

State Legislative Redistricting in 2001-2002: Emerging Trends and Issues in Reapportionment

By Ronald E. Weber

This article assesses the progress of the states in redrawing state legislative-district lines for the elections of 2002, now that the 2000 Census of Population data is in the hands of state legislatures. It describes emerging trends this decade and highlights the experience of several states in dealing with both old and new issues in redistricting. Whereas the redistricting round of the 1990s can be described as the round of racial and ethnic predominance, the 2000 round will be characterized as the rejuvenation of partisanship.

Introduction

A line of U.S. Supreme Court cases beginning with *Shaw v. Reno* in the 1990s circumscribed state legislatures' ability to rely predominantly on race or ethnicity in drawing legislative-district lines, making it clear that state legislatures could not draw districts based predominantly on race or ethnicity but would have to use other factors in drawing revised lines during this decade. These other factors might correlate highly with race or ethnicity and, since political partisanship of voters correlates highly with the racial and ethnic makeup of populations, the 2000 decade is likely to be the round of partisan gerrymandering.

The Supreme Court cases of the 1990s ultimately sanctioned the use of partisanship as a predominant factor in redistricting, even though in 1995, the Court argued in *Miller v. Johnson* for the use of a set of race-neutral, objective criteria, such as compactness, contiguity, respect for political subdivisions and respect for communities of interest. The controlling case is *Easley v. Cromartie*, where the Court upheld North Carolina's use of partisanship when it redrew its unconstitutional congressional-districting plan, despite the plaintiffs' contention that the plan relied predominantly on race. This decision sanctioned the unbridled use of partisanship as the predominant factor in redistricting in the current decade.

Partisanship Unbridled?

Legislative redistricting is among the most partisan of policy activities undertaken by state legislatures. In essence, the legislature takes the position that political districting is a matter of preserving self-interest: the spoils of politics belong to the strongest, and district line-drawing can be manipulated to improve the political position of the party that controls each chamber. A large number of states operate under the norm that each chamber is the primary arbiter of the lines for its chamber, so that the House defers to the wishes of the Senate and vice versa. Furthermore, many state legislators take the position that it is not the governor's job to intrude on the legislature's turf when it comes to draw-

ing districting lines for the state Senate or House. Of course, some districting schemes require a degree of cooperation between the two chambers, such as "nesting" House districts within state Senate districts. This cooperation gets a little dicey when Democrats control one chamber and Republicans control the other, as is the current situation in states such as Illinois, Indiana, Kentucky, Minnesota, New York and Wisconsin.

How each political party seeks to advance its political interests varies. The issue is to determine the best way to waste the vote of the partisans of the other party. To do so requires a great deal of information about past turnout patterns and levels of political support given by party followers. For example, Democrats are well aware that Republican supporters typically turn out at higher levels than Democratic followers. Democrats thus can "waste" Republican votes by using election-history information to identify areas with proven records of Republican voting patterns, along with higher-than-average levels of voter turnout. This has created the cul-de-sac theory of districting, where Democrats concentrate all the neighborhoods with gated communities and cul-de-sac street patterns in Republican districts. This approach was highly refined in Texas redistricting during the 1990s and was followed again this decade as the Texas Legislature worked unsuccessfully on state legislative districts.

Republicans, on the other hand, find the use of racial and ethnic data most useful in locating potential Democratic voters. Here the approach is to pack as many African-American or Hispanic minority voters as possible into legislative districts, so as to minimize the number of seats the Democratic party can win, while then spreading Republican supporters over the remaining districts. This approach was used effectively during the 1990s in Ohio, where the Republican-dominated apportionment board drew state legislative districts by concentrating African Americans at the highest possible levels in Democratic districts. Thus, the Republicans minimized the number of Democratic-leaning districts and produced a decade of Republican control of both chambers in Ohio. The Ohio

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Republicans also spent the decade fending off legal challenges by the Democrats to this approach of wasting minority Democratic votes (see the *Quilter v. Voinovich* cases of the 1990s). Since this approach was largely validated by the federal courts in the 1990s, state legislatures learned it might be legal to “waste” minority votes to achieve political gerrymandering. With the exception of Ohio, the state Democratic parties of the 1990s were more interested in cooperating with minority office-holders who wanted potentially safe electoral districts than in fighting Republican efforts to pack minority populations in Democrat districts. But this all changed in the early rounds of the 2000 redistrictings.

During the 1990s, a number of political scientists explored the question of what level of minority population is necessary to equalize the opportunity of minority voters to elect candidates of choice to congressional and state legislative offices. Invariably, this research determined that a combination of cohesive minority-group support along with white or “Anglo” voters would enable Democratic candidates to win congressional or state legislative office. And with regularity, the researchers determined that the appropriate minority-population percentage was less than 50 percent and usually closer to 40 percent. This research gave ammunition to Democrats, who argued that anything above those minority-percentage levels constituted “packing” of minority populations and thus would minimize the opportunity of Democratic voters to elect Democrats. My work for plaintiff interests in the *Shaw* type of cases in the 1990s demonstrated that Democratic candidates could count on various levels of white or “Anglo” cross-over votes and that these votes had to be taken into account in determining whether plans were narrowly tailored to advance compelling state interests. Thus, the Democrats learned that they had been mistaken in the 1990s to attempt to maximize minority populations in state legislative districts, as the minority office-holders often argued should be the case. Of course, the Republican sweep in the 1994 elections, particularly in the South, brought home to the Democratic Party the consequences of minority-population maximization, as the Republicans scored big gains in state legislative elections.

In this round of state legislative redistricting, the Democrats have reversed their approach because of the lessons learned during the 1990s. Now the lines of the partisan battle are quite clear. Democrats want an optimum percentage of minority populations in state legislative districts. Their goal is to not waste too many Democratic votes and to avoid including so few Democratic voters that the districts might not elect

Democrats. Thus, this optimum percentage must be determined in each state before beginning the state legislative districting. Most instructive on this point is the *Page* federal court case from New Jersey. In this case, the Democratic-inclined chair of the New Jersey Apportionment Commission had drawn a nested set of state Senate and House districts, in which the minority populations were apportioned to permit more minority and Democratic senators to be elected than under the previous districts. New Jersey Republicans and the National Association for the Advancement of Colored People (NAACP) both challenged this approach in federal court. The three-judge panel ruled that the New Jersey Apportionment Commission had made the right decision not to pack minority populations (or Democratic voters), as the New Jersey Republicans had wanted. Thus, in the first federal-court decision of the 2000 decade, the Democratic Party’s approach to state legislative districting was upheld.

Further evidence of how the two major political parties have changed their strategies this decade compared to the approaches of the past decade is provided by the Virginia legislature’s redistricting plans and the ensuing state-court litigation over the plans. Virginia Republicans controlled the legislative process and the governorship during this redistricting round, and they used their control to adopt a plan that maintained the same number of African-American-majority state Senate and House districts as in the 1990s. The Republican members of the legislature argued there was a need to fill in under-populated African-American districts with added African-American persons, so as to gain U.S. Department of Justice (DOJ) preclearance of the plans. Democratic legislators argued that the Republican majority packed African-American persons into African-American-majority districts so as to waste Democratic votes, and they offered alternatives, with smaller percentages of African Americans in the Senate and House districts.

After losing in the legislature, the Democrats sued in state court. In the meantime, DOJ granted preclearance to both the Senate and House plans. After trial in September, the state-court judge allowed the November 6, 2001 elections to proceed and took the case under advisement. However, when the judge’s position came up for reappointment during the 2002 legislative session, his name was withdrawn from consideration for a renewed term on the bench after some Republicans criticized him for hearing the case challenging the state legislative plans. On March 11, 2002, two days after the Virginia legislature adjourned for the year, the trial judge hearing the case ruled and invalidated a number of Senate and House districts on

Virginia state constitutional grounds. He found that a number of the districts violated the compactness provision of the Virginia constitution and further found that a number of the majority-minority Senate and House districts excessively packed African-American voters into those districts. The judge enjoined the use of the plans to elect Senate and House members, thus effectively shortening the terms of the House members who had been elected in November 2002.

Final evidence of how partisan interests have shifted over the past decade is offered by the example of state legislative-districting actions in South Carolina. In August 2001, with Republicans in control of both houses, the South Carolina legislature adopted Senate and House plans that Democrats opposed because of alleged packing of African-American voters in some districts and because of a reduction in the number of possible other districts in which African-American voters could influence the outcome of elections. The Democratic governor vetoed these plans, and a federal-court suit has been brought asking a three-judge panel to draw the Senate and House districts for the 2002 election. The governor's veto message argued that Republicans consciously employed racial data in drawing the districts, with an aim to minimize the number of Senate and House districts where African-American voters could influence election results. Conversely, the message argued that the remaining districts would have been overwhelmingly white in make-up and the plan would have led to increased racial polarization in South Carolina.¹

Is Retrogression a Problem Anymore?

In the 16 states covered wholly or in part under Section 5 of the U.S. Voting Rights Act of 1965 (as amended in 1982), the state legislatures must keep in mind the opportunity of minority voters to elect candidates of choice when redrawing state legislative-district lines. The legal standard under the U.S. Supreme Court *Reno v. Bossier Parish School Board* case is that the minority group must not be deprived of the opportunity to elect candidates of choice when the previous plan permitted the group's voters to do so. This interpretation means that the percentage of the minority-group population in a proposed district can only be reduced if the reduction does not make the group's voters unable to elect their preferred candidate.

The exact parameters of the Section 5 standard of retrogression are determined by the voting section of the Department of Justice, unless the state elects to seek preclearance from the U.S. District Court of the District of Columbia. There is only limited evidence of

the Department of Justice's interpretation of the retrogression standard, as only a few states have received preclearance for their state legislative plans.

So far, the DOJ has only objected to the Texas State House plan. The DOJ voting section objected to reducing the number of districts in which minority Hispanic voters would have had the opportunity to elect their candidate of choice. The voting section used a rough proxy measure of citizen voting-age population – Spanish Surnamed Voter Registration – to assess the Hispanic voters' opportunity to elect candidates of choice and found a net reduction of three potential Hispanic House districts. It is clear from the rejection letter that the voting section will determine whether a plan is retrogressive by simply counting the number of opportunities in the current plan and comparing them against the proposed plan. Any net reduction in opportunities will result in an objection. The problems that led to the voting-section objection were then remedied by a three-judge panel of the U.S. federal court, which heard a challenge by minority-group interests to the new Texas Senate and House districts drawn by the state Legislative Redistricting Board.

As of this writing, the Georgia and Louisiana legislatures have completed their redistricting and the Louisiana Senate plan is under administrative review for Section 5 preclearance. However, the Georgia and Louisiana houses have decided to bypass the administrative process for preclearance offered by the voting section and instead are seeking preclearance from the district court of the District of Columbia. The Louisiana filing challenges the 2001 DOJ Notice of Guidance for preclearance submissions and argues for using a benchmark to measure retrogression that had been employed by the DOJ prior to 1991. If the Louisiana House wins on this legal point, the DOJ's authority to object to redistricting plans will be further undermined.

Trends in the 2000 Redistricting Round

Although a number of states have not completed final legislative consideration of plans to redraw their state legislative districts, enough states have completed their redistricting to enable me to summarize some trends of the decade. My observations should be confirmed as the remaining states complete drawing their new districts.

Whereas the plans of the 1990s increased the representation of racial and ethnic minority interests within state legislatures, I do not anticipate similar gains in this redistricting round. There are several reasons for reaching this conclusion. First, in the states covered wholly or in part by Section 5 of the

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U.S. Voting Rights Act, the concept of retrogression will limit further gains in minority representation. And it is clear that legislators in at least two of the covered states have decided to have their plans reviewed by the district court of the District of Columbia instead of the DOJ voting section, because they believe the state will get a more favorable hearing in court. The anticipated result of such efforts will be a preservation of the status quo in racial or ethnic representation in those states.

Second, the main plaintiffs in Section 2 litigation against state legislative plans will come from Latino interests, not African-American interests. The burden of proof for Latino interests will be difficult, because high percentages of noncitizen populations have to be taken into account in assessing Latino plaintiff claims. The experiences in the two challenges already brought to the Texas Senate and House plans illustrate how difficult it will be for Latino interests to gain additional districts that were not created by the state legislative plans.

Third, in states with significant numbers of both African-American and Latino populations, the continuing desire for African-American and Latino interests to gain separate places at the table of representation will necessarily limit the number of occasions that exist to create combined majority-minority districts. Since these two groups seem to vote together in general elections, those who wish to create combined majority-minority districts must demonstrate that the two groups also support the same candidates in primary elections. Here the evidence is very mixed in the parts of the country where these conditions exist. Thus, it is highly likely that there will be few gains in racial and ethnic diversity in the state legislatures during the first decade of this century.

A major exception to the trend just elaborated occurred in the New Mexico state House districting. Like South Carolina, in New Mexico, different political parties control the governorship and the legislature (the governor is Republican and the legislature is Democratic). The New Mexico governor vetoed two attempts by the legislature to adopt a redistricting plan for the House. Then the matter of line-drawing was turned over to a state-court judge. Both Native-American and Latino interests sought to get the court to order additional House districts with effective Native-American and Latino population majorities. The court found Native Americans to be under-represented in the 1990s plan and ordered additional Native-American-majority districts. On the other hand, the court did not find under-representation of Latino populations in the 1990s plan and ordered a least-change

approach plan for the parts of the state not involved in the remedying of Native-American representation. Thus, this court-ordered plan for the New Mexico House enhances Native-American representation, while keeping Latino representation the same as in the previous decade.

If this round of redistricting will show less consciousness of race and ethnicity, does this mean that the states will end the practice of constructing non-compact and bizarrely shaped legislative districts? I see no evidence that the plans adopted so far are any less bizarre in shape than the plans being replaced. During this round, however, the bizarrely shaped districts seem to have more to do with partisan considerations than with racial and ethnic considerations. The technology of redistricting now makes it easy to construct districts based on the partisan predispositions of the voters, and a number of states have invested in the technology to enable them to do so. Since courts now typically hold that an absence of geographic compactness may be evidence of impermissible race consciousness in districting, states simply have to respond that they followed partisan preferences when drawing bizarrely shaped districts, not racial factors. The legal challenge of the 2000 round for the federal courts will be to determine whether the claim of justiciability decided in *Davis v. Bandemer* has any real meaning in the context of this decade's technological advances. I expect a number of legal challenges to be brought this decade to challenge the widespread practice of partisan gerrymandering while drawing state legislative-redistricting plans. One challenge has been filed in Nebraska, and I anticipate others will be filed as states complete their map drawing.

And there will be a number of cases heard by the courts as some states reach partisan impasses in creating their plans. Complicating the dispute-resolution process is the understanding now that the federal courts must first defer to the state courts, if the parties wish to be heard in state court (see *Grove v. Emison*). This need to litigate in state court is likely to delay the final resolution of the disputes, at a time when the states are racing to meet candidate-qualification deadlines for the 2002 primary and general elections. Again, I point to the experience in Texas, where the state-court process yielded no state plans at all, and the final resolution had to be handled by a three-judge panel of the federal court. The U.S. Congress granted an exceptional priority to statewide districting controversies, which allows them to be heard by three-judge panels with expedited appeal to the U.S. Supreme Court. The Congress understood the need to resolve these districting cases quickly, so the election process would not be disrupted.

The doctrine of the *Grove* decision clearly undermines the need to resolve these disputes quickly. To date, state legislative-districting plans have been or are being reviewed by federal courts in Alabama, South Carolina, West Virginia and Wisconsin, in addition to the previously mentioned cases in New Jersey and Texas. Overall, I expect the same amount of litigation over redistricting plans this decade as during the 1990s, but in the final analysis, I expect the challenges to be less successful, as the state legislatures more effectively justify the decisions they have made in redrawing district lines.

Finally, there is the decades old problem of meeting the one-person, one-vote equal-protection standard and other state constitutional criteria in state legislative districting. Already during this round, several states have been challenged as they have attempted to deal with meeting the equal-protection standard and other criteria. Only one of the three one-person, one-vote challenges has been to a legislatively adopted plan (West Virginia). The other two challenges have been to plans adopted by state redistricting boards (Alaska and Idaho).

The one-person, one-vote equal-protection challenge to a legislatively adopted plan involved the Senate plan for West Virginia. For several decades, the West Virginia Senate plan allocated two at-large districts to Kanawha County, the largest county in the state. This allocation resulted in two districts in the 2001 plan with a 5.96 percent population deviation below the ideal in the recently adopted plan. Because another district is 4.96 percent above the ideal population, the overall deviation for the plan is 10.92 percent. This deviation was challenged in *Deem v. Manchin* before a three-judge federal court. The court upheld the 10.92 overall population deviation, ruling that the state legislature had followed recognized, neutral principles in fashioning the Kanawha County Senate districts and that the legislature's policy decisions could not be judged irrational.

Legislative-districting plans adopted by state reapportionment boards have also been challenged under the one-person, one-vote equal-protection standard. Typically, after a state reapportionment board finishes its work, the plan is subject to some degree of review by state courts. This is the situation in Alaska and Idaho – the two states where state redistricting-board plans have been challenged on equal-protection grounds. In Alaska, the plan was upheld on the equal-protection ground, while Idaho's plan was invalidated on the equal-protection ground and sent back to the redistricting board for revision.

Among a number of challenges to the plan adopt-

ed by Alaska's reapportionment board was a claim that it violated the one-person, one-vote equal-protection standard. The plan the board adopted called for one House district with a population deviation of 6.9 percent below the ideal. This resulted in the House plan having an overall deviation of 12 percent and the Senate plan having an overall deviation of 10.6 percent. The state-court judge found the one under-populated House district acceptable, as the state redistricting board was able to demonstrate that both the size and unavailability of easily movable population blocks made the district's construction reasonable. Thus, the state court rejected the one-person, one-vote equal-protection challenge, while finding two other House districts unconstitutional on grounds of non-compactness and violation of socioeconomic integration.

In Idaho, the legislative-districting plan the state redistricting board adopted was challenged before the state Supreme Court on the ground of violating the one-person, one-vote equal-protection standard. One district was 5.52 percent below the ideal size, while another district was 5.17 percent above the ideal size. These two figures produced an overall deviation of 10.69 percent. Since the state redistricting board offered no evidence of a rational state policy for the population disparity in the plan, the Idaho Supreme Court invalidated the plan on the equal-protection ground.

One legislative-districting plan adopted by a state redistricting board has also been challenged on the basis of not meeting other state constitutional criteria. Colorado has a unique provision in its constitution that provides special protection in the redistricting process for political subdivisions, like counties and cities. The Colorado state legislative-districting plans were adopted by a state redistricting board and were subjected to review by the Colorado Supreme Court. The court found that the state redistricting board unduly split major counties and cities in devising the Senate plan and remanded the plan back to the board for redrawing. The remand was also expected to affect the drawing of House districts.

In conclusion, the political and legal terrain faced by state legislative redistricters is complex and multifaceted. It is not surprising that on a few occasions, plans can be successfully attacked. However, the overall pattern is for state legislative redistricters to weather the terrain and successfully create plans that will be employed for the next decade.

(See also William Frey and Bill Abresch's essay on Census 2000 in Chapter 7.)

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Notes

¹ On March 20, 2002, the federal court ruled in the South Carolina state legislative redistricting case. The court rejected plans offered by the contending parties and ordered interim plans for Senate and House districts with minimum population deviations across the districts. Furthermore, the court ordered the plans to be tailored to satisfy Sections 2 and 5 of the U.S. Voting Rights Act. Finally, the court seemed to make some interpretations that might be judged satisfactory to the state legislative defendants and other interpretations that might be deemed unobjectionable by the gubernatorial defendant.

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