

## Apportionment of the New York State Assembly

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systems are used to estimate the tax.<sup>23</sup> Finally, while the Code provides that corporations which reasonably expect their tax liability to exceed \$100,000 must file a declaration of estimated tax, no penalty is prescribed for failure to do so.<sup>24</sup> The only penalty is for actual underpayment of estimated tax.



## APPORTIONMENT OF THE NEW YORK STATE ASSEMBLY

### *Introduction*

On January 5, 1955, Governor Averell Harriman presented his first annual message to the New York State Legislature.<sup>1</sup> In his message, he called the legislature's attention to the glaring distortions in the apportioning of the Assembly.<sup>2</sup> The Governor recommended ". . . the initiation of a Constitutional amendment to remedy the injustices of our present apportionment system," by apportioning members on the basis of population.<sup>3</sup>

The present procedure for apportioning representatives in the Assembly is governed by Article III, Sections 2 and 5 of the New York State Constitution. Section 2 provides, in part, that "[t]he assembly shall consist of one hundred and fifty members."<sup>4</sup> There is no flexibility in the number of assemblymen to be apportioned, as there is in the case of senators.<sup>5</sup> This restrictive provision, as will

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<sup>23</sup> Thus, no penalty for underpayment is assessed if the estimated tax upon which the payments were based: (1) amounts to the previous year's tax (minus \$100,000); or (2) equals what would have been the previous year's tax liability (minus \$100,000) if it were computed according to current tax rates; or (3) equals at least 70% (after subtracting \$100,000) of the tax that would be due on the basis of current income up to a specified cut-off date. *Id.* § 6655(d).

<sup>24</sup> See 4 CCH 1955 FED. TAX. REP. ¶ 5552. Section 294(d)(1)(A) of the 1939 Code prescribed penalties for failure to file a declaration of estimated income.

<sup>1</sup> 1955 LEG. DOC. No. 1.

<sup>2</sup> The Governor posed as an example of such distortion the fact that "Schenectady County contains ten times as many citizens as Schuyler County, yet each is represented by a single Assemblyman." *Id.* at 21.

<sup>3</sup> *Id.* at 21.

<sup>4</sup> N.Y. CONST. Art. III, § 2.

<sup>5</sup> Article III, Section 2 of the New York State Constitution provides that the Senate shall consist of fifty members, except that an increase in this number may be allowed in accordance with the provisions of Section 4, where ". . . any county having three or more senators . . . shall be entitled . . . to an additional senator [for each full ratio over three]." See *Matter of Dowling*, 219 N.Y. 44, 113 N.E. 545 (1916).

be seen, has prevented an equitable apportionment since its adoption. Section 5 provides for the apportionment of assemblymen and the creation and adjustment of assembly districts. Pursuant to this section, the legislature is directed to apportion members of the Assembly to the counties at the same time that senate districts are readjusted, *i.e.*, at the first regular session following the last decennial federal census.<sup>6</sup> In the actual apportionment it is required that *every county*, with the exception of sparsely populated Hamilton, *shall always be entitled to one member of the Assembly*.<sup>7</sup> This requirement is another obstacle preventing a fair apportionment.<sup>8</sup>

The apportionment is determined on the basis of the quotient, designated as the "ratio," obtained by dividing the state's citizen population by the membership of the Assembly. Section 5 states that "[o]ne member of [the] 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 [the] assembly shall be apportioned to the counties having more than two ratios. . . . Members apportioned on remainders shall be apportioned to the counties having the highest remainders in order thereof respectively." The "remainders" are thus divided among the largest counties until their number is exhausted.

Section 5 also provides for the adjustment of assembly districts within a county having two or more assemblymen. The adjustment is to be made by the County Board of Commissioners, or, where a city contains an entire county within its boundaries, by the legislative body of that city. The latter situation operates only in the case of the five counties comprising New York City. Adjusted districts are required to be ". . . as nearly equal in number of inhabitants . . . as may be, of convenient and contiguous territory in as compact form as practicable. . . ." In addition, the section provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen. . . ."

Pursuant to these provisions of the Constitution, in effect since 1894, the legislature has enacted five apportionment acts<sup>9</sup> prior to

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<sup>6</sup> N.Y. CONST. Art. III, §§ 4, 5.

<sup>7</sup> *Id.* § 5.

<sup>8</sup> The principle of absolute county representation, though rejected during the early constitutional history of New York, was inserted in the Constitution as a result of the efforts of the Constitutional Convention of 1821. See 3 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 157-158 (1905).

<sup>9</sup> Apportionment Act of 1906, Laws of N.Y. 1906, c. 431 [declared unconstitutional in *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 81 N.E. 144 (1907)]; Apportionment Act of 1907, Laws of N.Y. 1907, c. 727 [constitutionality raised but not decided in *Matter of Reynolds*, 202 N.Y. 430, 96 N.E. 87 (1911)]; Apportionment Act of 1916, Laws of N.Y. 1916, c. 373 [declared unconstitutional in *Matter of Dowling*, 219 N.Y. 44, 113 N.E. 545 (1916)]; Apportionment Act of 1917, Laws of N.Y. 1917, c. 798, repealed by the Apportionment

the recently enacted Apportionment Act of 1953.<sup>10</sup> The apportionment of assemblymen under the latter Act follows the constitutional directives by the use of a ratio of 94,690,<sup>11</sup> assigning one member of the Assembly to 45 counties (including Fulton and Hamilton as one) with a citizen population of less than a ratio and one-half (142,035),<sup>12</sup> and two members to the remaining 16 counties.<sup>13</sup> At this step of the apportionment, 77 of the 150 assemblymen have been apportioned, leaving 73 "remainders," which are then apportioned to the 9 counties having more than two full ratios.<sup>14</sup> The 1953 Act directs the Board of Supervisors of counties apportioned two or more assemblymen and the City Council of the City of New York, to meet and adjust their county assembly districts in accordance with constitutional provisions.<sup>15</sup>

It is with regard to the apportionment by counties, and to a lesser extent, the adjustment of assembly districts, that problems have arisen indicating a patent inequality of representation in the Assembly. It is the purpose of this article to discuss these problems and to suggest possible revision of the Constitution in order that as fair a representation as is possible may be achieved.

### *Historical Background*

#### *Apportionment Prior to 1894*

Prior to the American Revolution, the Colony of New York was governed by a Governor and Council appointed by the Duke of York.

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Act of 1943, Laws of N.Y. 1943, c. 359, as amended, Laws of N.Y. 1944, c. 530. The Apportionment Acts of 1917 and 1943 were never contested in the courts.

<sup>10</sup> Laws of N.Y. 1953, c. 893, as amended, Laws of N.Y. 1954, c. 2.

<sup>11</sup> This ratio is derived by dividing the state's citizen population of 14,203,449, according to the 1950 federal census, by the membership of the Assembly (150). See Leg. Rep., McKinney's 1954 Session Laws of New York 29.

<sup>12</sup> The 45 counties with their citizen population are: Allegany (43,475), Cattaraugus (76,993), Cayuga (69,037), Chautauqua (133,159), Chemung (85,989), Chenango (38,741), Clinton (52,443), Columbia (42,111), Cortland (36,786), Delaware (43,863), Dutchess (131,969), Essex (34,542), Franklin (43,919), Fulton (54,190) (with Hamilton), Genesee (46,690), Greene (28,082), Herkimer (59,693), Jefferson (83,539), Lewis (22,187), Livingston (39,692), Madison (45,624), Montgomery (57,610), Ontario (59,269), Orleans (29,306), Oswego (75,935), Otsego (50,089), Putnam (19,668), Rensselaer (129,995), Rockland (86,123), St. Lawrence (96,517), Saratoga (73,447), Schenectady (139,304), Schoharie (22,218), Schuyler (14,066), Seneca (28,254), Steuben (90,761), Sullivan (39,359), Tioga (29,826), Tompkins (57,853), Ulster (90,350), Warren (38,677), Washington (46,353), Wayne (56,662), Wyoming (32,275), Yates (17,461). See Leg. Rep., McKinney's 1954 Session Laws of New York 32.

<sup>13</sup> See Appendix of this note for the counties and their citizen populations.

<sup>14</sup> See Appendix of this note for the nine most populated counties and the number of remainders apportioned to them, *i.e.*, by subtracting two from the total apportioned to each.

<sup>15</sup> Laws of N.Y. 1953, c. 893, § 124.

In 1683, due to public agitation for representative government, the Duke of York required the Governor to convene an Assembly of eighteen representatives to be chosen by the freeholders of the colony.<sup>16</sup> The Governor and the Council, acting in their own discretion, ordered the sheriff of each territory to conduct the elections. The first General Assembly met in the City of New York on October 17, 1683 and enacted its first legislation on October 30, 1683, which was entitled the "Charter of Liberties and Privileges."<sup>17</sup> Pursuant to the provisions of this charter, the colony was divided into twelve counties and membership in the Assembly was raised to twenty-three. "This first apportionment combined the ideas of territory and population . . ." and this procedure continued without basic change throughout the colonial period.<sup>18</sup>

After the American Revolution, the first New York State Constitution was ratified by the people in 1777.<sup>19</sup> Under the provisions of that Constitution, the Assembly was to consist of seventy members to be elected annually by those counties with one seventieth part or more of the state's eligible electors. It also authorized an increase or decrease in the membership, in accordance with that ratio, up to a maximum of 300. The Constitution further provided that future apportionments were to be made by the legislature based upon a census to be taken in 1783, or as soon thereafter as was practical.<sup>20</sup> The legislature passed six apportionment acts between 1791 and 1821. These enactments varied the membership of the Assembly from 70 in 1777 to 108 in 1801, lowered it to 100 in 1802, and raised it to 126 in 1815, where it remained until the Second Constitution was ratified in 1821.<sup>21</sup> The Constitution of 1821 provided for a permanent membership of 128 in the Assembly and *also required that each county theretofore established shall always be entitled to at least one*

<sup>16</sup> See Historical Note, 1 THE COLONIAL LAWS OF NEW YORK XV (1894).

<sup>17</sup> See 1 THE COLONIAL LAWS OF NEW YORK 111 (1894). However, upon the accession of the Duke of York to the throne as James II, he vetoed the "Charter of Liberties and Privileges" and New York became a royal province. Thereafter, during the reign of his successor, William III, a new assembly was convened in 1691, and from that date until the Revolution the Assembly continued to be an integral part of the colonial government. The Assembly's powers remained substantially uniform throughout this period under an unwritten constitution similar to the original "Charter of Liberties and Privileges" and a later charter modeled thereon in 1691. See DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 36-40 (1915).

<sup>18</sup> For an authoritative and exhaustive history of the colonial government, as well as early New York State history, see 3 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 138 *et seq.* (1905).

<sup>19</sup> For a copy of the Constitution of 1777, see REPORT OF PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1821, p. 2.

<sup>20</sup> It is interesting to note that the Constitutional Convention of 1777 rejected a motion made by Delegate Gouverneur Morris that each county be given at least one member in the Assembly. See 1 LINCOLN, *op. cit. supra* note 18, at 507.

<sup>21</sup> See 3 LINCOLN, *op. cit. supra* note 18, at 153-157.

member.<sup>22</sup> From 1821 until 1894 no appreciable changes were effected with regard to apportionment.

### *The Constitution of 1894*

The Constitutional Convention of 1894 was convened for the purpose, among others, of eliminating the alleged inequities of the apportioning system used pursuant to the Apportionment Act of 1892.<sup>23</sup> This Act, though its constitutionality was upheld by the Court of Appeals in *People ex rel. Carter v. Rice*,<sup>24</sup> had been attacked and criticized in several other taxpayer suits.<sup>25</sup> This litigation had demonstrated the need for a constitutional revision establishing a more just procedure for the apportionment of members of the legislature. This want was remedied in 1894 by the ratification of the provisions of Article III, Section 5 of the present Constitution. It was predicted at that time that “. . . the people of the state can never again be subjected to those inequalities of apportionment and representation which gave rise to some of the present constitutional provisions. . . .”<sup>26</sup> However, just as the population movement into urban areas following the Civil War rendered disproportionate the representation under the law prior to 1894, so also have the even greater increases and concentration of population during the first half of the Twentieth Century rendered the 1894 provisions unrealistic and inequitable.

After the adoption of the Constitution of 1894, attempts were made, in proposals submitted by delegates to the Constitutional Conventions of 1915<sup>27</sup> and 1938,<sup>28</sup> and also by the introduction of amend-

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<sup>22</sup> N.Y. CONST. Art. I, §§ 2, 7 (1821).

<sup>23</sup> Laws of N.Y. 1892, c. 397. The inequities involved in the Apportionment Act of 1892 concerned the inclusion of aliens in ascertaining the number of inhabitants in the counties, thereby favoring those counties with a high alien population. See *Matter of Whitney*, 142 N.Y. 531, 532-533, 37 N.E.621 (1894).

<sup>24</sup> 135 N.Y. 473, 31 N.E. 921 (1892).

<sup>25</sup> See *Matter of Whitney*, *supra* note 23; *Matter of Baird v. Board of Supervisors*, 138 N.Y. 95, 33 N.E. 827 (1893).

<sup>26</sup> *Matter of Smith v. Board of Supervisors*, 148 N.Y. 187, 194, 42 N.E. 592, 594 (1896).

<sup>27</sup> See 1 NEW YORK STATE CONSTITUTIONAL CONVENTION, PROPOSED AMENDMENTS, Nos. 174, 232, 321, 359 (1915). No. 232 would increase membership in the Assembly to 168 and would base representation upon districts and not counties; No. 359 would eliminate the county requirement by establishing three assembly districts in each senate district.

<sup>28</sup> The Convention proposed and adopted a complete revision of Article III, Sections 2 to 5 (inclusive). The revision provided for an Assembly membership of 159 and retained the requirement of county representation. However, the determination of the apportioning ratio was to be based upon the county vote for governor in the preceding election rather than on the citizen population. See 3 NEW YORK STATE CONSTITUTIONAL CONVENTION, PROPOSED AMENDMENTS, Nos. 813, 853, 888, 903 (1938). These proposed amendments were rejected by the voters on November 8, 1938. See 1953 LEGISLATIVE MANUAL (State Const. Section) 278.

ments in the legislature,<sup>29</sup> to adjust the apportionment provisions so as to conform to changing conditions. The 1935 Joint Legislative Committee on Reapportionment commented, in fact, that the 1894 Constitution prohibits, in practice, a fair apportionment.<sup>30</sup> Unfortunately, with few minor exceptions, Section 5 continues to govern apportionment of the Assembly as if the political conditions of 1894 continue without change.

### *Problems Relating to Apportionment*

As previously mentioned, the constitutional requirement of county representation is an obstacle to the achievement of a truly representative Assembly. When originally adopted in 1821, there was, to a greater degree than now, justification for the disproportionate representation in favor of the inhabitants of the rural areas of the state. This justification received judicial sanction in *Matter of Dowling*, where the Court of Appeals stated:

We believe the provision to be sound in principle, that somewhere in every representative government there should be a recognition of variety of interest and extent of territory as well as of mere number united in interest and location.<sup>31</sup>

However, since then, and particularly from 1894 to 1930, the percentage of the state's inhabitants located in the rural areas has steadily decreased, while the urban population of the state has greatly increased.<sup>32</sup> The clearly inequitable situation under the 1953 Apportionment Act is illustrated by the comparison between Lewis, Putnam, Schoharie, Schuyler and Yates Counties on the one hand, each with a citizen population of less than 25,000, yet each having one representative in the Assembly, and Schenectady County, which, with a citizen population of 139,304, is likewise represented by only one assemblyman.<sup>33</sup> At the same time, the five counties comprising New York City, having a total citizen population of 7,438,340

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<sup>29</sup> For a compilation of proposed legislative amendments to the Constitution from 1895 to 1937, see 2 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937 154-192 (1938).

<sup>30</sup> See 7 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 164 (1938).

<sup>31</sup> 219 N.Y. 44, 54, 113 N.E. 545, 547 (1916) (quoting from the Revised Record of Constitutional Convention of 1846). It is interesting to note in this regard that although New York City has 52.35 per cent of the state's population, the city covers only 0.07 per cent of the total land area of the state. See 1954 LEGISLATIVE MANUAL OF NEW YORK 424.

<sup>32</sup> See MALCOLM, THE NEW YORK RED BOOK 547 (1932). The urban population of New York was 78.8 per cent in 1910, 82.7 per cent in 1920, and 83.6 per cent in 1930; while the rural population decreased from 21.2 per cent in 1910, to 17.3 per cent in 1920, and to 16.4 per cent in 1930. *Ibid.*

<sup>33</sup> See note 12 *supra*.

(or 52.35 per cent of the state's population) are represented by 65 assemblymen (or 43.3 per cent of the total membership), an average of one assemblyman for each 114,436 citizens.<sup>34</sup> The root of this problem can be found in both the requirement of county representation, regardless of population, and the restriction on the maximum membership of the Assembly at 150. Due to the former requirement, the number of "remainders" available for apportionment to the larger counties is limited. The latter requirement prevents the use of a smaller ratio so that counties with a population approaching that of Schenectady County would have at least one additional assemblyman. In addition, this limitation prevents the highly populated counties, like Kings, from having an assemblyman for each of their full ratios.

Since the Constitutional Convention of 1894, the legislature has, in every valid apportionment, used a variation of the so-called "Brown Plan," better known as the "Republican Plan," as the method for apportioning "remainders."<sup>35</sup> After the initial apportionment of assemblymen in accordance with the constitutionally prescribed ratio, the "remainders" are then apportioned pursuant to a second ratio. This second ratio is determined by: (1) totalling the citizen population of each of the nine counties having at least two ratios; (2) subtracting therefrom the total citizen population represented by the two ratios of the nine counties already used; and, (3) dividing this result by the number of "remainders" to be apportioned. Then each county having a full second ratio is apportioned an additional assemblyman.<sup>36</sup> Those "remainders" still unassigned are then apportioned to the counties with the highest number of excess ratios in the order thereof respectively. This system provides a greater possibility of apportioning additional assemblymen to the less populated of the nine counties concerned.<sup>37</sup> The "Republican Plan," though approved by the Court of Appeals in *Matter of Dowling*,<sup>38</sup> is based upon a "non-mathematical" interpretation of Section 5, resulting from the belief of the legislature that "[t]he Constitution does not prescribe the precise formula to be used in apportioning these additional members of [the] Assembly."<sup>39</sup>

#### *Proposed Revision of the Constitution*

Alleviation of the present disproportionate representation in the Assembly might be accomplished by any one of three different pro-

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<sup>34</sup> See the Appendix.

<sup>35</sup> See Leg. Rep., McKinney's 1954 Session Laws of New York 29.

<sup>36</sup> *Ibid.*

<sup>37</sup> Compare this result, as indicated in the Appendix under the "Republican Plan," with the apportionment under the "Democratic Formula" with regard to Erie, Nassau, Westchester, Monroe and Onondaga Counties.

<sup>38</sup> 219 N.Y. 44, 59, 113 N.E. 545, 549 (1916).

<sup>39</sup> See note 35 *supra*.

cedures: First, by elimination of the requirement of county representation and the substitution of assembly districts based on population; Second, by retention of the county representation, but with the application of the "Democratic Formula," which is based upon a strict interpretation of the constitutional provisions applicable to the apportioning of remainders; Third, by retention of the county representation, but allowing for an increase in the number of assemblymen to the extent that one is apportioned to every county for each full ratio contained therein.

The first procedure advanced is in harmony with Governor Harriman's recommendation that apportionment should be based on population rather than geography.<sup>40</sup> This system of apportionment would divide the state into 150 assembly districts—of as equal population as possible—provided that no county or city shall be divided to form a district, a part of which contains another county or city or part thereof. Such a system of representation by population exists in California. That state's Constitution requires that the state is to be divided into 40 senate districts and 80 assembly districts according to population.<sup>41</sup> The County of Los Angeles, with a population of 4,151,687 out of the state's total of 10,586,223,<sup>42</sup> is in a similar position to that of New York City in relation to the state as a whole. Yet, out of the total assembly membership of 80, Los Angeles County, with slightly less than 40 per cent of the state's population, is apportioned 31 assemblymen,<sup>43</sup> or 38.75 per cent of the total, while New York City, containing 52.35 per cent of New York State's citizen population, is presently apportioned 65 assemblymen, or 43.3 per cent of that total membership.<sup>44</sup> The comparison of these two populated areas and their respective representation in their state assemblies clearly illustrates the more equitable result where apportionment is based on population rather than areas. As for the other states, the constitutions of twenty-seven states have a form of county representation, seventeen apportion assemblymen directly or indirectly on a population basis, three provide for representation by township, while one, Nebraska, operates under a unicameral legislature based on population.<sup>45</sup>

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<sup>40</sup> See Message of Governor Harriman to the Legislature, 1955 LEG. DOC. No. 1, 21.

<sup>41</sup> CAL. CONST. ART. IV, § 6. The Constitution provides that no county shall be divided in the formation of assembly districts unless it contains a population sufficient within itself to form two or more districts, nor shall any part of one county or city be united with another county or city in forming an assembly district. These requirements for geographical unity are similar to the provisions governing the formation of senate districts in New York. See N.Y. CONST. ART. III, § 4.

<sup>42</sup> See 1955 WORLD ALMANAC 287.

<sup>43</sup> CAL. GOV'T CODE § 491(40)-(70) (Deering, 1951).

<sup>44</sup> See the Appendix.

<sup>45</sup> For a collection of state constitutional provisions affecting apportionment,

Apportionment by districts in accordance with population rather than by political subdivisions of a state, *e.g.*, a county or township, is undoubtedly more in keeping with our principles of equal representation.<sup>46</sup> However, practical political considerations render the possibility of New York adopting a system similar to that of California almost academic.<sup>47</sup>

The "Democratic Formula," consistently advanced by that party since 1894,<sup>48</sup> would be more acceptable than apportionment by population alone. This system would adhere to the use of the single constitutionally provided ratio for the apportioning of "remainders," rather than applying a second ratio as does the "Republican Plan." The result here is that the counties having the highest ratios, after every county has been apportioned either one or two assemblymen, would be apportioned additional assemblymen in the order of the counties with the highest number of excess ratios to those with the lowest until the number of their excess ratios equalled the number of excess ratios of the next smaller county.<sup>49</sup> A glance at the Appendix will indicate the different result in apportionment achieved by this procedure as compared with the one presently in effect.

Although a more equitable arrangement would be achieved through strict adherence to the constitutional provisions, as in the "Democratic" procedure, there would still remain an inequality in representation among the counties, since some of the larger urban counties would have an excess of ratios for which no assemblyman was apportioned. Thus, it is submitted, in order to achieve the most equitable apportionment possible under existing political conditions, it is not only necessary to revise Section 5 of Article III of the Constitution, concerning the manner of apportionment, but also Section 2, so as to permit an increase in the total membership in the Assembly.

While retaining county representation, due to the practical necessity for recognition of area as well as population, the third procedure advanced would involve a rather simple but more equitable arrangement for apportionment once the restriction of Section 2 is lifted. The plan would call for the apportionment of one assemblyman for each full ratio that a county possesses. If a county possesses less than one full ratio, one assemblyman is apportioned to that county. (The ratio would be determined by always dividing the citizen popu-

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see 7 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 229-238 (1938).

<sup>46</sup> See *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 202, 81 N.E. 124, 129 (1907).

<sup>47</sup> The present constitutional system of apportionment favors the upstate Republican areas, as opposed to the Democratic counties in New York City. It is unlikely that the perennially Republican legislature will initiate an amendment calculated to terminate such a favorable state of affairs.

<sup>48</sup> See 7 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS 168 (1938).

<sup>49</sup> *Ibid.*

lation of the state by 150.) The membership of the Assembly would then fluctuate as counties gained or lost full ratios, in a manner similar to the present constitutional provision for the apportioning of senators.<sup>50</sup> Reference to the annexed Appendix will indicate what the apportionment would be under this plan, as compared with the two procedures previously mentioned. Amendments to the Constitution providing for an increase in the number of assemblymen have been proposed since 1899, but to no avail.<sup>51</sup> Objections to an enlargement of the Assembly would probably center around the fear that the legislative body would become so large as to be unworkable. However, the Appendix shows that the present conditions would call for an increase of only 12 members, and a further increase is possible only after the decennial federal census shows an increase of approximately 100,000 citizens in a county's population, based on a ratio that would, of necessity, be higher than the present ratio of 94,690. The advantage of this method of apportionment lies in its flexibility, permitting the larger counties to increase their representation as warranted, yet maintaining the representation of the smaller counties, so as to assure recognition of their needs by the state government. This system is not as equitable as the first procedure discussed, since each assemblyman would still not represent approximately the same number of people. It is more practical however, and would have a greater possibility of being accepted by all interested parties. In any event, all three procedures discussed are certainly fairer than the present apportionment procedure.

#### *Adjustment of Assembly Districts*

A related problem, though of less importance, concerns the adjustment of assembly districts.<sup>52</sup> Section 5 of Article III of the Constitution provides that

[i]n any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county [this applies solely to New York City] . . . the body exercising the powers of a common council [the City Council], shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district. . . .

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<sup>50</sup> N.Y. CONST. Art. III, § 4.

<sup>51</sup> The maximum number proposed was 200 in 1929, 1930 and 1931, while an assembly of 162 was proposed in 1935. See 2 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937, pp. 120-121 (1938).

<sup>52</sup> The procedure for adjustment of districts was proposed and adopted by the Constitutional Convention of 1846. N.Y. CONST. Art. III, § 5 (1846).

The exercise of this constitutional power of adjusting assembly districts, has, at times, been subjected to scrutiny by the courts in taxpayer suits, wherein abuses have been alleged on the part of a County Board of Supervisors<sup>53</sup> and the City Council of the City of New York.<sup>54</sup> Generally, the courts are reluctant to inquire into the adjustment of assembly districts, without a showing that the abuse or disregard of the constitutional provisions has been substantial.<sup>55</sup> Where judicial review has taken place, the abuse has usually concerned the requirement that the adjusted districts be as equal as possible in inhabitants and in as compact form as is practical.<sup>56</sup>

The adjustment of assembly districts is mentioned in connection with apportionment only to indicate that even though an equitable system of apportionment were to be adopted, any gain realized in representation might easily be nullified by the effects of "gerrymandering" at the county level. The only feasible remedy for this form of "politics" is for the courts to change their attitude toward reviewing adjustments, so that this form of abuse cannot continue to flourish despite explicit constitutional provisions.

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<sup>53</sup> See, *e.g.*, *Matter of Tishman v. Sprague*, 293 N.Y. 42, 55 N.E.2d 858 (1944); *Matter of Smith v. Board of Supervisors*, 148 N.Y. 187, 42 N.E. 592 (1896).

<sup>54</sup> See, *e.g.*, *Matter of Richardson*, 307 N.Y. 269, 121 N.E.2d 217 (1954); *Matter of Livingston*, 96 Misc. 341, 160 N.Y. Supp. 462 (Sup. Ct. 1916).

<sup>55</sup> See *Matter of Livingston*, *supra* note 54 at 351, 160 N.Y. Supp. at 469.

<sup>56</sup> See note 54 *supra*.

## APPENDIX

## Comparison of Procedures for the Apportionment of Assemblymen

County	Citizen Population*	Number of Assemblymen per County		
		Apportionment Act of 1953 ("Republican Plan")	"Democratic Formula"	Proposed Plan
Kings	2,595,187	22	26	27
New York	1,795,726	16	17	18
Queens	1,484,214	13	14	15
Bronx	1,378,181	12	13	14
Richmond	185,032	2	2	2
<b>N. Y. C. Total</b>	<b>7,438,340 (52.35%)†</b>	<b>65 (43.3%)‡</b>	<b>72 (48%)‡</b>	<b>76 (46.9%)‡</b>
Erie	878,502	8	7	9
Nassau	655,690	6	5	6
Westchester	601,682	6	4	6
Monroe	475,037	4	3	5
Onondaga	334,453	3	2	3
Suffolk	261,003	2	2	2
Albany	234,068	2	2	2
Onieda	216,486	2	2	2
Niagara	184,161	2	2	2
Broome	181,496	2	2	2
Orange	148,429	2	2	2
Remaining 45 Counties	2,594,102 (18.26%)†	1 Per 45 County (30.0%)‡	45 (30.0%)‡	45 (27.8%)‡
	<b>14,203,449</b>	<b>150</b>	<b>150</b>	<b>162</b>

\* Citizen population of the counties is based on the 1950 federal census.

† Percentage of the state's citizen population.

‡ Percentage of assembly seats apportioned.