



REDISTRICTING IN 2021: A Strong Basis in Evidence

Alabama Association of School Boards
Summer Law Clinic
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- Introduction
- What is Redistricting?
- Why Redistrict?
- Ideal Population and Allowable Deviation
- Guidelines and Traditional Redistricting Criteria
- The Special Case of § 2 Districts - A Big Change
- Big Issues Ahead
- Important Dates
- Questions

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- Ideal Population and Allowable Deviation
- **Traditional Districting Criteria** – race-neutral reasons that explain the shape of a district

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- “We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”

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WHY REDISTRICT?

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- Voting Right Act, § 2 – unequal districts dilute votes and violate Section 2 of the Voting Rights Act

WHY REDISTRICT?

- 52 U.S.C. § 10301 (~~42 U.S.C. § 1973~~)
- (a) **No** voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

WHY REDISTRRICT?

- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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- *Reynolds v. Sims* – unequal districts violate the one-person, one-vote principle and thus violate the Equal Protection Clause of the U.S. Constitution
- Voting Right Act, § 2 – unequal districts dilute votes and violate Section 2 of the Voting Rights Act
- State Law Requires Redistricting

WHY REDISTRICT?

- COUNTY BOARDS OF EDUCATION
- Section 16-8-1 - Composition; election; single member election districts; qualifications.
- (a) The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county.
- (b) County boards of education unless otherwise provided by law may ... establish single member election districts with one board member elected from each district. School boards exercising this option may establish five or seven such districts. ... The boundaries of such single member districts shall be determined by a majority vote of the county board of education. The county board of education shall apportion the districts according to the last federal decennial census for the county utilizing the principle of equal representation. Thereafter, each county board of education choosing to implement single member election districts shall reapportion those districts within six months following the publication of the results of each federal decennial census.

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- CLASS 4 MUNICIPALITIES (50,000-99,999)
- Section 16-11-3.2 - Election and operation of boards in Class 4 municipalities.
- Notwithstanding any other provision of law, the Legislature may, by local act, provide for the election of the board of education in any Class 4 municipality by the qualified electors of the municipality and may further provide for the operation of the board. The change to an elected board of education shall require the approval of a majority of the qualified electors of the municipality who vote at a referendum election prior to the change becoming effective.

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WHY REDISTRICT?

- CLASS 4 MUNICIPALITIES (50,000-99,999)
- No statutory deadline for completing redistricting
- An effective deadline is the election schedule

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One-person, one-vote =
equal population =
redistricting

- Equal population for school boards means “almost equal”

- Ideal Population is the starting point

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$$\frac{\text{Total Population}}{\text{Number of Districts}} = \text{Ideal Population}$$

- Ideal Population the starting point

$$\text{Total Population} / \text{Number of Districts} \\ = \text{Ideal Population}$$

- For example:

Montgomery County

226,486 (2019 estimate)

7 districts

Ideal Population = 32,355

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- Up to 5% below Ideal Population and 5% above Ideal Population = Total Allowable Deviation of 10%
- Compare with Congressional districts
 - Equal mean equal

- 1960, 1970, 1980, 1990, 2000 = 10%
- 2010 redistricting = 2%
- 2020 redistricting = 10%

- 2% or 10% - It Makes A Big Difference
- Montgomery County (2019 est.) = 226,486 total pop



- MCBOE – 7 seats
- $226,486 / 7 = 32,355$ ideal population of each district
- How much deviation should the MBOE allow?

Ideal Population and Allowable Deviation

		32,355		
	31,708	2%	33,002	
	29,120	10%	35,591	

- **Less Deviation**

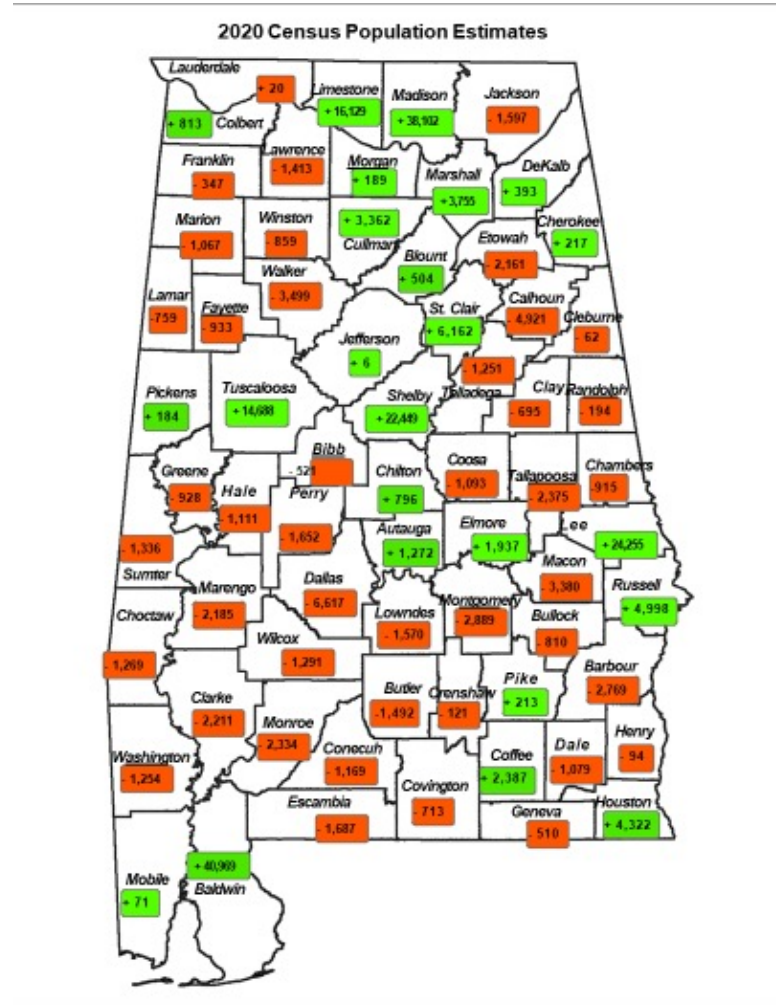
- Greater equality of population between districts
- But more split precincts and split jurisdictions

- **Greater Deviation**

- Easier to reach agreement on new district lines
- Better able to respect municipal boundaries and communities of interest
- More room for mischief - overpopulating opposing party's districts (packing) or under populating them (cracking)

- Recommend allowing total deviation of 10%

Ideal Population and Allowable Deviation



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- Districts must be drawn in conformance with the guidelines
- After-the-fact justifications based on the guidelines are not acceptable
- Equal Population is the background over which the Guidelines are applied
- Similarly, compliance with the Voting Rights Acts is assumed

- Draw contiguous and compact districts; contiguity by water allowed
- Make every part of every district contiguous with every other part of the district
- Avoid contests between incumbents
- Preserve the cores of existing districts
- Avoid split precincts
- Protect communities of interest, neighborhoods, and political boundaries

- “Communities of interest” includes:
 - An areas with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, and historical identities. The term may include political subdivisions such as municipalities, voting precincts, tribal lands and reservations, or school districts

- “The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.”

- Guidelines are not identified in order of precedence, because there will inevitable be conflicts between two or more
- Refer to the Guidelines of the Legislative Reapportionment Committee

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- Summary of the Redistricting Process
 - Establish Guidelines
 - Get redistricting data
 - Have public hearing on possible changes to districts
 - Draw new districts including §2 districts
 - Have public hearings on new districts
 - Vote on new districts
 - You're done
 - No Section 5 preclearance requirement – districts can be implemented immediately without awaiting approval from the Department of Justice

- In the past, ensuring compliance with the Voting Rights Act was the first step in redistricting
 - draw the §2 districts (majority-minority districts)
- ~65% BVAP or less – the Goldilocks Rule
 - Too high, and may be sued for “packing”
 - Too low, and may be sued for “cracking”
 - Looking for just right
- Then draw the other (majority-white) districts.
- That is now understood to be unconstitutional.

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- EPC says the State cannot be race conscious
- §2 says the State must be race conscious
- Supreme Court addressed this tension in three recent cases

- *Alabama Legislative Black Caucus*, 135 S.Ct. 1257 (2015).
- *Bethune-Hill Virginia State Board of Elections*, 137 S.Ct. 766 (2017).
- *Cooper v. Harris*, 137 S.Ct. 1455 (2017).

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- *Thornburg v. Gingles*, 478 U.S. 30 (1986) established three prerequisites for showing a violation of § 2 in redistricting cases.
 1. The minority population is sufficiently large and geographically compact to constitute a majority in a single-member district;
 2. The minority population is politically cohesive; and
 3. **The majority voters usually vote as a bloc to enable them to defeat the minority candidate of choice (aka racially polarized voting)**

- *Alabama Legislative Black Caucus*, 135 S.Ct. 1257 (2015).
 - To comply with Section 5, the State used the black populations for the 2000 districts, loaded with 2010 Census data, as the benchmark for new districts: many districts in 60-70 % range
 - Held - the State was **too race conscious**
 - Imposed a quota
 - Drew the majority-minority districts first

- *Bethune-Hill Virginia State Board of Elections, 137 S.Ct. 766 (2017).*
 - Required 55% BVAP for 12 majority-minority districts
 - Held - the State was **too race conscious**

- *Cooper v. Harris*, 137 S.Ct. 1455 (2017).
 - District 1 – BVAP increased from 48.6% to 52.7
 - District 12 – BVAP increased from 43.8% to 50.7%
 - Held- the State was **too race conscious**

- Supreme Court assumes that complying with the Voting Rights Act is a compelling interest
- Race-based districting is narrowly tailored to that objective if the State had “good reasons” or a “strong basis in evidence” for thinking it must use race to satisfy the Act
 - Whether plaintiff can establish the *Gingles* preconditions in a new district created without race-based districting
 - Conversations with incumbents from majority-minority districts, turnout rates, results of recent elections, *etc.*
 - Court does not “require States engaged in redistricting to compile a comprehensive administrative record” - **questionable**

- What to do?
- Draw all districts without regard to race. Do look at racial data.
- Ensure all districts have “equal” population.
- Draw boundaries using traditional districting criteria.
- Your plan is done, unless you have a **strong basis in evidence** that you could, by looking at race, draw a § 2 district
 - Are the *Gingles* pre-conditions met?
 - If yes, turn on race and adjust boundaries as needed.
- **Keep contemporaneous records for the decision you make**

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- Did the Voting Rights Act abrogate the States' 11th Amendment immunity?
 - *Alabama State NAACP v. State of Alabama* (11th Cir. 2020)
 - “To determine whether Congress abrogates state sovereign immunity, we ask whether Congress (1) expressed its unequivocal intent to do so and (2) acted “pursuant to a valid grant of authority.”
 - 14th Amendment
 - Unequivocal intent – circuits are split

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 - Residents who vote in other locations
 - Resident aliens

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- *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016).
- Texas Senate district had deviation of 8.04% measured by total-population
- But the deviation was greater than 40% measured by voter population (eligible voters and registered voters)
- Does using total population to draw districts violate one-person, one-vote?
- Appellants wanted to use CVAP (citizen voting age population) from the American Community Survey

- The Supreme Court found that constitutional history, precedent, and continuing practice demonstrate that a State or locality may draw districts based on total population.
- “Because history, precedent, and practice suffice to reveal the infirmity of appellants’ claims, we need not and do not resolve whether ... States may draw districts to equalize voter-eligible population rather than total population.”

- Does the Voting Right Act violate the Equal Protection Clause?
 - Supreme Court always *assumes* that compliance with the Voting Rights Act is a “compelling state interest” that justifies the use of race-conscious government action
 - When will the Court decide the issue and what will happen when it does?

- April 1, 2020
- December 31, 2020
- March 31, 2021
- August 16, 2021
- September 30, 2021



Thank
you.