LEGAL PRINCIPLES

A. The "One-Person, One-Vote" Standard

Redistricting is the process of redrawing the lines of districts from which public officials are elected.[1] Redistricting takes place following each census, and typically affects all jurisdictions that use districts and have representative bodies, like members of Congress, state legislatures, county and city commissions and school boards. The United States Constitution requires the reapportionment of Congressional Districts following every decennial census.[2] Most states' constitutions and local government charters similarly require their district lines to be re-drawn following the census.[3] Prior to 1960, however, the redistricting process was largely considered a "political" affair, best left to the judgment and discretion of legislative bodies and government officials. During this period, the courts generally did not get involved in state and local redistricting disputes, and court challenges were viewed as non-justiciable and summarily rejected.[4]

From 1900 through 1960—as populations in Southern States migrated from rural to urban areas—many state legislatures failed to redraw their districts to reflect the enormous population shifts toward the cities. For example, by 1960, about 14% of the population in Tennessee could elect a majority of the state legislature. In statewide contests in Georgia, a vote in 45 sparsely populated rural counties had 20 times the weight of a vote in urban Fulton County.[5] As a result, many rural districts had a distinct advantage, and disproportionate control of the legislative bodies.

As the 1960s approached, more-and-more cases were brought by urban voters to challenge these political decisions. Many of these challenges relied largely on the Equal Protection Clause of the Fourteenth Amendment. The first significant challenge is the landmark case Baker v. Carr.[6] This case was brought by Shelby County Court Chairman Charles Baker, an urban voter, challenging districts drawn for the Tennessee General Assembly. Like many states of this era, Tennessee districts of the early 1960s were designated by straight, geometrical lines that formed square, regularly shaped districts—with some predominantly rural and some urban.

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1 Johnson v. Miller, 929 F. Supp. 1529, 1534 n.12 (S.D. Ga. 1996).
2 Representatives . . . shall be apportioned among the several stales according to their respective numbers." U.S. Const. Art. 1, §2.
3 See e.g., Fla. Const. Art. III, § 16,; Art. VIII, §1(e); and Art. XII. §13 (2000)
4 Kidd v. McCandless, 292 S.W.2d 40 (Tenn. 1956)
5 South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, .J. dissenting).
6 369 U.S. 186, 234 (1962).

Baker argued that Tennessee's rural districts were unfairly more influential than the more densely populated urban districts. Although the Supreme Court did not rule on the merits of Baker's case, for the first time it recognized that redistricting was not just a political issue, but a justiciable one, and that it would be subject to Equal Protection scrutiny. From this case, the principal of "one-person, one-vote" has evolved.[7]

One-person, one-vote means that representative districts should be roughly the same size in population so that in the selection of each representative, each voter's vote will count roughly on equal in terms. Subsequent decisions of the Supreme Court underscored the significance of drawing districts of roughly equal populations by requiring that it be done as nearly as may be "practicable."[8] This means that state and municipal governments must make an "honest, good faith effort" to construct districts of equal population sizes. The ideal population for each district is calculated by dividing the number of districts in a jurisdiction by the total population. The re-drawn districts' population should be roughly equal to the ideal size, and any shifts in population should be accounted for.

This principle was embodied in the Governance Section of the Education Code, wherein it is required that school board member residence areas be designated through a resolution by majority vote of the board and be "equal in population as nearly as practicable." §1001.36 Fla. Stat. (2010).

In applying the one-person, one-vote principal to state and local legislative bodies,[9] the U.S. Supreme Court has considered gross deviations of 10% (+ 5% or- 5% of the ideal district size) to be *de minimus*.[10] Deviations greater than 10%, however, are acceptable only if they can be justified "based on legitimate considerations incident to the effectuation of a rational state policy."[11] Although the Court has permitted gross deviations of up to 16% of the population, 10% deviation seems to be more acceptable range. Without a showing of a gross deviation greater than 10% or some other bad conduct, a challenge to a redistricting plan will face great difficulty in making out a *prima facie* case for a violation of the one-person, one-vote principle.

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7 Baker v. Carr, 369 U.S. 186 (1962). See also Davis v. Bandemer, 478 U.S. 109 (1986).

8 Gray v. Sanders, 372 U.S. 368, 380-81 (1963) (the Fourteenth Amendment principle of "one-person, one-vote" requires population to be the most significant factor in redistricting); see also Reynolds v. Sims, 377 U.S. 533, 577 (1964).

9 The duty to reapportion the United States House of Representatives is imposed by Article I, Section 2 of the United States Constitution. The Courts have interpreted Article I as imposing a much stricter population equality standard in congressional redistricting. Congressional districts must be drawn within a state so that they are as mathematically equal as is reasonably possible. White v. Weiser, 412 U.S. 783, 790 (1973); Karcher v. Daggett, 462 U.S. 725, 730 (1983).

10 See Mahan v. Howell, 410 U.S. 315, 320 (1973) (10% de minirnus rule established).

11 Id. at 320.

For the implementation of the one-person, one-vote principle, the Supreme Court developed a quantitative constitutional analysis and has set standards for determining equal representation for equal numbers of people.[12]

B. Section 2 of The Voting Rights Act: Results Standard

Redistricting plans must also comply with section 2 of the federal Voting Rights Act.[13] Under this act, districts cannot be drawn in such a manner as to dilute or minimize the voting strength of racial and other minorities.[14]

Minority voter dilution claims under federal voting rights laws typically focus on whether the three *Gingles* factors are present:

(1) The existence of a minority group that is sufficiently large and geographically compact to constitute a majority in a single-member district;

(2) The minority group is politically cohesive; and

(3) The white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[15]

In addition, the courts have required plaintiffs to demonstrate the existence of several other historical and socio-economic factors, including eight factors that were outlined in the Senate report which makes up part of the legislative history of the voting rights act.[16] A court must ultimately determine whether in light of the Gingles factors and the totality of the circumstances, the challenged plan dilutes minority voting strength.[17] The Gingles factors apply to single-member, multi-member and at-large redistricting plans.[18] Courts' analyses have often emphasized the importance of achieving "proportionality," which is a term used to link "the number of majority-minority voting districts to minority members share of the relevant population."[19]

C. Other Redistricting Principles

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12 See Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (a variance of 5.97 percent between the population of the largest and smallest U. S. Congressional districts in Missouri was too great to meet the "nearly as practicable" standard); While v. Weiser, 412 U.S. 783 (1973) (a variance of 4.13 percent in Texas found unconstitutional); Karcher v. Daggett, 462 U.S. 725 (1983) (absolute population equality is the standard for determining whether a congressional redistricting plan satisfies Article I, Section 2 of the Constitution).

13 42 U.S.C. § 1973, 1973c (2000).

14 Thornhurg v. Gingles, 478 U.S. 30, 47 (1986).

15 Gingles v. Thornhurgh, 478 U.S. 30, 36-37 (1986).

16 S. Rep. No. 97-417 at 28-29 (1982).

17 Johnson v. DeGrandy, 512 U.S. 997 (1994).

18 Voinovich v. Quilter, 507 U.S. 146, 158 (1993).

19 Johnson v. DeGrandy, 512 U.S. 997, 1014 n. I I (1994).

In 1986, the Court's attention shifted toward political gerrymandering and the creation of majority-minority districts. A succession of cases after *Davis* defined a qualitative analysis (i.e., considering compelling governmental interest, legislative intent, the bizarreness of a district's shape, etc), often buttressed by statistical measures, based upon the Equal Protection Clause of the Fourteenth Amendment for state legislative redistricting and the equal protection component of the Fifth Amendment Due Process Clause for congressional redistricting.[20]

D. Fourteenth Amendment

Districts cannot rely too heavily on race when redrawing its districts. Recent cases, for example, have defined the limits and depths of the goal that representation of a minority group should roughly equal that of the minority group population.[21] The courts have sought to strike a balance between the rights of minority voters to elect and select representatives of their own choice, and the rights of majority voters and the State to preserve traditional norms of redistricting. The courts, for example, have recognized the Fourteenth Amendment right of white majority voters to challenge a "majority-minority" district, based solely on the existence of its irregular shape.[22]

The courts recognize that in the redistricting process legislative bodies should be aware of racial demographics, but that race should not "predominate" and subordinate traditional redistricting principles without a compelling reason.[23] State and municipal governments may recognize racial factors, provided its action is directed toward some common relevant interest.[24]

This line of Equal Protection cases, however, does not require perfectly symmetrical district shapes, and courts tend to approve a district as long as "it is reasonably compact and regular, taking into account traditional redistricting principles such as maintaining communities of interest and traditional boundaries."[25]

E. Redistricting 2011

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20 See DeWitt v. Wilson, 856 F. Supp. 1409, 1415 (D.C. Calif. 1994) (affirmed district court decision approving a California majority—minority redistricting plan); Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. l996)(found Florida's Third Congressional District to be an unconstitutional race—based gerrymander which must be redrawn); Miller v. Johnson, 115 S.Ct. 2475 (l995)(plaintiff states a claim under the Equal Protection Clause by showing that a redistricting plan, on its face, has no rational explanation except as an effort to separate voters based on their race); Bush v. Vera, 517 U.S. 952, 977 (1996) (upheld district court rejection of Texas' plan on the ground that the three majority-minority districts created by the plan violated Equal Protection Clause).

21 See Shaw v. Hunt, 517 U.S. 899 (1996) (proportionality in one area of the State or State as a whole cannot be used to offset problem of vote dilution in one discrete area); Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (proportionality rule).

22 See Shaw v. Reno, 509 U.S. 630, 641-42 (1993); Miller v. ,Johnson, 515 U.S. 900, 9 19-920 (1995).

23 Miller v. Johnson, 515 U.S. at 916

24 Id. at 920.

25 Bush v. Vera, 517 U.S. 952, 977 (1996).

With the recent Supreme Court decision in *Department of Commerce et al v. United States House of Representatives, et al,*[26] affirming that section 195 of the Census Act (13 U.S.C. 195) requires, where feasible, the use of statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census, but forbidding the use of sampling in calculating population for purposes of apportionment,[27] it is increasingly likely that the question of "one-person, one-vote" will be significant again, along with continuing questions regarding political gerrymandering.

In addition to the current attention on sampling at the federal level, efforts are currently underway in certain state legislatures to prohibit the use of census numbers derived from sampling for redistricting purposes. Republican lawmakers in Arizona, Minnesota, Colorado and Maryland have all introduced Resolutions to that effect. [28]

Since 2001, moreover, technology has added significant levels of detailed geographical, sociological, economic, political, age, racial, ethnic and gender information to the redistricting process. Census tiger files, geographic information systems and personal computers have made it possible to re-draw maps with greater precision, accuracy and efficiency. Political and demographic data may now be displayed at the block level, and compactness and dispersion measures are possible. With the advances, availability and expedience of this new technology, it will be interesting to see if this will effect the courts' requirements that districts be as equal as is "practicable," and whether that will in turn affect the rule that a 10% gross deviation among districts is *de minimus*.

Just as the Court gravitated toward increasingly precise measurements of population in the earlier line of cases, if sampling is utilized in post-2000 census redistricting, legislative bodies, elections supervisors and other government officials will find it essential to use the most refined techniques available to protect against potential challenges. It is important that municipal and county governments have (and/or retain) a team of advisors, counselors, computer programmers and cartographers assembled to provide expert service in this process, so that in drawing districts they will be

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26 525 U.S. 316, 119 S.Ct. 765 (1999)

27 Id., slip op. at 21. "[T]he section now requires the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census." It should be noted that there are differing opinions with respect to the question of what other data must be calculated in employing statistical sampling. Some are of the view that federal funding formulas and redistricting must both be based upon figures utilizing sampling; others maintain the court left the issue of mandatory utilization of sampling for redistricting figures an open question. See, e.g., Editorial, Census Summit, Roll Call, March 15, 1999 at 4 Editorial, Census Chicken, The Washington Post, March 15, 1999, at A. 16.

28 John Mercurio, GOP Asks Four States To Block Sampling, Roll Call, February 24, 1999, at 1.

knowledgeable about the operative legal standards and be highly competent in the utilization and analysis of statistical data.

The following are some traditional redistricting principles that are recognized by the courts and that the School Board may properly consider using during reapportionment.

1. Board member residence areas must be drawn as nearly equal in population as practical.

2. Board member residence areas must consist of contiguous territory.

3. Board member residence areas should have a rational configuration taking into consideration factors such as compactness and major roads.

4. Pursuant to the Voting Rights Act of 1965, Board member residence area boundaries should not unnecessarily divide areas of concentrated minority populations or drastically discriminate against a political party.

5. Current Board member residence area boundaries should be retained where feasible.

6. Board member residence area boundaries should take into consideration communities of interest and keep communities intact.

F. Staggered Elections for the School Board

The governance statute and consent decree also require that the board members' terms shall not be disturbed by the re-designation of residence area boundaries for board members, and generally that such terms be staggered. §§ 1001.36 and 1001.362 Fla. Stat. (2010). Numerous courts have found that permitting a staggered election cycle to continue unaltered following reapportionment caused, at most, a temporary disenfranchisement of voters that violates neither the equal protection clause nor any other constitutional provision. New elections for every board member would be a massive intrusion into a state-mandated political process of staggered elections requiring new elections and truncated terms of office.[29]

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[29] *See In re Apportionment Law Appearing as Senate Joint Resolution* 1 E, 414 So. 2d 1040, 1047 (Fla. 1982) (*citing Mader v. Crowell*, 498 F. Supp. 226 (M.D. Tenn. 1980); *Ferrell v. Oklahoma ex rel. Hall*, 339 F. Supp. 73 (W.D. Okla.), *aff'd*, 406 U.S. 939 (1972); *Legislature of the State of California v. Reinecke*, 516 P.2d 6 (Cal. 1973); *Twilley v. Stabler*, 290 A.2d 636 (Del. 1972); *Robinson v. Zapata Co.*, 350 F. Supp. 1193 (S.D. Tex.1972); *Carr v. Brazoria Co.*, 341 F. Supp. 155 (S.D. Tex 1972); *Pate v. El Paso Co.*, 337 F. Supp. 95 (W.D. Tex.1970); *Long v. Docking*, 283 F. Supp. 539 (D. Kan. 1968); *Stout v. Bottorff*, 249 F. Supp. 488 (S.D. Ind. 1965); *Visnich v. Board of Educ.*, 37 Cal. App. 3d 684, 112 Cal. Rptr. 469 (1974); *Griswold v. County of San Diego*, 32 Cal. App. 3d 56, 107 Cal. Rptr. 845 (1973); *In re Reapportionment of Colo. Gen. Assembly*, No. 82SA6, 647 P.2d 191 (Colo. 1982); *People v. Lavelle*, 307 N.E. 2d 115 (Ill. 1974); *Selzer v. Synhorst*, 113 N.W. 2d 724 (Iowa 1962); *Harris v. Shanahan*, 387 P.2d

Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a "delay" in the right to vote) is tolerated when it is an "absolute necessity" or when it is "unavoidable".[30] A temporary delay in voting, within a staggered-term structure, is an "absolute necessity" and is "unavoidable" when it is caused by the enactment of a new plan that is passed to correct a constitutionally-defective districting system. For this reason, partial temporary disenfranchisement is tolerated when the School Board approved a new districting plan. Moreover, the deprivation suffered is *de minimis* at most and the remedy would not justify the massive intrusion into the state's political machinery. The disenfranchisement is temporary in nature and is no different from that experienced by "new registrants who reach the age of 18 years shortly after an election and (by) people moving from one area to another."[31]

For example, the first election following the School Board's last redistricting effort in 2002, only School Board Districts 2, 4, 6 and 8 were up for election, while Districts 1, 3, 5, 7 and 9 were not. The District 5 School Board seat was also filled that year by an appointment made by Governor Bush. Therefore, it is anticipated that under the current statute and consent decree, only School Board Districts 1, 3, 5, 7 and 9 would be up for election in 2012.

The School Board may consider other redistricting principles as well. Our office will bring an item shortly to determine what needs to be done and we plan to bring an item to suggest a redistricting consultant. If you have any questions, please do not hesitate to contact me.

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771 (Kan. 1963); *Anggelis v. Land*, 371 S.W. 2d 857 (Ky. Ct. App. 1963); *New Dem. Coalition v. Austin*, 200 N.W. 2d 749 (Mich. Ct. App. 1972); *Barnett v. Boyle*, 250 N.W. 2d 635 (Neb. 1977); *Yates v. Kelly*, 274 A.2d 589 (N.J. Super. Ct. 1971); *Marston v. Kline*, 301 A.2d 393 (Penn. 1973)).

[30] See In re Reapportionment of the Colorado General Assembly, 647 P.2d 191 (Colo. 1982) and Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980).

[31] *Ferrell v. Oklahoma*, *supra*, 339 F. Supp. at 82.