

## State Legislative Redistricting in 2003–2004: Emerging Trends and Issues in Reapportionment

By Ronald E. Weber

*Whereas the redistricting round of the 1990s can be described as the round of racial and ethnic predominance, the 2000 round showed a growing emergence of partisanship as the predominant pattern of conflict. The experience of state legislatures in the latest round should provide an overall pattern for state legislative redistricting agencies to weather the terrain and successfully create plans in the future. The future political and legal terrain will continue to be complex and multifaceted.*

### Introduction

This article assesses the progress of the states in redrawing state legislative district lines for the elections of the remainder of the decade as several states had to complete or revise their districting after the elections of 2002. It also describes the final emerging trends this decade and highlights the experience of several states during 2003–2004 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 showed a growing emergence of partisanship as the predominant pattern of conflict. The state legislatures were able to take into account race or ethnicity in drawing lines as had been the emphasis in the previous decade; however, since political partisanship of voters correlates highly with the racial and ethnic makeup of populations, the use of race and ethnicity was subordinated to the use of partisan criteria with the 2000 decade proving to be a round of either partisan gerrymandering or bi-partisan protection of incumbent state legislators (see McDonald, 2004).

Supreme Court cases of the 1990s and early 2000s ultimately sanctioned the use of partisanship as a predominant factor in redistricting, even though the court in *Miller v. Johnson* (515 U.S. 900) in 1995 argued 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 first controlling case is *Easley v. Cromartie* (532 U.S. 234, 2001), 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 opened the door to the unbridled use of partisanship as the

predominant factor in redistricting in the current decade. The second controlling case is *Vieth v. Jubelirer* (541 U.S. 267, 2004), where the court upheld Pennsylvania's use of partisanship when the state legislature created its congressional districting plan in 2002. A plurality of the Supreme Court along with one concurring justice held that the plaintiffs had been unable to prove a partisan gerrymander by the Pennsylvania state legislature under the current judicial standards of *Davis v. Bandemer* (478 U.S. 109, 1986) and hence upheld the Pennsylvania congressional districting plan. However, the plurality opinion of the Supreme Court signaled that four justices desire to overturn *Davis v. Bandemer* and rule partisan claims non-justiciable.

### Partisanship Triumphs

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 which 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 turf of the legislature when it comes to drawing 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 one chamber is controlled by the Democrats and the other by the Republicans.

How each political party seeks to advance its po-

litical 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 refined to the nth degree in Texas redistricting in 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 potentially as many African-American or Hispanic minority voters into legislative districts so as to minimize the number of seats that the Democratic Party can win, while then spreading Republican supporters over the remaining districts. This approach was used effectively in the 1990s in Ohio where the Republican-dominated apportionment board drew state legislative districts by concentrating African-American populations 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 Republicans also spent the decade fending off legal challenges by the Democrats to this approach of wasting minority Democratic voters (see the *Quilter v. Voinovich* cases of the 1990s). Since this approach was validated largely 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 2000 round of redistricting.

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 office. 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. The author’s 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.

The two tables following this article have summarized the state conditions, litigation and final outcomes of the state senate and house redistrictings in 2001–2004 (see Tables A and B). These tables report whether there was any change in the number of seats after redistricting, whether the political conditions for redistricting was split or unified partisan control, whether the state adopted a plan that ended up being determined as valid, whether a suit was filed in state and/or federal courts, and if there was litigation, what the litigation’s outcome was. The data from these two tables are employed throughout the remainder of this article to exemplify trends and issues in the 2001–2004 state legislative redistricting.

In this latest round of state legislative redistricting, the Democrats 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 neither to waste too many Democratic votes nor to have so few Democrats that the districts might not elect Democrats. Thus, this optimum percentage had to be determined in each state before beginning the state legislative districting.

In addition to the discussion of the partisan inter-

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ests at play in the redistricting of New Jersey, South Carolina, Virginia and Wisconsin discussed in the author's article in the *The Book of the States 2003*, further evidence on the prevalence of partisanship is provided in McDonald (2004). In that article, McDonald categorizes the outcome of state legislative districting in the 50 states in terms of whether Democratic or Republican gerrymanders were achieved, whether the plan adopted was a bi-partisan incumbent protection plan, or whether the plan adopted had a neutral outcome. He found that in 27 states the plans adopted were either Democratic or Republican gerrymanders and in 17 of the other 23 states the outcomes were bi-partisan incumbent protection plans. Neutral outcomes were observed in only six states (McDonald, 2004: 386–388).

### 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 legislature had to keep in mind the opportunity of minority voters to elect candidates of choice when redrawing state legislative district lines. The legal standard under the *Reno v. Bossier Parish School Board* (528 U.S. 320, 1999) 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 elect candidates of choice. This interpretation means that the percentage of the minority group population in a proposed district can be reduced only 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 is determined by the Voting Section of the Department of Justice (DOJ) unless the state elects to seek pre-clearance from the U.S. District Court of the District of Columbia. The evidence on DOJ interpretation of the retrogression standard during this round shows that most of the state legislative plans adopted in the 16 covered jurisdictions received pre-clearance. DOJ only objected to the Florida House plan, the Georgia Senate plan, and the Texas House plan. In the case of the Louisiana House plan, the DOJ voting section fought an attempt by the Louisiana House to gain pre-clearance from the District Court of the District of Columbia. After one adverse federal court decision, the Louisiana House settled with the DOJ by redrawing several districts in the New Orleans area. The revised plan then received pre-clearance under Section 5. Thus, the 16 states were largely able to meet the legal requirements of Section 5 under *Reno v. Bossier Parish School Board* without much diffi-

culty. This left the battle over advancing minority voting rights to private plaintiffs that brought Section 2 lawsuits in several states seeking to enhance minority voting rights.

### Final Trends in the 2000 Redistricting Round

Whereas the plans of the 1990s increased the representation of racial and ethnic minority interests within state legislatures, little evidence was found of similar gains in this redistricting round. There are several reasons for this conclusion. First, in the 16 states covered wholly or in part by Section 5 of the U.S. Voting Rights Act (VRA), the concept of retrogression limited further gains in minority representation. The result of such efforts was 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 this round came from Latino interests not African-American interests. The burden of proof for Latino interests was difficult because high percentages of non-citizen population had to be taken into account in assessing Latino plaintiff claims. The experience in the two challenges already brought to the Texas Senate and House plans illustrated how difficult it was 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 limited the number of occasions which existed to create combined majority-minority districts. Since these two groups seem to vote together in general elections, those who wished to create combined majority-minority districts had to demonstrate that the two groups also supported the same candidates in primary elections. Here the evidence continued to be very mixed in the parts of the country where these conditions exist. Thus, there were few gains in racial and ethnic diversity in the state legislatures of the 2000s.

A major exception to the trend just elaborated occurred in the Massachusetts House districting and the South Dakota Senate and House districting. In Massachusetts, the Democratic Party majorities in the Senate and House were sufficient to permit the legislature to devise its own plans without any gubernatorial involvement. The plan proposed by a joint committee on redistricting and reapportionment proposed the creation of one additional House district with an African-American voting age population majority; however, a floor amendment undid the cre-

ation of the African-American majority district and the plan finally adopted was a status quo plan in terms of minority group representation. Both African-American and Latino voters brought separate actions in federal court challenging the adopted House plan on the basis of each minority group being “cracked” between and “packed” within several districts in the Boston area. Both African-American and Latino interests sought to get the court to order additional House districts with effective African-American and Latino population majorities. The court found African-American voters to be under represented in the 2001 House plan and ordered the state legislature to redraw the districts in the Boston area to provide additional African-American representation. On the other hand, the court did not find under representation of Latino voters in the 2001 House plan and upheld the plan in terms of Latino representation. Thus, the redrawn plan for the Massachusetts House enhances African-American representation while keeping Latino representation the same as in adopted plan of 2001.

In South Dakota, the state legislature in 2001 was in the hands of a Republican majority in both chambers with a Republican governor. South Dakota House districts from which two members are elected at-large are usually the same as the Senate districts, with the exception of one Senate district that has been divided into two single-member districts to enhance the chances of Native American representation in the House. The plan adopted by the state in late 2001 maintained the status quo in Native American representation and Native American voter interests then sued in federal court alleging a need for Section 5 pre-clearance under the VRA and that the plan violated Section 2 of the VRA for under representing Native American voters. Initially, the Federal court found that submission of the state legislative redistricting plan was required under Section 5 of the VRA and ordered the state legislature to submit it to the DOJ. The DOJ approved the plan concluding that the plan did not result in the retrogression of Native American voter interests. In the Section 2 lawsuit, the plaintiffs alleged that the state legislature packed Native American persons of voting age into one Senate and three House districts and that alternatively the Legislature could have adopted a plan that enhanced Native American representation in both the Senate and the House. The federal court in September 2004 agreed with the Native American plaintiff allegations and ordered the state legislature to redraw the Senate and House districts with an eye toward enhancing Native American representation in the

South Dakota Legislature.

If this round displayed less consciousness of race and ethnicity in districting, does this mean that the states have ended the practice of constructing non-compact and bizarrely shaped legislative districts? No evidence exists that the plans adopted in this round are any less bizarre in shape than the plans that are being replaced. In this round, however, the bizarrely shaped districts 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 the courts now typically hold that an absence of geographic compactness may be evidence of impermissible race consciousness in districting, the states simply have to respond that they followed partisan preferences when drawing bizarrely shaped districts, not racial factors. The legal challenges of the 2000 round to partisan gerrymandering have fallen mostly on deaf ears from the state and/or federal courts.

The most prominent legal development of this decade has been the resurgence of challenges in state rather than in federal courts. Overall, this decade witnessed fewer court challenges in all with a total of 23 senate and 24 house plans challenged (contrast this experience with that of the previous decade when a total of 27 senate and 30 house plans were challenged, see Weber 1995). In this decade a majority of the plaintiffs sought relief in state courts because the federal courts must now defer to the state courts if the parties wish to be in state court (see *Grove v. Emison*, 507 U.S. 25, 1993). The need to litigate in state court did not usually delay the final resolution of the disputes at a time when the states were racing to meet candidate qualification deadlines for primary and general elections. The author had expected delays and competition between litigants to find the most favorable forum to hear their disputes. The only prominent exception to the general trend occurred in Texas, where the state court process yielded no state plans at all for the state Senate and House, leaving the final resolution to be handled by a three-judge panel of the federal court. In the end, state legislative districting plans were reviewed by federal courts in Alabama, California, Florida, Georgia, Illinois, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, South Dakota, Texas, West Virginia and Wisconsin, with either state senate or house plans being invalidated or drawn by the courts in Florida, Georgia, Massachusetts, Rhode Island, South Caro-

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lina, South Dakota, Texas and Wisconsin. On the other hand, state courts were involved in reviewing state legislative plans in Alaska, Arizona, Colorado, Florida, Idaho, Illinois, Kansas, Maine, Maryland, Minnesota, Montana, New Hampshire, New Mexico, North Carolina, Oregon, Pennsylvania, Texas and Virginia. In 11 of those 18 states, the state court invalidated, ordered the redrawing, or redrew state senate or house plans. In the final analysis, legal challenges were found in the current round to be less successful than in the previous decade as the state legislatures more effectively justified the decisions they made in redrawing district lines.

One of the new trends opened up in state court review of adopted or proposed state legislative plans involved the potential electoral competitiveness of the districts. This issue took on prominence in the consideration and adoption of plans by state courts in Arizona and Minnesota. In Arizona, the redistricting process for state legislative districts had been turned over to the Arizona Independent Redistricting Commission (AIRC) as a result of voter adoption of an initiative, Proposition 106, in the 2000 general election. After development and adoption of the state legislative plan in 2001, the initial plan was challenged in state court by Latino and Native American plaintiffs. The plaintiffs sought to revise the plan to create more politically competitive districts while continuing to protect the voting rights of minority persons. Initially, the state court deferred trial on the merits of the case until after the 2002 general elections and permitted the AIRC plan to be used in those elections. After trial, a Superior Court Judge in Maricopa County in mid January 2004 found for the plaintiffs and ordered the AIRC to revise the state legislative districts in time for the 2004 elections. The court ruled the plan violated the state's constitution by not giving enough consideration to the creation of electorally competitive districts. The AIRC then took action about one month later to revise the district map to create additional electorally competitive districts and the state court approved the revised plan in April 2004. However, a state appeals court stayed the order of the lower court and approved the plan employed in 2002 for use in the 2004 elections. Thus, a combination of having an independent commission create the map along with a lower state court that was willing to enforce state constitutional criteria regarding electoral competitiveness kept in play a plan that heightened the extent of electoral competitiveness when compared to the plan it replaced.

A second state where the process put a renewed emphasis on the electoral competitiveness of state

legislative districts was Minnesota. There the state legislature, due to partisan differences between the two chambers, was unable to pass a state legislative plan by the statutory deadline of March 19, 2002. In anticipation of a partisan impasse, the Minnesota Supreme Court appointed a five-judge special redistricting panel and ordered them to release a redistricting plan only in the event a legislative redistricting plan was not adopted in a timely manner. When the deadline for legislative action expired, the special redistricting panel promulgated a plan for state Senate and House districts. Although the adopted plan was not governed by any explicit goal of fostering electoral competition, the employment of strict technical criteria related to population equality, contiguity, compactness, and the splitting of political sub-divisions resulted in a plan that created a larger number of districts without incumbents or paired incumbents. Thus, a larger number of open seat elections in electorally competitive districts occurred as a result of the Minnesota court-ordered plan devised by experts.

Next, 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. Several states were challenged in this round as they attempted to deal with meeting the one-person, one-vote equal protection standard and other criteria. And, for the most part state plans were not invalidated upon court review in terms of one-person, one-vote or other technical criteria challenges. Only in Alaska, Colorado, Georgia, Idaho, Maryland and North Carolina were plans invalidated on population or technical criteria with the courts ordering the redrawing or drawing of the plans themselves.

The most interesting case comes from Georgia (*Larios v. Cox*, 300 F. Supp. 2d 1320 (ND Ga. 2004)) where a three-judge federal court panel invalidated the state Senate and House plans on the basis of a one-person, one-vote challenge. The state legislature in formulating and revising the plans in 2001 and 2002 had assumed that a plus or minus 5 percent overall population deviation was a safe harbor in meeting the spirit of one-person, one-vote. However, plaintiffs attacked the plan and proved that state legislature had adopted "a deliberate and systematic policy of favoring rural and inner city interests at the expense of suburban areas north, east, and west of Atlanta." (300 F. Supp. 2d 1320, 1327 (ND Ga. 2004)). Furthermore, the court found that the state showed "an intentional effort to allow incumbent Democrats to maintain or increase their delegation,

primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.” (*Larios v. Cox*, at 1329). The court held that these actions violated the principle of one-person, one-vote because while each district deviation was within a permissible range (9.98 percent), there were no legitimate policies offered to justify these deviations. The U.S. Supreme Court affirmed the lower court decision and after the state legislature was unable to draw new lines, court-appointed experts drew new maps that the court approved. The Georgia example shows that if state legislatures believe that plus or minus 5 percent overall population deviation is a safe harbor, they will have to be more careful than the Georgia legislature in justifying the reasons for the population deviations. Other state legislatures did so during this past round; however, given the precision of current computer technology and the availability of block level population data, population deviations beyond minimum levels are going to be subject to continued challenges based on the experience of Georgia in 2004.

This article also assesses the overall success of state reapportionment boards and commissions in shaping state legislative districting plans. A total of 12 states employed either a partisan or non-partisan board or commission in the development and adoption of state legislative plans, with five other states employing boards or commissions if the state legislature was unable to adopt a plan. Most of these commissions are set up to have members of both political parties represented, but the process of choosing a commission chair or tie-breaker creates a partisan advantage for one or the other party. Several of the state commissions were more likely to produce bipartisan plans as they require a super-majority of the commission to adopt plans, along with state supreme court validation and/or super-majorities of the legislature to approve the plans. Thus, most of the plans adopted by state reapportionment boards or commissions do show partisan outcomes. Only a few states such as Arizona, Hawaii, Iowa, Maine and Washington seem to be operating the most neutral processes for drawing state legislative districts at the present time.

Finally, the partisanship surrounding state legislative districting processes of the current round has spurred a renewed interest in citizen initiatives to create less partisan reapportionment boards and commissions in states without them at the present time. As of this writing, there are uncoordinated campaigns

to reform state legislative districting processes in at least eight states, including California, Colorado, Florida, Georgia, Maryland, Massachusetts, Pennsylvania and Rhode Island. What proponents of change are suggesting is that states adopt board or commission forms such as that currently employed in Arizona or something akin to the neutral process employed by Iowa. This campaign for change has taken on new emphasis with the proposal coming from Governor Arnold Schwarzenegger of California to replace the state legislature of that state as the redistricting body with a panel of retired judges. The governor is planning to push this idea in a voter initiative geared to getting a new process and state legislative plans in place by the elections of 2006 (see Nagourney, *The New York Times*, February 7, 2005 and Frank, *Time Magazine*, January 6, 2005). In those states with the citizen initiative a possible fire-storm beginning in California may lead to fundamental reforms in the redistricting processes of other states in an attempt to dampen the partisanship of the state processes.

Thus, the future political and legal terrain faced by state legislative redistricters will continue to be complex and multi-faceted. One would expect that occasionally in the future legislatively adopted plans can be successfully attacked. However, the experience of state legislatures in the latest round should provide an overall pattern for state legislative redistricters to weather the terrain and successfully create plans in the future.

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All About Redistricting: all the information about the law and process of redistricting Congress and state legislatures, tracking the history and progress of the maps, reform proposals, and redistricting-related litigation around the country. Pennsylvania's state legislative lines are drawn by a five-member politician commission, in place since 1968. Each of the four legislative leaders (majority and minority leader in each legislative house) may choose one commissioner, and those four commissioners choose a fifth to serve as chair. In the 2010 cycle, Pennsylvania's legislature passed a congressional plan (SB 1249) on Dec. 20, 2011, which was signed on Dec. 22, 2011. The reapportionment or apportionment process actually refers to assigning seats in the House of Representatives among the states based on population counts from the decennial census, and is carried out at the national government level. The redistricting process, or the drawing of boundaries for congressional districts, occurs within states, and is conducted by the states. legislative district case, ruled that all (both upper and lower) state legislative districts had to be roughly equal in size under the Equal Protection Clause. States have approximately a year and one half to redistrict in time for congressional elections in 2012. Congressional Research Service. 7. Documents Similar To ORC - 103.51 Legislative Task Force on Redistricting, Reapportionment, And Demographic Research. Carousel Previous Carousel Next. David K. Johnson - The Lavender Scare\_ The Cold War Persecution of Gays and Lesbians in the Federal Government (2004, University Of Chicago Press) - libgen.lc.pdf. Uploaded by. Akiza 222.