



3-2014

The Recent History of Gerrymandering in Florida: Revitalizing Davis v. Bandemer and Florida's Constitutional Requirements on Redistricting

Devon Ombres

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Election Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Devon Ombres, *The Recent History of Gerrymandering in Florida: Revitalizing Davis v. Bandemer and Florida's Constitutional Requirements on Redistricting*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 297 (2014).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol20/iss2/5>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Recent History of Gerrymandering in Florida: Revitalizing *Davis v. Bandemer* and Florida’s Constitutional Requirements on Redistricting

*Devon Ombres**

Table of Contents

I. Gerrymandering as a Justiciable Question	303
A. <i>Davis v. Bandemer</i> & the Era of Justiciability	303
B. <i>Vieth v. Jubelirer</i> & Regression to Nonjusticiability	306
II. The Odd Case of Gerrymandering in Florida.....	307
A. The 1990’s.....	309
B. The 2000’s and the Challenge to Purely Political Gerrymandering	312
1. Results of the 2002 Reapportionment.....	314
2. Packing and Cracking Democratic Districts.....	317
C. The 2012 Reapportionment and Amendments to Florida’s Constitution	321
III. Applying the Dilution of Democrats’ Voting Power in Florida to Bandemer	324
A. Discriminatory Effects	325
B. The Extraordinary Circumstances of 2008.....	327
C. Extinguished Political Influence	332
D. The Template to Apply Bandemer to Party Claims of Purely Political Gerrymandering	334
IV. What Can Be Done About Gerrymandering?.....	335
A. Florida’s Constitutional Amendment	336
B. Creation of a Non-Partisan State Electoral Commission	338
V. Conclusion.....	340

* I would like to thank Prof. Jamie Raskin and Prof. Jeff Blatner for their guidance and support in writing this article.

Legislative redistricting is “the nastiest form of politics that there is” according to Rep. Lynn Westmoreland, the Vice Chairman of the House Republican Redistricting Committee in 2010.¹ Redistricting occurs every ten years, following the national decennial census and most states, including Florida, allow their legislatures to reapportion their state legislative and federal congressional districts. Because of the partisan nature of the redistricting process, the newly drawn districts will affect, and can unduly skew, electoral outcomes for the decade to come. In states such as Florida, where a single party controls both chambers of the state legislature, redistricting can devolve from a standard practice of partisan gamesmanship whereby some party equanimity in the redistricting process can be achieved, to outright gerrymandering on the part of the controlling party.²

When a single party controls both state legislative chambers, it provides them virtually unfettered power in the redistricting process, especially in light of the Supreme Court’s recent decision in *Shelby County v. Holder* striking down the preclearance provision of the Voting Rights Act.³ A party fully in control of the decennial redistricting process now has carte blanche to take steps to solidify its majority hold on state legislative chambers and congressional districts for the ensuing decade and can completely hinder any chance the minority may have of regaining majority control at the state or federal level.⁴ This will also often result in disproportionate representation in the legislative body in comparison to the political makeup of the state’s body politic. If sustained over time, gerrymandering can ultimately skew a state’s partisan representation to the point where one party holds a supermajority in both legislative houses, and

1. Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

2. See *Gerrymandering*, in ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/231865/gerrymandering> (explaining that in 1812, Massachusetts Gov. Eldridge Gerry, signed a bill creating state a senate district distinctly resembling a salamander to ensure that the state Senate remained in control of the Democratic Republican Party despite the House and governorship being swept by the Federalist Party).

3. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down § 4(b) of the Voting Rights Act).

4. See Sari Horowitz, *Justice Department to Challenge States’ Voting Laws*, WASH. POST (July 25, 2013) (“Hours after [the] Supreme Court ruling on voting rights, Texas Attorney general Greg Abbott said the state would move forward with its voter ID law and would carry out redistricting changes that had been mired in court battles.”).

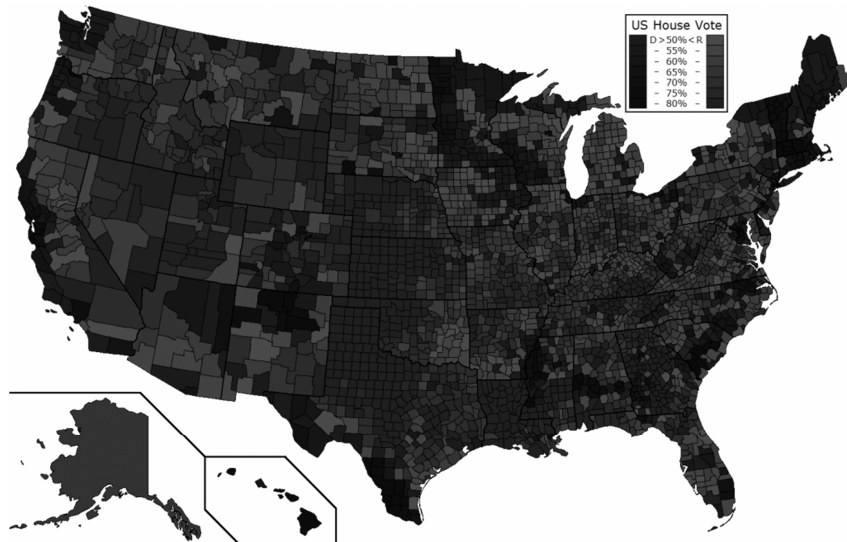
can run roughshod over the minority party regardless of any political or electoral efforts it may undertake.

Gerrymandering is a nationwide problem that is significantly skewing the country's political landscape without even considering the raft of voter ID laws recently enacted by Republican controlled state legislatures.⁵ In the 2012 election cycle, Democrats received 1.4 million more votes in elections for the House of Representatives, but Republicans maintained control of the House by 33 seats. States occasionally make efforts to raise the issue of gerrymandering⁶ but, regardless of their success or failure, gerrymandering quickly recedes from the public consciousness and is quickly replaced in the zeitgeist by memes and images that propagate an overarching belief that one party is dominant on a state and national scale, such as that below.⁷

5. The restrictive voter ID laws passed in North Carolina, Texas, Pennsylvania, etc., will not be further discussed herein.

6. See, e.g., FLA. DEPT. OF ELEC., PROPOSED CONSTITUTIONAL AMENDMENTS TO BE VOTED ON NOVEMBER 2, 2010, available at <http://election.dos.state.fl.us/publications/pdf/2010/2010ConstitutionalAmendmentsEnglishOMIT379.pdf> (highlighting that Amendments 5 & 6 set forth fair districting requirements for state legislative and congressional districts, discussed *infra*).

7. See Stephen Wolf, *Political Geography Part 5: Mapping the US Congressional Elections and Comparing to the Presidential*, DAILY KOS (Mar. 12, 2013) <http://www.dailykos.com/story/2013/03/12/1191706/-Political-Geography-Part-5-Mapping-the-US-Congressional-Elections#> (red blocks reflect districts voting for Mitt Romney in the 2012 presidential election).



These maps are widely distributed on social media and do not take into account the massive population of registered opposition voters hidden beneath the red and blue painted counties. Further, as mapping technology has improved in recent decades, these districts are arranged to appear compact and reasonable, but in many cases, such as in Florida, Arizona, Pennsylvania, North Carolina, Michigan, Illinois, Ohio, Virginia, Wisconsin and Texas, the result create legislatures that are more politically skewed than ever before.⁸

The extreme partisan divide of the current political climate extends to the states where sustained gerrymanders over multiple redistricting periods can lead to a virtual lockout of the minority party in state legislatures at the time of reapportionment, even in cases where that minority is supported by a majority of registered voters in the state. The gerrymander creates statistical improbabilities such that a minority of voters can actually obtain a majority of legislative seats. In states such as Florida, it is incongruous that there are over 500,000 more registered Democrats than Republicans and the state has voted for Democrats in four of the last six presidential

8. See Sam Wang, Op-Ed., *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html> (using statistical tools to find partisan gerrymandering in these ten states).

elections,⁹ yet the Republican Party holds a 2-to-1 advantage in representation within its Congressional Delegation and a virtual supermajority in both state legislative houses.¹⁰ The Republican advantage in Florida's state and federal legislative delegations that was entrenched during the 2002 reapportionment was only strengthened following the 2012 reapportionment despite the continued advantage of registered Democrats.

Until 2004, federal courts would consider whether a purely political gerrymander violated the Equal Protection clause, but have since deemed such claims non-justiciable. However, a redistricting pattern reflecting significantly disproportionate political gerrymandering over a lengthy period of time, as has occurred in Florida, may belie a blueprint to reviving purely political gerrymandering as a justiciable question, and it may provide the courts with guidelines to permit intervention. Although such a blueprint may be efficacious in other states and despite what could be considered a systematic pattern of disenfranchisement of Democratic voters' preferences in Florida, it is unlikely that the courts would apply such to Florida due to the simple fact that 22% of all registered voters in Florida are not affiliated with the major parties ("Non-Party Affiliates" or "NPAs").¹¹

The below will focus on the history and standards of the courts' consideration of purely political gerrymandering and its current status. Specifically, that despite the creeping invidiousness of gerrymandering, the courts will no longer consider whether purely political gerrymandering violates the equal protection clause of the Fourteenth Amendment.¹² It will also discuss the changing political landscape of Florida legislative districts over the course of the past twenty years, with a specific focus to

9 There may be an argument that Democrats have won, or should have won, Florida in five of the last six presidential elections, but that is a topic for many other articles.

10. Aaron Deslatte & Kathleen Haughney, *Despite Changes, Not Much Different in the State Legislature*, ORLANDO SENTINEL (Nov. 7, 2012), http://articles.orlando-sentinel.com/2012-11-07/news/os-florida-legislative-outcome-20121107_1_gop-agenda-florida-republicans-state-senate-seats ("Despite nearly 500,000 more registered Democrats than Republicans statewide, Republicans were poised to hold onto 76 of their 81 seats in the 120-member Florida House and lost only two seats in the Senate to keep a 26-14 majority.").

11. FLA. DEPT. OF ELEC., COUNTY VOTER REGISTRATION BY PARTY (October 9, 2012), http://election.dos.state.fl.us/voter-registration/statistics/pdf/2012/GEN2012_CountyParty.pdf [hereinafter COUNTY VOTER REGISTRATION 2012].

12. See U.S. CONST. Amend. XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

redistricting following the 2000 and 2010 censuses and the manner in which these changes have resulted in a virtual lockout of Democrats from state politics. It will also synopsise how these changes may be applied to the strictures providing for judicial action in the case of purely political gerrymandering as violative of equal protection set forth in *Davis v. Bandemer*.¹³ Finally, it will discuss recent constitutional amendments to the Florida Constitution to prohibit political considerations in redistricting, the current lawsuit focusing on their enforcement and how other states have attempted to bring equanimity to the political process of redistricting.

For the purpose of this discussion, “safe” district means there is greater than a 53/47% partisan split in voter registration, “leaning” district means that there is a 51-52.9% partisan advantage between registered party voters, and “toss-up” means that the partisan split of registered voters lies between 49.1%-50.9%.¹⁴ All electoral and voter registration figures have been derived from the Florida Department of State Division of Elections¹⁵, and does not take into full consideration the population of NPA voters in Florida.¹⁶

13. See *Davis v. Bandemer*, 106 S. Ct. 2797, 2816 (1986) (holding “political gerrymandering cases are properly justiciable under the Equal Protection Clause”).

14. See *Redistricting and Incumbent Protection in 2001-2002*, VOTING AND DEMOCRACY RESEARCH CENTER, <http://archive.fairvote.org/?page=715> (last visited Mar. 3, 2013) (defining a “safe” district as having a 55/45% partisan split, and a “highly competitive” district as having a 53/47% partisan split. However, after analyzing two decades of electoral data, in Florida, “safe” districts tend to comport with the definition in the body of text).

15. Voter Registration Statistics – By Election, FLA. DEPARTMENT OF STATE DIVISION OF ELECTIONS, <http://election.dos.state.fl.us/voter-registration/statistics/elections.shtml> (last visited Apr. 10, 2013) [hereinafter Voter Registration Statistics].

16. Compare FLA. DEPT. OF ELEC., COUNTY VOTER REGISTRATION BY PARTY (Oct. 11, 1994), <http://election.dos.state.fl.us/voter-registration/statistics/pdf/1994/94genparty.pdf>, with FLA. DEPT. OF ELEC., COUNTY VOTER REGISTRATION BY PARTY, Oct. 7, 2002, <http://election.dos.state.fl.us/voter-registration/statistics/pdf/2002/2002genparty.pdf>, and FLA. DEPT. OF ELEC., COUNTY VOTER REGISTRATION BY PARTY (Oct. 9, 2012), http://election.dos.state.fl.us/voter-registration/statistics/pdf/2012/GEN2012_CountyParty.pdf (signifying that Florida NPA voter populace has increased from 8.6% in 1994, to 16.5% in 2002 and to 22% in 2012).

I. Gerrymandering as a Justiciable Question

A. *Davis v. Bandemer & the Era of Justiciability*

The modern consideration of gerrymandering arose citing challenges to voting rights from racial discrimination, first in *Baker v. Carr*,¹⁷ followed by a litany of cases.¹⁸ The *Baker* court dealt primarily with the issue of race related gerrymandering, holding that the “equal protection clause is not diminished by the fact that the discrimination relates to political rights.”¹⁹

Additionally, the *Baker* court laid out the standard by which an issue was “justiciable” before the court, or whether it was a purely political question to which the federal courts could not grant jurisdiction. Specifically, political questions may have many elements which “identify it as essentially a function of the separation of powers,” including whether there is a textual constitutional commitment to a specific political department, the “lack of judicially discoverable and manageable standards for resolution, the “impossibility of deciding without an initial policy determination,” the “impossibility of undertaking independent resolution without expressing lack of respect due coordinate branches of government,” “the unusual need for unquestioning adherence to a political decision” or

17. See *Baker v. Carr*, 369 U.S. 186, 187 (1962) (questioning the constitutionality of a Tennessee apportionment statute on the basis that it led to a debasement of certain citizens’ votes in certain counties).

18. See *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (citing *Rogers v. Lodge*, 458 U.S. 613, 627–28 (1982) (holding that an at-large electoral system maintained for diluting the African American vote was invalid and ordered use of single member districts)) (stating that without population deviation, racial gerrymandering presents a justiciable question); see also *Mobile v. Bolden*, 446 U.S. 55, 80 (1980) (holding that an at-large electoral system did not violate the African American population’s Fifteenth Amendment rights); *White v. Regester*, 412 U.S. 755, 769 (1973) (holding that the establishment of multimember districts was proper given history of discrimination against minorities); *Whitcomb v. Chavis*, 403 U.S. 124, 124 (1971) (considering question of multimember district reapportionment’s affects on the district minority population); *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (holding that improperly proportioned multimember districts do not automatically result in invidious discrimination when election outcome does not substantially differ from “that which would result from use of a permissible population base”); *Fortson v. Dorsey*, 379 U.S. 433, 436 (1965) (holding that multimember districts did not devalue votes in comparison to that of single-member district constituents).

19. *Baker v. Carr*, 369 U.S. 186, 209–10 (quoting *Snowden v. Hughes*, 321 U.S. 1 (1944)).

the potential embarrassment from pronouncements by multiple departments on a single question.²⁰

Over time, and in areas not covered explicitly by the Voting Rights Act of 1965, claimants brought actions asserting unconstitutional gerrymandering arising from purely political discrimination as between Republicans and Democrats. In 1986, the Supreme Court determined for the first time, in *Davis v. Bandemer*,²¹ that gerrymandering was a justiciable question when the only affected class was a political party itself.²² *Bandemer* involved claims by the Indiana Democratic Party that the Republican Party had unconstitutionally gerrymandered the state legislative districts to disproportionately preclude the Democrats their representational voice.²³ Following the 1981 redistricting overseen by the Republican Party, Democratic candidates for the Indiana House received a majority of the statewide votes (51.9%), but won only 43 of 100 seats.²⁴ Additionally, the Democratic senatorial candidates received 53.1% of the statewide vote, but received only a bare majority of the seats, 13 of 25.²⁵

In so deeming the question of purely political gerrymandering justiciable, the *Davis* court wrote at length, noting that the creation of districts that would “‘minimize or cancel out the voting strength of racial *or* political elements of the voting population’ would raise a constitutional question.”²⁶ While mere political gamesmanship did not warrant overturning redistricting under the Fourteenth Amendment, efforts to dilute a political party’s voting power warranted review:

Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that [T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes because of place of residence impairs basic

20. *Id.* at 217.

21. 478 U.S. 109, 143 (1986) (holding “that political gerrymandering cases are properly justiciable under the Equal Protection Clause”).

22. *See id.* at 124–27 (stating that “each political group in a state should have the same chance to elect representatives of its choice as any other political group”).

23. *See generally* *Davis v. Bandemer*, 478 U.S. 109 (1986).

24. *Id.* at 115.

25. *Id.*

26. *Id.* at 119 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race....²⁷

The *Bandemer* court declined to act and overturn the gerrymandered districts in Indiana despite apparent sympathies to the opponents of political gerrymandering. The Court noted that redistricting merely makes it more difficult for a particular group to prevail is not *per se* unconstitutional because there is a perception that even the losing faction will be able to influence the political process by their simple continued involvement in engaging the candidates and elected officials.²⁸

In so striking down the Indiana Democrats' claim of unconstitutional gerrymandering, the Court notes that there was no finding by the lower court as to whether the Democrats could retake either legislative body, whether they would be resigned to a minority status for the entire decade, or whether they would fair better following reapportionment subsequent to the 1990 census.²⁹ The *Bandemer* court analogized the Democrats' losses in Indiana to *Whitcomb v. Chavis*,³⁰ stating that the "failure to have legislative seats in proportion to its populations emerges more as a function of losing elections than of built-in bias" and that "canceled out" votes are a euphemism for political defeat.³¹ "Only when such placement affects election results and political power statewide has an actual disadvantage occurred."³² They essentially held that as this was the first election following the redistricting, it was possible that Democrats could retake the legislature, and a wait and see approach was more appropriate than involving the judiciary in every potential case of political gerrymandering.

Unfortunately, the Court did not provide clear guidance as to the required findings allowing courts to intervene when purely political gerrymandering is found to purposefully disenfranchise an entire party from involvement in a state's political activity. In holding that a claim against political gerrymandering could succeed only in the event that "intentional

27. *Id.* at 123–24 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

28. *Id.* at 131–32 ("[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.")

29. *See* *Davis v. Bandemer*, 478 U.S. 109, 135–36 (1986) (stating the findings of the District Court).

30. *See* *Whitcomb v. Chavis*, 403 U.S. 124, 160 (holding that an apportionment scheme did not comply with the requirements of the equal protection clause).

31. *Bandemer*, 478 U.S. at 137.

32. *Id.* at 141.

discrimination against an identifiable political group and an actual discriminatory effect on that group,” the plurality did not go so far as to lay out a specific framework to guide the courts as to when intervention is appropriate.³³ As a result, a number of cases of purely political gerrymandering were reviewed as justiciable, but no action was taken.³⁴

B. *Vieth v. Jubelirer & Regression to Nonjusticiability*

In 2004, the Supreme Court again addressed the issue of purely political gerrymandering in *Vieth v. Jubelirer*,³⁵ which wholly overturned *Bandemer*, declaring the question nonjusticiable.³⁶ Writing for the majority, Justice Scalia stated that the effects prong of *Bandemer* would be very difficult to meet because it would have to take into account “a variety of historic factors and projected election results, [that] the [effected] group had been ‘denied its chance to effectively influence the political process’ as a whole, which could be achieved even without electing a candidate.”³⁷ In so reasoning, Justice Scalia relies on the *Bandemer* provision that in a statewide challenge to redistricting, the “inquiry centers on the voters’ direct *or indirect* influence on the elections of the state legislature as a whole.”³⁸

The Court also reasoned that equal protection under the Constitution does not guarantee equal representation in government to equivalently sized groups.³⁹ While the dissenting justices set forth several theorems whereby

33. *See id.* at 127.

34. *See Duckworth v. State Admin. Bd. of Election Laws*, 322 F.3d 769, 774 (4th Cir. 2003) (stating that strangely shaped districts are, alone, not sufficient to show unconstitutional gerrymandering absent actual discriminatory effects on an identifiable group); *see also Smith v. Boyle*, 144 F.3d 1060, 1068 (7th Cir. 1998) (stating that the denial of equal protection must be shown to be intentional to warrant intervention); *LaPorte Cnty. Republican Cent. Comm. v. Bd. of Com’rs of Cnty. of LaPorte*, 43 F.3d 1126, 1128 (7th Cir. 1994) (redistricting for at-large county commission seats is not actionable without showing affected balance between political parties); *O’Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (using the analysis in *Davis v. Bandemer* to assess plaintiff’s equal protection claim); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (holding that state’s motion for summary judgment is granted because plaintiffs failed to satisfy the two-part test outlined in *Davis v. Bandemer*).

35. 541 U.S. 267 (2004).

36. *Id.* at 306.

37. *Id.* at 283 (quoting *Bandemer*, 478 U.S. 109, 132 (1986)).

38. *Id.*

39. *Id.* at 287.

the courts could deem political gerrymandering unconstitutional, including Justices Breyer's definition that such occurred via "the *unjustified* use of political factors to entrench a minority in power," the majority rejected all such reasoning as too inexact to adequately delineate guidance for finding actionable scenarios.⁴⁰ Ultimately, the reversal of *Bandemer* was based upon the Court's assertion that it was unworkable and the courts are incapable of principled application of its strictures.⁴¹

However, Justice Kennedy held out hope that political gerrymandering may again be a justiciable question. Justice Kennedy concurred with the outcome in *Veith* based on the facts before the court, but he made an effort to note that a purely political gerrymander will violate equal protection upon a "conclusion that the classifications [utilized], though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective" as legislative redistricting should establish "fair and effective representation for all citizens."⁴² While a "manageable standard" to deal with illegitimate partisan gerrymandering had not yet been found, that does not preclude the possibility that such a standard will come to light.⁴³

II. *The Odd Case of Gerrymandering in Florida*

"Fair and effective representation for all citizens" is a just and valid goal, although not one that is often sought by either major party. It is in the self-interests of political parties and politicians to maintain power once a majority is achieved or a seat is won. In its traditional sense, Gerrymandering will often simply reinforce and institutionalize majority power,

40. *Id.* at 292–305 (Stevens, J dissenting) (reasoning that political gerrymandering be subject to strict scrutiny as suppression of political speech under the First Amendment is not discernable in the Constitution; Justice Souter's five part test showing that the plaintiff is the member of a cohesive political group, that no heed was paid to traditional districting principles, there were specific deviations from traditional districting principles and the distribution of the group's population, that a hypothetical district exists remedying packing and cracking, and there was intentional manipulation of the district to pack and crack the group does not work, because Justice Souter does not elucidate what is being tested for; Justice Breyer's unjust entrenchment of the minority is too nebulous, and he gives no instance of permanent frustration of the majority's will, and; Justice Kennedy's wait and see approach has already failed).

41. *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004).

42. *Id.* at 306 (Kennedy, J., concurring).

43. *Id.* at 311.

which likewise often reflects a majority of the population (or one that is nearly evenly split by political alliance).

In that regard, however, Florida poses a somewhat unique situation. Florida is a “swing state” on the national level but the makeup of its legislature and congressional delegation do not remotely reflect the political alliances held by its populace. As of the 2012 general election, Florida had 500,000 more registered Democrats than Republicans, forty-one of sixty-seven counties had more registered Democrats than Republicans,⁴⁴ the Republican governor, who won by a 1.2% margin, had a 39% approval rating,⁴⁵ the voters again cast a majority of ballots for President Obama, and yet Republicans held 17 of 27 congressional seats,⁴⁶ 26 of 40 state Senate seats,⁴⁷ and 76 of 120 state House seats.⁴⁸

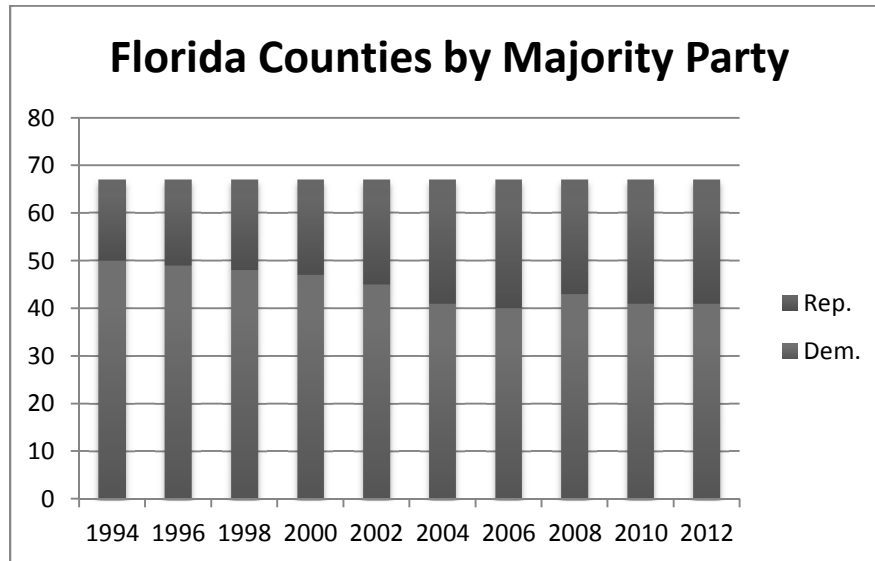
44. COUNTY VOTER REGISTRATION 2012, *supra* note 10 (including nearly all of the most populous counties, Broward, Palm Beach, Miami-Dade, Duval, Orange, Pinellas, Hillsborough, Polk and Volusia. Seminole, Lee, Pasco & Sarasota Counties maintain Republican majorities).

45. Jeremy Wallace, *Is Romney Campaign Avoiding Rick Scott?*, SARASOTA HERALD TRIB., Nov. 2, 2012.

46. *Members of the H.R.*, FLA. H.R. J. (1991); *Members of the S.*, FLA. S. J., (1991).

47. *2012–2014 Senators*, THE FLA. S., <http://www.flsenate.gov/Senators/> (last visited Apr. 10, 2013).

48. *Representatives for Regular Session 2013*, FLA. H.R., <http://www.myflorida.house.gov/sections/representatives/representatives.aspx?SessionId=73> (last visited Apr. 10, 2013).



A. The 1990s

During the 1990 census, Democrats held a solid majority in the House and a small majority in the Senate, allowing them to control the redistricting process.⁴⁹ There is limited electronically available information pertaining to the voter registration statistics available for Florida pre-1994, however it does not appear that the Democrats took significant or effective efforts to increase their majorities via redistricting as following the 1992 elections there was no change in the membership makeup of the House, in which they held a seventy-four-seat majority, and they actually lost a seat in the Senate.⁵⁰ Additionally, while Florida gained four Congressional seats, only a single additional seat went to Democrats in the 1992 election.⁵¹ Moreover, there were no challenges to the 1992-redistricting plan asserting

49. See *Members of the H.R.*, FLA. H.R. J. (1992) (House: 74-46); *Members of the S.*, FLA S. J. (1992) (Senate: 22-18).

50. See *Members of the H.R.*, FLA. H.R. J. (1994); *Members of the S.*, FLA. S. J., (1994).

51. See Dango, *The 1991–1992 redistricting cycle*, RED RACING HORSES (Oct. 21, 2011, 10:00:51 PM), <http://www.redracinghorses.com/diary/1250/the-19911992-redistricting-cycle>.

that there was impermissible, purely political gerrymandering. Rather, the challenges to the 1992-plan regarded alleged racial gerrymandering.⁵²

The 1994 election cycle was an odd year in electoral politics with the Newt Gingrich led Republicans running on the Contract with America. The Republican Party as a whole placed unprecedented pressure on “Southern” and “Blue Dog” Democrats, those with traditionally conservative leanings in somewhat conservative districts to retire, switch parties or face a strong Republican challenge.⁵³ Many congressional Democrats either retired or switched parties, which was felt down ticket as well, especially in North Florida and the Panhandle, which are traditionally more conservative than the metropolitan regions and areas south of Orlando.⁵⁴

Following the 1994 elections, there was a drop off in Democrats represented in the Florida legislature, with a low-point membership in the House of 45 seats, and in the Senate of 15 seats during the 1990 census cycle.⁵⁵ However, other national political events likely depressed Democratic voters and/or rallied Republicans, such as the Monica Lewinsky scandal being in the media forefront leading up to the 1998-midterm elections. However, during this decade, Democrats only lost a total of 8 “safe” state House seats and 3 “safe” Senate seats.⁵⁶

Throughout the 1990s, the districts that were considered “safe” for each party were fairly stable as to their partisan makeup. In the “safe” Democratic House districts, on average and between the two major parties, there was a 66/34% split between Democratic and Republican voters respectively; whereas in the Republican “safe” districts, there was a 61/39% split between Republican and Democrats. Similarly, in the “safe” Democratic Senate districts there was a 66/34% split between registered

52. See *Lawyer v. Dep't. of Justice*, 521 U.S. 567 (1997); *De Grandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Johnson v. Smith*, No. TCA 94-40025-WS, 1994 WL 907596 (N.D. Fla. July 18, 1994); *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995); *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996); *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 297280 (N.D. Fla. May 31, 1996); *Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

53. See Bruce Bartlett, *The Dismal Future of the GOP*, FORBES.COM, May 1, 2009, <http://www.forbes.com/2009/04/30/specter-future-gop-opinions-columnists-bartlett.html> (last visited Apr. 3, 2013).

54. See *id.*

55. See *Members of the H.R.*, FLA. H.R. J. (2000); *Members of the S.*, FLA. S. J. (2000).

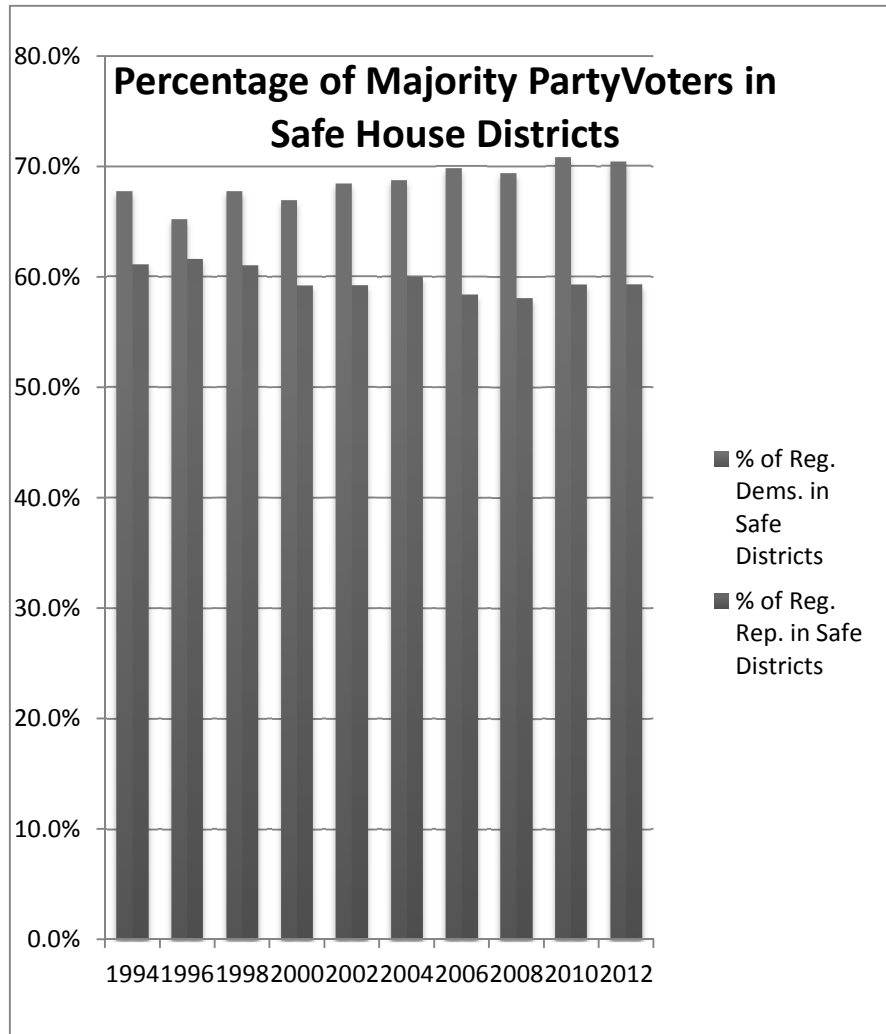
56. The 2000 Democrats had 53 “safe” House districts and 45 seats, 18 “safe” Senate districts and 15 seats.

Democrats and Republicans. In the “safe” Republican districts, the split was 59/41%.⁵⁷

Following the 2002 reapportionment, there were slight but significant changes to the House district partisan splits and a larger change to the Senate districts, both of which appear to have had dramatic results effectively ensconcing the Republican Party’s power in Florida for the entirety of the 2000s and seemingly beyond.⁵⁸

57. See Voter Registration Statistics, *supra* note 15.

58. See Sasha Abramsky, *The Redistricting Wars*, THE NATION (Dec. 11, 2003), <http://archive.fairvote.org/redistricting/reports/remanual/frames.htm> (explaining that, “entirely due to redistricting,” the Republicans expanded their majority).



B. The 2000s and the Challenge to Purely Political Gerrymandering

As of the 2000 decennial census, the Republican Party had control of both houses of the Florida Legislature by margins of 75 to 45 and 25 to 15 in the House and Senate respectively placing them wholly in control of the redistricting process.⁵⁹ During the 1992 redistricting process, Republicans

59. See Matthew C. Isbell, *Florida Senate: Republican Gerrymander tilts odds, but*

claimed that Democrats locked the doors to the reapportionment suite in the Capitol Building, and Speaker of the House, Daniel Webster asserted that the 2002 process would be open to all.⁶⁰ However, Speaker Webster's statement was made shortly before a security keypad was installed in the same office suite, and Democrats were not provided the entry code.⁶¹

Following the 2000 reapportionment, the Democrats immediately filed suit alleging racial gerrymandering and a breach of equal protection for purely political gerrymandering in *Bush v. Martinez*.⁶² A three-judge panel in the Federal Southern District of Florida heard the challenge and, as in numerous other challenges to voter dilution through political Gerrymandering, nothing ultimately came of it.

The court considered *Bandemer* but required that a four-part test not set forth therein be met to succeed on a claim of political gerrymandering: 1) the group is sufficiently large and geographically compact enough to constitute the majority of a single member district; 2) the group is politically cohesive; 3) the party winning the contested seat votes sufficiently as a block to enable it, "in absence of special circumstances, such as the minority candidate running unopposed, to defeat the minority party's preferred candidate"; and, 4) once the first three factors are met, that the totality of the circumstances reflects vote dilution.⁶³ Interestingly, the court did not take into account the population of NPA voters in Florida.

The *Martinez* court noted that in political gerrymandering cases, the best evidence of political identity will be proof of bloc voting and political cohesiveness.⁶⁴ These will most easily be established by showing that the candidates supported by each group are separate, and that each group votes

Chances for Democratic Takeover within Grasp, MCI MAPS, (July 18, 2013), <http://mcimaps.com/florida-senate-republican-gerrymander-tilts-odds-but-chances-for-democratic-takeover-within-grasp/> ("The end result was Democrats losing control of both legislative chambers in the 1990s. Redistricting following the 2000 Census allowed Republicans to further gerrymander themselves into a secure majority.").

60. David Royse, *Redistricting is a Handy Political Tool*, ASSOC. PRESS (Mar. 25, 2001), <http://archive.fairvote.org/redistricting/reports/remanual/flnews2.htm#handy>.

61. Steve Bousquet, *Democrats Fret Over Capitol Office Politics*, ST. PETERSBURG TIMES (Nov. 27, 2001), available at http://www.sptimes.com/News/112701/State/Democrats_fret_over_C.shtml.

62. 234 F. Supp. 2d 1275 (S.D. Fla. 2002).

63. *Id.* at 1334–35 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994))).

64. *See id.* at 1336.

for their candidate with a general mutual exclusivity, which must be shown over the course of time, not just a single election.⁶⁵

The Democrats were likely hasty in bringing the pure political gerrymandering claim in the *Martinez* action as only a single election had occurred under the new reapportionment, as occurred in *Bandemer*.⁶⁶ A lengthier record could have better reflected the Democrat's claims in the light that they were relegated to essentially become a superminority party throughout the decade. Certainly, there were issues of underperformance, but the political gerrymander helped preclude the Democratic Party from even the possibility of winning a majority of seats in either state house or of obtaining a majority of the congressional delegation.

1. Results of the 2002 Reapportionment

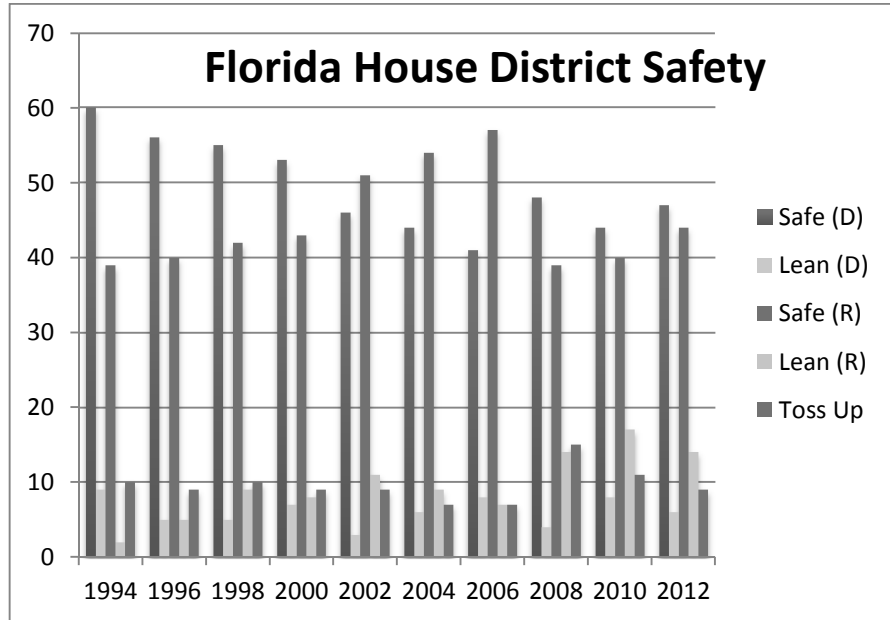
Under the 2002 reapportionment plan, the Democrats were not completely shut out of the political process vis-à-vis having no Democratic members of the state legislature, but their chances at reestablishing a majority in either house were diminished by packing more registered Democrats into fewer districts, diluting their vote in surrounding districts and thusly creating a statistical improbability that they will be able to successfully contest Republican held districts or achieve a Democratic majority in either chamber of the Florida Legislature. Democrats were additionally discounted from the Congressional Delegation.⁶⁷

The 2002 reapportionment reduced Democratic "safe" districts from 53 to 46, Democratic leaning districts were reduced from 7 to 3, and there was no change in "toss-up" districts, remaining at 9. Alternatively, Republican "safe" districts rose from 43 to 51 and "leaning" districts rose from 8 to 11. This plan resulted in a 22-seat swing in the Republican Party's favor by voter registration.

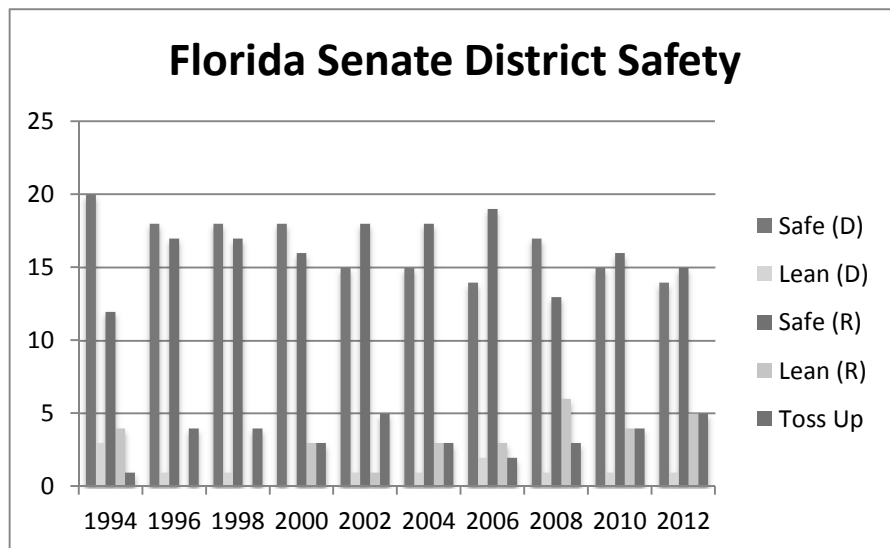
65. *See id.*

66. *See Davis v. Bandemer*, 478 U.S. 109, 135–36 (1986).

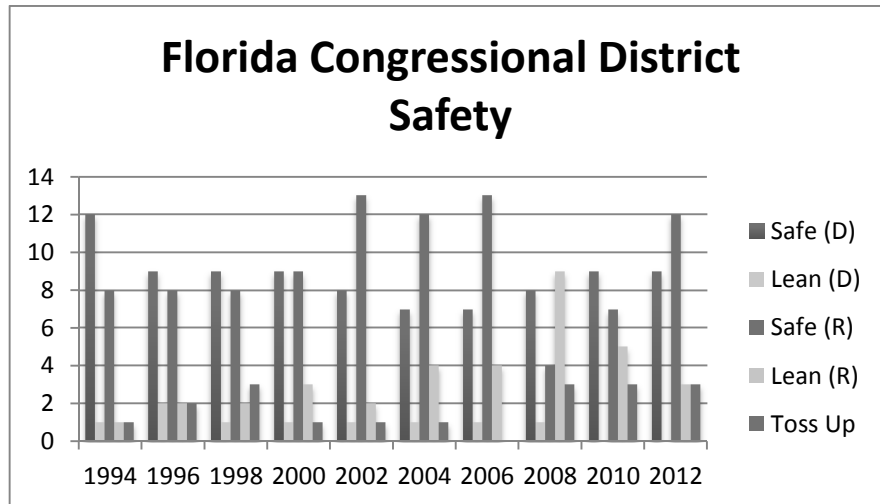
67. *See Voter Registration Statistics*, *supra* note 15.



Likewise, in the Senate, Democrats lost 3 traditionally safe seats, falling from 18 to 15 seats, while Republicans picked up 2, moving from 16 to 18 seats. Thus, there was a 5-seat swing.



For the Congressional Delegation, Florida was granted 2 additional seats, which were swiftly apportioned into “safe” Republican districts, while the Democrats lost a “safe” district, leaving them with a total of 8 “safe” districts.



While there are issues with Democratic electoral underperformance in the late 1990s, the 2002 reapportionment plan essentially codified a Republican majority, again despite registered Democrats composing a majority of the electorate.⁶⁸ Following the implementation of the 2000 redistricting plan, to obtain a bare majority in the House, Democrats would have had to sweep all districts with even the smallest Democratic majority, as well as all of the “toss-up” districts and steal three Republican districts. To regain the Senate, the same would apply in sweeping all of the “toss-up” seats. To gain a majority in the Congressional Delegation, Democrats would have to take their districts, the single “toss-up” district, the 2 Republican “leaning” districts, and a “safe” Republican district, which is statistically unlikely as in any given year as this requires a landslide victory

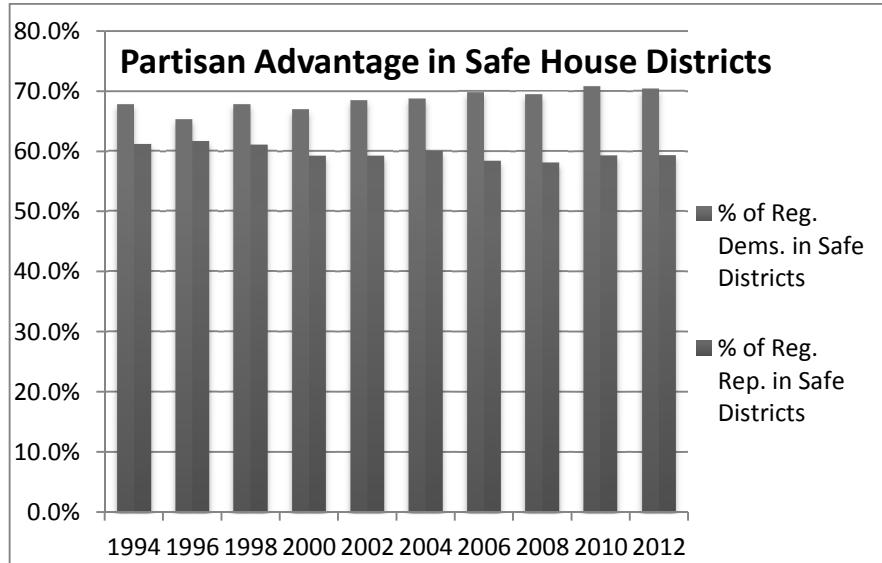
68. See generally Barbara Giles, *Florida Congressional Elections, 1952–2002: A Reversal of Party Fortunes*, 32 POL. & POL’Y 434 (Nov. 12, 2004), available at <http://onlinelibrary.wiley.com/store/10.1111/j.1747-1346.2004.tb00191.x/asset/j.1747-1346.2004.tb00191.x.pdf?v=1&t=hn7neivg&s=6ef0b5bea7675541b853aa75b76fc2def3c2b637> (examining elections from 1952–2002 and explaining the significance of reapportionment elections in bringing about change in party fortunes).

among NPA voters. Additionally there are generally only 60 state House races and 10–12 Senate races in a given year because incumbency protection makes running in most districts a waste of time and money.

2. Packing and Cracking Democratic Districts

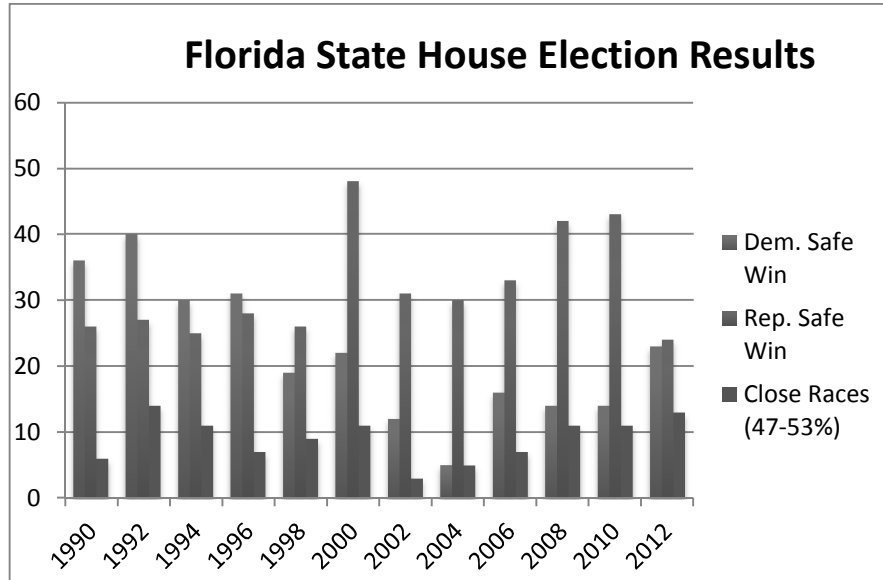
Gerrymandering is expected to give an advantage to the party controlling the redistricting process. However, it is the invidious packing and cracking schemes, increasing the density of the opposition party in already controlled districts while diluting their numbers in other districts that is at the heart of gerrymandering. This enables the gerrymandering party to strengthen its control of the legislature on one hand and allow them to announce that they established and/or protected number of safe opposition districts on the other. The packing and cracking of Democratic districts and the strengthening of Republican districts becomes patently clear when examined following the 2002 reapportionment. To this end, the “safe” Democratic districts saw an increase in the partisan divide, while the Republicans saw a decrease in such while maintaining the “safe” threshold of having over 55% of the registered partisan voters in the district.

The alterations to the Florida House districts were small, but significant. Prior to 2002, the average partisan split in “safe” Democratic House districts was 66.9/33.1%. The post-2002 reapportionment saw a 2.5% increase in the partisan divide of safe districts to 69.4/30.6%, which diluted the power of Democrats in neighboring districts, some of which were “leaning” or “toss-ups.” Conversely, Republican “safe” districts saw a diminution in the partisan split from 60.7/ 39.3% to 59/41% after the reapportionment, which ensured that “safe” seats remained safe and bolstered neighboring districts that were “leaning” or “toss-ups.”

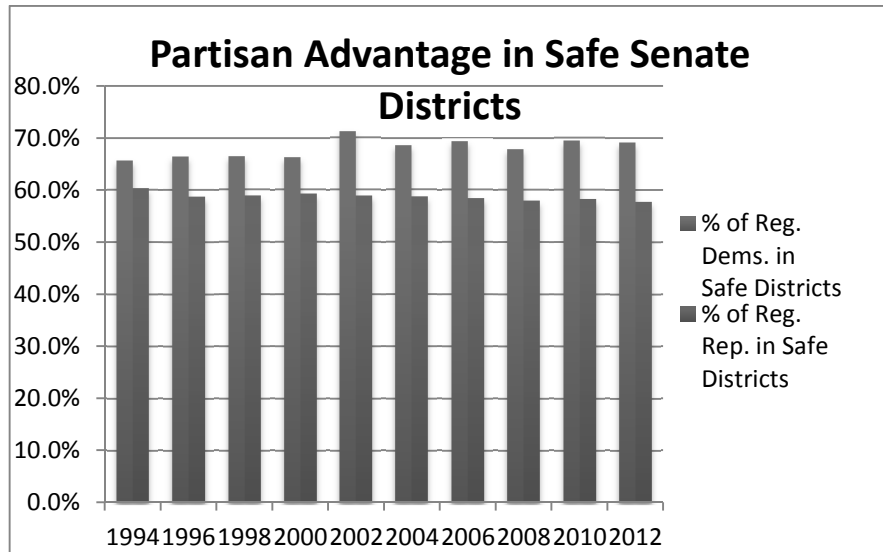


The 2002 election cycle also saw the second fewest state House races of the 2000s, at 46, as well as the fewest “competitive” races in two decades with only 3 races that fell under that category as having a 53/47% partisan split.⁶⁹

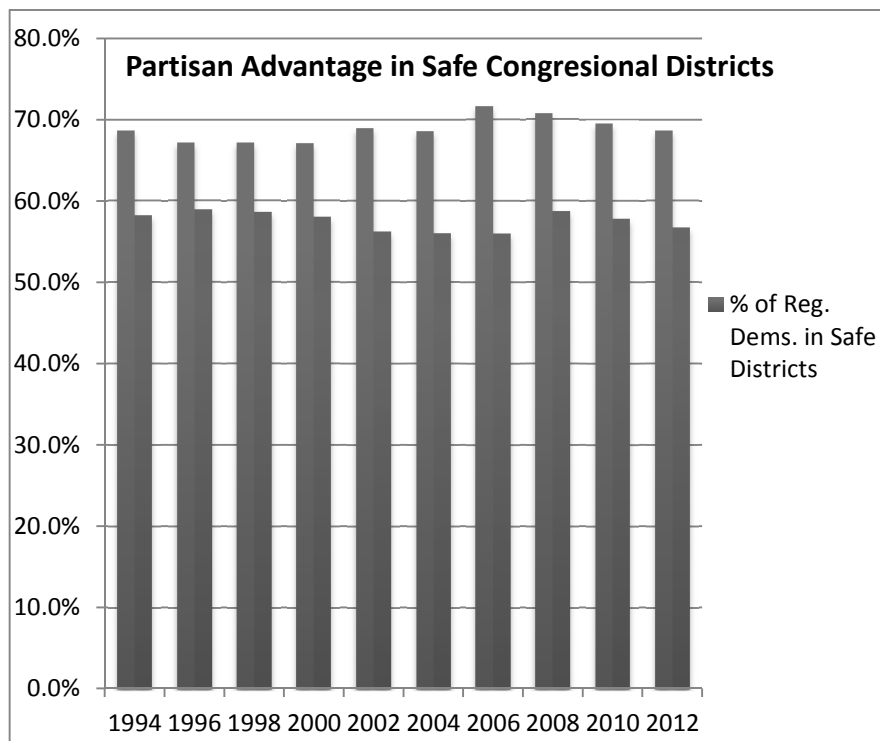
69. See VOTING AND DEMOCRACY RESEARCH CENTER, *supra* note 13 (noting that “competitive” races have final election results falling within a 55/45% split. For the purposes here, a “competitive” race falls within a 53/47% split.); see also *Bandemer*, 478 U.S. at 130.



The same pattern was seen in the Senate in 2002 with the average partisan divide of Democratic voters rising fully 3%, from a 66.2/33.8% split to a 69.2/30.8% split in “safe” districts. The Republican “safe” district fell from a 59.4/40.6% split to a 58.5/41.5% split, almost 1%.



This pattern held true to the Congressional districts as well. The Democrats saw an increase in their average partisan split margins in “safe” districts of 2.3%, from a 67.5/32.5% split to 69.8/30.2% split. The Republican reapportionment again maintained their safe margins while bolstering “leaning” and “toss-up” districts, going so far as to turn some Democratic “leaning” districts into “safe” Republican districts. The most obvious occurrence was in the grouping of Districts 20-22, which had respective Democrat-to-Republican splits in 2000 of 59/41, 36/64 and 53/47. Following the 2002 reapportionment, the partisan splits of Districts 20-22 were 63/37, 42/58 and 45/55, respectively. By packing a greater percentage of Democrats into Districts 20 and 21, the newly created district map was able to alter District 22 from “safe” Democrat to “safe” Republican district.



Absent extraordinary circumstances, reapportionment can place a stranglehold on the partisan makeup of a state legislature and its congressional delegation. At times, even extraordinary circumstances can be placed in check by a well-managed gerrymander. It is telling that only

three Florida congressional seats switched parties during the decade, one of which was the result of a sex scandal involving underage House pages, and all three reverted to Republican control in 2010 with the rise of the Tea Party.⁷⁰

C. The 2012 Reapportionment and Amendments to Florida's Constitution

Following the 2010 census, Florida gained an additional two seats to its congressional delegation, raising the total to 27. In the same year, recognizing the importance of maintaining equitability in the voting process, Floridians resoundingly passed two constitutional amendments by ballot initiative addressing reapportionment and gerrymandering.⁷¹ The purpose of the amendments was to prevent further gerrymandering by precluding the legislature from reapportioning the districts with the intent to protect incumbents, and requiring that the new districts be compact and use existing political boundaries.⁷² The amendments preclude the legislature

70. Districts 8, 16 and 22 were briefly held by Democrats during the decade. District 8 generally “leaned” Republican and is now a “safe” Republican district with a 56.7/43.3%. District 16 fell from “safe” to “leaning” Republican following the Mark Foley scandal and has again been reestablished as a “safe” Republican district with a 57.8/42.2% split. District 22 has since been reapportioned to a “safe” Democratic district.

71. Both proposed amendments were passed with over 62% of the vote. *See Constitutional Amendments*, FLA. DEP’T. OF STATE DIV. OF ELEC. Official Results, <http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN>; *see also Standards for Legislature to Follow in Legislative Redistricting*, FLA. DEP’T. OF STATE DIV. OF ELEC., <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=43605&seqnum=2> (last visited Apr. 10, 2013).

72. FLA. CONST. art. III, §§ 20–21 (2010):

SECTION 20. Standards for establishing congressional district boundaries.

In establishing congressional district boundaries: (a) No apportionment plan or individual 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 subsections (a) and (b) of this section are set forth shall not be read to establish any priority of

from taking into account political considerations or consulting with political entities in furtherance of the redistricting procedure.

It is yet to be wholly seen whether the amendments will result in a significant shake-up of the representational ratios in the Florida Legislature and Congressional Delegation. However, based on the outcomes of the 2012 election, as it stands, the amendments did not result in any significant shake-up to Florida's legislative or congressional delegation ratios. During the general election, President Obama did not fair as well as in 2008, but he carried Florida by 84,000 votes. While Democrats gained 2 down ticket Congressional seats, bringing their total to ten of twenty-seven seats, they held only 37% of the available seats despite receiving 48% of the votes statewide.

In order to obtain a majority of the Florida Congressional Delegation, Democrats would need to steal two Republican-leaning seats, which would be incredibly difficult to do, needing to overcome an average 46,000-voter deficit by registration, as well as win landslides among NPA voters. Alternatively, the Democrats have been packed into districts where they hold an average advantage in voter registration on Republicans of 114,000 voters. The "safe" Democratic districts essentially cannot be won by a Republican candidate, but this is preferred by the controlling party under the gerrymandered scheme to prevent the possibility of Democrats taking seats elsewhere. The gerrymander continues to be clearly evidenced via the

one standard over the other within that subsection.

SECTION 21. Standards for establishing legislative district boundaries.

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 subsections (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.

Id.

partisan split in “safe” districts whereby Democrats hold a 68.6/31.4% margin, while Republicans hold a 56.7/43.3% margin, which is generally sufficient to hold off even legitimate challenges to the seat.

In reapportioning the state House districts, Democrats gained only 3 “safe” seats, but lost 2 districts that “lean” Democrat by voter registration tally. The 2012 election results prove the further discouraging effects of gerrymandering when Democrats won only 23 of 47 races for the House when receiving 120,000 more votes than Republicans in contested races and a total of 52% of the popular vote. Additionally, only 13 races fell into the “competitive” category of less than a 53/47% partisan split. However, despite their strong showing at the polls, Democrats gained just 5 seats on their previous total, improving to 44 seats, holding just 36.6% of available House seats.

In the state Senate plan, Democrats actually lost a “safe” district, Republicans gained a “leaning” district, and a single additional district fell into the “toss-up” column. The breakdown for seat safety in the Senate keeps the Democrats at a disadvantage, giving them 14 “safe” seats and 1 “leaning” seat, while the Republicans have 15 “safe” seats and 5 “leaning” seats. The Democrats would need to sweep all 5 “toss-up” seats over the course of two election cycles to simply reach an even split in the state Senate. In winning 2 seats during the 2012 election, the Democrats brought their total up to 14 seats.

As to the Congressional Delegation, Democrats gained no “safe” districts, remaining stable at 9 seats and there were no changes to the “toss-up” districts. However, the Republican hold strengthened as the two new seats granted to the Florida congressional delegation were drawn as safe Republican districts. Overall, the Republican reapportionment resulted in 12 safe districts, up from 7 in 2010, and a decrease in leaning districts from 5 to 3.

With regard to alterations in the partisan splits following the 2012 reapportionment, there was little change to the Congressional districts. In the Florida House, however, Democratic votes in “leaning” and “toss-up” districts were further diluted, with the partisan split in “safe” districts rising from an average of 69.4/30.6% to 70.4/29.6%. In the Senate, the Republicans further strengthened their hold on “safe” and “leaning” districts by decreasing their density in “safe” districts from a decade average of 58.5/41.5% to 57.8/42.2%, ensuring to remain above the 55% percent “safe” threshold.

As a result of the redistricting plan passed by the Republican controlled Florida legislature, two primary lawsuits, which have been

consolidated for interlocutory appellate purposes, have been filed, alleging violations of the amendments, and they are currently pending before the Second Judicial Circuit of Florida in Leon County and the Supreme Court of Florida.⁷³ The allegations assert that high-ranking staff of the Florida House Speaker and Senate President were in frequent contact with Republican Party of Florida officials and consultants who were involved in analyzing and drafting the 2012 redistricting maps.⁷⁴ The case is discussed further below.

III. Applying the Dilution of Democrats' Voting Power in Florida to Bandemer

Bandemer was effectively killed by *Vieth*, but its premise remains: that purely political gerrymandering results in equal protection violations when it is shown that a political group is intentionally discriminated against and there is an actual discriminatory effect. Florida's reapportionment plans and their effects over the course of the past two decades provide a blueprint for the required elements for a court to consider when acting on a claim that equal protection rights were violated due to purely political gerrymandering.

The following several factors are those that may be considered in applying the template and requiring that a court take action to ensure that equal protection is applied in the face of a purely political gerrymander:

- Whether the newly reapportioned districts are compact and contiguous, utilizing historical political boundaries where possible;
- Whether the reapportionment is controlled by a single party;
- Whether that reapportionment significantly weakens the political prospects of the party in the minority to elect their representatives to Congress or the state legislature;

73. See *The League of Women Voters, et al. v. The Fla. House of Representatives*, et al., Fla. S. Ct. Case No. SC 13-949, (Fla. 1st DCA Case No. 1D12-5280, Fla. 2d Jud. Cir. Case No. 37-2012 CA 00412); see also *Romo, et al. v. The Florida House of Representatives, et al.*, Fla. S. Ct. Case No. SC 13-951, (Fla. 1st DCA Case No. 1D12-5280, Fla. 2d Jud. Cir. Case No. 37-2012 CA 00490).

74. Mary Ellen Klas, *Emails Show Legislative Staff Talked with Party Over Redistricting Maps*, MIAMI HERALD (Feb. 4, 2013), <http://www.miamiherald.com/2013/02/04/v-fullstory/3217223/emails-show-legislative-staff.html>.

- Whether the party discriminated against has a majority or minority of the registered voters in that state affected;
- Whether an extraordinary political circumstance (the Contract with America, the Obama campaign, the Tea Party Revolution, etc.) occurred during the decade being reviewed that benefited the party on the national level, but failed to reflect any benefit at the state level via an increase in legislative seats, and;
- Whether the majority party's membership in the state's congressional delegation significantly outstrips its percentage of registered voters on the state level, i.e., whether a party holds a supermajority or near supermajority in one or both legislative chambers despite its registered voters composing 50% or less of the electoral populace.

A finding that several of the above factors are met would warrant court intervention and require redistricting with an eye toward equanimity between the parties' registered voters in a majority of districts, allowing both parties an equal opportunity to convince the electorate and NPAs of their superior position.

These issues are discussed below in combination to reflect the discriminatory effects on the electoral realities and prospects of the Democratic Party as affected, the Democrats inability to overcome the gerrymander despite the extraordinary national surge of the Democratic Party from 2006-2008, and the effectual extinguishment of Democratic political influence in the state due to their relegation to superminority status.

A. Discriminatory Effects

The intentional discrimination against a political group is patently clear, as the intent of redistricting is to obtain a political advantage in the electoral process.⁷⁵ Therefore, the question falls to whether there was a discriminatory effect.

From 2000 onward, the Republican Party of Florida has solidified its hold on the Legislature and Congressional Delegation by systematically packing and cracking Democratic voters into fewer viable districts via the

75. See *Davis v. Bandemer*, 478 U.S. 109, 128–29 (1986) (“[W]henver a legislature redistricts, those responsible for the legislation will know . . . whether a particular district is a safe one for a Democrat or Republican candidate [I]t should not be very difficult to prove that the likely political consequences of reapportionment were intended.”).

2002 and 2012 reapportionment plans.⁷⁶ Democrats are almost an afterthought within the legislature because they have been relegated to superminority status with little hope of regaining any semblance of a majority in either house.

The system put in place in 2002 creates strong protections for incumbents and parties. The best predictor of the party that will win a district is whether that party holds even a bare majority in registered voters under the 2002 reapportionment system. As seen, *supra*, only three Florida congressional seats switched parties during the 2000s. But even more telling of the strength of the gerrymander is that there were only 79 of a possible 125 challenges made for a congressional seat during the decade, and of those races, the party with a minority of registered voters won election in only 11 contests totaling 14%.

A similar pattern holds true for the Florida Senate and House. In the Senate, there were only 60 contested races of a possible 100, and the winner from a district representing a minority of its registered voters only occurred on 7 occasions or 12% of the time. In fact, in the 2012 Senate elections, the party with the majority of registered voters in a district held sway in 100% of the elections. The House saw less than 50% of possible races contested; there were a mere 242 contests out of a possible 600 over the course of the decade. In those races, the winner came from the party with a minority of registered voters in the district in 43 elections or 18% of the time. Of these races with a minority party winner, the same generally occurred when the district “leaned” or was a “toss-up,” happening 7 of 11 times in “lean/toss-up” congressional races, 5 of 7 times in “lean/toss-up” state Senate races, and 27 of 60 times in “lean/toss-up” state House races.

Given the data seen in Florida during the past decade, gerrymandering has clearly resulted in a discriminatory effect on the Democratic Party. Florida’s electoral districts have virtually been locked down to the party holding the majority of registered voters in each district, resulting in the infeasibility that Democrats could obtain a majority in the Congressional Delegation or either chamber of the Florida Legislature. This trend has only continued into the 2010s via the 2012 reapportionment, again

76. See John Kennedy, *Florida’s Redistricting Could Pit Republicans Against Fellow Republicans*, PALM BEACH POST (Aug. 7, 2011, 10:50PM), <http://www.palmbeachpost.com/news/news/state-regional/floridas-redistricting-could-pit-republicans-again/nLwnt/> (noting that after the 2002 redistricting, Republicans held 19 of Florida’s 25 congressional districts despite Democrats holding a 600,000-voter edge statewide over Republicans).

controlled by the Republican Party, regardless of the state constitutional amendments attempting to take politics out of the redistricting equation.

B. The Extraordinary Circumstances of 2008

The *Bandemer* court declined to act on the Indiana Democrats' claims of Equal Protection Clause violations in part by questioning whether it was possible that they could retake either legislative chamber, whether they were resigned to minority status for a decade, and whether they would fare better following the 1990 decennial census.⁷⁷ In applying those inquiries to the Florida scenario, the answer is no to all three.

As discussed, *supra*, there can be extraordinary circumstances that can catapult one political party over the other to obtain a surprise majority in a single election cycle as occurred in 1994 with the Contract with America. The Democrats "extraordinary circumstance" occurred in 2008 behind a confluence of events: President Obama's campaign, President Bush's incredibly low 37% approval rating,⁷⁸ and the emerging fiscal crisis. Nationally, Democrats gained 21 congressional House seats, expanding their majority to a 257-178 margin.⁷⁹ There was an 8-seat gain in the United States Senate, raising the Democratic majority (including the two Independents) to a 57-43 margin.⁸⁰ Finally, Barack Obama won the presidency with 365 Electoral College votes and by a margin of 10 million popular votes.⁸¹

The national trend did not, however, apply to Florida, which President Obama carried by almost 250,000 votes.⁸² There were 23 Congressional

77. See *Bandemer*, 478 U.S. at 135–36 (determining that the District Court erred in concluding there was a violation of equal protection in the absence of explicit findings that Democrats could not retake either legislative chamber, were resigned to minority status, and would have no hope of doing better following the 1990 census).

78. *George W. Bush Presidential Job Approval*, GALLUP, <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> (last visited Apr. 15, 2013).

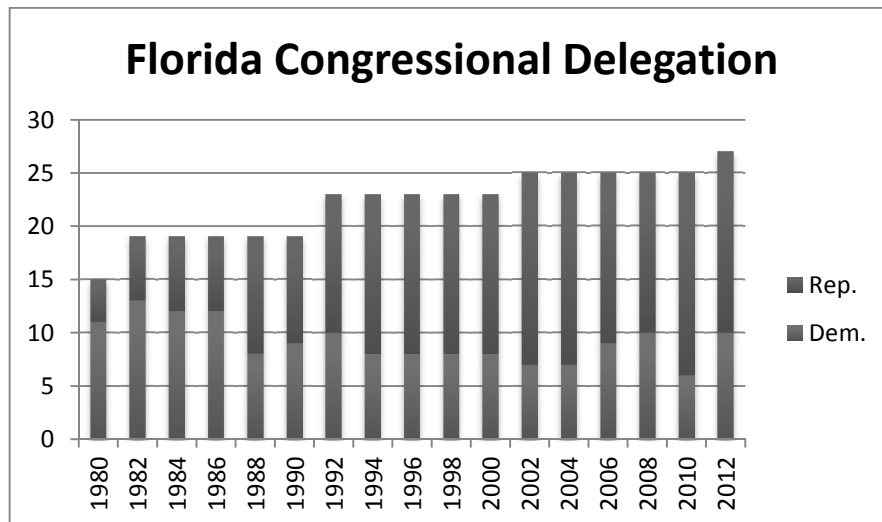
79. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 3 (July 2009), available at <http://www.fec.gov/pubrec/fe2008/federalelections2008.shtml> [hereinafter FEDERAL ELECTIONS 2008].

80. *Id.*

81. *Id.* at 5, 13.

82. FLA. DEP'T OF STATE DIV. OF ELECTIONS, OFFICIAL RESULTS: PRESIDENT OF THE UNITED STATES, available at <http://doe.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008&DATAMODE=> (last visited Apr. 15, 2013).

racers for 25 available seats and Democrats gained 1 seat, winning 2 Republican “leaning” seats and losing 1 “safe” seat.⁸³ Although the final total vote tally reflects a 300,000-voter preference for Republicans, the 2 districts where the incumbent was not contested were Democratic strongholds with a combined 500,000 registered Democrats to 110,000 registered Republicans, which likely would have erased any Republican advantage in that vote total.⁸⁴ Thus, were a majority of votes for Florida’s Congressional Delegation to fall for the Democrats or were there a 50/50 split, the Delegation total would not have changed, and Republicans would still hold a 15 to 10 seat advantage over Democrats, which is demonstrable evidence of gerrymandering.



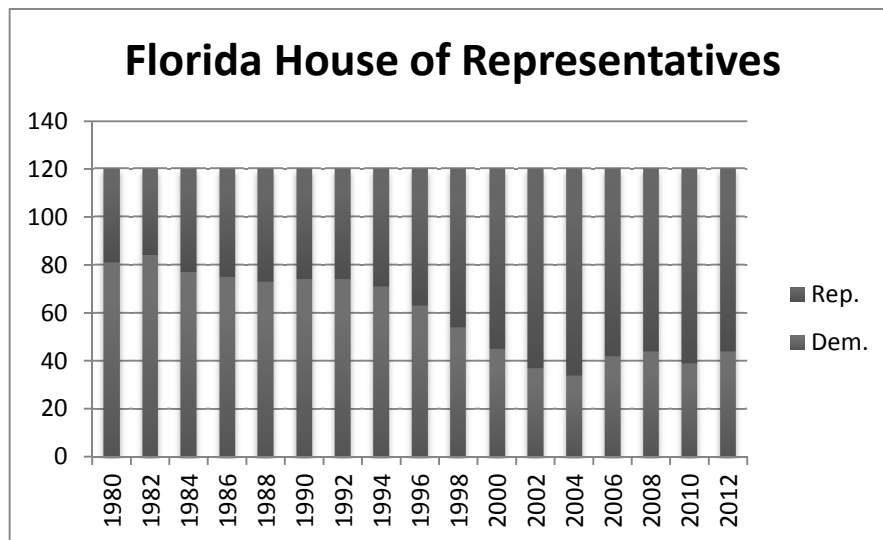
In the Florida House, again, Democrats only gained 4 seats in races for only 56 of 120 available seats.⁸⁵ Of those 56 races, 33 of the seats historically are or were “safe” for Republicans and an additional 6 seats historically leaned Republican. Democrats likely underperformed in the state House races as they lost 12 of 15 races where there was a majority party switch of registered voters, with the winning candidate coming from

83. FEDERAL ELECTIONS 2008, *supra* note 79, at 97–100.

84. *Id.*

85. *Candidate Listing for 2008 General Election*, Fla. Dep’t of State, Div. of Elections, <http://election.dos.state.fl.us/candidate/CanList.asp> (last visited Oct. 25, 2013).

the minority of a district. However, in all of those races, the Democratic candidate was facing a Republican incumbent, and incumbents are notoriously difficult to defeat due to the ingrained name recognition and fund raising capabilities.⁸⁶ Regardless, Democrats were successful in carrying just 14 of the 56 races, bringing their total membership in the House to 39.⁸⁷ To have obtained a majority of the House, Democrats would have needed to sweep all of the districts where they maintained even a slight majority as well as all 9 of the “toss-up” districts with contested races, most of which had Republican incumbents and historically “leaned” Republican.

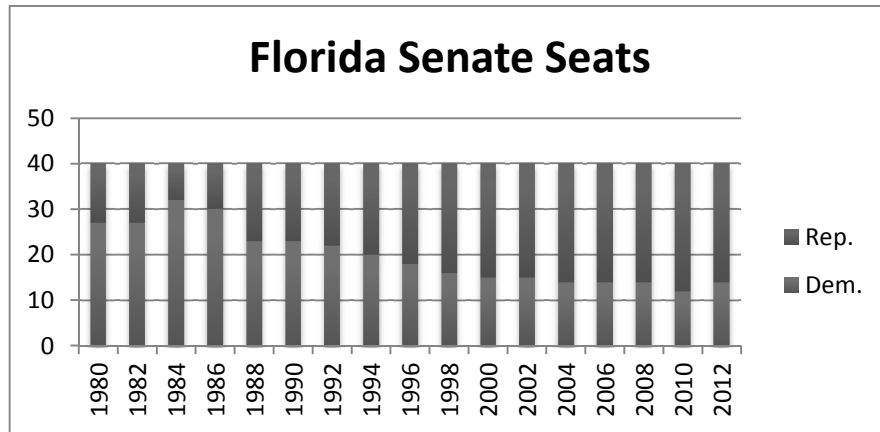


The Democrats did not fare well in the Senate races either, although this appears to be resultant of gerrymandering rather than under-performance. To obtain a bare majority, Democrats were required to sweep all Democratic districts and all “toss-up” districts, which is impossible to do in a single year due to the staggered elections in the Senate. There were

86. See JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 234 (2004) (explaining that incumbents are advantaged not only by the high cost of mounting campaigns but also by “self-subsidies in the form of press secretaries, speechwriters, telephones, office space and so on . . .”).

87. *Candidate Listing for 2008 General Election*, FLA. DEP’T OF STATE, DIV. OF ELECTIONS, <http://election/dos.state.fl.us/candidate/CanList.asp> (last visited Oct. 25, 2013).

only 12 Senate races, with the Democrats winning 4.⁸⁸ Six of the districts were historically “safe” for Republicans. Democrats did not gain any additional seats in the Senate, leaving them with only 14 members, a mere 35% of the Senate.



A review of the Florida Senate district map, *infra*, from 2008 reveals Senate districts that clearly fail the test of compactness, especially in highly populated areas such as the Tampa Bay region, Orlando, Jacksonville, and Southeast Florida. In Tampa Bay, Democrats are packed into District 18, which is crescent moon shaped and encompasses parts of four counties holding a registered Democratic voter advantage of 110,000; the remaining surrounding districts, 10, 13, 16, and 21 are Republican held and have a combined registered Republican advantage of 52,000 voters.⁸⁹

In the Orlando region, District 19, where Democrats hold a 3-to-1 registered voter advantage totaling 87,000 voters, is wrapped around a bubble protruding from District 9, which holds a 5,000 voter Republican majority.⁹⁰ In Southeast Florida, a Democratic stronghold, Districts 36, 38, and 40 are carved out to have a combined advantage of 74,000 registered Republican voters; Districts 33, 34, and 35, which adjoin and surround these Republican districts, have a combined Democratic voter advantage of

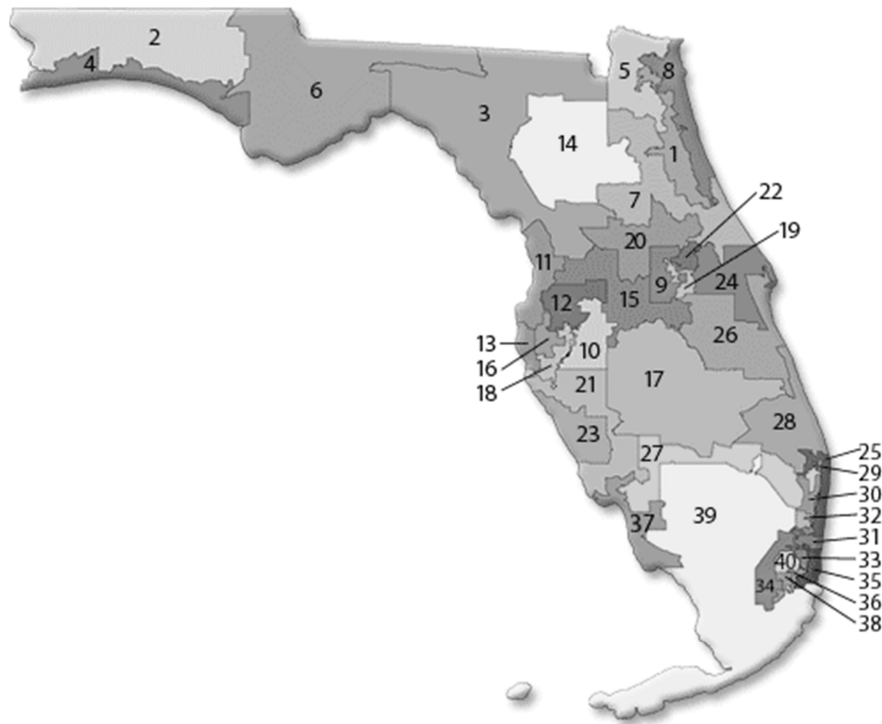
88. *Id.*

89. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, COUNTY VOTER REGISTRATION BY SENATE DISTRICT (Oct. 6, 2008), available at <http://election.dos.state.fl.us/voter-registration/statistics/pdf/2008/2008genSenateDist.pdf>.

90. *Id.*

244,000.⁹¹ The shapes of these districts result in an 8-district swing in the Republican Party's favor due to the discriminatory packing and cracking of Democrats in these regions.

2008 Florida Senate District Map



The above map applied to Florida Senate districts from 2002 onward, skewing the majority of seats in favor of the Republican Party, but it is most glaring in years such as 2008 when absent the gerrymander, Democrats would have a very strong opportunity to reclaim control of the Florida Senate based on the overall voter registration and voting patterns in Florida.

91. *Id.*

C. Extinguished Political Influence

One aspect of *Bandemer* that Justice Scalia relied on in striking down the justiciability of purely political gerrymandering, that a party's indirect influence on political discourse otherwise negates political discrimination, fails to take into account political realities and should be remedied in applying *Bandemer* or its successor to the blueprint laid out by Florida's current situation. Democrats have not faced voter suppression in the traditional sense whereby they are precluded access to the polls, directly violating the Equal Protection Clause.⁹² However, *Bandemer* provides:

[A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.⁹³

Justice Powell's concurrence in *Bandemer* derided the plurality's assertion that a loss is "constitutionally insignificant as long as the losers are not 'entirely ignored' by the winners."⁹⁴ He went on to note:

[T]he facts that the legislature permitted each Democratic voter to cast his or her one vote, erected no barriers to the Democratic voters' exercise of the franchise, and drew districts of equal population, are irrelevant to a claim that district lines were drawn for the purpose and with the effect of substantially debasing the strength of votes cast by Democrats as a group.⁹⁵

Justice Powell's concurrence is illuminating, as the mere presence of any Democrats in the state legislature would preclude allegations of violations of the Equal Protection Clause by Justice Scalia's reasoning. Total dominance by a party via 100% membership control in a legislative body is the only thing that could apparently overcome this "indirect influence" requirement.

92. See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1339 (2002) (stating that the mere fact of being outvoted "provides no basis for invoking constitutional remedies where . . . there is no indication that [the] segment of the population is being denied access to the political system" (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971))).

93. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986).

94. *Id.* at 170 (Powell, J., concurring in part and dissenting in part).

95. *Id.* at 171.

However, being “entirely ignored” is not beyond the pale in the event that a single party holds a supermajority in both state chambers. State representatives are not solely “in the business of providing constituents with government services, such as fire and police protection, schools, utilities, and road improvements,”⁹⁶ and limiting the courts’ view to this aspect of the legislature’s job constricts the nature of issues to be considered. There are vast differences in policy outlook regarding the larger issues tackled by state legislatures, including creating environmental and transportation policy, providing funding for schools and higher education, regulating welfare and food stamp distribution, and countless other issues.

Likewise, the effects of gerrymandering are not limited to in-state issues in suppressing a minority party’s political will. Recently, several states have floated the proposal of changing the Electoral College from a winner-take-all proposition to awarding votes according to the congressional districts won in each state.⁹⁷ The effect in Florida on National elections would have been significant; Al Gore would have defeated President Bush in the 2000 presidential election. If the proposition were carried to several states, President Obama could have lost in 2008 and 2012 despite holding a significant advantage in the popular vote in both elections.⁹⁸

The effect in Florida of Republicans holding a supermajority in both houses is that Democrats are unable to pass any policy initiative based on the Democratic platform or block any Republican policy initiative that they vehemently disagree with.⁹⁹ The only matters that Democrats may be able

96. *Martinez*, 234 F. Supp. 2d at 1339–40.

97. See Nia-Malika Henderson & Errin Haines, *Republicans in Virginia, Other States Seeking Electoral College Changes*, WASH. POST (Jan. 24, 2013), http://articles.washingtonpost.com/2013-01-24/politics/36528394_1_electoral-votes-votes-by-congressional-district-electoral-college (naming Virginia, Michigan, Ohio, and Pennsylvania among those proposing the changes).

98. See Micah Cohen, *Electoral College Changes Would Pose Danger for Democrats*, FIVETHIRTYEIGHT (Jan. 25, 2013, 8:47PM), http://fivethirtyeight.blogs.nytimes.com/2013/01/25/electoral-college-changes-would-pose-danger-for-democrats/?_r=0 (claiming that if Virginia, Michigan, Ohio, Pennsylvania, Wisconsin, and Florida assigned electoral votes by congressional district, Obama would have lost the 2012 election).

99. See Janet Zink, *Gov. Rick Scott Rejects Funding for High-Speed Rail*, TAMPA BAY TIMES, Feb. 16, 2011 (rejecting \$2.4 billion in federal funding to build high-speed rail line between Tampa and Orlando); Alvarez, Lizette, *Florida Higher Education May Face Big Budget Cuts*, N.Y. TIMES, Mar. 6, 2012, at A12 (trimming \$300 million from higher education budget); Mark Memmott, *Drug Tests for Welfare Recipients, State Workers Ignites Debate in Florida*, NPR (June 2, 2011, 10:14AM), <http://www.npr.org/blogs/thetwo->

to effect are those that have little to no effect on the state as a whole. The supermajority would even permit veto override if the governor were a Democrat, further overriding the will of a majority of the registered voting populace.

*D. The Template to Apply Bandemer to Party Claims of Purely Political
Gerrymandering*

The above clearly denotes a template for use in claims of purely political gerrymandering, yet will generally require a decade of delay prior to bringing a suit based on alleged violations of the Equal Protection Clause. The time required to show that there has been a violation would encompass two reapportionment periods, or approximately ten years, so as to show a pattern of discrimination and an inability to overcome such.

The above factors are patently present in Florida denoting purely political gerrymandering with a discriminatory effect on the Democratic Party, but it is still questionable whether the courts will deign to intervene. As noted, *supra*, Florida's electorate consists of 22% of registered voters not affiliated with any party or who are registered Independents.¹⁰⁰ The *Martinez* court's holding can be read to infer that a court can *never* interfere in the event of purely political gerrymandering cases because electoral losses are not the result of gerrymandering, dilution of voting power, or violations of equal protection, but rather the failure of the losing party to register sufficient voters, campaign well, and turn out voters well enough to win.¹⁰¹

way/2011/06/02/136884455/drug-tests-for-welfare-recipients-state-workers-ignites-debate-in-florida (requiring drug testing of welfare recipients and new state government hires); Arthur Delaney, *Florida Unemployment Regime Violates Civil Rights: Labor Department*, HUFFINGTON POST (Apr. 4, 2013), http://www.huffingtonpost.com/2013/04/25/florida-unemployment-civil-rights_n_3154409.html?utm_hp_ref=rick-scott (requiring literacy and math tests prior to receiving unemployment benefits regardless of language abilities).

100. COUNTY VOTER REGISTRATION 2012, *supra* note 11. There are a number of smaller parties registered in Florida, but the parties are so small and have so few registered voters as to render them statistically insignificant for the purposes herein.

101. See *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1340 (2002). The court stated that even if a political majority could prove:

[A] history of disproportionate results in conjunction with some other evidence in the totality of the circumstances of unconstitutional vote dilution, no group will be able to prove a lack of ability to participate in the political process. Any such claim will necessarily be refuted by the logical inference to be drawn from a disparity between voting age population and registered

It could be argued that the *Martinez* reasoning may be theoretically sound but is certainly not applicable to real-world scenarios. A court viewing such issues rationally and through the prism of real-world experiences will not simply toss aside such claims as inactionable. Rather, one hopes that a court considering a claim that purely political gerrymandering results in equal protection violations will recognize that even in a state with a high percentage of registered voters not affiliated with party politics, gerrymandering can make it statistically improbable for the party discriminated against to achieve electoral victory, regardless of their voter registration and get-out-the-vote efforts. By example, for Democrats to succeed in Congressional districts controlled by Republicans, they would need to achieve landslide victories among NPA voters by receiving in excess of 66% of their votes and much higher in many districts.

IV. *What Can Be Done About Gerrymandering?*

It is not likely that the courts will take up the issue of purely political gerrymandering in the near future or take action given the current makeup of the Supreme Court. Florida voters have taken an excellent first step in addressing the issue by passing amendments to the state constitution, *supra*, but the result has yet to be fully determined as the court cases addressing them are still in their early stages. Should judicial enforcement of the constitutional amendments fail, it is incumbent on the Florida Legislature or voters to take additional steps to rectify the situation.¹⁰² Creating a truly

voters or between registered voters and voter turnout. . . . A failure to do these things will be the actual cause of any inability on the group's part to elect the candidates of its choice and have those candidates represent its interests.

Id. The rejection of minority views by the majority party cannot raise constitutional concerns:

To hold otherwise would be tantamount to holding that 'it is invidiously discriminatory for a [political subdivision] to elect its delegation by a majority vote based on party or candidate platforms and so to some extent predetermine legislative votes on particular issues.

Id. (alteration in original) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 155 (1971)).

102. See Martin Dyckman, *Rejected Redistricting Reform of 1993 Haunts Legislature*, ST. PETERSBURG TIMES (Mar. 24, 2002), http://www.sptimes.com/2002/03/24/Columns/Rejected_redistrictin.shtml (describing previous failed attempts to amend the Florida constitution). Several efforts were made in 1978, 1993 and 1998 to create a judicial or non-partisan redistricting commission. *Id.* The 1978 ballot initiative lost at the polls, while the

non-partisan redistricting commission will be the most effective way to create fairness in the electoral process and it will be the easiest method to communicate to the electorate.

A. Florida's Constitutional Amendment

As noted, *supra*, Florida's 2010 constitutional amendments, in theory, will preclude political considerations in the redistricting process. In applying to both congressional and state legislative redistricting, the state constitution now provides that "[n]o 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" ¹⁰³ Although the amendments were initially challenged on federal constitutional grounds, they have been upheld by the Florida Supreme Court as "entirely consistent with the Elections Clause, both as to its substance and matter of enactment." ¹⁰⁴

In adopting these provisions, the Florida Constitution places more stringent requirements on the redistricting process than does the United States Constitution. ¹⁰⁵ Additionally, the Florida Supreme Court recognized the "critical importance of redistricting in ensuring the basic rights of the citizens to vote for the representatives of their choice" and that the new constraints were intended to "'maximize electoral possibilities by leveling the playing field' for the increased protection of the rights of Florida's citizens" ¹⁰⁶ By enacting these amendments, the Florida judiciary's role has been expanded in analyzing the level of compliance the legislature meets in preventing partisan influence in redrawing the district maps. ¹⁰⁷ However, the new Florida law differs from the analysis of the federal courts

1993 and 1998 efforts were killed in the legislature due to incumbency concerns. *Id.*

103. FLA. CONST. art. III § 20 (2010).

104. *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1285 (11th Cir. 2012).

105. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 598–99 (Fla. 2012) ("With the advent of the Fair Districts Amendment, the Florida Constitution now imposes more stringent requirements as to apportionment than the United States Constitution and prior versions of the state constitution.").

106. *Id.* at 604–05 (quoting *Brown*, 668 F.3d at 1285).

107. *See id.* at 607 ("[T]he parameters of the Legislature's responsibilities under the Florida Constitution, and therefore this Court's scope of review, have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance.").

under the Equal Protection Clause as provided under *Vieth*, which looks to when partisan districting “has gone too far,” but prohibits wholesale partisan intent from the “apportionment plan as a whole and to each district individually.”¹⁰⁸

Following passage of these amendments, the 2012 redistricting process was conducted by a Republican-dominated legislature with the apparent assistance of Republican Party consultants. As a result, the League of Women Voters, Common Cause, and a number of individual plaintiffs filed lawsuits, now consolidated at the appellate levels, challenging the new districts.¹⁰⁹ The first of these cases was filed in February, 2012, and they are still in the trial discovery phase as the legislature claimed that their deliberations in the redistricting process were privileged. The legislature refused to disclose draft maps and documents related to redistricting, and they refused to produce legislators and staff for depositions.

The Supreme Court of Florida heard oral argument on this issue on September 16, 2013. In its opinion, the Court recognized for the first time the existence of legislative privilege in Florida, but held that it was not absolute, as there is a broad constitutional right to access of public records and transparency in the legislative process.¹¹⁰ This legislative privilege may yield to a compelling, competing interest¹¹¹ and that “[p]artisan political shenanigans are not ‘state secrets.’”¹¹² To that end, the Court again recognizes that the constitutional amendments “mandate prohibiting improper partisan or discriminatory intent in redistrict” and “therefore requires that discovery be permitted to determine whether the Legislature has engage in actions designed to circumvent the constitutional mandate.”

The Florida Supreme Court’s ruling in this matter is a victory for the challengers to the 2012 redistricting, and it appears that it will result in the transparency sought by the amendments and recognized by the courts. Although the case now continues unabated in the discovery process, a final

108. *Id.* at 616–17 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

109. See Justin Levitt, *Litigation in the 2010 Cycle: Florida*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/cases-FL/php#FL> (last visited Oct. 22, 2013) (listing current Florida redistricting cases).

110. *The League of Women Voters, et al. v. Florida House of Representatives*, No. SC13-949; *Romo, et al. v. Florida House of Representatives*, No. SC13-951, 2013 WL 6570903, at *1, *9 (Dec. 13, 2013).

111. *Id.* at *9.

112. *Id.* at *6, citing *Romo v. Florida House of Representatives* 113 So. 3d 117 (Fla. 1st DCA 2013) (Benton, C.J., dissenting).

determination on the concrete impact of the amendments on the Florida redistricting process will not likely be reached before 2015 due to the probable lengthy appellate process.

Should the Florida courts enforce the amendment with the exactingness dictated by precedent, it must “construe [the] constitutional provision[s] consistent with the intent of the framers and the voters” examine “the evil sought to be remedied, and the circumstances leading to its inclusion” in the constitution “in light of the historical development” of the law at the time of its adoption.¹¹³ Per the Florida Supreme Court’s prior ruling in *In re. . . Legislative Apportionment*, all redistricting efforts must be devoid of political intent:

[T]here is no acceptable level of improper intent. It does not reference the word “invidious” as the term has been used by the United States Supreme Court in equal protection discrimination cases, and Florida’s provision should not be read to require a showing of malevolent or evil purpose. Moreover, by its express terms, Florida’s constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually.¹¹⁴

Accordingly, in theory, the outcome of these court challenges would require the legislature to refrain from contemplating political outcomes when conducting redistricting. However, if this proves unavoidably difficult, it is feasible that the legislature *sua sponte* divests itself of its redistricting powers to create a truly bipartisan or non-partisan commission to undertake the decennial reapportionment within the legislature.

B. Creation of a Non-Partisan State Electoral Commission

A number of states currently use a non-partisan commission to conduct their decennial redistricting.¹¹⁵ Other options, such as multi-member

113. *In re Legislative Apportionment* 1176, 83 So. 3d 597, 614 (Fla. 2012) (quoting *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004); *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 1982 Special Apportionment Session; *Constitutionality Vel Non*, 414 So. 2d 1040, 1048 (Fla. 1982); *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980).

114. *In re Legislative Apportionment* 1176, 83 So. 3d at 617 (internal citations omitted).

115. See *State by State Redistricting Procedures*, BALLOTPEdia, http://ballotpedia.org/wiki/index.php/State-by-state_redistricting_procedures (last modified Aug. 27, 2013) (listing fourteen states that provide for non-legislative/bipartisan redistricting committees: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New Jersey, Pennsylvania, and Washington).

districts, instant run-offs and proportional representation via preferential voting are other options, but will require significant efforts to educate the public on their mechanisms.

The non-partisan commission may be combined with a “top two open primary” system whereby all candidates are put on the same ballot regardless of party affiliation, and the two candidates receiving the most primary votes will run in the general election.¹¹⁶ This method was recently effectuated in California with great success in restoring competitiveness in races and proportionality to the legislative makeup of its Congressional Delegation.¹¹⁷ A number of other states have codified in their state constitutions and statutes that partisanship be removed from the redistricting process with similar results.¹¹⁸

This proposed method may not ultimately work to return proportional representation to the electoral process as many Florida Democrats self-locate in metropolitan areas such as South Florida, Tampa Bay, Orlando, and Jacksonville, resulting in vast geographical areas where they do not maintain a majority.¹¹⁹ However, the first step must be taken to prevent further distortion of Florida’s and the nation’s political landscape and well-being. As it is unlikely that any majority party will freely abdicate power, Florida Democrats would do well to take a two-pronged approach in rectifying gerrymandering in the state. First, they should file an action laying out the discriminatory effects of political gerrymandering since 2002 in hopes that a court would not immediately dismiss it as a non-justiciable question. Second, they must continue efforts to obtain a state constitutional amendment via a ballot initiative should the current iterations of the amendments prohibiting political considerations be utilized in redistricting

116. *Congressional & Presidential Primaries: Open, Closed, Semi-Closed and “Top Two”*, FAIRVOTE.ORG, http://www.fairvote.org/congressional-and-presidential-primaries-open-closed-semi-closed-and-top-two#.UXcDGL_3DoA (last updated May 2012).

117. See CAL. CONST. art. XXI §§ 1–3 (directing the creation of a 14-member “Citizens Redistricting Commission”); see also Wang, *supra* note 8 (noting that California Democrats received 62% of the votes cast for the House of Representatives and won 38 of 53 seats, exactly matching computer models forecasting the delegation makeup by vote proportion).

118. See IDAHO CODE ANN. §72-1506; IOWA CODE ANN. §42.4; MONT. CODE ANN. §5-1-115; OR. REV. STAT. ANN. §188.010(2); WASH. CONST. art. II §43(5).

119. See Chris Christoff & Greg Giroux, *Republicans Foil What Majority Wants by Gerrymandering*, BLOOMBERG NEWS (Mar. 18, 2013, 12:00AM), <http://www.bloomberg.com/news/2013-03-18/republicans-foil-what-most-u-s-wants-with-gerrymandering.html> (noting that in the 2008 election, Obama received more than half of his Florida votes from just six of the state’s 67 counties).

not be strictly upheld. The constitutional amendment should create a bipartisan commission to establish representational districts, thus taking the decennial reapportionment out of the hands of the legislature.

V. Conclusion

Despite the clear evidence of gerrymandering in Florida through two censuses, disaffected Florida voters will not likely obtain a reprieve from the federal courts in this decade and thus have acted accordingly by overwhelmingly passing and seeking the enforcement of the above discussed constitutional amendments. If the Florida constitutional amendments are ultimately enforced in accord with the plain meaning of their language, the results could force the legislature to recuse itself from the redistricting process and create a non-partisan commission.

Although the highest concentrations of Democratic voters lie in metropolitan areas such as South Florida, Tampa Bay, Orlando, and Jacksonville, they maintain a majority of registered voters in 41-of-67 Florida counties and a non-partisan redistricting plan would likely bring the state and legislative delegations toward an equilibrium more reflective of the partisan make-up of the state. Such a non-partisan redistricting plan may not be the final cure-all to ease Florida's proportionally unrepresentative electoral woes due to the vagaries of off-year elections, voter motivation, and the ever-present NPA voter, but it would certainly be a good first step toward restoring fair and proportionate representation at the state legislative and Congressional levels.