J. Gerald Hebert
Executive Director, Campaign Legal Center

NATIONAL CONFERENCE OF STATE LEGISLATURES

REDISTRICTING IN 2010
Redistricting in the 2010 Cycle

House Reapportionment From the 2010 Census

Northeastern states, such as Pennsylvania and New Jersey, and states in the Midwest continued to lose House seats, with gains coming in the South and West.

Change since 2000:
- +4 seats
- +2 seats
- +1 seat
- No change
- -1 seat
- -2 seats

Bold numbers indicate the state’s current number of House seats.

SOURCE: U.S. Census Bureau

JOHN DUCHNESKIE / Staff Artist
Redistricting in the 2010 Cycle

Nonpartisan Legislature
Tech “Improvements” Lead To...

NC-03  NY-08  MD-02  NC-12

FL-22  PA-12  MD-03  IL-04
Shaw v. Reno (1993)

- North Carolina redistricted and drew one MMD. The AG rejected the plan because the state could have drawn 2 MMDs. Rather than challenge the AG, the State drew a second district.
- Appellants contended that a redistricting scheme like this one is unconstitutional on its face if it is unexplainable on grounds other than race.

- HOLDING: If a district is so bizarre that it is unexplainable by anything other than race, it gets “strict scrutiny”
Applying Shaw: The Scrutiny Analysis

- Compelling government interests
  - Respect for political subdivisions
  - Respect for communities of interest
  - Protection of Incumbents
  - Preserve core of existing districts
  - Compactness
  - Maintain partisan make-up of district
  - Contiguity
  - Other state-specific neutral criteria
  - Compliance with the VRA

Shaw v. Reno has sometimes been interpreted as saying you cannot take race into account in drawing districts and that’s wrong.
Retrogression

- **Section 5 of VRA:**
  - The burden of proof under Section 5 is on the covered jurisdiction to establish that the proposed change does not have a discriminatory purpose and effect (retrogression)

- **Shaw v. Reno:**
  - Thus, we do not read *Beer* or any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.

- **Hunt v. Cromartie:**
  - [W]here majority-minority districts (or the approximate equivalent) are at issue ... the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.
Redistricting Litigation

The 2010 redistricting cycle has spawned 187 cases and there are still 69 active cases in 25 different states, including...

- Illinois*
- Texas
- Florida
- North Carolina
- Virginia (State Senate)*

*Not active
Redistricting Litigation

Active cases in 25 states
(14 affecting congress, 21 affecting state leg)

187 total cases filed, 69 still active
Illinois
Illinois' congressional lines are drawn by the state legislature and subject to gubernatorial veto

- Democrats controlled all the levers of power
- The new map heavily favored Democrats, protecting every Democratic incumbent and attempting to pick up as many as five Democratic pick-ups
- Some have claimed the delegation could flip from 11-8 Republican to 12-6 Democrat
Illinois

- **League of Women Voters of Ill. v. Quinn,** No. 1:11-cv-05569 (N.D. Ill.) & No. 11-943 (Sup. Ct.): a challenge based on an alleged partisan gerrymandering.
  - On October 28, 2011, the court dismissed the case, finding no First Amendment violation in the use of partisan data to conduct redistricting.
  - On appeal, the decision was summarily affirmed by the U.S. Supreme Court.
Illinois

- **Committee for a Fair and Balanced Map v. Ill. State Bd. of Elections**, No. 1:11-cv-05065 (N.D. Ill.): a challenge based on alleged violations of the VRA and partisan and racial gerrymandering
  - On November 1, 2011, the court issued an opinion preserving claims of racial gerrymandering and VRA violations, but dismissed claims of partisan gerrymandering
  - On December 15, the court rejected the remaining claims on the merits
Texas

Interim map
Texas

- Texas' congressional lines are drawn by the state legislature and subject to gubernatorial veto
- Republicans controlled all the levers of power
- Redistricting timeline:
  - July 18, 2011 – Legislature-passed lines signed into law by the Governor; inexplicably, State delays seeking preclearance
  - November 8, 2011 – U.S. District Court for DC denies Texas summary judgment, setting the matter to trial; meanwhile, a San Antonio federal court draws an interim map
  - January 20, 2012 – Supreme Court vacates and remands for the San Antonio court to redraw and/or re-explain its work, deferring (mostly) to Texas’s enacted plan. New standard for courts in covered states drawing interim plans: Section 5 issues are “not insubstantial”
  - February 28, 2012 – Court issues a new interim map, which creates safe partisan seats in all but one of the 36 districts, but which does not fairly reflect minorities in the State.
Texas

- **Perez v. Texas**, No. 5:11-cv-00360 (W.D. Tex.): a challenge based on alleged VRA violations, racial and partisan gerrymandering, and excessive population deviations (including prison-based gerrymandering)
  - The district court dismissed plaintiffs' 15th Amendment and gerrymandering claims
  - Interim plans for Congress and state legislature ordered into effect
  - Texas now using the San Antonio court’s second interim map for the 2012 elections
  - The state continues to wait for a preclearance ruling from the D.C. court
Florida
Florida’s congressional lines are drawn by the state legislature and subject to gubernatorial veto

- In 2010, voters passed constitutional amendments that said the new districts (for Congress and state legislature) must not “favor or disfavor an incumbent or political party,” must be “compact” and must account for “geographical boundaries”
- Republicans controlled all the levers of power
- DOJ precleared Florida’s map on April 30, 2012 and a trial court judge rejected an argument that the map be put on hold while it is being litigated in Circuit Court
- The delegation could go from 19-6 Republican to anywhere from 21-6 to 16-11 Republican
• **Romo v. Scott**, No. 2012-CA-000412 (Fla. Cir. Ct., Leon County): an action challenging the plan on state constitutional grounds, including violations of prohibitions on partisan and racial gerrymandering, and requirements of compactness
  - On April 30, 2012, the court denied plaintiffs' motions for summary judgment, and on May 30, it denied defendants’ motions to dismiss
  - The case will now go to trial, scheduled for February 11, 2013
Florida—state legislative redistricting

- Florida’s state assembly lines are drawn by the legislature and not subject to gubernatorial veto
- Amendment 5 mandated that the state Supreme Court automatically review state legislative lines
- On March 9, 2012 the Court approved state House districts and struck down the state Senate plan
  - The Court found that “Senate Districts 1, 3, 6, 9, 10, 29, 30, and 34 are constitutionally invalid” and tasked the legislature “to ensure compliance with the Florida minority voting protection provision as well as the tier-two standards of equal population, compactness, and utilization of existing political and geographical boundaries”
  - On March 27, 2012, the state legislature passed a revised Senate plan, which was approved by the state Supreme Court
  - The House and Senate plans were both precleared on April 30
North Carolina
North Carolina

- North Carolina’s congressional lines are drawn by the legislature and *not* subject to gubernatorial veto
- Republicans controlled all the levers of power
- The new map, precleared by DOJ on November 1, 2011, could flip the delegation from 7-6 Democrat to 9-4 (or even 10-3) Republican
North Carolina

- **Laroque v. Holder**, No. 1:10-CV-00561-JDB (U.S. Dist. Ct. D.C.): Voters in Kinston challenged DOJ’s denial of the Town’s proposed electoral changes, arguing that Section 5 of the VRA contravenes the 5th, 14th, and 15th Amendments.
  - The district court dismissed the suit for lack of standing, a decision that plaintiffs appealed. Reversed.
  - On remand, the district court rejected constitutional challenge. On appeal, DOJ withdrew their objection to the Town’s proposed electoral change and the DC circuit dismissed the case as moot. A cert petition is now pending in this case.
Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super Ct., Wake County) & No. 201PA12 (N.C. Sup. Ct.): a challenge on state and federal constitutional grounds, including allegations of discriminatory purpose, unnecessary division of counties and precincts, and racial gerrymandering

- On February 6, 2012, the court dismissed claims based on partisan gerrymandering and on violations of several other state statutes; it preserved claims based on racial gerrymandering and unnecessary precinct-splitting
- A discovery dispute over legislative privilege was appealed to the state Supreme Court, with a hearing held July 10, 2012
Redistricting proposal: “Under the decision by the United States Supreme Court in Strickland v. Bartlett … the State is now obligated to draw majority black districts with true majority black voting age population.”

Rucho-Lewis statement: “Current District 12 … is not a Section 2 majority black district. Instead, it was created with the intention of making it a very strong Democratic District … Because of the presence of [VRA-protected] Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District.”
Did the NC General Assembly need to increase the black VAP in CD 1 & 12 in order to avoid retrogression?

**Shaw v. Reno:** “[W]e do not read Beer or any of our other § 5 cases to give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression.”

**NC-1:** 48.5% AA VAP $\rightarrow$ 52.3% AA VAP

**NC-12:** 43.3% AA VAP $\rightarrow$ 49.4% AA VAP

- **NC-08:** 26.9% AA VAP $\rightarrow$ 19.3% AA VAP
- **NC-13:** 27.2% AA VAP $\rightarrow$ 14.8% AA VAP
Virginia’s congressional lines are drawn by the state legislature and subject to gubernatorial veto.

Republicans controlled the Governorship and state House; for state-level redistricting, Democrats controlled the state Senate.

- After the Nov. 2011 State Senate elections, the upper chamber was split 20-20, with ties broken by the GOP Lt. Governor.

- After vetoing an earlier plan, the Governor signed into law the state redistricting map on April 29, 2011.

- The Congressional plan — precleared by the DOJ — was signed into law on January 25, 2012.
Virginia (State Senate)

- **Burch v. Va. Bd. of Elections**, No. 3:11-cv-256 (E.D. Va.): a challenge to the unequal population of current districts, in the event that the legislature would be unable to agree on district lines before the next election
  - The case was dismissed on June 15, 2011
Virginia (State Senate)

- The percentage of black voting age population declined in every majority black senate district without triggering a retrogression objection:
  - VA-2: 61.3% → 52.4%
  - VA-5: 57.8% → 54.5%
  - VA-9: 56.7% → 51.5%
  - VA-16: 55.8% → 53.9%
  - VA-18: 59.1% → 54.1%

But the districts’ black voters can still elect the candidate of their choice!
Conclusion

- There are still 69 active cases involving claims of racial and partisan gerrymandering, population deviations, violations of the VRA, preclearance, etc.
- The Supreme Court will possibly reconsider §5 of the VRA this term, but it remains the law of the land
  - The VRA does not require that districts must maintain levels of minority VAP in order to avoid retrogression. Functional analysis required.
  - As long as minority voters can still elect their preferred candidate, it matters not at all for retrogression purposes if the minority VAP% decreases
Conclusion

- Technology is making it easier and easier to draw districts with partisan intentions and statistical exactitude.

- Reform organizations remain interested in taking the power over redistricting from the legislature and giving it to an independent or bipartisan commission with increased public input.
Sources

- http://ballotpedia.org/
- http://redistricting.lls.edu/
- http://brennan.3cdn.net/7182a7e7624ed5265d_6im622teh.pdf
- http://txredistricting.org/
- http://redistricting.dls.virginia.gov/
- http://northernvirginialawyer.blogspot.com/
- http://www.floridasupremecourt.org/