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# Fair Districts Florida: A Meaningful Redistricting Reform?

Jordan Lewis

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# Fair Districts Florida: A Meaningful Redistricting Reform?

Jordan Lewis\*

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## INTRODUCTION

For decades, citizens' groups have been unsuccessful in stopping legislators from creating their own political dynasties. Through manipulation of the redistricting process, legislators and political parties can remain in power indefinitely by choosing their own voters at the expense of democracy. This has produced uncompetitive elections and partisanship. Some states did away with legislative control of redistricting and instituted nonpartisan commissions, which have been somewhat successful.<sup>1</sup> Florida voters enacted the Fair Districts Amendments, which aimed to curb redistricting designed protect incumbents or a political party. While the Florida Supreme Court and the Leon County Circuit Court have invalidated maps designed with unlawful intent, these changes haven't gone far enough to effectuate the intent of the voters and allow them to effectively choose their leadership in Tallahassee.

In late 2011 and early 2012, political consultants worked with legislators out of the public's eye to create maps that would protect incumbents and the Republican Party. These efforts were captured in documents released by the Florida Supreme Court. As an attorney in the redistricting cases notes, "the documents reveal in great detail how they [political operatives] manipulated the public process to achieve their partisan objectives."<sup>2</sup>

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<sup>1</sup> See Steven F. Huefner, *Don't Make Redistricters Accountable to the People, Make Them the People*, 5 DUKE J. CONST. K. & PUB. POL'Y 37 (2010); compare with Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637 (2013).

<sup>2</sup> See Associated Press, *Supreme Court Unseals Documents About Redrawing of Florida Districts*, TAMPA BAY TIMES (Nov. 25, 2014) <http://www.tampabay.com/n>

It would be shortsighted to think that these problems are limited to the redistricting process in Florida. But the United States Supreme Court has been an ineffective route for pursuing remedies for partisan gerrymandering. And political actors will be hesitant to end a practice that ensures their political livelihood. Thus, it is up to the American public to shift redistricting reform at the state level: through ballot initiatives and pressure on legislators. Finally, some measures require state courts to enforce the constitutional provisions requiring objectives such as compactness. As this note explores, the simple passage of redistricting reforms cannot rid the process of its ills while preserving the legislature's primacy in the redistricting process. The great lengths that partisan consultants and leaders went to evade the Fair Districts Amendment's requirements show how important the redistricting process is and how critical it is to protect Florida voters from gerrymandered districts.

Part I of this note will explore the process of redistricting, its timing, tactics, and impacts on Florida and the nation. Part II will explore the relevant standards and case law guiding redistricting litigation. Then, Part III will explore Florida's redistricting litigation, before and after the passage of the Fair Districts Amendments. Next, Part IV will analyze the successes and failures of the Fair Districts Amendments. Finally, Part V will explore potential solutions to partisan gerrymandering with a brief look at other jurisdictions.

## I. THE REDISTRICTING PROCESS

Every ten years, the United States Census Bureau is charged with tracking changes in the nation's population, as required by Article I, Section 2 of the U.S. Constitution.<sup>3</sup> This population data is then used to determine the allocation of U.S. Representatives and state legislators.

### A. *Who Draws the Maps?*

In most states, the duty to redistrict falls upon the legislature.<sup>4</sup> In most of these jurisdictions, redistricting bills are passed by each house of the legislature, reconciled, and sent to the Governor for approval.<sup>5</sup> In

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ews/politics/supreme-court-unseals-documents-about-redrawing-of-voter-districts/2207946.

<sup>3</sup> See U.S. CONST. art. I, § 2, cl. 3.

<sup>4</sup> See Justin Levitt, *A Citizen's Guide to Redistricting*, BRENNAN CENTER FOR JUSTICE, 1, 20 (2010) <http://www.brennancenter.org/sites/default/files/legacy/CGR%20Reprint%20Single%20Page.pdf>.

<sup>5</sup> Levitt, *supra* note 4.

twenty-two states, redistricting commissions have a role in the redistricting process.<sup>6</sup> Of these states, six use wholly independent commissions consisting of individuals who are not public servants, and five states implement the commission model only if the legislature fails to produce a constitutionally adequate map in time.<sup>7</sup>

### B. *How it Happens*

After the primary redistricting body receives the population data, it should move to draw districts of equal or nearly equal population according to what are known as “traditional redistricting principles.”<sup>8</sup> In accordance with such principles, legislators should try to keep communities of interest, such as cities, counties, and neighborhoods intact.<sup>9</sup> The districts should also be compact and contiguous (not perforated) whenever possible, and comply with the Voting Rights Act and U.S. Constitution. These principles and requirements are central to the analysis of Florida’s Fair Districts Amendments.

Redistricting has a long tradition in American politics. Its much-maligned cousin, the gerrymander, has endured almost as long.<sup>10</sup> Black’s Law Dictionary defines “gerrymandering” as “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>11</sup> In a legislative body, the primary goal for a majority party is to increase or preserve the majority. Generally, the primary goal for a legislator in redistricting is to get re-elected. These goals interact and influence the redistricting process. Even in states where the population is equally distributed between the major parties, it is possible for the majority party to gerrymander their way to an unyielding majority. This can be accomplished in several different ways.

The tools of packing, cracking, and tacking provide the majority party with tools to remain in power. A legislature may want to “pack” or

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 21.

<sup>8</sup> *Id.* at 40.

<sup>9</sup> *What is Redistricting?*, REDISTRICTING CALIFORNIA, <http://www.redistrictingca.org/what-is-redistricting>.

<sup>10</sup> Around 1812, the term “gerrymander” was coined to refer to a plan by Massachusetts Governor Elbridge Gerry that would improve the chances of his Democratic-Republican Party. One such district took the shape of a salamander. Federalists combined the terms into a portmanteau known as “gerrymandering.” However, his was not the first recorded instance of gerrymandering. *See* Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, THE ATLANTIC (Sept. 19, 2012) <http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/#slide1>.

<sup>11</sup> BLACK’S LAW DICTIONARY 334 (4th pocket ed. 2011).

cram the opposing party's supporters into a few districts.<sup>12</sup> This guarantees that the opposition will win the district by large margins, but the surrounding districts will lose opposition voters, making it easier for the majority to win more competitive districts by small margins. In contrast, "cracking" involves efforts to split the opposition's supporters so they do not have enough support in a single district to elect a representative.<sup>13</sup> Finally, the technique of "tacking" refers to the process of reaching out from the core of a district to grab friendly voters, or include an incumbent's residence.<sup>14</sup> The use of these techniques, often in unison, gives the majority party an extra advantage in the elections to come.

Gerrymandering produces a legislative body that is inconsistent with the will of the voters. The 2010 elections were critical for the Republican Party because they won control of many state legislatures, giving them control of the decade's redistricting process. In 2012, Democrats retained the Presidency and gained Senate seats, while Democratic candidates for the House of Representatives won more votes than their Republican counterparts.<sup>15</sup> However, they only won 46% of House seats.<sup>16</sup> In swing states with Republican legislatures, Democrats won Senate races but carried only a fraction of swing-state congressional seats. In 2014, the Republican majority won 57% of seats with 47% of the national vote.<sup>17</sup> Barring a wave election, Republicans will control the House of Representatives until 2022.<sup>18</sup>

In addition to producing inconsistent results, gerrymandering produces excessive partisanship. Most districts are uncompetitive during general elections, but sometimes have intense primary battles, where candidates move closer to ideological extremes to avoid defeat in a

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<sup>12</sup> Levitt, *supra* note 4, at 57.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 58.

<sup>15</sup> See Ian Millhiser, *Democratic House Candidates Now Have a Nearly 1.2 Million Vote Lead Over the Republicans*, THINK PROGRESS (Dec. 21, 2012) <http://thinkprogress.org/justice/2012/12/21/1351161/democratic-house-candidates-now-have-a-nearly-12-million-vote-lead-over-the-republicans>.

<sup>16</sup> *Id.*

<sup>17</sup> See Rebecca Ballhaus, *Deep Loss by Democrats Obscures Party's Numbers Problem*, WALL ST. J. (Nov. 24, 2014) <http://blogs.wsj.com/washwire/2014/11/24/loss-by-democrats-obscures-partys-numbers-problem>.

<sup>18</sup> *Id.* A "wave election" is an election in which one party makes substantial gains and has few losses. 2010 was a "wave election" for the Republican Party in 2010, where they won an additional 63 House seats and 4 Senate seats. See *Wave Election*, TAEGAN GODDARD'S POLITICAL DICTIONARY (2015) <http://politicaldictionary.com/words/wave-election>.

primary.<sup>19</sup> Because candidates from both parties have moved further from the center, Congress has become less productive and unable to respond to our nation's needs.<sup>20</sup>

## II. SUBSTANTIVE REDISTRICTING LIMITS AND STANDARDS

The Voting Rights Act of 1965 and the Equal Protection Clause provide a federal floor in which redistricting plans must meet. Beyond these federal limits, states are free to impose additional limits on the redistricting process.

### A. *The Voting Rights Act of 1965*

The Voting Rights Act was enacted at the apex of the Civil Rights movement as a means to ensure that African-Americans and other minorities had a meaningful opportunity to participate in the political process. Sections 2 and 5 of the Voting Rights Act apply to the redistricting process and require legislators to meet several benchmarks to ensure minority representation. Legislative plans must comply with these provisions to be valid.

#### 1. Section 2 Requirements

Section 2 bans practices that make it more difficult for minority voters to “participate in the political process” and to “elect representatives of their choice.”<sup>21</sup> Most Section 2 challenges involve cases of vote dilution, which is the practice of reducing the effectiveness of a group's voting strength by limiting chances to turn that strength into voting power.<sup>22</sup> In 1982, the Senate amended Section 2 to allow plaintiffs to establish a violation if they could prove, based on a totality of the circumstances, that the challenged practice had the result of denying the racial or language minority the equal opportunity to participate in the

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<sup>19</sup> As of 2013, only ninety seats in the House of Representatives have a partisan rating that falls within five points of the national average. The Cook Partisan Voting Index measures how strongly a district leans toward a party, in comparison with the nation as a whole. See Hamilton Nolan, *Gerrymandering is Eating Democracy*, GAWKER (July 29, 2013) <http://gawker.com/gerrymandering-is-eating-democracy-948842710>.

<sup>20</sup> See Mark Miller, *Congress on Track to be the Least Productive in History*, NBC NEWS <http://www.nbcnews.com/politics/first-read/congress-track-be-least-productive-modern-history-n169546> (last visited Apr. 12, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> See In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 622 (Fla. 2012) (hereinafter “*Apportionment I*”). Cracking and packing are common techniques to dilute the voting power of minorities. For further discussion on *Apportionment I*, see *infra* III.E.

political process.<sup>23</sup> Four years later in *Thornburg v. Gingles*, the Supreme Court held that Section 2 mandated the creation of plans<sup>24</sup> used to project a minority population if: (1) the minority project has population large enough to form a majority in a single district, (2) the minority is politically and geographically cohesive to support a single candidate, and (3) non-minority voters usually oppose the majority's preferred candidate.<sup>25</sup> The satisfaction of the *Gingles* factors may not be enough in itself to prove vote dilution; the Court must look at the totality of the circumstances to examine whether the minority vote has been unreasonably diluted.<sup>26</sup>

## 2. Section 5 Requirements

Prior to the Supreme Court's ruling in *Shelby County v. Holder* in 2013, state legislators in "covered jurisdictions" had to comply with Section 5 requirements prohibiting discrimination in voting practices.<sup>27</sup> Section 5 prohibits practices and procedures that have a discriminatory effect.<sup>28</sup> Under Section 5, a plan has a discriminatory effect under the statute if, when compared to the benchmark plan, the submitting jurisdiction cannot prove that the plan does not "result in a retrogression in the position of racial minorities with the respect to their effective

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<sup>23</sup> *Id.*

<sup>24</sup> Such as a majority-minority district. A majority-minority district is a legislative district in which more than half of the population of voting age are racial or ethnic minorities. *See The Role of Section 2- Legal Requirements*, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., <http://redrawingthelines.org/legalrequirements> (last visited Apr. 12, 2015).

<sup>25</sup> *Thornburg v. Gingles*, 478 U.S. 30, 93 (1986). The Senate listed factors that might be probative of a Section 2 violation, including a history of official discrimination, racially polarized voting, electoral practices that may enhance discrimination against a minority group, a denial of access to a candidate slating process, discrimination in education, employment or health which hinders the minority group's ability to participate in the political process, racial appeals in political campaigns, a lack of minority candidates elected to public office, a lack of responsiveness to the needs of the minority group, and that the policy underlying the use of a voting qualification is tenuous.

<sup>26</sup> *See Johnson v. De Grandy*, 512 U.S. 997 (1994). In *Johnson*, the Supreme Court held that the Florida House's failure to maximize majority-minority districts was not enough to support a finding of vote dilution. The Court held that proportionality or a lack of proportionality in electoral results and representation in and of itself cannot prove or disprove a case of vote dilution.

<sup>27</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (holding unconstitutional the coverage formula under Section 4 of the Voting Rights Act). Prior to *Shelby County*, redistricting procedures and maps in certain covered jurisdictions must be cleared by the Justice Department prior to implementation. These jurisdictions had histories of discriminating against minority candidates. Without Section 4, Section 5 is unenforceable.

<sup>28</sup> 42 U.S.C. § 1973c.



exercise of their electoral franchise.”<sup>29</sup> A proposed plan is retrogressive if its net effect would reduce the effective exercise of the franchise, when compared to the benchmark.<sup>30</sup> In other words, if the change makes it less likely that a protected minority group will be able to elect a representative, the plan will be seen to be retrogressive under Section 5 and would be prohibited from going into effect.<sup>31</sup>

### B. Racial Redistricting Limitations

It is not only important to protect minority populations so that they can elect representatives, but also important to protect these populations from being over-concentrated or packed in only a few districts, in order to dilute their influence in other districts. While the Voting Rights Act encourages the use of racial performance statistics to guard the ability of a minority group to elect candidates, the Equal Protection Clause and the Supreme Court’s line of racial gerrymandering cases provide limits to the use of race in redistricting. In 1993, the Court held in *Shaw v. Reno* that redistricting based upon racial considerations must be subject to strict scrutiny.<sup>32</sup> Two years later, the Court invalidated Georgia’s redistricting plans designed with the intent of creating a third majority-minority district.<sup>33</sup> Additionally, the Equal Protection Clause’s ban on the use of racial considerations only applies when race is the *predominant* factor in redistricting.<sup>34</sup> If political considerations play a role in the redistricting process so that race alone is not the predominant factor, then the Equal Protection Clause has not been violated.<sup>35</sup> In *Easley v. Cromartie*, the Court rejected the plaintiff’s Equal Protection claim because they could not prove that racial motives were “dominant and controlling,” and that political reasons could explain the packing of African-American voters

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<sup>29</sup> *Beer v. United States*, 425 U.S. 125, 141 (1976).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Shaw v. Reno*, 509 U.S. 630 (1993). Redistricting bodies should be conscious of race to the extent that they must comply with Sections 2 and 5 of the Voting Rights Act. *Shaw* held that part of the danger of having seats that were created by a predominantly partisan purpose was that representatives would feel like they were beholden to mapmakers and certain groups rather than his or her entire constituency.

<sup>33</sup> *Miller v. Johnson*, 515 U.S. 900 (1995); *see also* *Bush v. Vera*, 517 U.S. 592 (1996) (holding that complying with Section 2 of the Voting Rights Act was a compelling state interest, but Texas’ plan was not narrowly tailored to further such an interest).

<sup>34</sup> *Easley v. Cromartie*, 532 U.S. 234, 241 (2001).

<sup>35</sup> *See id.*

into a “snakelike” district.<sup>36</sup> The Supreme Court continues to hear racial gerrymandering claims every decade.<sup>37</sup>

### C. One-Person, One-Vote Requirements

Redistricting bodies have a duty to ensure that each congressional district be equal in population “as nearly as is practicable.”<sup>38</sup> Any deviation from exact population equality usually must be justified by a consistent state policy.<sup>39</sup> Even granted a consistent state interest, deviations that cause a one percent spread from the most populous district to the least populous district will likely be held unconstitutional.<sup>40</sup> When drawing state legislative lines, the redistricting bodies have a little more leeway; the districts must only be “substantially equal.”<sup>41</sup> Generally, courts will allow for deviations of up to ten percent; however, larger deviations can be justified by compelling reasons, such as compliance with the Voting Rights Act, while smaller deviations could be seen as unacceptable if they are used to further partisan goals.<sup>42</sup>

### D. Partisan Gerrymandering

While the *Shaw* line of racial gerrymandering cases offer a remedy for redistricting efforts in which race predominates, there is no justiciable federal standard to decide cases in which political interests are the major factors in the redistricting efforts. While the Equal Protection Clause provided a standard to apply to one-person one vote claims, courts had repeatedly refused to weigh in on claims of partisan gerrymandering.<sup>43</sup>

In *Davis v. Bandemer*, Justice White required that plaintiffs prove that voters have been “unconstitutionally denied their chance to effectively influence the political process.”<sup>44</sup> The Court held that the

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<sup>36</sup> Easley, 532 U.S. at 241-42.

<sup>37</sup> See, e.g., Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (holding that Alabama’s redistricting scheme was an unconstitutional racial gerrymander because race was the predominant motive in redistricting).

<sup>38</sup> See Wesberry v. Sanders, 367 U.S. 1 (1964).

<sup>39</sup> Justin Levitt, *All About Redistricting: Where are the Lines Drawn?*, LOYOLA LAW SCHOOL, <http://redistricting.lls.edu/where.php>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* (comparing *Voinovich v. Quilter*, 507 U.S. 146 (1993) with *Larios v. Cox*, 300 F. Supp 1320 (N.D. Ga. 2004) (three judge court), *aff’d sub nom. Cox v. Larios*, 542 U.S. 947 (2004). In *Voinovich*, the Court upheld the redistricting plan, despite a deviation over 10%, because the deviations were necessary to preserve county boundaries. In *Larios*, the Court rejected a plan with 10% deviation, because there were no legitimate reasons for such deviation.

<sup>43</sup> *Davis v. Bandemer*, 478 U.S. 109, 120 (1986).

<sup>44</sup> *Id.* at 124.

plaintiffs failed to establish a continued inability to influence the political process.<sup>45</sup> *Bandemer* effectively foreclosed all political gerrymandering claims.<sup>46</sup> Courts have been extremely hesitant to intrude upon a traditionally legislative function, and generally have deferred to state legislatures, even in cases involving the most egregious of gerrymandered maps.<sup>47</sup>

In 2004, the Supreme Court again took up a political gerrymandering case.<sup>48</sup> In *Vieth v. Jubelirer*, the Court rejected a challenge to Pennsylvania Republicans' congressional redistricting scheme that allegedly sought to balance out Democratic gains in redistricting in other parts of the nation.<sup>49</sup> A four-justice plurality held that such claims were not justiciable and lacked constitutionally discernable standards of review.<sup>50</sup> Justice Kennedy concurred in judgment, writing that while such a standard might be found in the future, none existed at the time.<sup>51</sup> Justices Stevens, Souter, and Breyer wrote separate dissents, arguing that such claims were justiciable, but disagreeing on the standard to apply.<sup>52</sup> Justice Stevens argued that the Court should have adopted an approach like that adopted in *Shaw*, holding that plans with a predominant purpose to achieve political gain were unconstitutional.<sup>53</sup>

Two years later, the Court again declined to step in to invalidate another partisan gerrymander in *League of United Latin American*

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<sup>45</sup> Davis, 478 U.S. at 124.

<sup>46</sup> See Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 248–49 (2009) (explaining that no political gerrymandering claims have succeeded after *Bandemer*). In one case, *Ragan v. Vosburgh*, No. 96-2621, 1997 WL 168292, at \*6 (4th Cir. 1997) the plaintiffs succeeded on such a claim (involving a system of electing judges statewide), but the decision was rendered moot after the state legislature adopted a new system of elections.

<sup>47</sup> See *Bandemer*, 478 U.S. at 143 (explaining that the Supreme Court does not have a long tradition of intervention in redistricting cases); see also Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002). Prior to *Baker v. Carr*, in 1962, such claims had been dismissed as part of the “political question” doctrine, in which it was seen to be desirable for courts to stay out of the “political thicket.” *Baker*, 369 U.S. 186. As many commentators have noted, and as the line of political gerrymandering cases describe, the courts have not been willing to venture into this “political thicket” in cases of mixed motive, or to draw a line in which political gerrymandering would no longer be acceptable from an Equal Protection standpoint. *Id.*

<sup>48</sup> See *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>49</sup> *Id.*

<sup>50</sup> *Vieth*, 541 U.S. at 267.

<sup>51</sup> *Id.* at 306 (Kennedy, J., concurring).

<sup>52</sup> *Id.* at 317–368 (Stevens, Souter, and Breyer, J., dissenting).

<sup>53</sup> *Id.* at 317 (Stevens, J., dissenting).

*Citizens v. Perry*.<sup>54</sup> In 2003, the Texas Legislature redistricted after Republicans won the Texas House of Representatives, modifying the map made at the beginning of the decade to maximize Republican gains in Congress.<sup>55</sup> While some Texas Republicans admitted that political gain was the sole motive, the Court again dismissed the claim of partisan gerrymandering.<sup>56</sup> While at least five Justices on the current Court believe that a standard could be found, it seems like the most likely remedy for a political gerrymander will be at the state level. The Supreme Court has largely refused to intervene in political gerrymandering matters.

### III. REDISTRICTING IN FLORIDA

#### A. *Before Fair Districts*

Florida is in the peculiar position of being a swing state on the national level, but somewhat less competitive on a local level.<sup>57</sup> While Democrats outnumber Republicans in registered voters, Republicans garner a super-majority in the State House of Representatives, and twenty-six out of forty seats in the State Senate.<sup>58</sup>

Like in many other Southern states, Democrats traditionally controlled the Florida Legislature and elected most governors. But by the 2000 election, their political fortunes had been reversed. Republicans controlled seventy-five of 120 House seats and twenty-five of forty Senate seats, putting them in the driver's seat for the next redistricting process.<sup>59</sup> After a largely partisan redistricting process, Republicans solidified their gains. Republicans were able to reduce "safe" Democratic seats in the House from 53 to 46 and Democratic "leaning" seats from 7 to 3.<sup>60</sup> By increasing the concentration of Democrats in safe seats, while spreading Republican voters into several safe seats, Republicans were

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<sup>54</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (explaining that the Texas redistricting effort was inherently suspicious because it took place during the middle of the decade and without any other compelling reason to redistrict).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> I would probably classify Florida as a "purplish" state. While President Barack Obama won Florida twice, only three Democrats have won a statewide election in Florida since 2000: Bill Nelson in 2000, 2006, and 2012; Chief Financial Officer Alex Sink in 2006; and Obama in 2008 and 2012.

<sup>58</sup> See Devin Ombres, *The Recent History of Gerrymandering in Florida: Revitalizing Davis v. Bandemer and Florida's Constitutional Requirements on Redistricting*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 297 (2014).

<sup>59</sup> *Id.* at 312.

<sup>60</sup> *Id.* at 314.

able to protect their majority.<sup>61</sup> Barring a wave election, it would have been nearly impossible for Democrats to win a majority of seats.<sup>62</sup> The same patterns held true for the Senate and congressional maps.<sup>63</sup> During the decade, only three congressional seats switched parties, and all switched back to the Republican Party by the 2010 Election.<sup>64</sup>

Democrats challenged the maps in *Martinez v. Bush* unsuccessfully.<sup>65</sup> The plaintiffs failed to prove instances of intentional discrimination or vote dilution under Section 2.<sup>66</sup> Additionally, they were unable to succeed on their political gerrymandering claim, in part due to their inability to satisfy the demanding standards under *Bandemer*.<sup>67</sup>

### B. The Fair Districts Amendments

Prior to the approval of Fair Districts, Florida's constitutional requirements guiding the redistricting process were no more stringent than the requirements under the United States Constitution and the Voting Rights Act.<sup>68</sup> With the approval of the two amendments in 2010, Fair Districts provided courts with a framework to apply for political gerrymandering claims.

#### 1. Adoption of Fair Districts

Wary of partisan gerrymandering, citizen groups gathered signatures to put the Fair Districts Amendments on the ballot as Amendments 5 and 6. Both Amendments passed with almost 63% of the vote. According to the chain of the Fair Districts campaign, the purpose of the Amendments was to require legislators to draw districts “that make sense geographically, and that are *not rigged to achieve a political result*” (emphasis added).<sup>69</sup>

The Florida Supreme Court, upon approving the Amendments for the ballot, stated that the overall goal of the Amendments was twofold: “to

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<sup>61</sup> Ombres, *supra* note 58, at 317.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 316 (describing how Republicans were able to create another safe district in Congress).

<sup>64</sup> *Id.* at 321.

<sup>65</sup> *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D.Fla. 2002).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Apportionment I*, *supra* note 22, at 598.

<sup>69</sup> See Steve Bousquet, *African American Legislators Split on Changing Redistricting Method*, TAMPA BAY TIMES, Mar. 10, 2010, <http://www.tampabay.com/news/politics/legislature/african-american-legislators-split-on-changing-redistricting-method/1079561>.

Mrs. Freidin later added that her organization's goal was to level the playing field in elections.

require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations,” and “to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts . . . are avoided.”<sup>70</sup>

With the approval of Florida voters, Amendments 5 and 6 were codified in Article III of the Florida Constitution. Section 21 (a), codifying Amendment 5, reads:

In establishing legislative district boundaries:

(a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within sub-sections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.<sup>71</sup>

Amendment 5 establishes limitations on redistricting in the Florida House and Senate. Its corollary, Amendment 6, is codified in Section 20 of the Constitution, with almost identical language applying to congressional redistricting.<sup>72</sup> These limitations add a more comprehensive framework to preexisting standards for the Florida courts to apply.

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<sup>70</sup> *Apportionment I*, *supra* note 22, at 636.

<sup>71</sup> Art III, §21(a), Fla. Const.

<sup>72</sup> Art III, §21(b), Fla. Const.

### C. Applying the Standards

Justice Pariente, writing for the majority in *Apportionment I*, provided the framework to apply Section 21 of the Florida Constitution. The Florida Supreme Court can only act if the Florida Legislature fails to follow constitutional requirements; the doctrine of separation of powers requires judicial restraint to avoid injecting the Florida Supreme Court's personal views into a legislative matter.<sup>73</sup> The Florida Supreme Court should defer to the Florida Legislature and not wholly disregard policy choices when those choices are not inconsistent with constitutional standards.<sup>74</sup>

In analyzing the language of the Amendments, the Florida Supreme Court found that in cases where "tier-one" standards (sub-section 21(a)) conflicted with "tier-two" standards (sub-section 21(b)), the Florida Legislature should adhere to the requirements of tier-one before complying with tier-two whenever practicable or feasible.<sup>75</sup>

#### 1. Tier-One Standards

The requirement that no plan be drawn to favor a political party or candidate is new to Florida, but contained in the laws of six other states.<sup>76</sup> While federal gerrymandering claims require excessive or "invidious" intent, Florida's Constitution prohibits any intent and applies to both individual districts and the entire legislative plan.<sup>77</sup> Because the effects of a redistricting plan are predictable, the focus is on both direct and circumstantial evidence of intent.<sup>78</sup> The effects of a plan, the shape of district lines, and the demographics of an area are all objective indicators of intent.<sup>79</sup> The Florida Supreme Court can consider all of the evidence to reach such a conclusion.<sup>80</sup>

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<sup>73</sup> *Apportionment I*, *supra* note 22, at 606.

<sup>74</sup> *Id.* at 608.

<sup>75</sup> *Apportionment I*, *supra* note 22, at 615.

<sup>76</sup> *Id.* California and Washington have these provisions in their state constitutions. Idaho, Iowa, Montana, and Oregon have statutory restraints on such redistricting motives. *Id.* n.19. The Florida Supreme Court noted that previous instances of political gerrymandering were an "unfortunate fact of political life around the country," but not illegal. *See id.* at 616 (citing *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002)); *see also* *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>77</sup> *Apportionment I*, *supra* note 22, at 617.

<sup>78</sup> *Id.* at 617. The effects of a redistricting plan are predictable for several reasons. Legislators and consultants have access to advanced data that allows them to identify and choose voters. More voters tend to identify with political parties and ideological positions. They tend to be clustered in certain areas. Finally, these voters are relatively loyal to a political party and its candidates.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Such unconstitutional intent can be inferred by a departure from tier-two redistricting principles without other justifications.<sup>81</sup> The Florida Supreme Court noted that a desire to maintain the integrity of political subdivisions, and compact and contiguous districts would undermine opportunities for political favoritism.<sup>82</sup> Intent may be inferred when a district's shape is bizarre without countervailing justifications.<sup>83</sup> Moreover, the manipulation of district lines to include or exclude incumbents' previous districts or current addresses could prove intent to favor an incumbent.<sup>84</sup>

Section 21 (a) is consistent with the provisions of the Voting Rights Act by preventing vote dilution and protecting the opportunity of a minority group to elect a candidate of its choice.<sup>85</sup> The protection of minority voters may entail a modification of tier-two requirements, though only to the extent necessary.<sup>86</sup> However, if a plan goes beyond what is necessary to avoid retrogression, it can be invalidated as an impermissible racial gerrymander.<sup>87</sup> The Florida Supreme Court required a review of the 1) voting age population (VAP), 2) voter registration data, 3) voter registration of actual voters, and 4) election results history.<sup>88</sup> The Florida Supreme Court rejected an argument that the minority population in districts should not decrease (retrogress), but instead, the above factors should be used in consideration to determine if the minority group was still able to elect a candidate of choice.<sup>89</sup>

The last tier-one requirement is contiguity. The Florida Supreme Court defined contiguous as "being in contact, touching along a boundary or at a point."<sup>90</sup> If one point is isolated from the rest of the district by another district, or only touches at a common angle, it is likely to not be contiguous.<sup>91</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Apportionment I, supra* note 22, at 617.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 618–19.

<sup>85</sup> *Apportionment I, supra* note 22, at 618-19. These requirements are in Section 2 and Section 5 of the Voting Rights Act, respectively. While Section 5 requirements were limited to covered jurisdictions, the minority voting protections here were extended throughout the entire state.

<sup>86</sup> *Id.* at 626.

<sup>87</sup> *Id.* at 627 (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993)).

<sup>88</sup> *Id.* at 627.

<sup>89</sup> *Id.* The court held that legislature should not dismantle majority-minority districts, or weaken other historically performing districts. *Id.* In coalition or crossover seats, minority groups have the ability to elect candidates of choice, usually in conjunction with other like-minded groups of voters. *See id.* at 625.

<sup>90</sup> *Id.* at 628.

<sup>91</sup> *Id.*



## 2. Tier-Two Standards

First, Section 21 (b) requires legislators to make an “honest and good faith effort” to construct districts “as nearly of equal population as practicable,” balancing other legitimate considerations, and following federal one-person, one-vote standards.<sup>92</sup>

The second tier-two requirement is compactness.<sup>93</sup> The Florida Constitution does not define the term, but the Florida Supreme Court interpreted it to mean geographic compactness by reviewing the shape of the district and by quantitative geometric measures of compactness such as the “Reock method” and the “Area/Convex Hull method.”<sup>94</sup> The Constitution does not require the highest scores; some districts, such as the district enclosing the Florida Keys, are naturally not compact.<sup>95</sup> Additionally, this requirement may be superseded by other legitimate considerations such as to keep the boundaries of political subdivisions.<sup>96</sup>

The final requirement under Section 21 (c) is to utilize existing geographic and political boundaries where feasible.<sup>97</sup> Generally, such boundaries are utilized and keep communities of interest together.<sup>98</sup> The Florida Supreme Court approved the House’s choice to prioritize county boundaries, while rejecting the Senate’s broad use of demarcations and roadways, criticizing the approach as rendering the constitutional provisions “meaningless and standardless.”<sup>99</sup>

Overall, the Florida Supreme Court noted that the goal of the second tier requirements were to guard against gerrymandering, and to provide the Court with indicators as to how well the Florida Legislature complied with the tier-one formulae.<sup>100</sup> The tier-two frameworks provide an objective starting point for analyzing challenges to the maps.<sup>101</sup> Finally, the challengers to a redistricting plan should be able to proffer an alternative plan to achieve the same constitutional objectives to protect minorities without subordinating other standards.<sup>102</sup> In other words, the

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<sup>92</sup> *Apportionment I*, *supra* note 22, at 630.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 634–35. The Reock Method, used by the Florida House, measures the ratio between the area of the district and the area of the smallest circle that could fit around that district. *Id.* The Area/Convex Method measures the ratio between the area of the district and the area of the minimum complex polygon that can enclose the district. *Id.*

<sup>95</sup> *Apportionment I*, *supra* note 22, at 635.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 636.

<sup>98</sup> *Apportionment I*, *supra* note 22, at 637.

<sup>99</sup> *Id.* at 638.

<sup>100</sup> *Id.* at 639–40.

<sup>101</sup> *Id.* at 640–41.

<sup>102</sup> *Id.* at 641.

failure to produce a more feasible alternative could highlight the difficulties in drawing such a district, rendering such a challenge moot.<sup>103</sup>

#### *D. The 2010 Redistricting Cycle*

Florida gained an additional two congressional seats after the 2010 Census. Florida's Legislature once again set out to redraw its congressional and state legislative districts. In early 2012, the Florida Legislature passed the new maps, which were signed into law by Governor Rick Scott. However, the redistricting process was not without controversy.

Throughout 2011, the Florida Legislature held public hearings and committee meetings in what was supposed to be a transparent redistricting process.<sup>104</sup> On the contrary, the redistricting process was scarred by the revelation of secret meetings and strategies between political consultants and legislators to conceal partisan intent behind their redistricting plans. The Florida Supreme Court in November 2014 revealed emails that showed that consultants played a major role in the redistricting process.<sup>105</sup> Several maps were created by consultants, but were submitted under the names of everyday citizens to avoid suspicion that partisan consultants created the maps.<sup>106</sup> Moreover, the documents revealed some of the deliberations involved in the redistricting process. One email noted that they had to correct the maps to include the home of a Republican Senator.<sup>107</sup> Another indicated that one plan would retire a long-serving Republican Congressman.<sup>108</sup> Finally, the maps revealed a fundamental intent to redistrict for partisan advantage.<sup>109</sup> One expert noted that it would be impossible to draw the warped districts without

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<sup>103</sup> *Id.*

<sup>104</sup> See FLA. HOUSE OF REPRESENTATIVES, *Special Session 2014A Congressional Redistricting*, FLORIDA REDISTRICTING, <http://www.floridaredistricting.org/> (last visited Jan. 19, 2015).

<sup>105</sup> See Brandon Larrabee, *Redistricting Process Under Scrutiny*, HERALD-TRIBUNE (Nov. 26, 2014) <http://politics.heraldtribune.com/2014/11/26/redistricting-process-scrutiny/>.

<sup>106</sup> *See id.*

<sup>107</sup> See Peter Schorsch, *Read Here: The Trove of Redistricting Documents the Florida GOP Sought to Keep Secret*, SAINT PETERSBLOG (Nov. 23, 2014) <http://www.saintpetersblog.com/archives/167956>. The documents are available at <https://www.scribd.com/doc/247933322/The-Redistricting-Documents-The-Florida-GOP-Fought-To-Keep-Secret>.

<sup>108</sup> See Peter Schorsch, *Read Here: The Trove of Redistricting Documents the Florida GOP Sought to Keep Secret*, SAINT PETERSBLOG (Nov. 23, 2014) <http://www.saintpetersblog.com/archives/167956>.

<sup>109</sup> See Schorsch PDF file, *supra* note 107, at 8. "I count 28 R seats, 29 if you were able to pick up the new Hispanic seat in Orlando."

such a bias; while another noted that the maps were the most biased that he had ever seen.<sup>110</sup>

The approved 2010 maps did not differ much from the maps in the 2000 redistricting cycle. In the Florida House, Democrats gained three safe seats, but lost two seats that potentially leaned Democratic.<sup>111</sup> The Senate plan created an additional Republican-leaning district, while costing Democrats a safe seat.<sup>112</sup> Additionally, the congressional map consolidated Republican gains in the past decade, bolstering some Republican seats.<sup>113</sup> On the whole, Democratic seats were made more Democratic, and safe Republican seats slightly more Republican, so as to maximize safe Republican seats, protecting their majority.<sup>114</sup>

### *E. Apportionment I*

Under the Florida Constitution, the Attorney General is required to petition the Florida Supreme Court for declaratory judgment within fifteen days of the passage of the apportionment plan, and the Supreme Court is required to enter judgment within thirty days of the petition.<sup>115</sup> On February 9th, 2014, the Senate passed Senate Joint Resolution 1176, apportioning the state into 120 House and 40 Senate districts.<sup>116</sup> The Supreme Court, after holding oral argument, approved the Florida House map, but rejected several districts in the Florida Senate's plan.<sup>117</sup>

#### 1. Challenges

The Florida Democratic Party ("FDP") and a coalition of groups including the League of Women Voters of Florida, the National Council of La Raza, and Common Cause Florida ("Coalition") challenged that the redistricting plans violated the Florida Constitution.

First, they argued that a statistical analysis of the plans revealed an overwhelming partisan bias in registration and election results.<sup>118</sup> Voter registration statistics revealed that Republicans had an advantage in 22 of 40 Senate districts and 61 of 120 House districts.<sup>119</sup> Additionally, the Republican Governor would have won in 26 Senate districts and 73

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<sup>110</sup> Paula Dockery, *Fair District Amendments Make Impact*, THE LEDGER (June 18, 2014) <http://www.theledger.com/article/20140618/COLUMNISTS0309/140619229>.

<sup>111</sup> See Ombres, *supra* note 58, at 323.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Art. III, § 16(e), Fla. Const.

<sup>116</sup> *Apportionment I*, *supra* note 22, at 600.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 641.

<sup>119</sup> *Id.* at 642.

House districts despite winning only 50.6% of the two-party vote.<sup>120</sup> While the Florida Supreme Court held that these statistics might be depictive of a lack of political fairness, these statistics go to effect and not improper intent.<sup>121</sup> In fact, Democratic voters tend to cluster in urban areas, creating a natural “packing” effect.<sup>122</sup> Additionally, this imbalance could be the result of the required compliance with the Voting Rights Act.<sup>123</sup> Finally, unlike states that encourage competitive districts, Florida’s Constitution does not require a balanced map, or proportional representation, but merely a neutral map without improper intent involved.<sup>124</sup>

#### a. House Map and House District Analysis

The Florida Supreme Court approved the plans for the Florida House without modifications.<sup>125</sup> The court found no evidence of improper intent, and further, compliance with the tier-two standards was designed to serve as a bellwether for a political gerrymander.<sup>126</sup> The challengers failed to find any retrogression in the overall plan or evidence of a racial gerrymander.<sup>127</sup> Most districts were compact, and the few irregular districts were justified by compliance with the Voting Rights Act or natural geography.<sup>128</sup> Finally, the Florida Supreme Court found that the House’s use of county boundaries whenever possible was a consistent and reasoned approach.<sup>129</sup>

After reviewing the map as a whole, the Florida Supreme Court examined and approved the districts challenged by the FDP and Coalition. In some cases, tier-two formulae were not satisfied, but were justified by compelling reasons, foremost, preserving minority voting strength<sup>130</sup>. Districts 70, 88, 115, and 117 were all challenged for lack of compactness, while 100, 101, 102, 103, 105, 115, and 117 were challenged for failure to utilize municipal boundaries.<sup>131</sup> However, all these districts had large minority protections that warranted protection

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Apportionment I, supra* note 22, at 643.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Apportionment I, supra* note 22, at 644–45.

<sup>127</sup> *Id.* at 645.

<sup>128</sup> *Id.* at 645.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 647–53.

from retrogression under Section 5 of the Voting Rights Act and tier-one of the Florida Constitution's requirements.<sup>132</sup> The Florida Supreme Court held that the Florida Legislature was limited in options in these districts, and the challengers could not redraw them without retrogressive effect.<sup>133</sup>

#### b. Senate Map and Senate District Analysis

While the Florida Supreme Court held that the Florida House made adequate efforts to comply with Florida's anti-gerrymandering amendment, it found that the Florida Senate made little modifications to the partisan map in 2002, and ordered the Senate to modify its map.<sup>134</sup>

The Senate plan as a whole demonstrated a clear pattern of unconstitutional intent.<sup>135</sup> Incumbents were spared challenges against other incumbents, and were given large parts of their prior constituencies.<sup>136</sup> Moreover, the Senate's renumbering process benefitted incumbents to allow them to serve longer than the constitutional term limits.<sup>137</sup> Furthermore, 70% of overpopulated districts were Republican-performing districts used to shore up Republican support in these seats.<sup>138</sup> Additionally, a number of districts had low compactness scores.<sup>139</sup> Finally, the Senate's choice of political boundaries was inconsistent throughout the map.<sup>140</sup>

The numbering of a Senate district is critical because it determines the years in which Senate elections are held, and the eligibility of Senators for election.<sup>141</sup> Under the Senate's plan, odd-numbered districts were assigned to those senators elected to terms of two years or less prior

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Apportionment I, supra* note 22, at 653.

<sup>135</sup> *Id.* at 654.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Apportionment I, supra* note 22, at 654.

<sup>139</sup> *Id.* at 656.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 657. *See* Art. III, §15(a-b), Fla. Const. Elections for Senate in odd-numbered districts are held in the years the numbers of which are multiples of four, whilst even-numbered districts hold elections in the even-numbered years that are not multiples of four. *Id.* Additionally, the next election after a reapportionment, some senators shall be elected for two-year terms to maintain staggered terms. *Id.* Florida law limits the length of a legislator's term by preventing those who have served in office for eight consecutive years from seeking re-election. *Apportionment I, supra* note 22, at 657. By adding the staggered two-year terms, most Senators could serve a maximum of ten years in office. *Id.*

to redistricting, and even-numbered districts assigned to those elected to four year terms prior to redistricting.<sup>142</sup> In effect, almost every incumbent was given an opportunity to serve additional years, both frustrating the intent of the term-limits amendment, and advantaging incumbents as prohibited by the Fair Districts Amendment.<sup>143</sup>

The Senate established District 1 in order to keep the coastal districts of Florida's panhandle together.<sup>144</sup> By doing so, however, it sacrificed compactness, and concerns for political boundaries, splitting five counties, and switching between different boundaries such as major and minor roads, and various geographical features.<sup>145</sup> The Florida Supreme Court held that because compactness, a tier-two requirement, was sacrificed for a non-compelling need, the district was constitutionally invalid.<sup>146</sup>

Senate Districts 6 and 9 are bordering districts in Northeast Florida that were challenged for using the minority voting protections as a pretext for partisan favoritism. The State proffered that the district was formed to promote minority-voting opportunities, but neither the district nor its predecessor contained a majority black population.<sup>147</sup> The Florida Supreme Court sided with the challengers because their alternative District 6 was more compact, was wholly contained in Duval County, and preserved minority voting populations.<sup>148</sup> Additionally, because District 9's lack of compactness was the result of District 6's configuration, it was unconstitutional as well.<sup>149</sup>

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<sup>142</sup> *Apportionment I, supra* note 22, at 661.

<sup>143</sup> *Id.* at 659–61.

<sup>144</sup> *Id.* at 663.

<sup>145</sup> *Id.* Senate District 1 had a Reock score of 0.12, where more compact districts are closer to 1. The Coalition's alternative map only split one county in the Panhandle. *Id.*

<sup>146</sup> *Apportionment I, supra* note 22, at 665. The goal to create an urban and a rural district could be a rational state interest, but other tier-two constraints such as equal population requirements, or to follow municipal or county boundaries would be more compelling. *Id.* The fact that both Districts 1 and 3 kept over 80% of their predecessor districts' population was noted by the court and could signal an intent to aid incumbents. *Id.*

<sup>147</sup> *Apportionment I, supra* note 22, at 665.

<sup>148</sup> *Id.* at 668–69. While the alternative district had a smaller black voting-age population (VAP), the Florida Supreme Court found that the district would be a Democratic-performing district, and that Black voters would control the Democratic primary, consisting of 64% of primary voters, affording black voters the opportunity to elect their preferred candidates. *Id.* It also was much more compact (0.32 Reock score). *Id.*

<sup>149</sup> *Id.* at 669. District 6 was drawn to take in Democratic neighborhoods, making the surrounding districts less Democratic. *Id.* Again, the districts retained most of the population from the 2002 map, which had no limitations on partisan gerrymandering. *Id.*

Districts 10 and 12 were challenged on the grounds of partisan favoritism.<sup>150</sup> District 10 is fairly compact, but contains a 12-mile long appendage in between Districts 12 and 13.<sup>151</sup> The appendage was on average only a few miles in width, and contained the home of an incumbent Senator.<sup>152</sup> Because District 10 was visually non-compact, contained an appendage to reach out to encompass an incumbent, and could not be justified on the basis of protecting minority-voting strength, it was constitutionally invalid.<sup>153</sup>

Much like District 1, the Florida Supreme Court invalidated District 30 because it was non-compact, and split geographic counties.<sup>154</sup> The Florida Legislature claimed that the purpose of the district was to tie coastal communities together, but the court invalidated the district because this interest cannot come at the expense of required constitutional standards.<sup>155</sup>

Finally, the Florida Supreme Court invalidated Districts 29 and 34, in Southeast Florida, which had similar departures from compactness and political boundary standards that led to the conclusion of improper intent.<sup>156</sup> District 34 was a 50-mile long, narrow district stretching from Northern Palm Beach County into Southern Broward County, slicing through neighborhoods and cities along the way.<sup>157</sup> District 34 bordered to the north of District 29, and then traveled alongside its eastern boundary along the coastline.<sup>158</sup> The Senate tried to justify compliance with minority protection by noting that District 34 had a 56% VAP.<sup>159</sup> Like Districts 6 and 9, the challengers submitted an alternative that was more compact and complied with minority protection requirements.<sup>160</sup> The Court concluded that District 34 was drawn to take Democratic

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 670.

<sup>152</sup> *Apportionment I, supra* note 22, at 670. In Senate floor debate, it was asked whether an incumbent lived in the appendage. *See id.* n. 50. The reply response indicated that it was unknown whether an incumbent lived in the appendage, though the incumbent was present at the debate. *Id.*

<sup>153</sup> *Id.* at 671. An appendage added to an otherwise compact redistrict can violate the requirement of compact districting. *Id.* (citing *Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992)).

<sup>154</sup> *Id.* at 672.

<sup>155</sup> *Id.* at 673. District 30 was described as an “upside-down alligator” and contained much of the same constituency as the former district.

<sup>156</sup> *Apportionment I, supra* note 22, at 673.

<sup>157</sup> *Id.* at 674.

<sup>158</sup> *Apportionment I, supra* note 22, at 674.

<sup>159</sup> *Id.* at 675.

<sup>160</sup> *Id.* at 674–75. District 29 had a Reock score of 0.15, while 34 had the lowest Reock score of just 0.05. *Id.* The challengers’ replacement map improved on these scores. *Id.* at 678. Additionally, the new map would also have a majority-minority district. *Id.*

voters out of District 29, creating a plan that made District 34 a competitive, Republican-leaning seat.<sup>161</sup> It found that the lack of compliance with tier-two standards was designed for political gain.<sup>162</sup>

The FDP challenged several other districts unsuccessfully.<sup>163</sup> In these cases, the Court found that the shape of the districts was explained by a compelling interest, and that the challengers failed to meet the burden of improper intent.<sup>164</sup> In Districts 4, 25, and 26, the FDP failed to demonstrate a method that would avoid splitting county lines.<sup>165</sup> In Districts 15, 28, and 33, the FDP failed to show indicators of intent or departure from traditional redistricting principles.<sup>166</sup> Finally, the FDP challenged that Districts 35 and 36, and 38 were over-packed with Democrats to dilute the Democratic vote in other districts.<sup>167</sup> In both challenges, the alternative plan would result in retrogression while decreasing compactness.<sup>168</sup>

## 2. Redrawing the Map

Holding that Districts 1, 3, 6, 9, 10, 29, 30, and 34 were invalid, the Court directed the Florida Legislature to redraw the districts in compliance with Florida's constitutional standards.<sup>169</sup> The Florida Legislature was not required to redraw the entire plan.<sup>170</sup> The Florida Legislature convened for a special session to approve the maps in March 2012, by Senate Joint Resolution 2-B.<sup>171</sup> Once again, the Florida Supreme Court was constitutionally obligated to review the Senate map.<sup>172</sup> However, this time, by a *per curiam* opinion, the revised Senate map was approved for use for the next election cycle.<sup>173</sup>

### a. Changes to the New Map

The Florida Legislature modified parts of twenty-six of the original forty districts in their new plan.<sup>174</sup> The FDP and Coalition again

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<sup>161</sup> *Id.* at 675.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 679.

<sup>164</sup> *Apportionment I, supra* note 22, at 679–80.

<sup>165</sup> *Id.* at 679.

<sup>166</sup> *Apportionment I, supra* note 22, at 679.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 680.

<sup>169</sup> *Id.* at 685.

<sup>170</sup> *See In Re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 879–80 (Fla. 2012) (hereinafter *Apportionment II*).

<sup>171</sup> *Id.* at 880.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 881.

<sup>174</sup> *Id.* at 880.



challenged that the entire plan contained improper intent, but the Court found no new evidence of such intent.<sup>175</sup> They also claimed that the Florida Legislature did not materially alter the previously non-complying districts when it re-drew the plan.<sup>176</sup>

### b. Unchallenged Districts

The Florida Legislature made some changes to the first map that clearly complied with the new standards, so that the FDP and Coalition declined to challenge them.<sup>177</sup> District 1 was redrawn to increase compactness while only splitting Okaloosa County.<sup>178</sup> Additionally, District 23 (former District 30) became more compact, and took in much less of the former district.<sup>179</sup> Finally, Districts 29 and 34 were redrawn to become more compact, and exhibited less partisan favoritism.<sup>180</sup>

### c. Challenged Districts

The challengers alleged that District 8 was still non-compact, split counties, and was drawn to split the Democratic portion of Daytona Beach.<sup>181</sup> District 8 contains much of the southern portion of former District 6.<sup>182</sup> The Court upheld this district, holding that the Senate map was the most compact, and that ensuring population equality justified splitting the city of Daytona Beach.<sup>183</sup> The Court also noted that the Coalition's claim of partisan intent was weak in that the change had a minor impact on the district's partisan balance.<sup>184</sup>

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<sup>175</sup> *Apportionment II*, *supra* note 170, at 882.

<sup>176</sup> *Id.* at 883.

<sup>177</sup> *Id.* at 887.

<sup>178</sup> *Id.* Former Districts 1 and 3 split five counties. New District 3 contains the entirety of eleven counties in the district. *See District Maps*, THE FLA. SENATE, <http://www.flsenate.gov/Senators/Districts> (last visited Jan. 19, 2015) (displaying the approved Senate map).

<sup>179</sup> *Apportionment II*, *supra* note 170, at 887. Former District 30 had contained 84.9% of the predecessor District; District 23 contained 59.8%. *Id.*

<sup>180</sup> *Id.* at 877–79.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 887.

<sup>183</sup> *Apportionment II*, *supra* note 170, at 888.

<sup>184</sup> *Id.* In the Senate plan, and the proposed alternatives, redrawn District 6 remains a solidly Republican district, while District 8 is competitive during presidential election cycles; *see Dorothy Hukill*, BALLOTPEdia, [http://ballotpedia.org/Dorothy\\_Hukill](http://ballotpedia.org/Dorothy_Hukill). Former Representative Dorothy Hukill won 57% of the vote in the 2012 Senate Election in District 8 and ran unopposed in 2014); *see also 2014 General Election Active Registered Voters by Senate District*, FLA. DEP'T OF STATE (Oct. 18, 2014, 10:13 AM) [http://election.dos.state.fl.us/voter-registration/statistics/pdf/2014/GEN2014\\_CountyPartySenateDist.pdf](http://election.dos.state.fl.us/voter-registration/statistics/pdf/2014/GEN2014_CountyPartySenateDist.pdf). Registered Democrats outnumber registered Republicans in this district by 1,828 voters as of the 2014 general election.

The Court approved Districts 10, 13, and 14 over challenges on grounds of compactness and that they favored incumbents.<sup>185</sup> Old District 10 contained an appendage; however the Senate concluded that it could not remove the appendage without impairing minority rights in bordering districts.<sup>186</sup> Additionally, the new District 13 had little of its predecessor district, and drew two incumbent legislators together.<sup>187</sup>

In new Districts 21 and 26, the Court found that challengers failed to establish violations with the new map, finding that county lines were followed, and the maps were relatively compact.<sup>188</sup>

The Court approved the remainder of the map for the 2012 elections. Additionally, it approved of the Florida Legislature's renumbering scheme, which assigned a lottery method for randomly assigning districts with odd or even numbers.<sup>189</sup>

#### d. Concurrences

Justice Pariente concurred, holding that the challengers failed to find constitutional flaws in the map, but cited barriers to the effective execution of the voters' will. Justice Pariente found that time constraints made the fact-finding process more difficult, preventing the Court from testing the depth and complexity of the assertions made.<sup>190</sup> The Court had a thirty-day window to review complex maps and had to clear the maps before the candidate qualifying period.<sup>191</sup>

Next, Justice Pariente examined the "intent" requirement of 21(a).<sup>192</sup> Intent is separate from impact, and is a difficult inquiry, to be resolved using tier-two objective standards.<sup>193</sup> Justice Pariente found no new evidence of improper intent, but suggested that potentially, a partisan

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<sup>185</sup> *Apportionment II*, *supra* note 170, at 888.

<sup>186</sup> *Id.* at 889. The elimination of the appendage would have meant that black voters would not have controlled the Democratic primary, making it less likely that minority voters could elect a representative.

<sup>187</sup> *Id.* New Districts 10 and 13 have performed Republican in 2012 and 2014 and Republicans have a 54% and 52% proportion of the voters registered to vote with the two major parties in these districts, respectively. District 12 is Democratic performing and Democrats have 69% of the two-party registered voters in this district.

<sup>188</sup> *Apportionment II*, *supra* note 170, at 890.

<sup>189</sup> *Apportionment II*, *supra* note 170, at 880; see also Mary Ellen Klas, *Lottery Style Drawing Caps Strange Day of Redistricting Debate*, TAMPA BAY TIMES (Mar. 21, 2012, 8:06 PM) <http://www.tampabay.com/news/courts/lottery-style-drawing-caps-strange-day-of-redistricting-debate/1221212> (describing the lottery process, with the Senate President declaring the lottery the "most incumbent-neutral and random method that the Senate committee on reapportionment could devise").

<sup>190</sup> *Apportionment II*, *supra* note 170, at 892 (Pariente, J., concurring).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 895.

<sup>193</sup> *Id.*

imbalance could be used to invalidate an entire plan.<sup>194</sup> With the burden of proof on the challengers, it is difficult to effectuate the majority's standards, because any redrawing of lines will have political consequences, regardless of intent.<sup>195</sup> To separate actual intent from alleged intent is a difficult task, indeed. Justice Pariente questioned whether the intent of the Amendment could be carried out with legislators in charge of redistricting, suggesting that an independent redistricting body could bring about the desired results.<sup>196</sup>

Justice Perry concurred and dissented in holding that District 8 was improperly split, diluting black voters around Bethune Cookman University in Daytona Beach, in order to create two Republican districts.<sup>197</sup> Justice Perry wrote that although a majority-minority district was not required, the district contradicts the requirements, allowing the Florida Legislature to split a minority group before it can reach a majority-voting bloc.<sup>198</sup>

#### F. Florida's Congressional Map

Unlike Florida's legislative maps, which are automatically subject to facial review by the Florida Supreme Court, congressional maps must be challenged as part of an as-applied challenge in a circuit court.<sup>199</sup>

In early 2012, multiple groups filed suit in a Leon County Circuit Court to challenge Florida's congressional map.<sup>200</sup> After a lengthy bench trial, in July 2014, Judge Terry P. Lewis found congressional districts 5 and 10 to have violated the Florida Constitution, rendering the map unconstitutional.<sup>201</sup>

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<sup>194</sup> *Id.* at 897 (Pariente, J., concurring). Justice Pariente suggests that defining a threshold would be very difficult. Perhaps this is similar to the challenges faced by the United States Supreme Court in *Vieth*.

<sup>195</sup> *Apportionment II*, *supra* note 170, at 898.

<sup>196</sup> *Id.* at 897.

<sup>197</sup> *Id.* at 898 (Perry, J., concurring in part and dissenting in part).

<sup>198</sup> *Apportionment II*, *supra* note 170, at 901. Justice Perry worries that approving District 8 would set a precedent that would make it difficult to challenge the district because it wouldn't be "retrogressive" from that point onward. Additionally, he wrote that the new districts failed to follow consistent geographical boundaries.

<sup>199</sup> See Peter Schorsch, *Judge Rejects Legislature's request to dismiss challenge to Senate redistricting plan*, SAINTPETERSBLOG (Jan. 17, 2013) <http://www.saintpetersblog.com/archives/82626> (In as-applied challenges, circuit courts can consider the facts of the case as well as the law. The Florida Supreme Court does not handle as-applied challenges).

<sup>200</sup> These cases were consolidated to form *Romo v. Detzner*, No. 2012-CA 000412, 2014 WL 3797315, \*1 (Fla. Cir. Ct. July 10, 2014) (hereinafter "Romo").

<sup>201</sup> *Id.* at \*3-4. Judge Lewis held that the inquiry was into the process, end result, and motive behind the legislation.

### 1. Congressional Districts 5 and 10

Congressional District 5 immediately failed the tier-two requirements as it was visually non-compact, bizarrely shaped, wound all the way down from Jacksonville to Orlando, featured an appendage into District 7, and followed few political boundaries.<sup>202</sup> The Florida Legislature's justification for the district was compliance with minority voting protections by creating a majority-minority district.<sup>203</sup> However, the plaintiffs showed that a more compact district could have been drawn without being retrogressive; the last map had only a plurality black population.<sup>204</sup> Nor was the population large enough or geographically compact for the Voting Rights Act to require a majority-minority district.<sup>205</sup> Finally, the appendage into District 7 appeared to be drawn to favor the Republican Party by capturing the area's minority population.<sup>206</sup> Because of the failure to meet tier-two principles, and a finding of intent to benefit the Republican Party, District 5 was invalid.<sup>207</sup>

While District 10 was mostly compact, it contained an appendage that wrapped under and around District 5.<sup>208</sup> The Florida Legislature claimed that it was necessary to protect the minority voting protections in bordering Districts 5 and 9, but Judge Lewis found that it was unnecessary to avoid retrogressive effect.<sup>209</sup> The appendage also improved the re-election odds for Republican incumbent Congressman Webster.<sup>210</sup> Much like bordering District 5, a lack of compactness combined with unconstitutional intent rendered the district unconstitutional.<sup>211</sup>

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<sup>202</sup> *Id.* at \*16. According to the Florida Supreme Court in *Apportionment I*, appendages render a district not compact and should be avoided unless necessary to fulfill tier-one principles, mainly protecting minority voting strength.

<sup>203</sup> Romo, No. 2012-CA-412, 2014 WL 3797315 at \*16.

<sup>204</sup> *Id.* The previous district also elected an African-American to Congress despite not having a majority-minority population.

<sup>205</sup> *Id.* *Gingles* requires that the minority population be geographically compact and cohesive; this district connects two distant urban populations and a black rural population connecting the two.

<sup>206</sup> *Id.* The proposed changes to District 7 decreased the number of registered Democrats in that district by 1%.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Romo, No. 2012-CA-412, 2014 WL 3797315 at \*17.

<sup>210</sup> *Id.* The number of registered Democrats was reduced from 37.2% to 36.8%.

<sup>211</sup> *Id.* at \*18.

## 2. Fixing the Congressional Map

The Florida Legislature was ordered to withdraw the congressional map to fix Districts 5 and 10.<sup>212</sup> Legislative leaders made slight fixes to the invalid maps and approved them to be sent back to the Leon County Circuit Court for approval.<sup>213</sup> The map made changes in seven districts and attempted to make the districts more visually and mathematically compact and adhered to geographical boundaries.<sup>214</sup> The legislative leaders noted the lack of partisan operatives during the new process.<sup>215</sup> However, the League of Women Voters claimed that the new plan made only slight alterations and would not correct the constitutional defects of the old plan.<sup>216</sup>

On August 22, 2014, Judge Lewis approved the changes to the congressional map.<sup>217</sup> The plaintiffs again challenged the districts, offering an East-West configuration in place of the new District 5, which went from North to South.<sup>218</sup> The Florida Legislature's changes did remedy some of the previous district's flaws by becoming more compact and removing the appendage.<sup>219</sup> Additionally, District 10's appendage was removed.<sup>220</sup> Because the new districts remedied the old maps' tier-two constitutional flaws, the Court had no choice but to accept the map.<sup>221</sup> Because the map was approved so close to the 2014 elections, presenting legal and logistical hurdles, the Court held that the 2012 map would be used for the 2014 cycle.<sup>222</sup> The plaintiffs appealed and placed the question before the Florida Supreme Court as a question of great

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<sup>212</sup> Romo, No. 2012-CA-412, 2014 WL 3797315 at \*18.

<sup>213</sup> See Mary Ellen Klas, *Florida Legislature Opens Session with Plan for Modest Redistricting Map Changes*, MIAMI HERALD (Aug 7, 2014) <http://www.miamiherald.com/news/politics-government/article1978732.html>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See Order Approving Remedial Plan, *Romo v. Detzner*, No. 2012CA-412, 2014 WL 4261829 at \*1 (Fla. Cir. Ct. July 22, 2014).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at \*2.

<sup>220</sup> *Id.*

<sup>221</sup> See *id.* ("My duty is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.").

<sup>222</sup> Order Approving Remedial Plan, 2014 WL 4261829 at \*1. Florida was one of the last states to complete the redistricting process, leaving little time for the circuit court to review the plan's constitutionality.

public importance.<sup>223</sup> The Court accepted jurisdiction and will hold oral argument on March 4, 2015.<sup>224</sup>

#### IV. ANALYSIS OF THE FAIR DISTRICTS AMENDMENTS

Did the Fair Districts Amendments to the Florida Constitution prevent the kind of nefarious partisan gerrymandering that they were designed to prevent? It's certainly not an easy question to answer. First, although we now know that partisan operatives played a role in the creation of the maps, we cannot precisely decipher the actual intent of each boundary drawn, whether each district was created for political gain or for a more legitimate reason. The set of tier-two criteria provide a modest baseline, but a shrewd legislature can craft districts that satisfy tier-two criteria while preserving political advantage. Finally, gerrymandering is most effective in the aggregate; by creating a majority of favorable, non-competitive districts, the voting majority can guarantee that they have enough votes to pass a legislative agenda. The Florida Supreme Court and Leon County Circuit Court forced changes to the maps that made the affected districts slightly fairer. But the courts' limitations to finding intent in the entire map constrained their ability to effectuate the intent of the Amendments.

##### A. *Intent vs. Effect*

As Justice Pariente noted in her concurrence in *Apportionment II*, challengers are limited by the burden of proving improper intent in a redistricting plan. As drafted, the tier-two requirements allow the Florida Supreme Court to examine intent. Additionally, the Florida Supreme Court can and should consider outside factors such as the role of consultants in the map-making process. But during the next redistricting process, consultants will likely make better efforts to conceal their role in the process. The Florida Supreme Court in *Apportionment I* held that while political effects could serve as objective indicators of intent, the Florida Constitution prohibits only intent, not disparate political effects.<sup>225</sup>

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<sup>223</sup> See *League of Women Voters of Fla. v. Detzner*, 39 Fla. L. Weekly D2079 (Fla. 1st DCA 2014).

<sup>224</sup> *League of Women Voters of Fla. v. Detzner*, No. SC14-1905, 2014 WL 5502409, at \*1 (Fla. October 23, 2014). The Florida Supreme Court will have the opportunity to apply the Fair Districts standards and perform a review of the congressional map.

<sup>225</sup> *Apportionment I*, *supra* note 22, at 617. Laughlin McDonald's nationwide standard would include predominant partisan purpose and disproportionate electoral results as elements of an unconstitutional gerrymander; see also Laughlin McDonald, *supra* note 46. Laughlin McDonald's nationwide standard would include predominant partisan

While proportional representation is not required, disparate political effects should play a greater role in the finding of improper intent.<sup>226</sup> The political impacts of gerrymandering are predictable to anybody with access to sophisticated political data.<sup>227</sup> Moreover, gerrymandering is designed to create policies that favor a party and incumbents. The Florida Supreme Court should take a more extensive look at the political impacts of an entire redistricting plan and consider that improper intent may persist although tier-two flaws are fixed. A review of the redistricting plans reveals that the decisions of the courts did little to mitigate the political effects (and thus likely political intent of the legislature).

There are drawbacks to adopting such an approach. The Voting Rights Act, and demographic clustering tend to skew electoral results away from proportionality. Incumbent success occurs nationwide, and even in states in which commissions control redistricting.<sup>228</sup> The Florida Supreme Court considered this approach, and noted that redistricting inherently has political effects, benefitting one party over the other.<sup>229</sup> However, if the purpose of the Amendments was to level the playing field, a more extensive look at election results must be incorporated.

### B. Comparing House and Senate plans

The Florida Supreme Court's decision to uphold the House map while rejecting the Senate map can be explained in part by the House's

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purpose and disproportionate electoral results as elements of an unconstitutional gerrymander; see also Ethan Weiss, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 721 (2013). Ethan Weiss suggests adopting the *Arlington Heights* test, which looks at an unequal burden on one group, the historical background of the decision, the sequence of events leading up to the decision, legislative history, and other background circumstances.

<sup>226</sup> Proportional representation generally refers to a system where parties receive a number of seats based upon the percentage of the vote that they received. A party that wins 40% of the vote would win around 40% of seats.

<sup>227</sup> Political consultants, legislators, and even knowledgeable bloggers can easily estimate the political impacts of redistricting, and even create their own maps using online tools.

<sup>228</sup> See Devin McCarthy, *Did the Cal. Redistricting Comm'n Really Create More Competitive Dist's?*, FAIR VOTE (Nov. 26, 2013) <http://www.fairvote.org/research-and-analysis/blog/did-the-california-citizens-redistricting-commission-really-create-more-competitive-districts/>. Incumbents benefit from other factors including advantages in name recognition and political successes in bringing money and jobs back to their districts.

<sup>229</sup> *Apportionment I*, *supra* note 22, at 617 (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). The Leon County Circuit Court took a closer look at the role of partisan consultants, as part of an as applied review of the redistricting process. It also utilized some of the *Arlington Heights* factors as part of its review and as suggested by Weiss.

efforts to comply with Fair Districts, in contrast with the Senate's effort to skirt the requirements.

One commentator praised the House's map as a "model plan," although it would be extremely unlikely for Democrats to achieve a majority in this decade.<sup>230</sup> Blogger Dave Trotter argued that House Republicans have "gotten smarter" allowing them to create majority districts that also complied with the constitutional requirements.<sup>231</sup> Such a map is a reminder that a durable majority can be built without creating bizarrely shaped districts. Unless a court is committed to weighing partisan effects to invalidate an entire map, such a redistricting practice can likely survive Florida's new constitutional standards. In other words, if a majority creates a map that complies with tier-two and minority protection requirements, it likely will be upheld. Such a redistricting strategy might be more effective than combating the constitutional standards directly, as the Senate tried.<sup>232</sup>

While the House map was generally regarded as fair, the Senate's map ignored tier-two requirements while protecting incumbents. But when Republicans were tasked to redraw the districts, Republicans made the districts look "nicer", but the districts were "pretty much the same."<sup>233</sup> By fixing the constitutional defects in the eight invalidated districts, the Senate was able to preserve a map that had been produced with unconstitutional intent.

Democrats under the new map would still have little chance at achieving a Senate majority.<sup>234</sup> Even with heightened anti-gerrymandering standards, the approved Senate map is not too different

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<sup>230</sup> Dave Trotter, *Understanding Republican Redistricting*, THE POLITICAL HURRICANE (Mar. 22, 2012) <http://thepoliticalhurricane.com/2012/03/22/understanding-republican-redistricting-the-district-45-project/>.

<sup>231</sup> *Id.*; see also Kartik Krishnaiyer, *Redistricting Saga: Senate Still Does Not Get It*, THE POLITICAL HURRICANE (Mar. 18, 2012) <http://thepoliticalhurricane.com/2012/03/18/redistricting-saga-senate-still-does-not-get-it/> (stating that the State House understood the mandate from the voters in a way that the Senate failed to grasp).

<sup>232</sup> See *Fla. H. R. Elections, 2012*, BALLOTPEdia [http://ballotpedia.org/Florida\\_House\\_of\\_Representatives\\_elections\\_2012](http://ballotpedia.org/Florida_House_of_Representatives_elections_2012). Democrats picked up 7 seats in the Florida House of Representatives in 2012, increasing their delegation to 45 out of 120 seats. 12 seats fell within a 5% margin of victory; see also *November 4, 2014 Gen. Election*, FLA. DEP'T OF STATE <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2014&DATAMODE=>. After the 2014 elections, Republicans increased their majority to 81 seats. 7 seats fell within the 5% margin of error.

<sup>233</sup> Dave Trotter, *New Senate redistricting plan out, GOP and incumbents with large advantages*, THE POLITICAL HURRICANE (Mar. 17, 2012) <http://thepoliticalhurricane.com/2012/03/17/new-senate-redistricting-plan-out-gop-and-incumbents-with-large-advantages/>.

<sup>234</sup> *Id.* Trotter writes that Democrats could peak at 15 seats, but likely end up with 14 or less out of 40.



from the gerrymandered 2002 maps that consistently produced a Republican majority.<sup>235</sup> While Democrats hold a small advantage in voter registration statewide, Republicans would have an advantage in 21 seats under the court-approved plan and 22 seats under the old plan.<sup>236</sup> However, while Democrats hold registration advantages in these districts, Democratic candidates perform worse than their registration advantages.<sup>237</sup> Under the old map, Democratic Gubernatorial candidate Alex Sink would have won 14 seats in 2010, and President Obama 16 seats in 2008.<sup>238</sup> Under the revised map, Democrats would be projected to pick up one more seat.<sup>239</sup>

The districts unsurprisingly performed as predicted. In 2012, in a good year for Democrats, Democrats gained two Senate seats to reach 14, ending the Republican supermajority, but still rendering Democrats a clear legislative minority.<sup>240</sup> However, only one district was truly competitive, District 34, pitting two incumbents against one another.<sup>241</sup> The streak of incumbency continued into 2014, a year of Republican gains.<sup>242</sup> Ten Senate seats were up for reelection, and incumbents won every seat by more than 15%, except for the District 34 rematch between Senators Sachs and Bogdanoff.<sup>243</sup> Despite two disparate election cycles, only one Senate incumbent lost re-election over the two cycles, and this was in the only competitive district. Clearly, the purpose of the Amendments has been frustrated with almost unanimous incumbent success, limited competitiveness, and an almost guaranteed majority for the next decade. Given these results, the Florida Supreme Court should

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<sup>235</sup> See The Prophet, Comment to *Redistricting Saga: Senate Still Does Not Get It*, THE POLITICAL HURRICANE (Mar. 18, 2012) <http://thepoliticalhurricane.com/2012/03/18/redistricting-saga-senate-still-does-not-get-it/> (noting that the 2002 districts were meant to elect 26 Republican Senators, and that the new Fair Districts standards produced a map that reflected a partisan gerrymander of the past).

<sup>236</sup> *Apportionment II*, *supra* note 170, at 896 (Pariente, J., concurring).

<sup>237</sup> See Kevin Cate, *Commentary: Fla. Democrats Should Change the Rules, Again*, PALM BEACH POST (Nov. 16, 2014 3:27 PM) <http://www.palmbeachpost.com/news/news/opinion/commentary-florida-democrats-should-change-the-rul/nh7QX/>. This is because of lower Democratic turnout in non-presidential year elections, and Dixiecrats, conservatives who used to vote Democratic, but vote Republican for most major elections.

<sup>238</sup> *Apportionment II*, *supra* note 170, at 896.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See *November 6, 2012 General Election*, FLA. DEP'T OF STATE <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/6/2012&DATAMODE>. Then-Representative Maria Sachs defeated Senator Ellyn Bogdanoff by 5.6%. No district was decided by a margin of less than 5%.

<sup>242</sup> See *November 4, 2014 General Election*, FLA. DEP'T OF STATE, <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2014&DATAMODE>.

<sup>243</sup> *Id.*

have been able to infer intent to protect incumbents and the Republican Party.

The decision to invalidate eight Senate Districts was not insignificant. But the individual changes did little to shift electoral outcomes. The fixing of Districts 1 and 3 still produced two safe Republican seats.<sup>244</sup> The alterations of Districts 6 and 9 produced a minority-performing district surrounded by safe Republican seats.<sup>245</sup> Additionally, old districts 10 and 30 remain Republican-performing despite becoming more compact.<sup>246</sup> The fixing of the South Florida districts did produce an additional Democratic seat, preventing a supermajority. Old District 29 would have been a competitive, but Republican leaning seat.<sup>247</sup> But after the Senate made 29 and 34 more compact, new District 34 became a Democratic-leaning seat.<sup>248</sup> Given the shift in partisan demographics, it is likely that Democrats garnered an extra seat until 2022.<sup>249</sup> In the end, the new Senate map created “nicer-looking” districts, but only impacted one race. If voters wanted to “level the playing field,” then nicer-looking districts won’t cut it if incumbents and party control are protected.<sup>250</sup>

### C. Congressional Modifications

Similar issues emerged from the decision to accept the Florida Legislature’s modified congressional map. In terms of fairness and

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<sup>244</sup> See *November 4, 2014 General Election*, Districts 1 and 2 (old District 3) both have large Republican registration advantages and performance.

<sup>245</sup> *Id.* The modifications may have had a small impact on District 8 to the South, which is split evenly by voter registration, but performed for the Republican candidate in 2012. *Id.* Note that the Jacksonville-based minority opportunity district was renumbered as 9, and its old bordering district as number 6.

<sup>246</sup> *Id.* The appendage to avoid an incumbent versus incumbent battle turned out to be unnecessary, and both incumbents ran in different districts and got elected.

<sup>247</sup> *Apportionment II*, *supra* note 170, at 676. It would have voted 47.7% for Democratic gubernatorial candidate Alex Sink in 2010, and 48.7% for Democratic gubernatorial candidate Jim Davis in 2006. However, Obama would have won the seat with 51% in 2008.

<sup>248</sup> Anthony Man & Aaron Deslatte, *Sens. Bogdanoff, Sachs in South Fla. Showdown*, SUNSENTINEL (Apr. 27, 2012) [http://articles.sun-sentinel.com/2012-04-27/news/fl-senate-redistricting-plan-upheld-20120427\\_1\\_bogdanoff-of-fort-lauderdale-maria-sachs-republican-ellyn-bogdanoff](http://articles.sun-sentinel.com/2012-04-27/news/fl-senate-redistricting-plan-upheld-20120427_1_bogdanoff-of-fort-lauderdale-maria-sachs-republican-ellyn-bogdanoff).

<sup>249</sup> The shift from a district nearly equal in voter registration to one in which Democrats have a 56% share of the two party vote probably accounts for the margin between the two candidates. Sachs won by over four percent in a GOP-friendly cycle. *2014 General Election Active Registered Voters by Senate District*, FLA. DEP’T OF STATE (Oct. 18, 2014, 10:13 AM) [http://election.dos.state.fl.us/voter-registration/statistics/pdf/2014/GEN2014\\_CountyPartySenateDist.pdf](http://election.dos.state.fl.us/voter-registration/statistics/pdf/2014/GEN2014_CountyPartySenateDist.pdf).

<sup>250</sup> *Apportionment I*, *supra* note 22, at 605.

incumbency challenges, the congressional map was fairer than the Senate map.<sup>251</sup> However, a majority of incumbents have won re-election comfortably.<sup>252</sup> The changes to the congressional map were insignificant.<sup>253</sup> While District 5 became more compact, and lost some black Democrats to District 10, the changes only make a heavily Democratic district slightly less Democratic, and a moderate GOP district slightly less red, but clearly favorable towards Republicans.<sup>254</sup> Simply put, a slight modification cannot cure a map with improper intent.

#### D. Competing Tier-One Requirements

Most of what has been discussed, *supra*, involves the inference of intent from deviation from tier-two requirements. But some of the most difficult cases involve the creation of minority protection districts. While compliance with minority voter protections is required under the Amendments, conservative legislators can use these protections as a pretext to pack black voters into districts to “bleach” neighboring districts of black, Democratic voters. America’s history of suppressing the black vote makes minority protection a compelling interest, but where should a court draw the line between necessary protection and excessive packing for political gain?<sup>255</sup>

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<sup>251</sup> *November 6, 2012 General Election, supra* note 241. Six incumbents lost primary or general elections during that span. Two more filled open seats.

<sup>252</sup> *Id.* Most incumbents won by comfortable margins over the span.

<sup>253</sup> See Philip Bump & Aaron Blake, *Florida’s Proposed New Congressional Map Looks Familiar*, WASH. POST (Aug. 7, 2014) <http://www.washingtonpost.com/blogs/the-fix/wp/2014/08/07/floridas-proposed-redistricting-redraw-looks-pretty-familiar/>.

<sup>254</sup> Bump & Blake, *supra* note 253 (concluding that the redraw would not have a huge impact on the GOP’s majority in Florida or nationwide); see also *supra* notes 232 and 241. Both incumbents won re-election in 2012 and 2014. District 10 was a 54-46 Romney-performing district in 2012. Its black population increased from 10 to 12.2%; see also Fla. H. R. Elections, *supra* note 232; November 6, 2012 General Election, *supra* note 241.

<sup>255</sup> Richard H. Pildes, *Is the Voting-Rights Law Now at War With Itself? Soc. Sci. and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002). Richard H. Pildes believes that coalition districts may be sufficient in terms of ensuring that minority voters can elect a candidate, because white voters are now willing to elect minority candidates at a higher rate; Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011). Adam Cox and Richard T. Holden take a different approach, holding that the Voting Rights Act benefits Democrats more than Republicans in that it constrains Republicans from denying minority voters at least one representative. They hold that the “pack-and-crack” model is not the most efficient; see also Stephen Wolf, *What if Legislators Didn’t Have to Draw Majority-Minority Dists.? Democrats Would Lose Big*, DAILY KOS, (Mar. 09, 2014 1:59 PM) <http://www.dailykos.com/story/2014/03/09/1270976/-What-if-legislators-didn-t-have-to-draw-majority-minority-districts-Democrats-would-lose-big> (performing an analysis of

The issue of retrogression is tricky. If a minority population in a district is significant but not substantial (such as in District 8), the legislature in the next redistricting cycle will not have a high benchmark minority population, potentially hurting the minority's chances to elect a candidate.<sup>256</sup> On the other hand, a district with a high minority population could require that a subsequent district also contain a high minority proportion.<sup>257</sup> For example Florida's 5th Congressional District was required to stretch from Jacksonville to Orlando to come near to a 45% black VAP, because the benchmark district was a plurality district.<sup>258</sup> The compliance with such minority voting protections can often overshadow partisan intent.<sup>259</sup> Courts should thus be wary of underlying partisan motives behind the use of minority-protection districts. In order to make the right decision, the legislature must look at the totality of the circumstances to determine how much support the minority candidate would need to get elected. The Senate had several districts invalidated for not performing a functional analysis as to when to apply minority protection provisions.<sup>260</sup> The Florida Supreme Court appears to be willing to invalidate districts if they are over-packed with minority voters and flexible on the non-retrogression issue. This seems to be a good first step in this part of the redistricting litigation.

## V. TRACKING THE SUCCESSES OF OTHER REDISTRICTING REFORMS

Other states have intent-based prohibitions on redistricting. But the redistricting process in Florida is unique in that Florida allows its legislature to draw the lines, in compliance with constitutional constraints against incumbents helping themselves.<sup>261</sup> Other states have

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redistricting without the VRA requirements and concluding that removing VRA requirements could cost Democrats 13 congressional seats, especially in the Deep South).

<sup>256</sup> This echoes Judge Perry's dissent, worrying that the new map split Daytona Beach's black population, cracking their vote into multiple districts.

<sup>257</sup> The new district would not necessarily have to have the same percentage, but would have to be drawn to avoid diminishing the minority's chances of electing a candidate.

<sup>258</sup> See *Romo*, 2014 WL 3797315 at 10 The State's expert testified that at 43.6% black VAP (voting age population), there would be a 50/50 chance of electing a minority candidate of choice.

<sup>259</sup> In cases where the legislature goes beyond what is necessary, and there is evidence of partisan intent, the district can be invalidated, as was the 5th congressional district.

<sup>260</sup> *Apportionment I*, *supra* note 22, at 656.

<sup>261</sup> See Katie Sanders, *Florida Holds the Record for Redistricting Incumbents Together*, *Will Weatherford says*, POLITIFACT (Apr. 13, 2012, 2:37 PM) <http://www.politifact.com/florida/statements/2012/apr/13/will-weatherford/florida-holds-record-redistricting-incumbents-toge/>.

prohibitions against plans that favor a party or incumbents, but these states employ redistricting commissions in place of their legislatures.<sup>262</sup> For example, Iowa prohibits the use of incumbent address, political affiliations of voters, electoral results, and demographic information, except where necessary to comply with the Voting Rights Act.<sup>263</sup> But while these standards can serve to guide a redistricting commission, they play a different role where the legislature is a primary redistricting body. Since legislators have a personal interest in redistricting, it makes it more important to have stringent guidelines against gerrymandering.

Some states allow redistricting commissions to take the process of redistricting out of the legislature's control. Many academics believe that redistricting commissions produce maps that in appearance look fairer than those created by the legislatures. However, some academics note that redistricting commissions in the Western United States have not necessarily created more competitive seats.<sup>264</sup> They have, however, created a more open and transparent redistricting process.<sup>265</sup> It is important to contrast politically independent redistricting commissions from those that are dependent on partisan public officials.<sup>266</sup> In Ohio, the political party appointing the majority of the apportionment board has seen gains in state legislative seats following each redistricting.<sup>267</sup> In contrast, models such as California's have helped limit legislative self-interest and have produced districts that reflected local priorities.<sup>268</sup>

In a survey, Nicholas Stephanopoulos found that margins of victory were lower, turnout was higher, and divergence between the overall vote and proportion of congressional seats was lower in the states that employed a commission model.<sup>269</sup> Employing a commission model to

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<sup>262</sup> *Id.*

<sup>263</sup> See IOWA CODE § 42.4 (6).

<sup>264</sup> See Grofman & Miller, *supra* note 1 (discussing Arizona's congressional races, as mandated by the state constitution, have been competitive for a Republican-leaning state).

<sup>265</sup> *Id.*

<sup>266</sup> See Huefner, *supra* note 1 (Ohio employs a model where the Secretary of State, Governor, State Auditor, and two members appointed respectively by each major party); see also CAL. CONST. art. XXI, § 2 (In contrast, California's 14-member redistricting commission is made up of California voters, selected through an application process, consisting of five voters from each major party, and four voters from neither party. Members are forbidden from holding public office, working for a public official, or lobbying for a certain period of time after being appointed to the Commission. The final maps require a vote of at least nine members).

<sup>267</sup> Huefner, *supra* note 1, at 42-43.

<sup>268</sup> See Angelo N. Ancheta, *Redistricting Reform and the Cal. Citizens Redistricting Comm'n*, 8 HARV. L. & POL'Y REV. 109, 140 (2014).

<sup>269</sup> Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 340-41 (2007).

Florida redistricting would likely require an expensive political campaign and would represent a dramatic shift in our redistricting process.<sup>270</sup> However, most academics support statewide commissions as an effective shield for the democratic process. The gains in political responsiveness would justify the costs of running such a campaign. Alternatively, proponents could seek to amend the Florida Constitution to require competitive districts such as in Arizona, or to make the intent burden easier to satisfy.<sup>271</sup> This would also require an expensive campaign, but would represent a positive shift towards greater electoral responsiveness.

### CONCLUSION

The Senate argued that it would be a “Sisyphean” task to discern improper intent.<sup>272</sup> Certainly it is not an easy task. But Florida’s Fair Districts Amendments make it unlike the cases of *Bandemer* and *Vieth*, which hold that political gerrymandering cases are not justiciable, because there are no standards to measure improper intent. In Florida, intent to favor parties is completely forbidden. There is a standard that the courts can apply. By assigning a greater weight to political effects and long term patterns, along with tier-two criteria, courts can more easily discover intent and effectuate the interests of the voters. Unless the system changes, certain constituents will not have a chance to have their voices heard. Instead, the majority will be beholden to the mapmakers and special interests that continue to get them elected as opposed to worthy policies that a potential majority of voters may support.<sup>273</sup> In the end, the court must choose between the interests of the Senate and that of the voters who desire fair elections. In the meantime, Florida voters

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<sup>270</sup> See *Campaign Finance Database*, FL. DEP’T OF ELECTIONS, <http://election.dos.state.fl.us/campaign-finance/contrib.asp#com>. A key leader behind Fair Districts Florida noted that it could cost \$10 million for such a campaign. The highest-profile ballot initiative in 2014 was Amendment 2, which would have legalized medical marijuana in the state. The proponents, *People United for Medical Marijuana* raised over \$8 million for their campaign. The opponent committee spent over \$6.3 million. Additionally, the measure would have to pass with at least 60% of the vote, against a likely well-organized and well-funded opposition.

<sup>271</sup> See *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014) (jurisdiction postponed in 135 S. Ct. 46 (2014)) (A ruling against the Arizona Commission could jeopardize such redistricting commissions across the country).

<sup>272</sup> *Apportionment I*, *supra* note 22, at 617; see also *Arizona State Legislature*, 997 F. Supp. 2d at n. 22 (“A Sisyphean task is one synonymous with futile and endless labor.”).

<sup>273</sup> *Shaw v. Reno*, 509 U.S. 630, 631 (1993) Justice O’Connor found in *Shaw* that legislators would be sent a message that only the members of a certain group would matter, and not their entire constituency.

should elect people with ethics to the legislature who will comply with the constitutional requirements. This is probably easier said than done, however.

Florida's new constitutional standards add might to the Florida Supreme Court's ability to strike the most obvious gerrymanders, and as Hebert notes, they are a significant improvement and protection for Florida voters.<sup>274</sup> But the Florida Legislature continues to be trusted to protect the interests of Florida voters. The burden of challenging districts is high for a proponent to meet. And while tier-two principles mandate a map that is free from bizarre districts, compliance with tier-two principles does not necessarily mean that the map is free from partisan intent. The creation of safe seats, the near guarantee of a majority throughout the decade, and the near unanimous record of incumbent successes indicate that the maps may not be free of such illicit intent. Under the Fair Districts precedents, the courts can only do so much to stop partisan gerrymandering, denying the ability of the voters to elect their preferred representatives. This must change. Simply put, democracy is too important to allow legislators to pick and choose their own constituents. Such a practice is inconsistent with the theory that voters should be able to choose their representatives.

In the meantime, we can only hope that our legislators have the morals to serve the people and not the mapmakers.

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<sup>274</sup> J. Gerald Hebert and Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POLY. REV. 543, 557 (2011).