HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB SPCSEP 10-01 Method and Standards for Legislative and Congressional Redistricting and Reapportionment
SPONSOR(S): Select Policy Council on Strategic & Economic Planning
TIED BILLS: **IDEN./SIM. BILLS:**

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SUMMARY ANALYSIS

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the United States Census, to apportion state legislative districts. The United States Constitution requires the reapportionment of the United States House of Representatives every ten years, which includes the distribution of the House's 435 seats between the states and the equalization of population between districts within each state.

Two citizen initiatives, related to redistricting, have secured placement on the 2010 General Election ballot. Amendments 5 and 6, promoted by FairDistrictsFlorida.org, would add standards for state legislative and congressional redistricting to the Florida Constitution. The amendments do not contain definitions for the proposed new standards, which may have the effect of restricting the range of redistricting choices available under the federal Voting Rights Act.

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add new state constitutional standards for establishing legislative and congressional district boundaries. The proposed standards in the joint resolution would complement the proposed standards in Amendment 5 and 6 and provide for a balancing of the various constitutional redistricting standards.

Specifically, the proposed joint resolution would require that the state apply federal requirements in its balancing and implementing of the redistricting standards in the state constitution. Both the equal opportunity of racial and language minorities to participate in the political process and communities of interest are established as standards that are on equal footing as any other standard in the state constitution. Therefore minority access districts can be considered, and communities of interest can be respected and promoted, as matters of legislative discretion. Finally, the joint resolution asserts that districts and plans are valid if the standards in the state constitution were balanced and implemented rationally and consistent with federal law.

The proposed joint resolution would require approval by 60% of the voting electorate in Florida's 2010 General Election.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The law governing the reapportionment and redistricting[1] of congressional and state legislative districts implicates the United States Constitution, the Florida Constitution, and federal statutes.

Florida Constitution

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the Census is conducted, to apportion the State into senatorial districts and representative districts. According to Article III, Section 16(a), Florida Constitution, senatorial districts must be:

1. Between 30 and 40 in numbers;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

Representative districts must be:

1. Between 80 and 120 in number;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

The joint resolution is not subject to gubernatorial approval. If the Legislature fails to make the apportionment, the Governor must reconvene the Legislature in a special apportionment session not to exceed 30 days. If the Legislature fails to adopt an apportionment plan at its regular or special apportionment session, the Attorney General must petition the Florida Supreme Court to make the apportionment.[2]

[1] The concepts of reapportionment and redistricting are distinct. Reapportionment refers to the process of proportionally reassigning a given number of seats in a legislative body, i.e. 435 seats in the U.S. House of Representatives, to established districts, i.e. amongst the states, based on an established formula. Redistricting refers to the process of changing the boundaries of any given legislative district.

[2] Article III, Section 16(b), Florida Constitution.

Within 15 days after the Legislature adopts the joint resolution, the Attorney General must petition the Supreme Court to review the apportionment plan.[3] Judicial review is limited to:

1. Whether the plan satisfies the "one person, one vote" mandate of equal protection; and

2. Whether the districts are of contiguous, overlapping or identical territory.[4]

If the Court invalidates the apportionment plan, the Governor must reconvene the Legislature in an extraordinary apportionment session, not to exceed 15 days.[5] Within 15 days after the adjournment of the extraordinary apportionment session, the Attorney General must petition the Supreme Court to review the apportionment plan adopted by the Legislature or, if no plan was adopted, report the fact to the Court.[6] If the Court invalidates the apportionment plan adopted by the Legislature at the extraordinary apportionment session, or if the Legislature fails to adopt a plan, the Court must draft the redistricting plan.[7]

The Florida Constitution is silent with respect to congressional redistricting. Article 1 Section 4 of the United States Constitution grants to each state legislature the exclusive authority to apportion seats designated to that state by providing the legislative bodies with the authority to determine the times place and manner of holding elections for senators and representatives. Consistent therewith, Florida has adopted its congressional apportionment plans by legislation subject to gubernatorial approval.[8] Congressional apportionment plans are not subject to automatic review by the Florida Supreme Court.

U.S. Constitution

The United States Constitution requires the reapportionment of the House of Representatives every ten years to distribute each of the House of Representatives' 435 seats between the states and to equalize population between districts within each state.

Article I, Section 4 of the United States Constitution provides that "[t]he Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." *See also* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."). The U.S. Supreme Court has recognized that this language delegates to state legislatures the exclusive authority to create congressional districts. *See e.g., Growe v. Emison,* 507 U.S. 25, 34 (1993); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 416 (2006) ("[T]he Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress . . . .").

In addition to state specific requirements to redistrict, states are obligated to redistrict based on the principle commonly referred to as "one-person, one-vote."[9] In *Reynolds*, the United States Supreme Court held that the Fourteenth Amendment required that seats in state legislature be reapportioned on a population basis. The Supreme Court concluded:

> …"the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies…The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[10]

[3] Article III, Section 16(c), Florida Constitution.
[4] *In re Constitutionality of House Joint Resolution 25E,* 863 So. 2d 1176, 1178 (Fla. 2003).
[5] Article III, Section 16(d), Florida Constitution.
[6] Article III, Section 16(e), Florida Constitution.
[7] Article III, Section 16(f), Florida Constitution.
[8] *See generally* Section 8.0001, et seq., Florida Statutes (2007).
[9] *Baker v. Carr*, 369 U.S. 186 (1962).
[10] *Reynolds v. Sims,* 377 U.S. 533, 568 (1964).

The Court went on to conclude that decennial reapportionment was a rational approach to readjust legislative representation to take into consideration population shifts and growth.[11]

In addition to requiring states to redistrict, the principle of one-person, one-vote, has come to generally stand for the proposition that each person's vote should count as much as anyone else's vote.

The requirement that each district be equal in population applies differently to congressional districts than to state legislative districts. The populations of congressional districts must achieve absolute mathematical equality, with no *de minimis* exception.[12] Limited population variances are permitted if they are "unavoidable despite a good faith effort" or if a valid "justification is shown."[13]

In practice, congressional districting has strictly adhered to the requirement of exact mathematical equality. In *Kirkpatrick v. Preisler* the Court rejected several justifications for violating this principle, including "a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts."[14]

For state legislative districts, the courts have permitted a greater population deviation amongst districts. The populations of state legislative districts must be "substantially equal."[15] Substantial equality of population has come to generally mean that a legislative plan will not be held to violate the Equal Protection Clause if the difference between the smallest and largest district is less than ten percent.[16] Nevertheless, any significant deviation (even within the 10 percent overall deviation margin) must be "based on legitimate considerations incident to the effectuation of a rational state policy,"[17] including "the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts, or the recognition of natural or historical boundary lines."[18]

However, states should not interpret this 10 percent standard to be a safe haven.[19] Additionally, nothing in the U.S. Constitution or case law prevents States from imposing stricter standards for population equality.[20]

Compared to other states, Florida's population range ranked 13th of 49 (2.79%) for its State House districts, ranked 3rd of 50 (0.03%) for it State Senate districts, and achieved statistical perfection (0.00%) for its Congressional districts.[21]

The Voting Rights Act

Congress passed the Voting Rights Act (VRA) in 1965. The VRA protects the right to vote as guaranteed by the 15th Amendment to the United States Constitution. In addition, the VRA enforces the protections of the 14th Amendment to the United States Constitution by providing "minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination."[22]

The relevant components of the Act are contained in Section 2 and Section 5. Section 2 applies to all jurisdictions, while Section 5 applies only to covered jurisdictions (states, counties, or other jurisdictions within a state).[23] The two sections, and any analysis related to each, are considered independently of

[11] *Reynolds v. Sims,* 377 U.S. 584 (1964).
[12] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[13] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[14] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).
[15] *Reynolds v. Sims,* 377 U.S. 533, 568 (1964).
[16] *Chapman v. Meier,* 420 U.S. 1 (1975); *Connor v. Finch,* 431 U.S. 407, 418 (1977).
[17] *Reynolds,* 377 U.S. at 579.
[18] *Swann v. Adams,* 385 U.S. 440, 444 (1967).
[19] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 36.
[20] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 39.
[21] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 47-48.
[22] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.
[23] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.

each other, and therefore a matter considered under by one section may be treated differently by the other section.

The phraseology for types of minority districts can be confusing and often times unintentionally misspoken. It is important to understand that each phrase can have significantly different implications for the courts, depending on the nature of a legal complaint.

A "majority-minority district" is a district in which the majority of the voting-age population (VAP) of the district is African American, Hispanic, Asian or Native-American. A "minority access district" is a district in which the dominant minority community is less than a majority of the VAP, but is still large enough to elect a candidate of its choice through either crossover votes from majority voters or a coalition with another minority community.

"Minority access" though is more jargon than meaningful in a legal context. There are two types of districts that full under the definition. A "crossover district" is a minority-access district in which the dominant minority community is less than a majority of the VAP, but is still large enough that a crossover of majority voters is adequate enough to provide that minority community with the opportunity to elect a candidate of its choice. A "coalitional district" is a minority-access district in which two or more minority groups, which individually comprise less than a majority of the VAP, can form a coalition to elect their preferred candidate of choice. A distinction is sometimes made between the two in case law. For example, the legislative discretion asserted in *Bartlett v. Strickland*—as discussed later in this document—is meant for crossover districts, not for coalitional districts.

Lastly, the courts have recognized that an "influence district" is a district in which a minority community is not sufficiently large enough to form a coalition or meaningfully solicit crossover votes and thereby elect a candidate of its choice, but is able to effect election outcomes and therefore elect a candidate would be mindful of the minority community's needs.

Section 2 of the Voting Rights Act

The most common challenge to congressional and state legislative districts arises under Section 2 of the Voting Rights Act. Section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State…in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[24] The purpose of Section 2 is to ensure that minority voters have an equal opportunity along with other members of the electorate to influence the political process and elect representatives of their choice.[25]

In general, Section 2 challenges have been brought against districting schemes that either disperse members of minority communities into districts where they constitute an ineffective minority—known as "cracking"[26]—or which concentrate minority voters into districts where they constitute excessive majorities—known as "packing"—thus diminishing minority influence in neighboring districts. In prior decades, it was also common that Section 2 challenges would be brought against multimember districts, in which "the voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates."[27]

The Supreme Court set forth the criteria of a vote-dilution claim in *Thornburg v. Gingles*.[28] A plaintiff must show:

1. A minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

[24] 42 U.S.C. Section 1973(a) (2006).
[25] 42 U.S.C. Section 1973(b); *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).
[26] Also frequently referred to as "fracturing."
[27] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 54.
[28] 478 U.S. 30 (1986).

2. The minority group must be politically cohesive; and

3. White voters must vote sufficiently as a bloc to enable them usually to defeat the candidate preferred by the minority group.

The three "*Gingles* factors" are necessary, but not sufficient, to show a violation of Section 2.[29] To determine whether minority voters have been denied an equal opportunity to influence the political process and elect representatives of their choice, a court must examine the totality of the circumstances.[30]

This analysis requires consideration of the so-called "Senate factors," which assess historical patterns of discrimination and the success, or lack thereof, of minorities in participating in campaigns and being elected to office. [31] Generally, these "Senate factors" were born in an attempt to distance Section 2 claims from standards that would otherwise require plaintiffs to prove "intent," which Congress viewed as an additional and largely excessive burden of proof, because "It diverts the judicial injury from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[32]

States are obligated to balance the existence and creation of districts that provide electoral opportunities for minorities with the reasonable availability of such opportunities and other traditional redistricting principles. For example, in J*ohnson v. De Grandy*, the Court decided that while states are not obligated to maximize the number of minority districts, states are also not given safe harbor if they achieve proportionality between the minority population(s) of the state and the number of minority districts.[33] Rather, the Court considers the totality of the circumstances. In "examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2."[34]

In *League of United Latin American Citizens (LULAC) v. Perry*, the Court elaborated on the first *Gingles* precondition. "Although for a racial gerrymandering claim the focus should be on compactness in the district's shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group."[35]

In *Shaw v. Reno*, the Court found that "state legislation that expressly distinguishes among citizens on account of race - whether it contains an explicit distinction or is "unexplainable on grounds other than race,"…must be narrowly tailored to further a compelling governmental interest. Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption."[36]

Later, in *Shaw v. Hunt*, the Court found that the State of North Carolina made race the predominant consideration for redistricting, such that other race-neutral districting principles were subordinated, but the state failed to meet the strict scrutiny[37] test. The Court found that the district in question, "as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under Section(s) 2 of the Act," and "could not remedy any potential Section(s) 2 violation, since the minority group must be shown to be "geographically compact" to establish Section(s) 2 liability."[38] Likewise, in *Bush v. Vera*,

[29] *Johnson v. De Grandy*, 512 U.S. 997, 1011-1012 (1994).
[30] 42 U.S.C. Section 1973(b); *Thornburg vs. Gingles*, 478 U.S. 46 (1986).
[31] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 57.
[32] Senate Report Number 417, 97th Congress, Session 2 (1982).
[33] *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).
[34] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 61-62.
[35] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 62.
[36] *Shaw v. Reno*, 509 U.S. 630 (1993).
[37] "Strict scrutiny" is the most rigorous standard used in judicial review by courts that are reviewing federal law. Strict scrutiny is part of a hierarchy of standards courts employ to weigh an asserted government interest against a constitutional right or principle that conflicts with the manner in which the interest is being pursued.
[38] *Shaw v. Hunt,* 517 U.S. 899 (1996).

the Supreme Court supported the strict scrutiny approach, ruling against a Texas redistricting plan included highly irregularly shaped districts that were significantly more sensitive to racial data, and lacked any semblance to pre-existing race-neutral districts.[39]

Lastly, In *Bartlett v. Strickland*, the Supreme Court provided a "bright line" distinction between majority-minority districts and other minority "crossover" or "influence districts. The Court "concluded that §2 does not require state officials to draw election district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice."[40] However, the Court made clear that States had the flexibility to implement crossover districts as a method of compliance with the Voting Rights Act, where no other prohibition exists. In the opinion of the Court, Justice Kennedy stated as follows:

> "Much like §5, §2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts…When we address the mandate of §2, however, we must note it is not concerned with maximizing minority voting strength…and, as a statutory matter, §2 does not mandate creating or preserving crossover districts. Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns…States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if §2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters." [41]

Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act of 1965, as amended, is an independent mandate separate and distinct from the requirements of Section 2. "The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters."[42]

Section 5 requires states that comprise or include "covered jurisdictions" to obtain federal preclearance of any new enactment of or amendment to a "voting qualification o prerequisite to voting, or standard, practice, or procedure with respect to voting."[43] This includes districting plans.

Five Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—have been designated as covered jurisdictions.[44]

Preclearance may be secured either by initiating a declaratory judgment action in the District Court for the District of Columbia or, as is the case in almost all instances, submitting the new enactment or amendment to the United States Attorney General (United States Department of Justice).[45] Preclearance must be granted if the qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[46]

The purpose of Section 5 is to "insure that no voting procedure changes would be made that would lead to a retrogression[47] in the position of racial minorities with respect to their effective exercise of the electoral franchise."[48] Whether a districting plan is retrogressive in effect requires an examination of

[39] *Bush v. Vera*, 517 U.S. 952 (1996),
[40] *Bartlett v. Strickland,* No. 07-689 (U.S. Mar. 9, 2009).
[41] *Bartlett v. Strickland,* No. 07-689 (U.S. Mar. 9, 2009).
[42] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 78.
[43] 42 U.S.C. Section 1973c.
[44] Some states were covered in their entirety. In other states only certain counties were covered.
[45] 42 U.S.C. Section 1973c.
[46] 42 U.S.C. Section 1973c
[47] A decrease in the absolute number of representatives which a minority group has a fair chance to elect.
[48] *Beer v. United States*, 425 U.S. 130, 141 (1976).

"the entire statewide plan as a whole."[49] "And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan."[50]

The Department of Justice requires that submissions for preclearance include numerous quantitative and qualitative pieces of data to satisfy the Section 5 review. "The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission. The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information. A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented."[51]

Majority-Minority and Minority Access Districts in Florida

Based on the 2002 data and subsequent state legislative and congressional maps:

- The Florida House of Representatives includes 24 majority-minority districts[52] and 10 minority access districts.[53]

- The Florida Senate includes 5 majority-minority districts[54] and 7 minority access districts.[55]

- Florida's Congressional districts include 4 majority-minority districts[56] and 2 minority access districts.[57]

Legal challenges to the Florida's 1992 state legislative and congressional redistricting plans resulted in a significant increase in elected representation for both African-Americans and Hispanics. Table 1 illustrates those increases. Prior to 1992, Florida Congressional Delegation included only one minority member, Congresswoman Ileana Ros-Lehtinen. Since those legal challenges, the Florida Legislature created maps that balance the establishment and maintenance of majority-minority districts and minority access districts, with other legally mandated redistricting standards, and other traditional redistricting principles.

[49] *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).
[50] *Georgia v. Ashcroft*, 539 U.S. 484 (2003).
[51] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 96.
[52] House Districts 8, 14-15, 39, 55, 59, 84, 93-94, 102-104, 107-117 and 119.
[53] House Districts 23, 27, 49, 58, 92, 101, 105-106, 118 and 120
[54] Senate Districts 29, 33, 36, 38 and 40.
[55] Senate Districts 1, 6, 18-19, 34-35 and 39.
[56] Congressional Districts 17-18, 21 and 25.
[57] Congressional Districts 3 and 23.

Table 1. Number of Elected African-American and Hispanic Members in the Florida Legislature and Florida Congressional Delegation

	Congress African-American	*Congress Hispanic*	*Senate African-American*	*Senate Hispanic*	*House African-American*	*House Hispanic*
Before 1982	*0*	*0*	*0*	*0*	*5*	*0*
1982 to 1992	*0*	*0-1*	*2*	*0-3*	*10-12*	*3-7*
1992 to 2002	*3*	*2*	*5*	*3*	*14-16*	*9-11*
2002 to Present	*3*	*3*	*7*	*3*	*17-20*	*11-15*

Prior to the legal challenges in the 1990s, the Florida Legislature established districts that generally included minority populations of less than 30 percent of the total population of the districts. For example, Table 2 illustrates that the 1982 plan for the Florida House of Representatives included 27 districts in which African-Americans comprised 20 percent of more of the total population. In the majority of those districts, 15 of 27, African-Americans represented 20 to 29 percent of the total population. None of the 15 districts elected an African-American to the Florida House of Representatives.

Table 2. 1982 House Plan
Only Districts with Greater Than 20% African-American Population[58]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	2, 12, 15, 22, 23, 25, 29, 42, 78, 81, 92, 94, 103, 118, 119	15	0
30% - 39%	8, 9	2	1
40% - 49%	55, 83, 91	3	2
50% - 59%	17, 40, 63, 108	4	4
60% - 69%	16, 106,	2	2
70% - 79%	107	1	1
TOTAL			10

Subsequent to the legal challenges in the 1990s, the Florida Legislature established districts that were compliant with provisions of federal law, and did not fracture or dilute minority voting strength. As Table 1 and Table 3 illustrate, the resulting districting plan, which allowed minority communities an equal opportunity to participate and elect its candidates of choice, doubled the number of African-American representatives in the Florida House of Representatives.

[58] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison.

Table 3. 2002 House Plan
Only Districts with Greater Than 20% African-American Population[59]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	10, 27, 36, 86	4	1
30% - 39%	3, 23, 92, 105	4	3
40% - 49%	118	1	1
50% - 59%	8, 14, 15, 55, 59, 84, 93, 94, 104, 108	10	10
60% - 69%	39, 109	2	2
70% - 79%	103	1	1
TOTAL			18

Equal Protection – Racial Gerrymandering

Racial gerrymandering is "the deliberate and arbitrary distortion of district boundaries...for (racial) purposes."[60] Racial gerrymandering claims are justiciable under equal protection.[61] In the wake of *Shaw v. Reno*, the Court rendered several opinions that attempted to harmonize the balance between "competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process."[62]

To make a *prima facie* showing of impermissible racial gerrymandering, the burden rests with the plaintiff to "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[63] Thus, the "plaintiff must prove that the legislature subordinated traditional race-neutral districting principles…to racial considerations."[64] Traditional districting principles include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests,"[65] and even incumbency protection.[66] If the plaintiff meets this burden, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest,"[67] i.e. "narrowly tailored" to achieve that singular compelling state interest.

While compliance with federal antidiscrimination laws—specifically, the Voting Rights Act—is a "very strong interest," it is not in all cases a compelling interest sufficient to overcome strict scrutiny.[68] With respect to Section 2, traditional districting principles may be subordinated to race, and strict scrutiny will be satisfied, where (i) the state has a "strong basis in evidence" for concluding that a majority-minority district is "reasonably necessary" to comply with Section 2; (ii) the race-based districting "substantially addresses" the Section 2 violation; and (iii) the district does "not subordinate traditional districting

[59] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison
[60] *Shaw v. Reno*, 509 U.S. 630, 640 (1993)
[61] *Shaw v. Reno*, 509 U.S. 630, 642 (1993)
[62] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 72.
[63] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[64] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[65] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[66] *Bush v. Vera,* 517 U.S. 952, 964 (1996).
[67] *Miller v. Johnson*, 515 U.S. 920 (1995).
[68] *Shaw v. Reno*, 509 U.S. at 653-654 (1993).

principles to race substantially more than is 'reasonably necessary' to avoid" the Section 2 violation.[69] The Court has held that compliance with Section 5 is not a compelling interest where race-based districting is not "reasonably necessary" under a "correct reading" of the Voting Rights Act.[70]

The Use of Statistical Evidence

Political vote histories are essential tools to ensure that new districts comply with the Voting Rights Act.[71] For example, the use of racial and political data is critical for a court's consideration of the compelling interests that may be involved in a racial gerrymander. In *Bush v. Vera*, the Court stated:

> "The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria…"

As noted previously, when the U.S. Department of Justice conducts a Section 5 preclearance review it requires that a submitting authority provide political data supporting a plan.[72] Registration and performance data must be used under Section 2 of the Voting Rights Act to determine whether geographically compact minority groups are politically cohesive, and also to determine whether the majority population votes as a block to defeat the minority's candidate of choice. That data is equally essential to prove the validity of any electoral changes under Section 5 of the Voting Rights Act.[73]

If Florida were to attempt to craft districts in areas of significant minority population without such data (or in any of the five Section 5 counties), the districts would be legally suspect and would probably invite litigation.

Traditional Redistricting Principles

There are seven general policies or goals that have been most frequently recognized by the courts as "traditional districting principles." If a state uses these principles as the primary basis for creating a district, with race factoring in simply as a consideration, then the redistricting plan will not be subject to strict scrutiny. If race is a predominant factor, particularly for a district that is oddly shaped, then the state will be subject to strict scrutiny and therefore must show that the district was narrowly tailored to serve a compelling state interest.[74]

Since 1993, the seven most common judicially recognized "traditional districting principles" are:[75]

- Compactness;
- Contiguity;
- Preservation of counties and other political subdivisions;
- Preservation of communities of interest;
- Preservation of cores of prior districts;
- Protection of incumbents; and
- Compliance with Section 2 of the Voting Rights Act

The meaning of "compactness" can vary significantly, depending on the type of redistricting-related analysis in which the court is involved.[76] Primarily, courts have used compactness to assess whether

[69] *Bush v. Vera,* 517 U.S. 977-979 (1996).
[70] *Miller v. Johnson*, 515 U.S. 921 (1995).
[71] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[72] 28 U.S.C. § 51.27(q) & 51.28(a)(1).
[73] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[74] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-114.
[75] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-106.
[76] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 109-112.

some form of racial or political gerrymandering exists. That said, it is important to remember that gerrymandering could conversely be the necessary component of a district or plan that attempts to eliminate the dilution of the minority vote. Therefore, compactness is not by itself a dispositive factor.

"There are three generally accepted statistical measures of compactness, as noted in *Karcher*: the total perimeter test, the Reock test, and the Schwartzberg test."[77] However, courts have also found that "compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further it speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city."[78] In a Voting Rights context, compactness "refers to the compactness of the minority population, not to the compactness of the contest district"[79] as a whole.

Overall, compactness is a functional factor in reviewing plans and districts. Albeit, compactness is not regarded as a trumping provision against the carrying out of other rationally formed districting decisions. [80] Additionally, interpretations of compactness require considerations of more than just geography. For example, the "interpretation of the *Gingles* compactness requirement has been termed 'cultural compactness' by some, because it suggests more than geographical compactness."[81] In a vote dilution context, "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[82]

Moreover, it should be noted that in the context of geography, states use a number of geographical units to define the contours of their districting maps. The most common form of geography utilized is Census Blocks, followed by Voter Tabulation Districts. Several states also utilize designations such as Counties, Towns, Political Subdivisions, Precincts, and Wards. For the current districts maps, Florida used Counties, Census Tracts, Block Groups and Census Blocks, more geographical criteria than any other state.[83]

Along the lines of other race-neutral traditional redistricting principles, in *Wise v. Lipscomb*, the Court noted "that preserving the cores of prior districts" was a legitimate goal in redistricting.[84] In *Georgia v. Ashcroft*, the United States Supreme Court recognized that the positions of legislative power, influence, and leadership achieved by representatives elected from majority-minority districts are one valid measure of the minority population's opportunity to participate in the political process. [85] The Court noted that, "Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda…"[86]

Equal Protection – Partisan Gerrymandering

"Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that intentionally discriminates against a political party. Courts recognize that politics is an inherent part of any redistricting plan. The question is how much partisan gerrymandering is too much, so that it denies a citizen the equal protection of the laws in violation of the 14th Amendment."[87]

[77] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 109.
[78] *DeWitt v. Wilson*, 856 Federal Supplement 1409, 1414 (E.D. California 1994).
[79] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 26 (2006).
[80] *Karcher v. Daggett*, 462 U.S. 725, 756 (1983).
[81] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 111.
[82] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 27 (2006).
[83] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 49.
[84] *Wise v. Lipscomb*, 437 U.S. 535 (1978).
[85] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[86] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[87] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 115.

In *Davis v. Bandemer*, the Court held that an allegation of partisan gerrymandering presents a justiciable equal protection claim.[88] It declined to articulate a standard, but a plurality concluded that a violation "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[89]

Eighteen years later, no congressional or state legislative redistricting plan had been invalidated on partisan gerrymandering grounds. Thus, in *Vieth vs. Jubelirer*, four Justices explained that "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged" and concluded as a result that such claims "are nonjusticiable and…*Bandemer* was wrongly decided."[90]

Furthermore, the *Vieth* Court rejected a standard that is "based on discerning 'fairness' from a totality of the circumstances…as unmanageable in that the plurality could conceive of "fair" districting plans that would include all of the alleged flaws inherent in the" very plan that the Court was rejecting in *Vieth*.[91]

More recently, in *League of United Latin American Citizens v. Perry*, the Court declined to "revisit the justiciability holding" but found that the plaintiffs failed to provide a "workable test for judging partisan gerrymanders." However, the case did not foreclose the possibility that such a test might be discovered.[92] Furthermore, *Davis v. Bandemer* does still offer helpful guidance of the Court's opinion on the subject, noting that:

> "The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group's electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, as here, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionally underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[93]

FairDistrictsFlorida.org

Two citizen initiatives, related to redistricting, have already secured placement on the 2010 General Election ballot. Amendments 5 and 6, often referred to as the FairDistrictsFlorida.org amendments, seek to add standards for state legislative and congressional redistricting to the Florida Constitution. Most of the standards contained within Amendments 5 and 6 are not currently referenced in the Florida Constitution, although there is some overlap with the current requirements in Article III, Section 16 for legislative apportionment. Amendments 5 and 6 would create sections 20 and 21 in Article III of the Florida Constitution.

"The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee 'working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards.'"[94] "The sponsor proposes that the amendment will establish fairness standards for use in creating legislative district boundaries; protecting minority voting rights; prohibiting district lines that

[88] *Davis v. Bandemer,* 478 U.S. 109 (1986).
[89] *Davis v. Bandemer,* 478 U.S. 132 (1986).
[90] *Vieth vs. Jubelirer*, 541 U.S. 267, 281 (2004)
[91] *Vieth vs. Jubelirer*, 541 U.S. 267, 291 (2004)
[92] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006).
[93] *Davis v. Bandemer,* 478 U.S. 109, 132 (1986).
[94] *Complete Financial Information Sheet*. Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used."

While Amendment 5 relates to state legislative redistricting, and Amendment 6 relates to congressional redistricting, the standards contained within both are substantively identical. In subsection (1) of the amendments, there is a prohibition against any apportionment plan or individual district from being drawn with the intent to favor or disfavor a political party or incumbent. The amendments prohibit any district from being drawn with the intent or result of denying racial and language minorities the equal opportunity to participate in the political process or diminishing their ability to elect candidates of their choice.

According to Amendments 5 and 6, districts shall consist of contiguous territory. This requirement is similar to the current language in Article III, Section 16(a) of the Florida Constitution. However, Amendments 5 and 6 do not make any reference to the additional language in Article III, Section 16(a), regarding districts overlapping or being identical in territory (*often referred to as "multi-member districts"*).

In subsection (2), Amendments 5 and 6 further require that districts shall be compact, districts shall be as nearly equal in population as practicable, and districts shall utilize existing political and geographic boundaries where feasible. However, compliance with these standards is not required if they are in conflict with the standards in subsection (1) or federal law.

In subsection (3), Amendments 5 and 6 clarify that the standards within each subsection are not to be read as though they were establishing any priority of one standard over another within each subsection.

The ballot summary for Amendment 5 [and Amendment 6] states:

> "Legislative [Congressional] districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries."

January 29, 2009, the Florida Supreme Court approved the ballot summaries for the 2010 General Election ballot.[95] The Court wrote, "We conclude that the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)."

In that ruling the Court noted, "The proposed amendments do not alter the functions of the judiciary. They merely change the standard for review to be applied when either the attorney general seeks a 'declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged."

Furthermore, the Court concluded:

- "There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume that the Legislature will comply with the law at the time an apportionment plan is adopted."

- "It can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards."

[95] *Advisory Opinion to Attorney General re Standards for Establish Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

- "Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch."

The financial impact statement on the ballot will read, "The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."[96]

The FairDistrictsFlorida.org amendments do increase the number of state constitutional requirements for the Court to consider, and the amendments increase the number of standards by which an apportionment plan can be challenged. According to the Financial Impact Estimating Conference, "the proposed amendment(s) may result in increased costs based on the following":

- "The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment(s) increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan." Such legal costs are indeterminate.

- "The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions."

- "The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate."

- "The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments."

- "Any additional cost to the Legislature to develop the plans is indeterminate."

November 6, 2009, Congresspersons Corrine Brown (FL-3) and Mario Diaz-Balart (FL-25) sent correspondence to the House Select Policy Council on Strategic & Economic Planning, asking questions about the impact of the initiative petitions proposed by FairDistrictsFlorida.Org. In this correspondence, the congresspersons raised several significant legal issues, stating:

> "These questions seek an explanation for the Amendments, which in our initial review appear internally contradictory and to violate several constitutional and statutory provisions, especially the protections of the 14th and 15th Amendments to the United States Constitution and the Voting Rights Act, as amended. We are particularly concerned that passage of these amendments would result – however unintentionally – in a significant dilution of the voting rights of the African-Americans and Hispanics as well as significant loss in a number of representatives elected from those communities."[97]

The letter asked 18 questions including whether the several standards in the petitions can be reconciled and applied practically and legally in the Redistricting process. The 18 questions can be generally summarized into four separate areas of analysis:

[96] *Financial Impact Statement*. Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.
[97] *Letter from Congresswoman Corrine Brown and Congressman Mario Diaz-Balart to Chairman Dean Cannon*. November 6, 2009.

- Impact of the U.S. Supreme Court case of *Bartlett v. Strickland*, and how the terms of these initiatives may affect the ability and discretion of the Legislature to create minority access or "crossover" districts;[98]

- Questions raised regarding the relationship between incumbency protection and minority voting rights;[99]

- Use of political data which is necessary to comply with federal law, and how the use of this data itself may give rise to litigation;[100] and

- The legality or constitutionality of the petitions.[101]

Overall, the congresspersons asserted that FairDistrictsFlorida.org's proposed standards lack definition, lacked a clear method for reconciling inconsistencies, and could dilute minority access seats.

Effects of the Proposed Council Bill

The proposed joint resolution, PCB SPCSEP 10-01, would create a new Section 20 to Article III of the Florida Constitution. The new section would add state constitutional standards for establishing legislative and congressional district boundaries. The ballot summary is identical to the actual joint resolution, and reads as follows:

> "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law."

District Boundary Lines: The joint resolution would add new state constitutional standards for state legislative redistricting. Furthermore, the joint resolution would create state constitutional standards for congressional districting. The joint resolution does not apply the already existing state standards for state legislative redistricting to the process of congressional redistricting.

State and Federal Redistricting Requirements: The state shall apply federal requirements for state legislative and congressional redistricting, and balance the standards for state legislative and congressional redistricting contained in the Florida Constitution. In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Racial and Language Minorities: In state legislative and congressional redistricting, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

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[98] *Id.*.
[99] *Id.*
[100] *Id.*
[101] *Id.*

Currently, only federal law addresses the ability of racial and language minorities to participate in the political process and elect candidates of their choice. In effect, the joint resolution maintains the discretion of the state to establish and maintain minority districts, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to establish and maintain minority districts.

Communities of Interest: In state legislative and congressional redistricting, the state may respect and promote communities of interest, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the joint resolution establishes the discretion of the state, in state law, to create and maintain districts that respect and promote communities of interest, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

Currently, only case law addresses communities of interest. In effect, the joint resolution maintains the discretion of the state to respect and promote communities of interest, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to create districts that respect and promote communities of interest.

Communities of interest in Florida's current state legislative and congressional district maps include, but are not limited to: cultural communities, agricultural communities, economic development communities, coastal communities, environmental communities, Caribbean-American communities, urban communities, rural communities, historically underserved communities, minority communities, ethnic communities, retirement communities, etc.

Validity of Districts and Plans: State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Racial and Language Minorities

Concerns have been expressed that the FairDistrictsFlorida.org initiatives do not articulate their relationship to the federal Voting Rights Act, and therefore could result in a regression of minority representation.[102] Additionally, while federal law regarding redistricting has become relatively settled in the past decade, there is a lack of precedent to guide both the Courts and the Legislature in complying with the arrangement of standards in FairDistrictsFlorida.org's initiatives. Depending on how it is that the FairDistrictsFlorida.org initiatives are interpreted, the results could range from a reduction in minority access seats to equal protection concerns.

For example, *Bartlett v.* Strickland, was decided March 9, 2009, after the FairDistrictsFlorida.org initiative petitions were crafted, and after the Florida Supreme Court completed its review of the petitions' ballot summary in January, 2009. In *Bartlett v. Strickland*, the State of North Carolina had a provision in its Constitution prohibiting dividing counties when drawing the State's legislative districts, which was known as the "Whole-County Provision." The "Whole-County Provision" in the North Carolina Constitution is somewhat analogous to the provisions in FairDistrictsFlorida.org's initiatives requiring compact districts, and use of existing political and geographical boundaries.

The U.S. Supreme Court held in favor of the "Whole-County Provision," and ruled against the creation of a minority "crossover" district that had violated the provision. According to the Court, Section 2 of the VRA allows States to choose their own methods of compliance with the VRA, and compliance may include the creation of crossover districts, where no other prohibition exists in the State's law. The only districts that could violate such a prohibition in State law would be majority-minority districts.

[102] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.

Subsection (2) of the FairDistrictsFlorida.org initiatives does preempt the requirements (compactness, contiguity, equal population, political and geographical boundary lines) in that subsection if they are in conflict with federal law or the requirements (incumbency, political parties, and equal participation for minorities) in Subsection (1). However, if federal law is interpreted to be discretionary in this matter, and the state law is interpreted to reflect federal law, the other standards in the initiatives could never be in conflict with a purely discretionary matter. Therefore, if FairDistrictsFlorida.org's provisions were interpreted to be a recapitulation of the federal Voting Rights Act, and if the Voting Rights Act does not compel the creation of minority access seats, where the minority group is less than 50 percent of the voting age population, the FairDistrictsFlorida.org's initiatives may create prohibitions to the Legislature's discretion in maintaining and creating minority access seats.

Conversely, if FairDistrictsFlorida.org's initiatives were interpreted to exceed the VRA, and allow for the creation of irregularly shaped districts under Section 1 only for racial factors, the such districts may run afoul of the Equal Protection Clause of the United States Constitution.

Additionally, one other possible view of the initiatives is that they would create a Section 5 standard with statewide application. If the initiatives create a permanent Section 5 standard which would apply to every individual district drawn in all 67 Florida counties, regardless of evidence of prior or present discrimination, there would be significant legal concerns. Federal case law holds that race-based provisions of law must be of last resort, remedial in nature, and narrowly tailored. Therefore, as written, the initiatives invite equal protection challenges and furthermore a volume of litigation which no state has experienced.

In public statements that addressed the relationship between the initiatives and the VRA, FairDistrictsFlorida.org provided three perspectives on the language.

1. "While minority voting rights are presently guaranteed by federal statute, the new standards will enshrine them in the Florida Constitution and they will be difficult to repeal. These standards will not change current law but they will ensure that the law is permanent in Florida."[103]

2. "Compactness and utilization of local boundaries only come into play to the extent that they can without conflicting with the protection of minority voters." [104] "If it is a race district, if it is a racial or language minority district it is going to be a very different calculus than it is going to be if it is a -- if it is a non minority district." [105] "So first you have to have the minority districts drawn. Once you have those districts drawn you go ahead and you make the other districts to the extent that you can, compact and utilizing existing boundaries."[106]

3. "The language says that districts cannot be drawn or plans cannot be drawn to diminish the ability of minority voters to elect representatives of their choice. That is not presently part of the Voting Rights Act, except to the extent that it might be somewhat similar to what is in Section V."[107]

The PCB addresses these concerns in two different ways. First, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. Reflecting back on *Bartlett v. Strickland*, this PCB prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts.

Second, the bill requires that districts and plans be drawn in a manner that balanced and implements the standards in the Florida Constitution in a rational manner and in a manner that is consistent with federal law. In effect, the Legislature is required the rationally balance the plain reading of Florida Constitution with the U.S. Constitution and the federal Voting Rights Act.

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[103] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[104] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment*. Meeting Transcript. February 11, 2010.
[105] *Id.*
[106] *Id.*
[107] *Id.*

As it pertains to the ability of racial and language minorities to participate in the political process and elect candidates of their choice, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Communities of Interest

Communities of interest are a well-recognized traditional redistricting principle in case law. Florida's current district maps include a number of districts that encompass communities with common priorities and interest, including agricultural communities of interest, coastal communities of interest, economic communities of interest, etc.

However, without explicit instruction, a compactness standard would not necessarily be interpreted to incorporate such communities. For instance, low income communities and historically underserved communities are frequently isolated in urban centers, and thereby not always immediately connected to communities with similar interest. Yet such communities may be well served if aligned together, in the same district, as this would increase the likelihood that the elected representatives of the district were mindful of the economic and historical needs of the district.[108] Furthermore, maintaining communities of interest can help maintain the core of existing districts, and thereby reduce voter confusion.[109]

The FairDistritcsFlorida.org initiatives are silent in regards to "traditional redistricting principles." Because they have no mention in the language of the initiatives, aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest. Therefore, under the plain reading of the language of the initiatives, legislative discretion to respect communities of interest may be eliminated, or at least constrained. For example, Florida's 25th Congressional District contains one of the most significant environmental communities of interest in the world, yet otherwise the boundaries of the district would be difficult to maintain under a purely mathematical or geometrical application of a compactness standard.

The PCB addresses these concerns in a similar manner to those regarding minority districts. First, communities of interest are expressed in the language as a standard that may be respected and promoted. Second, communities of interest may not be subordinated to any other provision in Article III of the Florida Constitution, giving communities of interest an equal footing with other state redistricting standards.

As it pertains to communities of interest, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Balancing

The Florida Supreme Court presumes the constitutionality of legislative action. "[E]very reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act."[110] Also, in the specific context of determining compliance with redistricting standards in the state constitution, the court has held that the legislature's enactment is presumed constitutional. Specifically:

> "Also in contention in various comments and at oral argument is the presumptive validity of the joint resolution of apportionment and the amount of deference this Court gives to the joint resolution of apportionment. The opponents generally argue that the

[108] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.
[109] *Id.*
[110] *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 805-06 (Fla. 1972).

> Legislature's joint resolution of apportionment is not presumptively valid like a statute because the joint resolution is not subject to gubernatorial veto. Our 1972 opinion addressed this issue. *See In re Apportionment Law*, 263 So. 2d at 805-6. To clarify this issue, consistent with the discussion in the 1972 case, we hold that the joint resolution of apportionment identified in article III, section 16, Florida Constitution, upon passage is presumptively valid."[111]

However, without providing much instruction, the intent provisions in the FairDistrictsFlorida.org initiatives—regarding incumbency, political parties, and equal participation for minorities—could be read to create standards for challenging or reviewing redistricting plans or districts. Proponents of FairDistrictsFlorida.org suggested that the intent standards were meant to make discoverable and scrutinize the use of political data in redistricting.[112] Furthermore, the intent standards are divined by the public and private statements of the legislators themselves. [113]

Conversely, Ellen Freidin provided some insight that would suggest FairDistrictsFlorida.org's initiatives were not intending to excessively increase public review and judicial scrutiny if districts and plans were established through reasonable processes that accounted for all the applicable standards. According to Ellen Freidin, "The answer is that in order to draw these maps you must have not only data, but you must have census information. You must have voting data, you must have census information, you must have geographical information and you have also got to have a balancing by a legislative body of all of the criteria." [114] "Well, I think that the very principal of districting and the way it has always been done in the past is to do it after public comment and with collegial collaboration among the members."[115]

The PCB incorporates these statements and the historical position of the Florida Supreme Court in two statements. First, "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution." In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Second, "Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law. State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Requirements for Joint Resolutions by the Florida Legislature

- According to Article XI, Section 1, of the Florida Constitution, "Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature."

- According to Article XI, Section 5(a), of the Florida Constitution, "A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records…"

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[111] *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002)
[112] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[113] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment*. Meeting Transcript. February 11, 2010.
[114] *Id.*
[115] *Id.*

- According to Article XI, Section 5(d), of the Florida Constitution, "Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published."

- According to Article XI, Section 5(e), of the Florida Constitution, "Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

- According to Section 101.161(1), Florida Statutes, "Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language." The substance of the amendment shall be embodied in the ballot summary of the measure. Ballot language for amendments proposed by joint resolution is not restricted by the 75 word standard that applies to other forms of constitutional amendments. In addition, joint resolutions are not required to provide a separate financial impact statement. "The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of."

- According to Section 101.161(2), Florida Statutes, the Department of State is responsible for furnishing each proposed constitutional amendment with a place on the ballot and corresponding number. "The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on."

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Non-recurring FY 2010-2011

The Department of State, Division of Elections would estimates the cost of this proposed amendment to the state constitution, to be considered on the November 2, 2010 General Election ballot, to be approximately $9,089.28 in non-recurring General Revenue for publication costs.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election. Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for the proposed joint resolution is 96 words X $94.68 = $9,089.28.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Supervisors of Election would be required to include the ballot summary proposed amendment on printed ballots.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES