THE CAMPAIGN LEGAL CENTER

Redistricting in the Post-2010 Cycle: Lessons Learned?

By J. Gerald Hebert and Megan P. McAllen | **Sep 6, 2012**

After each decennial federal census, state and local governments across the country begin the process of redrawing their congressional districts, state legislative seats, and local governing bodies to accommodate population shifts. All state and local redistricting plans must comport with federal limitations, most notably constitutional equal population requirements and the Voting Rights Acts of 1965, as amended (VRA). Unless constrained by state constitutional or statutory requirements, state and local governments have wide latitude to develop and apply their own redistricting criteria. In practice, however, few state laws set more rigorous standards than those already required under federal law.

Since redistricting is an inherently political act, redistricting authority commonly resides with state legislatures—a venerable, if deeply flawed, practice. Legislative redistricting entrusts political line-drawing decisions to those who most stand to gain, or lose, from the process. The practice ensures that voters cannot choose their own representatives; instead, their representatives choose them.

While the U.S. Supreme Court has observed that it is theoretically possible for a partisan gerrymander to go "too far" because it impermissibly "degrade[s] a voter's or a group of voters' influence on the political process as a whole," *see Davis v. Bandemer*, 478 U.S. 109, 132 (1986), no partisan gerrymander has yet been found unconstitutional by the high Court. Getting a majority of Justices on the Supreme Court to agree on a judicially manageable standard has proven an elusive goal for opponents of egregious political gerrymanders. Moreover, the Court has thus far been reluctant to regulate partisan gerrymandering "because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *See LULAC v. Perry*, 548 U.S. 399, 416 (2006).

Extreme partisan gerrymandering turns democracy on its head by allowing politicians to choose their voters, rather than the other way around; therefore, one would think that the Court would craft a judicially manageable standard for assessing such claims. In *Vieth v. Jubilerer*, 541 U.S. 267 (2004), the Court had the opportunity to do just that, but was unable to agree on a legal standard for adjudicating partisan gerrymandering claims even though several workable standards were

See, *e.g., Perez v. Perry* and *Quesada v. Perry*, 5:11-cv-00360-OLG-JES-XR (Order of September 2, 2011). Issuance of such orders, of course, is tantamount to deciding that political gerrymandering cases may not be brought in federal courts.

For those frustrated by decades of incumbent protectionism, there may be reason to hope. In recent years, a handful of states have instituted reforms designed to curb the undemocratic effects of extreme partisan gerrymandering. Although recent reforms vary widely in substantive approach, they generally seek to prevent legislators from drawing lines that benefit their self-interest. Instead, the reforms aim to effectuate the interests of *voters*—interests that are overlooked in many cases and trampled in others. If successful, these new restraints can counteract the self-serving incentives that incumbents bring to bear in drawing political maps. More than that, state-level reforms can restore legitimacy and political accountability to a process too long dominated by entrenched partisan interests.

Voter-initiated redistricting reforms in Florida and California aptly illustrate the potential value of reforms generated at the grass roots level. Although the process is still far from perfect in either state, the changes represent a considerable improvement in our democracy and an astounding achievement for those who were able to bring about these reforms. Would-be reformers in other states would do well to study and learn from these incipient programs.

Fair Districts for Florida Voters

In a landmark opinion construing two recent voter-enacted constitutional amendments, the Florida Supreme Court made clear that it is voters—not incumbent politicians—who "have the rights in the process by which their representatives are elected." *In Re Senate Joint Resolution of Legislative Apportionment No. 1176 (In Re SJR)*, slip op. at 142, 2012 WL 753122 (Fla. Mar. 9, 2012). Prior to 2010, Florida redistricting plans were effectively unconstrained by anything but the U.S. Constitution and the VRA; any additional standards imposed by state law were so vague as to be meaningless. Partisan gerrymandering by Democrats and Republicans alike ran rampant. That landscape changed significantly in 2010 when Florida voters adopted by a supermajority the Fair Districts Amendments to the Florida Constitution. The Amendments, by seeking to eliminate the favoritism and discrimination common to legislative redistricting, developed more stringent redistricting standards and provided for a robust judicial review process to ensure compliance with those standards.

evince any intent to favor or disfavor an incumbent or political party. Second, they cannot have the intent or result of denying or abridging the equal opportunity of race or language minority groups to participate in the political process, or diminish minorities' ability to elect their representatives of choice. Third, districts must consist of contiguous territory. Section 21(b) contains three additional standards to guide the redistricting process. As far as practicable, districts should have equal populations; they should be compact; and they should incorporate existing political and geographical boundaries. These guidelines are specifically designated as lower-priority than those provided in subsection (a). Together, these new standards "act as a restraint on legislative discretion" insofar as they prohibit legislative redistricting practices that were formerly acceptable and widespread.

The Florida Supreme Court's recent opinion highlights the potential—and potential limitations—of the new redistricting regime. Observing that both plans (senate and state house) submitted by the Legislature would have passed constitutional muster before the amendments, the Court upheld the house maps but invalidated the senate's plan for violating "the will of the voters" as expressed in the amendments. *In Re SJR*, slip op. at 185. Critically, the senate plan's entire numbering scheme was held unconstitutional because it was not incumbent-neutral; districts had been renumbered to benefit otherwise term-limited state senators. In addition, senate districts inadequately protected minorities and violated principles of compactness and contiguity. As required by law, a revised senate plan was later submitted for, and received, the Court's approval.

The Court's earlier decision suggests that the new standards have some teeth. However, it is far from clear that the legislature will adhere to the constraints absent strong judicial enforcement. While the house's first plan apparently avoided improper favoritism, the senate map was every bit as gerrymandered as pre-amendment maps. Indeed, term-limited representatives may have had a more limited stake in the redistricting than their senate counterparts, so it is difficult to draw definitive conclusions about the house plan's lack of partisan favoritism. Nevertheless, the new standards—when combined with a Court willing to enforce them—signify a significant improvement and protection for Florida voters.

We Draw the Lines! Citizen Redistricting in California

California's fraught redistricting history further demonstrates the potential benefits, and inherent limitations, of redistricting reform. Until recently, California left map-drawing to the state legislature; in the event of a veto from the Governor, the California Supreme Court would appoint "Special Masters" to draw new electoral boundaries. It is noteworthy that the resulting maps in pre-2010 California redistricting cycles, whether drawn legislatively or by Special Masters, tended

McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plan*, 4 Cal. J. of Politics & Policy 1 (Feb. 2012), *available here (http://faculty.wwu.edu/donovat/kogan.pdf)*.

Direct democracy was an additional complicating factor in this heated context. Citizen groups, often organized by the "losing" political party, could challenge new maps by public referendum. To avoid that potentiality, the legislature agreed to a bipartisan gerrymander during the 2001 redistricting cycle that would protect incumbents on both sides of the aisle. Because these plans passed by a two-thirds vote, the 2001 maps were not subject to referendum challenge. The public outcry was immediate and intense, and fueled two initiatives aimed at reforming the redistricting process.

Propositions 11 and 20, which passed in 2008 and 2010 respectively, transferred line-drawing power from the legislature to a Citizens' Redistricting Commission (CRC) and established new constitutional redistricting standards designed to maximize nonpartisan interests. Fourteen citizen commissioners are selected by a complex process set forth in Article XXI, section 2 of the California Constitution. The selection process aims to eliminate partisan bias by appointing Commissioners without ties to elected officials or political parties. Notably, there must be five Democratic, five Republican, and four third-party or decline-to-state Commissioners, and some members of each partisan bloc must vote to approve each map. The conflict-of-interest rules are particularly robust; following their appointment to the CRC, individuals are ineligible to hold elective office for a period of ten years, and ineligible to hold appointed office, serve as a paid legislative staffer, or register as lobbyists for a period of five years. Cal. Const., Art. XXI, § 2(c).

The official redistricting criteria adopted by voters through Prop. 11, in order of priority, are: (1) Equal population; (2) Compliance with the VRA; (3) Geographical contiguity; (4) "To the extent possible," the geographic integrity of any city, county, neighborhood, or community of interest shall be respected; (5) Geographical compactness; and (6) "To the extent practicable," districts must be "nested," meaning each Senate district would be comprised of two whole Assembly districts, and each Board of Equalization district would contain 10 Senate districts. While none of these standards were foreign to California redistricting law (except arguably the protection for communities of interest), ranking them in order of priority was new. Language in the Proposition also prohibited drawing maps "for the purpose of favoring or discriminating against an incumbent." Perhaps most notably, the new system provides for substantial public input throughout the process (*see generally*http://wedrawthelines.ca.gov (http://wedrawthelines.ca.gov/)).

making elections more likely to reflect the electorate's political will. If they withstand forthcoming legal and referendum challenges, they have the potential to seriously reshape California's political landscape.

California's experience also serves as a reminder that any political map will have winners and losers. Making the redistricting process more transparent and participatory, while a laudable innovation, will not "eliminate the zero-sum nature of electoral competition." Kogan & McGhee, *supra*, at 36. One way or another, organized interests will try to shape future redistricting plans. At least the new system ensures that ordinary citizens are also able to play an important role in shaping new plans.

Redistricting reform is most achievable in direct democracy states where voters can reform the process notwithstanding the opposition of incumbent officeholders; state legislators are understandably hostile to legislation that could put their positions at risk. However enacted, though, state-level reforms represent the best, and most immediate, way to restore democracy to representative government. Hopefully, we will see additional states institute redistricting reforms over the course of this decade. That would be a good dose of medicine for our ailing democracy.

Texas' Post-2010 Redistricting Cycle

Perhaps the other new development in the post-2010 redistricting cycle is best illustrated by the experience in Texas. The Texas Legislature enacted redistricting plans for its congressional districts, state senate seats and state legislative seats in the 2011 legislation session. Texas is one of 16 states that must obtain federal approval (a process known as preclearance) of their redistricting plans under the Voting Rights Act. Rather than choose the speedier and less costly alternative of obtaining approval from the U.S. Department of Justice, Texas instead sought approval from a special three-judge court in Washington, DC.[1] (http://www.clcblog.org/index.php?option=com_content&view=article&id=472:redistricting-in-the-post-2010-cycle-lessons-learned-#_ftn1)

Other States subject to these special preclearance provisions of the Act also sought VRA approval in the DC court this cycle, more states than any previous cycle. What drove Texas and these other states to follow this course? All but one have a Republican Attorney General or Governor who had expressed mistrust over the review of their plan by "the Obama Justice Department". Except for the State of Texas, these other states simultaneously sought approval in the DC Court and from the Justice Department, which they are entitled to do. DOJ approved all of the plans submitted to them, but since Texas did not seek administrative approval, the case went to the D.C. Court.

Eventually DOJ filed an answer in the case saying it did not oppose the senate plan, but since private parties had intervened in the suit and were opposed to the senate plan, the senate plan remained at issue in the case notwithstanding DOJ's failure to oppose it. If Texas had simultaneously sought administrative approval of all three plans from DOJ (as other states had done), the Senate redistricting plan would have been administratively approved under the Voting Rights Act. Because Texas did not do so, the senate plan went to trial along with the House and congressional plans and all three are awaiting decision from the D.C. Court.

The fact that Texas chose the slowest VRA approval route had other consequences. Because Texas did not have its statewide redistricting plans approved under the Voting Rights Act, and because population shifts over the course of the decade had rendered their pre-2010 plans violative of one-person, one-vote requirements, Texas was left with no legally enforceable plans in place and a looming election schedule. Accordingly, a three-judge federal court in Texas imposed court drawn plans so the election schedule could proceed.

Texas took an emergency appeal to the U.S. Supreme Court, which initially stayed, and then reversed, the decision imposing new interim plans. In doing so, the Court deviated from settled law. Previously, plans that had not received substantive approval under the Voting Rights Act were legally unenforceable and federal courts had not shown much deference to them. In January 2012, however, the Court reversed the Texas court's order imposing new plans, saying the lower court should have deferred to the state's unapproved plans to a far greater degree. *Perry v. Perez*, 565 U.S. ___, Case. No. 11-713, slip op. at 4 (Jan. 20, 2012). Importantly, the Court also noted that since the plan had not been approved under the Voting Rights Act, the Texas Court was obliged to make a determination as to whether the issues raised in the pending DC Court action were "not insubstantial." If they were "not insubstantial", the Texas court would be obligated to take those into account in crafting an interim plan. The Supreme Court was also clear that the Texas court may not usurp the DC Court's preclearance role. In February, with no decision from the DC Court, the Texas court drew new interim plans in accordance with the decision in*Perry v. Perez* and imposed those plans for the 2012 elections. Meanwhile, as noted above, no decision has yet been rendered by the D.C. Court.

The high Court's Texas ruling will be interesting to watch throughout the rest of this decade and in the next redistricting cycle, assuming that the preclearance requirements withstand the constitutional challenges that are now pending against them. (Several lawsuits are now working their way in the trial and appellate courts challenging the constitutionality of the Voting Rights Act's special provisions on a number of grounds). The Supreme Court's decision in *Perry v.*

precisely what the Texas court found on remand in imposing new interim plans.

CONCLUSION

The redistricting process remains a major blemish on our democracy, fueling the public's mistrust of government. Voters know that legislators have an inherent conflict of interest when they get to pick and choose which voters they want in or out of their districts. But the process is so 'inside baseball' and cyclical that getting meaningful reforms through the legislature is a virtual impossibility. Real redistricting reforms are achievable in states that allow voters to correct the process by public referendum. Redistricting reform measures, such as those recently adopted in California and Florida, helped to curb the most egregious gerrymandering by self-interested politicians. If we don't see widespread reforms or national standards for congressional redistricting, then it seems certain we can look forward to more cases like Texas, where unelected federal judges get to choose voters for elected politicians. That's no better than letting legislators choose their own constituents. We can, and should, do better.

This opinion piece by Executive Director J. Gerald Hebert and Attorney Megan P. McAllen of the Campaign Legal Center originally appeared in the American Bar Association's Human Rights in the August 2012 Edition.