IRC was supposed to submit a second plan, this time the IRC wasn't even able to meet, let alone submit a plan. The Republican members refused to attend a meeting to vote on proposed plans,²¹ thus denying the commission the seven-member quorum the constitution requires for action.

At that point, the Democratic-controlled legislature—unconstrained to follow either of the initial plans proposed by the IRC or by the need to obtain any Republican votes—adopted its own plan. That plan was widely perceived as enacting an “unapologetic”

¹³ N.Y. CONST. art. III, § 5-b(a).

¹⁴ According to IRC chair David Imamura, a Democratic appointee, “[o]n the New York commission, the Republicans chose all former state legislators or former state legislative staffers.” David Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, A.B.A. (Oct. 24, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economics-of-voting/the-rise-and-fall-of-redistricting-commissions [<https://perma.cc/6XD4-KEGC>].

¹⁵ *See id.*

¹⁶ *See, e.g., id.*

¹⁷ N.Y. CONST. art. III, § 5-b(f)(1).

¹⁸ *See id.*

¹⁹ *See* Clifford Michael, *Divided Redistricting Commission Stalemates, Sends Dueling Lines to Legislature*, THE CITY (Jan. 3, 2022, 9:09 PM), <https://www.thecity.nyc/politics/2022/1/3/22866064/bipartisan-redistricting-commission-sends-dueling-maps-to-albany-lawmakers> [<https://perma.cc/RM3Z-NZRH>].

²⁰ The constitution provides that, when both houses of the legislature are controlled by the same party, redistricting plans need a two-thirds vote in both chambers. N.Y. CONST. art. III, § 4(b)(3).

²¹ *See* Imamura, *supra* note 12.

Democratic gerrymander that would enable the party to pick up three congressional seats.²² Still, at least one leading election law scholar found only a modest pro-Democratic tilt, which seemed worse than it actually was because the post-2010 plan then in effect had a pro-Republican bias.²³

II. THE 2022 REDISTRICTING IN THE COURTS

Within hours of the governor's approval of the plan, Republicans sued in state supreme court in Steuben County, which has but a single Republican justice.²⁴ Petitioners initially challenged only the congressional district plan, and later added a challenge to the senate redistricting—but not to the legislature's assembly plan.²⁵ After a trial, the court concluded that because the legislature had acted before receiving a second plan from the IRC, all the legislatively-enacted maps—including the unchallenged assembly map—were “void *ab initio*.”²⁶ The court reasoned that under the “currently constructed [c]onstitution when the IRC fail[s] to act and submit a second set of maps there is nothing the legislature has the power to do.”²⁷ For good measure, the court added that the legislature's congressional map was an unconstitutional partisan gerrymander. Although the constitutional failure vitiating the legislature's action was its failure to wait for a second IRC plan, the court sent the maps back to the legislature, albeit subject to an innovative condition—that any new plan “must enjoy a reasonable amount of bipartisan support”²⁸—intended to mimic the bipartisanship the court took to be built into the constitutional amendments. Otherwise, the court would appoint a special master to draw new maps.²⁹

The Appellate Division for the Fourth Department, in a four-to-one vote, reversed the trial court's finding that the legislature's action violated the redistricting *procedure* required by the constitution; however, in a three-to-two split, it also concluded that the congressional map was a partisan gerrymander.³⁰ On the process

²² See, e.g., John Ketcham, *A Raw Deal for New York's Republicans*, CITY J. (Feb. 8, 2022), <https://www.city-journal.org/new-yorks-obvious-gerrymander> [<https://perma.cc/V88S-AP35>].

²³ See, e.g., Nicholas Stephanopoulos, *The New York Gerrymander That Wasn't (That Extreme)*, ELECTION L. BLOG (Feb. 11, 2022, 6:48 PM), <https://electionlawblog.org/?p=127605> [<https://perma.cc/BQL7-69UH>].

²⁴ *Harkenrider v. Hochul*, 76 Misc. 2d 171, 185 (Sup. Ct. Steuben Cnty. 2022).

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 194.

²⁹ See *id.*

³⁰ *Harkenrider v. Hochul*, 204 A.D.3d 1366 (4th Dep't 2022). Presiding Justice Whalen and Justices Centra, Lindley, and Winslow formed the majority rejecting

question, the majority recognized that the constitution “is silent as to the appropriate procedure to be utilized in the event that the IRC fails to submit a second redistricting plan . . . as constitutionally directed” and that, if such failure occurs “[n]othing in the [c]onstitution . . . expressly prohibits the legislature from assuming its historical role of redistricting.”³¹ As to the gerrymandering claim, the plurality relied on a combination “of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map,” and the analysis of petitioners’ expert, which was challenged by respondents’ experts.³² Petitioners’ expert’s opinion was that, based on an ensemble of computer-generated simulated maps that complied with some, albeit not all, of the state constitution’s districting requirements, the enacted map was so pro-Democratic as to evidence a partisan gerrymander.³³ The court decided to give the legislature the opportunity to enact a valid congressional map, without the bipartisan vote proviso added by the trial court.³⁴

The New York Court of Appeals reversed on the process question and affirmed on the partisan gerrymandering question.³⁵ Unlike the six justices below, however, the court of appeals majority refused to send redistricting back to the legislature. Instead, Chief Judge DiFiore’s majority opinion³⁶ returned the case to the Steuben County court for the adoption of new maps. As Judge Shirley Troutman’s dissent pointed out, the majority’s brief treatment³⁷ of the gerrymandering issue provided little guidance concerning the interpretation of the substantive constitutional restriction on partisanship. The majority opinion gave more attention to the process question and the remedy. The rest of this Essay will do the same.

the process violation claim. Justices Centra, Lindley, and Curran, who had dissented on the process violation issue, formed the majority for the finding of gerrymandering, with Presiding Justice Whelan and Justice Winslow dissenting on that point.

³¹ *Id.* at 1369.

³² *Id.* at 1371.

³³ *See id.* at 1371–75.

³⁴ *See id.* at 1375. The court’s action was limited to the congressional plan; having reversed the trial court on the constitutional process point, the senate and assembly plans were found constitutional.

³⁵ *Harkenrider v. Hochul*, 38 N.Y.3d 494, 501–02 (2022).

³⁶ Chief Judge DiFiore’s opinion was joined by Judges Garcia, Singas, and Cannataro. *Id.* at 501, 554. Judge Troutman’s separate opinion concurred in the finding that the legislature violated the constitutional procedure but dissented on both the gerrymandering finding and the remedy. *Id.* at 524–27. Judges Wilson and Rivera dissented with respect to both holdings. *Id.* at 527–54.

³⁷ The majority devoted eight pages to the constitutional process issue, *see id.* at 509–17, and three to the remedy, *see id.* at 521–24, but only four paragraphs to the gerrymandering question, *see id.* at 518–20.

With respect to the process issue, Chief Judge DiFiore’s opinion properly stressed that “the constitutional reforms were intended to introduce a new era of bipartisanship and transparency through the creation of an independent redistricting commission.”³⁸ But the constitution could not force a bipartisan IRC plan into existence if the IRC commissioners were unwilling to adopt one. Though the amendments provided that the IRC submit a second plan if the legislature failed to adopt the first, they contain no back-up provision in the event the IRC was unable to submit a second plan. As the majority in the Fourth Department recognized, the constitution is “silent” as to what happens then, an especially troubling omission if, as happened, the reason for the IRC’s inaction was the unwillingness of one party to make up a quorum.³⁹ Judge Jenny Rivera, writing for the dissent, put the question: Did the constitution “command the legislature [to] remain idle in the face of an IRC decision not to submit a plan?”⁴⁰ Perhaps the legislature should not have jumped the gun and should have waited until the February 28 deadline before enacting its own plan. That would have avoided breaching the constitutional timetable. But given the deadlock on the IRC and the fact that, as Chief Judge DiFiore’s opinion acknowledges, under the 2014 amendments “the legislature retains the ultimate authority to enact districting maps upon completion of the IRC process,”⁴¹ it’s hard to see why the legislature should have had to mark time over the month of February to run out the clock on a process that had already broken down.

The majority urged that “[t]his view ignores the fact that procedural requirements matter and are imposed because, as here, they safeguard substantive rights.”⁴² Chief Judge DiFiore contended that failure to find the legislature violated the constitutional procedure “would be to render the 2014 amendments . . . functionally meaningless.”⁴³ But that is overblown. It’s hard to see what substantive rights were violated by the legislature’s failure to wait a month before acting. Indeed, the legislature’s precipitate action accelerated the timetable for substantive challenges to the redistricting plan, increasing the possibility that disagreements could be resolved in time for the 2022 elections. Nor did the legislature’s action render the amendments “meaningless.” The statewide hearing process generated substantial public input and information helpful to fleshing out the constitution’s vague requirement that district lines consider “communities of interest.”⁴⁴

³⁸ *Id.* at 503.

³⁹ *See Harkenrider*, 204 A.D.3d at 1369.

⁴⁰ *Harkenrider*, 38 N.Y.3d at 549 (Rivera, J., dissenting).

⁴¹ *Id.* at 516 (majority opinion).

⁴² *Id.* at 512 n.9.

⁴³ *Id.* at 509.

⁴⁴ N.Y. CONST. art. III, § 4(c)(5).

In any event, the substantive restrictions adopted in 2014 continue to have bite, as the Fourth Department demonstrated by sustaining the legislative process while invalidating the congressional map as a partisan gerrymander.

To be sure, as Chief Judge DiFiore’s opinion and Judge Troutman’s dissent emphasize, the process set up by the 2014 amendments was intended to be the “exclusive” process for redistricting, and it wasn’t followed.⁴⁵ Still, once it was evident that the IRC would not act, it’s not clear that legislative action was procedurally unconstitutional. The constitutional amendment did not require the legislature to adopt the maps proposed by the IRC or even require the legislature to work from them.

The *Harkenrider* majority urged that “the IRC’s fulfillment of its constitutional obligation was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature’s exercise of its discretion in redistricting.”⁴⁶ But that’s not quite right. The IRC’s plans were intended to be a precondition, but they did not limit the discretion of the legislature, which is free to ignore two sets of IRC maps and adopt its own redistricting plan.⁴⁷ As the trial court in a 2014 case considering a challenge to the abstract accompanying the amendment when it was placed on the ballot observed, in “reality . . . the commission’s plan is little more than a recommendation to the legislature, which can reject it for unstated reasons and draw its own lines.”⁴⁸ The Steuben County court in the 2022 litigation was correct in emphasizing that the real constraint the IRC process places on the legislature is political: abiding by constitutional procedures would place the legislature in “the awkward political position of having to vote down two sets of bipartisan redistricting maps before drafting their own maps, at the risk of raising the ire of the voters at the next election.”⁴⁹ When the legislature has not been given one set of bipartisan redistricting maps, let alone two, and the prospect of receiving further maps is dim, that political constraint is already gone.

⁴⁵ *Harkenrider*, 38 N.Y.3d at 515 (majority opinion), 524 (Troutman, J., dissenting).

⁴⁶ *Id.* at 514 (majority opinion).

⁴⁷ Under the constitution, “[i]f either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary. All such amendments shall comply with the [substantive] provisions of this article. If approved by both houses, such legislation shall be presented to the governor for action.” N.Y. CONST. art. III, § 4(b). The supermajority requirements that apply to approval of an IRC plan by a legislature in which both houses are controlled by the same party do not apply to this vote.

⁴⁸ *Leib v. Walsh*, 45 Misc. 3d 874, 881 (Sup. Ct. Albany Cnty. 2014).

⁴⁹ *Harkenrider v. Hochul*, 76 Misc. 2d 171, 185 (Sup. Ct. Steuben Cnty. 2022).

The high court’s majority, no doubt, aimed to punish the legislature for what it saw as partisan misconduct that frustrated the purpose of the 2014 amendments. In its view, failure to invalidate the legislature’s plan “would encourage partisans involved in the IRC process to avoid consensus, thereby permitting the legislature to step in and create new maps merely by engineering a stalemate at any stage of the IRC process.”⁵⁰ But in this case, perversely, the court’s action actually rewarded the very members of the IRC and their legislative appointers who stalemated the process.

Even if the legislature’s enactment violated the constitutional process, handing redistricting over to a single Steuben County supreme court judge, whom the Republican plaintiffs had strategically selected to hear their case, and to the special master the judge appointed, was inconsistent with both the text and the spirit of the constitution. Article III, section 5 clearly states:

In any judicial proceeding relating to the redistricting of congressional or state legislative districts, *any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law’s infirmities.*⁵¹

To be sure, by the time of the court of appeals’ decision, it was no longer possible for the legislature to cure the procedural infirmity of not having waited for a second IRC submission. But returning redistricting to the legislature—which, under the constitution, was free to adopt its own plan after rejecting a second IRC plan—is closer to the constitutional text than judicial arrogation of that function.

In her separate opinion, Judge Troutman urged that the matter be returned to the legislature subject to an order that the legislature adopt one of the two plans the IRC submitted in January, “on a strict timetable, with limited opportunity to make amendments thereto.”⁵² She also suggested, consistent with a law enacted in 2012 in conjunction with the first passage of the amendments, that any legislative changes to a plan be limited to two percent of the population of any district.⁵³

⁵⁰ *Harkenrider*, 38 N.Y.3d at 517.

⁵¹ N.Y. CONST. art. III, § 5 (emphasis added).

⁵² *Harkenrider*, 38 N.Y.3d at 526 (Troutman, J., dissenting).

⁵³ *See id.*

Although derided by the majority as “extraordinary” and “incongruous”⁵⁴—and admittedly not what the constitution provides—Judge Troutman’s remedy comes closer to both the text and spirit of the 2014 amendments than does the majority’s order. As she put it, hers would be a “remedy that matches the error.”⁵⁵ It would certainly better connect the ultimate districting maps back to the process adopted by the voters. The majority’s heated language suggests that frustration with the IRC, the legislature, and the political process more broadly got the better of its analysis, both regarding whether the constitutional procedure was followed and also, in particular, the remedy for a violation.

On the other hand, the court of appeals’ aggressive, “tough love” approach might have benefits. Although the court’s 2022 action aided Republicans, who gained three congressional seats—including one for the now-notorious George Santos—under the special master’s map, many of those victories were won by narrow margins and occurred in a year in which Republicans did well statewide.⁵⁶ Next time, the better strategic play might be made by the Democrats.

III. THE UNCERTAINTIES OF JUDICIAL INTERVENTION: MOVING FORWARD

Given the uncertainties built into judicial intervention, the parties might now have more of an incentive to approach the IRC process in good faith. Indeed, the post-*Harkenrider* redistricting of the state assembly⁵⁷ proceeded very smoothly.⁵⁸ Following an extensive public outreach and comment process, the IRC produced a map that, for the first time, was agreed to by the appointees of both

⁵⁴ *Id.* at 523 n.20 (majority opinion).

⁵⁵ *Id.* at 525 (Troutman, J., dissenting).

⁵⁶ See Jim Brennan, *The Ruthless Midterm: New York Democrats Made Key Mistakes in the 2022 Elections but Still Barely Lost House Seats*, GOTHAM GAZETTE (Dec. 30, 2022), <https://www.gothamgazette.com/games-archive/130-opinion/11759-new-york-democrats-mistakes-2022-elections-house-seats> [<https://perma.cc/5NX9-ENS6>].

⁵⁷ *Harkenrider* invalidated only the legislature’s congressional and senate maps, as those were the only maps petitioners had challenged. Thereafter, a petition was filed to invalidate the assembly map. That challenge was filed too late to block use of the assembly map in 2022, but the legislature’s general failure to follow the constitutional redistricting process led to the invalidation of the assembly map. See *Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep’t 2022). Unlike in *Harkenrider*, that adoption of a new assembly was directed to go through the IRC process. See *Matter of Nichols v. Hochul*, 212 A.D.3d 529, 530–31 (1st Dep’t 2023).

⁵⁸ See, e.g., Shantel Destra, *Five Big Takeaways from the New Assembly Draft Map*, CITY & STATE N.Y. (Dec. 1, 2022), <https://www.cityandstateny.com/politics/2022/12/heres-newly-drawn-draft-map-assembly/380347> [<https://perma.cc/U9C8-88BV>].

political parties and was adopted by a vote of nine-to-one.⁵⁹ It was then swiftly passed by the legislature and signed into law by the governor.⁶⁰

Despite the relatively happy 2023 assembly postscript, the 2022 redistricting process in New York was not at all what the framers of the 2014 amendments intended. As I have argued elsewhere, if there is any silver lining to this sorry episode of multiple constitutional failures it may be that the state legislature next time will be more careful in its IRC appointments, its attention to the IRC process, and, importantly, its response to the IRC's plans in order to avoid messy judicial intervention.⁶¹ New York's redistricting misadventure in 2022 demonstrates that a flawed reform can lead to a flawed process. But the final word on the 2014 constitutional revision has not yet been written.

⁵⁹ See, e.g., *New York Independent Redistricting Commission Sends New Assembly Map to Legislature*, DEMOCRACY DOCKET (Apr. 20, 2023), <https://www.democracymarket.com/news-alerts/new-york-independent-redistricting-commission-sends-new-assembly-map-to-legislature/?emci=8d5f5ec0-e1e2-ed11-8e8b-00224832eb73&emdi=dd4eb758-eb2-ed11-8e8b-00224832eb73&ceid=6017991> [<https://perma.cc/SBG8-E68M>].

⁶⁰ See *id.*

⁶¹ See Richard Briffault, *Constitutional Failure*, TWENTY EAGLE (May 3, 2022), <https://twentyeagle.com/constitutional-failure> [<https://perma.cc/252V-CVQR>].