

FLORIDA STATE ASSOCIATION OF SUPERVISOR OF ELECTIONS (FSASE) 2010 MID-YEAR WINTER CONFERENCE

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Saddlebrook Resort – Tampa
Wesley Chapel, Florida**

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REDISTRICTING LOCAL GOVERNMENTS IN FLORIDA – 2011

- I. The Purpose of the Process.
 - A. We are trying to divide voting districts up to closely approximate 1 person 1 vote.
 - B. The basis for reapportionment is the constitutional obligation to count the populace of the United States each decennial year and apportion congressional representation.
- II. United States Supreme Court Historical Role.
 - A. High level of importance, stemming from constitutional requirement that Congressional seats be apportioned among the states.
 - B. Equal Protection and Voting Rights Issues – will be addressed below.
 - C. Awkward process:
 - a. File in federal court; almost all other cases are heard by a single federal judge.
 - b. Redistricting cases are heard by a three panel district court, which must include at least one appellate judge.
 - c. Makes its way to the U.S. Supreme Court.
 - i. Usually U.S. Supreme Court decisions are handed down, and over the next 5-10 years, various lower court decisions will be made that interpret and apply the Supreme Court decision.
 - ii. Here, because the redistricting only occurs every 10 years, the cases more lurch from one to another, with very little development by the lower courts.

III. The General Process.

- A. County Commissions – 5 to 19 members; including at large.
- B. Even population distribution, to prevent one district from having to represent 10,000 people while another represents 100,000.
 - a. Major Principle – evenly dividing up districts, no intent to affect voting composition one way or the other.
 - i. Can protect existing incumbencies, as they represent communities of interest
 - ii. Can favor one party over another;
 - iii. Cannot intentionally separate on the basis of race.
 - b. Cannot intentionally dilute minority vote.
- C. Race – separate consideration
 - a. Equal Protection principles – cannot be the subject of racial gerrymandering without more under the Constitution.
 - i. Cannot rely on the need to prevent a Section 2 violation to protect you against an Equal Protection Claim.
 - ii. You have a right not to be treated differently on the basis of your race unless it is necessary to protect your vote.
 - b. Statutory Principles – Section 2 of the Voting Rights Act
 - 1. Cannot dilute power to prevent the actual exercise of voting.
 - a. Significant evidentiary constraints.
 - b. Minority group must be large and geographically compact, vote as a politically cohesive group, and the white electorate must vote as a block.
Thornburg v. Gringles, 478 U.S. 30 (1986).
 - c. Actual voting based on race, not the voting age population only.
 - d. Totality of the circumstances; history of official discrimination, overt or subtle racial appeals in elections; extent to which minority group at issue has been elected to public office.
 - 2. Must show that one group votes as a block. Usually it is the minority group, but case law does not expressly limit it to minorities.

IV. Key United States Supreme Court Cases.

- 1. *Avery v. Midland County*, 390 U.S. 474 (1968) (applying equal protection requirement to local government districts; district with 67,000+ compared with districts of less than 1,000).

2. *Baker v. Carr*, 369 U.S. 186 (1962) (redistricting is no longer a political question).
3. *Bush v. Vera*, 517 U.S. 952 (1196) (racial gerrymandering, Texas, plurality, race was predominant factor; strict scrutiny, not narrowly-tailored to further a compelling governmental interest).
4. *Colegrove v. Green*, 328 U.S. 549 (1946), plurality – overturned largely by *Baker v. Carr*, held redistricting was a political question.
5. *Davis v. Bandemer*, 478 U.S. 109 (1986), attempted to address political party gerrymandering; plurality, not very helpful.
6. *Easley v. Cromartie*, 532 U.S. 234 (2001) (*Cromartie II*) (political gerrymandering is acceptable); (“At a *minimum* Plaintiffs must show that the legislature subordinated traditional race-neutral districting principles . . .to racial considerations.)
7. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (landmark voting rights case, Alabama’s exclusion of blacks in Tuskegee violated the 15th amendment; later recognized as an equal protection claim).
8. *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*) (race must be the predominant factor motivating the legislature’s districting decision). (12th District of North Carolina), same as *Shaw v. Hunt*. Held it does not violate the constitution to create a Democrat district where the voting correlation was 95% black.
9. *Miller v. Johnson*, 515 U.S. 900 (1995), white voters in Georgia challenged the shape of a district, held intent to create a black district violated the equal protection clause.
10. *Mobile v. Bolden*, 446 U.S. 55 (1980). Intent is critical. Facially neutral electoral districting is constitutional, even if at-large elections dilute voting strength without more.
11. *Reynolds v. Sims*, 377 U.S. 533 (1964) (precursor to ruling that local government districts had to be roughly equal in population; held state districts were required to be so comprised).
12. *Shaw v. Reno*, 509 U.S. 630 (1993). (race must be considered under strict scrutiny under the equal protection clause, cannot just rely on avoiding a Section 2, Voting Rights Act problem.)
13. *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Section 2 of the Voting Rights Act is violated if black and white voters are impeded to cause an inequality in the ability to elect their preferred candidates; prove requires a sufficiently large compact district; minority group is politically cohesive;

white electorate votes as a block); subsequent VRA decisions require a purpose or effect of decreasing minority voting power in order to prove a VRA violation; *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). (*Bossier II*).

14. *Utah v. Evans*, 536 U.S. 452 (2002) (hot deck imputation of persons present not allowed for congressional count –)
15. *Vieth v. Jubelirer*, 541 U.S. 267 (2004)(plurality; political gerrymandering in and of itself not unconstitutional).
16. *Wesberry v. Sanders*, 376 U.S. 1 (1964)(landmark case; congressional districts need to be drawn as nearly as possible for one person one vote).

B. Back to the initial principles.

1. One person, one vote; slightly more leeway with local districts.
2. Apply traditional redistricting principles:
 - a. Protect incumbents.
 - b. Communities of interests.
 - c. Compactness.
 - d. Respect for existing political subdivisions (not dissecting a municipality unless necessary).
3. If you stray from them, you can be under a challenge if there is a racial disparity, either black or white under equal protection analysis
4. If you reduce or eliminate a majority/minority district, must be prepared to show it does not dilute voting rights.

V. Practical Considerations

- a. Fully explain your goal of following traditional redistricting principles.
- b. Keep a good record; clarify matters that may be taken out of context or misunderstood.
- c. Keep your planning director or other statistical expert and your lawyer close.