State and Federal Law Governing Redistricting in Texas

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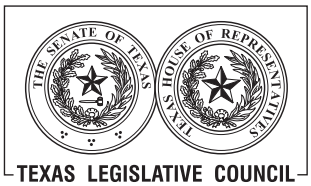

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Introduction

In *Wesberry v. Sanders*, the landmark voting rights case extending the principle of one person, one vote to the election of members of the U.S. Congress, the U.S. Supreme Court stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[1]

It has long been recognized that manipulating legislative, congressional, and other elective districts can be just as effective in fencing disfavored groups out of the political system as directly prohibiting the right to vote itself. However, before 1962, federal courts and the courts of most states refused to hear cases challenging the composition of those districts. The courts took the position that redistricting is an exclusively political matter in which judicial involvement would be inappropriate. The supreme court summarized that position in 1946 in *Colegrove v. Green*, a suit challenging the validity of Illinois' congressional districts on a number of constitutional grounds, including the population inequality among the districts:

> It is hostile to a democratic system to involve the judiciary in the politics of the people. . . . The petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. . . . But due regard for the Constitution as a viable system precludes judicial correction.[2]

The court concluded that the federal judiciary should not enter the "political thicket" of redistricting.[3]

Until the supreme court reversed its position in the 1962 case *Baker v. Carr*,[4] courts routinely dismissed redistricting challenges. In *Baker*, the court finally abandoned the hands-off approach exemplified by *Colegrove*, holding that the federal courts must consider and decide claims by disgruntled voters that legislative redistricting plans violate their federal constitutional rights. The need for judicial scrutiny of districting plans was especially apparent in light of the extreme population disparities among districts that existed in many states. Since those who suffered most from such malapportioned districts lacked the very legislative representation needed to remedy that malapportionment in the redistricting process, federal judicial intervention was necessary to break the incumbents' stranglehold. The court recognized that, as a matter of political reality, incumbent state legislators could not be relied on to fully protect the voting rights of all citizens at the cost of their own political power. Since the *Baker* decision opened the federal courthouse to legal challenges to the composition of electoral districts, challenges under state and federal law against both state and local redistricting plans have become commonplace.

U.S. Supreme Court decisions handed down since *Baker* have recognized three major constitutional standards governing redistricting plans:

(1) districts must be of equal population to ensure that the value of every person's vote is substantially equal;

(2) a plan may not intentionally dilute the voting strength of members of a racial or ethnic minority group; and

(3) a plan that contains districts drawn primarily on the basis of race or ethnicity requires a compelling justification.

Within three years of the supreme court's decision in *Baker*, Congress enacted the federal Voting Rights Act of 1965, which was substantially revised in 1982.[5] The act introduced a whole new body of statutory law to help enforce the guarantees of the U.S. Constitution against racial and ethnic discrimination in the electoral process. The Voting Rights Act is the single most important law protecting the voting rights of racial and ethnic minority groups. The act has had a revolutionary effect on state and local voting practices in general and on redistricting plans in particular. Section 5 of the act requires certain jurisdictions, including the State of Texas, to obtain from federal authorities prior approval of any redistricting plan. Section 2 of the act allows members of a racial or language minority group to challenge a redistricting plan that limits or diminishes their opportunity to participate in the electoral process and to elect representatives of their choice.

In addition to challenges based on these federal constitutional and statutory grounds, a substantial amount of litigation has occurred in state courts challenging redistricting plans as violative of state constitutional requirements. Since no two states have identical constitutional provisions governing redistricting, this litigation has developed independently in each state. The interplay between sometimes inconsistent state and federal requirements and the difficulty of complying completely with both further complicate redistricting law.

There has been a great deal of continuity in redistricting law since the 2001 edition of this publication, but several areas of the law are still developing. The tolerance for population deviations in redistricting plans for districts other than congressional districts appears to be uncertain once again (see Chapter 2). Congress's 2006 renewal of Section 5 of the Voting Rights Act raises questions about the application of the reworded statute and even the future viability of the preclearance requirement applicable to jurisdictions such as Texas based on coverage formulas derived from 40-year-old elections (see Chapter 4). Citizenship data has become a necessary component of a Section 2 vote dilution analysis in Texas (see Chapter 3), and yet the source and reliability of that data have changed substantially in the last decade (see Chapter 1). Racial gerrymander claims were prominent in litigation in the 1990s, while in the 2000s they have largely faded away (see Chapter 5). Claims of partisan gerrymandering, which have never succeeded, continue to fade away as well, although the possibility of such a legal challenge remains (see Chapter 6).

This publication is intended to assist the Texas Legislature in carrying out its redistricting responsibilities and to provide information about Texas legislative redistricting to the public and other interested persons. It focuses on the legislative redistricting process under Texas law and the redistricting rules provided by state and federal law applicable to the four statewide bodies for which the legislature is to draw new districts after publication of the 2010 federal census: the state's congressional delegation, the Texas Senate, the Texas House of Representatives, and the State Board of Education.

Local governments in Texas are also subject to the federal constitutional standards and the Voting Rights Act. After publication of the 2010 census, election districts for local governmental bodies, such as county commissioners precincts, city council wards, and school board districts, must be redrawn to eliminate excessive population disparities between districts and to eliminate any unlawful dilution of minority voting strength that the new census figures reveal in the old districts. While many portions of this publication may be generally applicable to local as well as state redistricting, other legal and practical considerations may apply to local election districts. Accordingly, this publication is not intended to serve as a guide for local redistricting.

Readers should be cautioned that rapidly occurring developments threaten to make portions of any publication obsolete overnight. In particular, challenges to the constitutionality of Section 5 of the Voting Rights Act are ongoing at the time of this publication. Judicial decisions refining and revising the legal standards for redistricting will proliferate after states and local governments begin to adopt redistricting plans in 2011. It will therefore be necessary to monitor developments in redistricting law that take place after the release of this publication to keep abreast of the issues that face the legislature in its effort to enact redistricting plans that will survive court challenge.

Notes, Introduction

[1] 376 U.S. 1, 17 (1964).

[2] 328 U.S. 549, 553-554.

[3] *Id*. at 556.

[4] 369 U.S. 186.

[5] Now codified, as amended, at 42 U.S.C. Secs. 1973 to 1973bb-1.

Chapter 1
The Texas Redistricting Process

I. Redistricting: A Legislative Function

A. Redistricting Authority

Section 28, Article III, Texas Constitution, requires the Texas Legislature to apportion both houses of the legislature at its first regular session after publication of the federal decennial census. Without this requirement, the legislature would be responsible for legislative redistricting under the plenary legislative authority granted by Section 1, Article III, Texas Constitution. The Texas Supreme Court has stated that Section 1 grants to the legislature "all legislative power—the power to make, alter and repeal laws—not expressly or impliedly forbidden by other provisions of the State and Federal Constitutions."[1] Redistricting of the state's congressional districts has always been and continues to be a legislative responsibility under the general legislative power granted by Section 1, Article III. For other state government election districts such as State Board of Education districts, which the constitution does not expressly assign to any entity the duty to redistrict, redistricting is also within the exclusive domain of the legislature. The drawing of local government districts, such as county precincts, school board election districts, and city council wards, has been delegated by the state constitution[2] or by statute[3] to the local governments themselves. The state constitution assigns to the legislature, the Judicial Districts Board, and the Legislative Redistricting Board the duty to draw districts for the state district courts.[4]

Section 28, Article III, Texas Constitution, delegates a portion of the legislative redistricting function to a special constitutional body—the Legislative Redistricting Board (referred to in this chapter as the LRB)—in effect stripping the legislature of a portion of its general legislative power. The power of the LRB within its limited jurisdictional period is legislative, in effect the same as that ordinarily exercised by the legislature. Before Section 28 was amended in 1948 to create the LRB, legislative redistricting was within the exclusive authority of the legislature.

Legislative Discretion. While redistricting is thought of as a special legislative function, it is nonetheless lawmaking the same as any other lawmaking. When redistricting, the legislature, and the LRB within its jurisdiction, is establishing policy on behalf of the people of the state. While the broad requirements of redistricting are established by the Texas Constitution, that same constitution entrusts the details of redistricting to the legislature and the LRB. The legislature and LRB must comply with the specific laws governing redistricting discussed in this publication: the U.S. Constitution, the federal Voting Rights Act of 1965, and the Texas Constitution. In all other respects, the state's redistricting bodies are free to craft redistricting plans as they consider appropriate. They may attempt to balance the influence of urban, suburban, and rural voters, give preference to one over the other, or disregard urban, suburban, or rural interests altogether. They may attempt to keep cities, school districts, neighborhoods, or other identifiable areas with common interests together, or may split them between districts. They may use existing political and natural boundaries as much as possible, or ignore them and create new lines altogether. They may create districts that are inconvenient or expensive to campaign in. They may attempt to minimize contests between incumbents, or ignore incumbents. Unless such action can be shown to violate the constitution or other specific law, it is subject to the discretion of the legislature or LRB.

There are important practical limits to this discretion. The requirements of state and federal law must be kept in mind at every turn. Good faith efforts to preserve incumbents, create compact districts, preserve local communities, or follow existing political boundaries may come into direct conflict with legal requirements. In addition, courts often look to features such as the shapes of districts, their effect on incumbents, and the extent to which they correspond to existing political boundaries or identifiable communities of interest as evidence that the districts were intended to achieve invalid or suspect goals, such as minimizing or maximizing the voting power of a racial or ethnic group.

Redistricting by Bill. Section 28, Article III, does not specify the manner in which the legislature is to carry out redistricting. As a general rule, the legislature must carry out its constitutional authority by bill. Section 30, Article III, Texas Constitution, provides that "[n]o law shall be passed, except by bill." The legislature has consistently used bills to carry out redistricting, under Section 28, Article III, for the state legislature, and for other bodies such as the state's congressional delegation and the State Board of Education. This is also the practice in other states.

Redistricting plans must therefore comply with all the constitutional safeguards and procedures imposed on the enactment of bills generally, including the authority of the governor to veto the bill under Section 14, Article IV. Texas courts have not been presented with the question of whether the legislature may carry out its redistricting authority in a manner other than by bill or whether the governor may veto a legislative redistricting measure. The U.S. Supreme Court has held that congressional redistricting, delegated to the states under Section 2, Article I, U.S. Constitution, is to be carried out under the general lawmaking authority of each state.[5] Federal courts have looked to a state's constitution to determine how that authority is to be exercised and have indicated that if the state constitution provides for the gubernatorial veto of legislation generally, that veto power also applies to congressional redistricting measures passed by the legislature.[6] The Texas Legislature's established practice of redistricting by bill has probably foreclosed any argument that the legislature could do so by resolution or other procedure instead of by bill. In 1981, the governor vetoed the legislature's senate redistricting bill.[7] The validity of the veto was not questioned.

A legislative resolution, while not having the force of law, may be useful in the context of redistricting litigation for the legislature to express its preferences to a court considering the adoption of a remedial redistricting plan after a legislative plan has been held invalid or when the legislature has failed to enact a plan. As discussed in Chapter 8 of this publication, a court implementing a remedial plan is supposed to incorporate the preferences of the state's legislature or other policymakers—such as the LRB—to the extent not inconsistent with legal requirements. One or both houses of the legislature may consider the adoption of a resolution proposing redistricting changes to a court when there is not time to pass a bill, when a gubernatorial veto may appear likely, or when there is no consensus between the houses as to a remedial plan but at least one house would like the court to consider its own preferences. In 1983, the Texas Senate adopted a resolution stating that it approved a remedial plan for senate districts worked out as a compromise between state officials and the plaintiffs in pending litigation.[8] The senate resolution indicated that the senate considered the proposal to embody legitimate state policies such as the preservation of existing political units, natural boundaries, communities of interest, and existing member-constituent relationships. The court adopted the proposed compromise plan in part because of its approval by the Texas Senate.[9] However, such a resolution is not effective unless adopted by the court and implemented as part of the court's remedy.[10] While the courts are required to give

deference to legislative preferences in drawing court-ordered plans, the preferences of either or both houses expressed through a resolution are not treated with the same degree of deference as a redistricting plan enacted by bill and approved or allowed to become law by the governor, and may be given no weight at all.[11]

B. Time for Redistricting

Congressional Districts. Under federal law, the traditional enumeration of the population under the federal census is used to determine the number of congressional seats apportioned to each state for the decade.[12] Texas has been assigned 36 congressional seats under the 2010 apportionment, 4 more than were apportioned to Texas in 2000. The increase to 36 representatives applies beginning with the 2012 elections for the 113th Congress, which convenes in January 2013. No state or federal statute expressly requires congressional redistricting at any particular time. However, as a practical matter, the legislature must draw new districts for the state's 36 congressional seats in time for the preclearance of those plans under Section 5 of the Voting Rights Act before the candidate's filing period for the 2012 primary election.[13] If the legislature fails to draw congressional districts in time, a suit could be brought in federal court to enforce 2 U.S.C. Section 2c, which requires the state to draw separate districts for each member of its congressional delegation.[14] Even without the increase in the number of seats awarded to Texas, the population deviations that have developed among the present districts since the 2000 census would prevent the use of the old districts because that use would violate the one-person, one-vote principle.[15]

Congressional redistricting can be carried out by the legislature in a special session, as was done in 1971, 1981, 1991, and 2003.[16] However, the legislature may not call itself into special session for that purpose. The decision to call a special session to consider legislation rests exclusively with the governor under the state constitution.[17] Furthermore, if the legislature attempted to pass a congressional redistricting bill during a special session called for a purpose other than congressional redistricting, any member of the legislature could block the bill under traditional parliamentary practice by invoking a point of order that the bill is not within the subject matter of the special session.[18]

State Board of Education Districts. Section 8, Article VII, Texas Constitution, directs the legislature to provide for a State Board of Education, to be appointed or elected as provided by law. Currently, the board is elected from single-member districts as required by statute.[19] No statute requires redistricting of State Board of Education districts at a particular time, although the statutes governing the board assume that the districts will be redrawn after each federal decennial census.[20] The 2010 census will show that the current board districts drawn by a federal district court in 2001[21] vary widely in population because of the state's uneven population growth during the intervening years. Failure to redraw the board's districts after the 2010 census would invite litigation under the one-person, one-vote principle, in which the plaintiff would almost certainly prevail, as happened following the failure of the legislature to redraw board districts in 2001. Thus, the legislature as a practical matter must draw new State Board of Education districts at the 2011 Regular Session or at a subsequent special session in time to preclear the new districts under Section 5 of the Voting Rights Act for the 2012 primary election filing period.

State Legislative Districts. Section 28, Article III, Texas Constitution, was amended in 1948 to require the legislature to apportion the state into senate and representative districts "at its first regular session after the publication of each United States decennial census." The Texas Supreme

Court in 1971 in *Mauzy v. Legislative Redistricting Board* held that if the census is published during a regular session, then that session is the regular session at which the legislature must redistrict the house and senate, even if there are only a few days left in that session.[22] In each of the six decades since Section 28, Article III, was amended, the census was published during the first regular session of the decade (1951, 1961, 1971, 1981, 1991, and 2001), and the legislature undertook state house and senate redistricting at that session, though no legislative plans were enacted in 2001.

Section 28, Article III, provides that, if the legislature fails to redistrict the state house or senate at the first regular session, that duty falls to the LRB, which consists of the lieutenant governor, the speaker of the house, the attorney general, the comptroller of public accounts, and the commissioner of the General Land Office. The board must convene to carry out its redistricting duty within 90 days after the end of that regular session and must complete its task within 60 days after convening.

Section 28 appears to limit the LRB to a single 60-day session. If the board convenes after the regular session of the legislature, redistricts one house that the legislature failed to redistrict, and adjourns at the end of 60 days, it is not clear whether the board could convene again within the 90-day deadline to redistrict the other house if the legislative plan for that house were held invalid after the board's adjournment but before the end of the 90 days. If the board redistricts one house and adjourns in less than 60 days, it is also unclear whether it could reconvene within the 60 days after it originally convened to redistrict the other house.

If a legislative redistricting plan for either house is held invalid after the 90th day after the end of the regular session, the board has jurisdiction to redistrict that house if the board has convened within the 90 days to redistrict the other house and is still in session when the legislative plan becomes invalid. In 1971, the Texas Supreme Court ordered the LRB to redistrict the house, as the legislature's house plan was held invalid on September 16 and the board was in session at that time to redistrict the senate.[23]

The legislature may not redistrict the house or senate in special session during the LRB's jurisdiction.[24] If the LRB fails to complete house or senate redistricting within the time provided by Section 28, or an LRB plan is subsequently invalidated, the legislature may resume redistricting efforts in a special or regular session after the constitutional authority of the LRB has expired.[25]

In practice, if legislative redistricting is not completed before the 2012 elections, lawsuits will certainly be filed attempting to require the legislature to redistrict in order to comply with the one-person, one-vote principle and to remedy any minority vote dilution that the 2010 census data discloses to have developed in the existing districts since they were drawn using the 2000 census. Given the significant population growth that has occurred in Texas since 2000, it is unlikely that the courts would allow the state to use the districts adopted under the 2000 census for the 2012 legislative elections if the state is unable to enact a valid new plan by that time. If time permits, the court would give the legislature a reasonable opportunity to draw new districts before implementing a court-ordered plan.

C. Role of the Legislative Redistricting Board

The LRB was created by constitutional amendment in 1948 to ensure that the state would "get on with the job of legislative redistricting which had been neglected or purposely avoided for more than twenty-five years."[26] Before 1962, the courts had determined that redistricting was a

political matter and refused to entertain suits to remedy malapportionment or discrimination in a redistricting plan. Without the threat of judicial intervention, the Texas Legislature, like legislative bodies in many other states, simply refused to disturb the status quo. This inaction preserved the existing balance of political power and precluded legislative battles over what changes to make.

Scope of LRB's Authority. The LRB's authority to redistrict the house and senate if the legislature fails to do so in regular session is an express exception to Section 1, Article III, Texas Constitution, which grants plenary legislative power to the legislature. Such an exception is generally construed strictly according to its exact terms, to guard against invading the legislature's plenary power.[27] Although Section 28, Article III, provides a specific period during which the LRB may exercise its redistricting authority, that time limit of course does not prohibit the officers who make up the board from planning for the board's activities in advance of the period in which it has authority to adopt a redistricting plan, including the drawing of preliminary plans.

Section 28, Article III, limits the LRB's jurisdiction to redistricting state senate and house districts. With the exception of the board's separate authority provided by Section 7a, Article V, Texas Constitution, to reapportion district court districts in certain circumstances, the LRB has no authority to redistrict any other body, such as the state's congressional delegation, the State Board of Education, or local governmental bodies.

The LRB is authorized to redistrict the house or senate, as necessary, in the following circumstances:

(1) the legislature fails to enact a house or senate plan at the first regular session that occurs in whole or in part after the date the federal census is published;

(2) a house or senate plan enacted by the legislature is vetoed by the governor;[28] or

(3) a house or senate plan enacted by the legislature and approved or allowed to become law by the governor is held invalid under state or federal law before the end of the board's jurisdictional period.[29]

As a practical matter, it is unlikely that a suit filed in the federal courts would reach a resolution, including the exhaustion of appeals, before the jurisdictional period of the LRB expires. Federal litigation relating to a matter as complex as redistricting is usually time-consuming, involving large amounts of data and controversial issues of law. The parties usually require significant time to prepare their cases, especially those involving statistical analysis of voting patterns and related matters. Moreover, an appeal in the federal courts is difficult to expedite, given the filing and briefing periods and competing litigation.

As discussed in Chapter 4 of this publication, a redistricting plan may not be implemented until "precleared" under Section 5 of the Voting Rights Act. The preclearance process creates some uncertainty with respect to the LRB's redistricting authority if the legislature enacts both a house plan and a senate plan and neither is vetoed. There are two ways to obtain preclearance: (1) approval by the U.S. Department of Justice; and (2) a declaratory judgment from the U.S. District Court for the District of Columbia. The former procedure is the far more commonly used method. Under that procedure, the justice department has 60 days after submission to deny preclearance of the plan and may request an extension of another 60 days in certain circumstances. The justice department frequently uses the full 120 days to consider a statewide redistricting plan. In addition, it requires some time to prepare a preclearance submission. Thus, it is likely that the justice department will not have completed its consideration of a legislative plan before the 90-day deadline for convening the LRB.

In addition, the effect of an objection to a redistricting plan by the justice department with respect to the LRB's authority is unclear. Under Section 5 of the Voting Rights Act, the state may seek preclearance from the District Court for the District of Columbia after the department's objection. A justice department objection under Section 5 does not literally make a legislative plan invalid since the state still may seek judicial preclearance. The Voting Rights Act does not impose a deadline for seeking preclearance—it simply makes preclearance a prerequisite to implementing a plan. If the state seeks preclearance of a plan in federal court, either bypassing the justice department or after an objection by the department, the LRB probably has no authority to redistrict the body whose plan is involved before final action on preclearance, since the legislative plan will not have been finally determined to be invalid. Denial of preclearance in a judicial proceeding would almost certainly occur after the jurisdictional period for the LRB has expired.

LRB Procedures. Section 28 gives the LRB discretion to decide when it will convene within the 90-day period immediately following the regular session during which the federal census is published. Section 28 provides that a majority of the LRB's five members constitutes a quorum. Accordingly, it seems clear that organizational decisions, such as where and when to convene and how to give notice to the public, may be made by any three board members. Section 28 does not prescribe detailed procedural rules for the LRB, so it generally may establish whatever procedures a majority of the board members prefer. The board chose its own officers in 1971, 1981, and 2001.

The extent to which the LRB is governed by other laws applicable to governmental bodies in general is uncertain. In 1981 and 2001, the board routinely posted notice of its meetings in conformity with the state open meetings law.[30] The board probably should comply with all general laws that in literal terms apply to it, unless compliance appears to be inconsistent with the procedures or intent of Section 28, Article III. Section 28 provides that the legislature must provide funding for staffing, technical needs, and incidental expenses of the LRB. This provision is intended to ensure that the board is able to carry out its duties effectively. The Texas Supreme Court has held that members of the LRB are acting in a legislative capacity when performing their redistricting duties and thus the LRB members and staff are entitled to legislative immunity and privilege regarding their deliberations.[31]

II. The Federal Census and Redistricting

A. Background

The federal decennial census is required by Section 2, Article I, U.S. Constitution. The federal constitution expressly requires that the federal census be used for the apportionment of congressional seats among the states. The use of the federal census for other federal purposes, such as the allocation of federal funds under certain programs among the states or other geographic areas, is a policy decision made by Congress in statute. Nothing precludes Congress from using other population data, such as adjusted or updated census estimates, for those purposes. In fact, under federal law a mid-decade census is conducted using limited studies and surveys to make statistical adjustments to the decennial census, and those mid-decade census figures are used in some federal programs for the second half of each decade.[32]

The constitution leaves to Congress the authority to determine how the decennial census is to be conducted, but Congress's discretion in this respect is apparently limited by the constitutional mandate in Section 2 of the Fourteenth Amendment that the census count "the whole number of

persons in each State" for purposes of the apportionment of congressional seats among the states. This language arguably precludes Congress from excluding certain classes of persons, such as undocumented aliens, from the census count. With a few exceptions (such as foreign diplomatic personnel and families living at foreign embassies), the federal census as it is now conducted is intended to count every person residing in the United States, including aliens, whether documented or not.

In recent decades, the methods used by the Census Bureau in counting people have come under increasing scrutiny. The methods traditionally used involve a door-to-door or, more recently, a mail-out, mail-back survey of every household, with a personal follow-up interview for those households that do not respond initially or that provide incomplete responses. Population counts derived exclusively from this methodology are sometimes referred to as the "headcount" or "enumerated" data. Doubts as to the accuracy of this data have led the Census Bureau to initiate procedures to assess its accuracy through follow-up surveys of a sample of the population. Initial population counts may be adjusted statistically based on those samples. These population counts are often referred to as "adjusted" or "sampled." The decision regarding which method to use to produce the official census data led to a great deal of litigation in connection with the 1990 census and was a major issue leading up to the 2001 redistricting round. By 2011, the issue had largely faded, and the Census Bureau produced numbers for redistricting derived exclusively from headcount data in 2011.

B. The Census Undercount and Statistical Adjustment

Section 2, Article I, U.S. Constitution, refers to the census as an "actual Enumeration," a term that some argue requires an actual headcount as opposed to some sort of estimate based entirely or primarily on statistical sampling. An absolutely accurate national headcount is of course not possible. Some people are not counted (commonly referred to as the "undercount") and some people are counted more than once (the "overcount"). Furthermore, different groups may be undercounted or overcounted to a greater or lesser degree than the population as a whole or other groups, creating what is known as a "differential undercount."

Following the 1990 and 2000 censuses, the Census Bureau sought to evaluate the scope of the undercount among various groups by conducting a survey of people after the census headcount had been completed. These surveys theoretically could also be used to adjust the headcount number. Following the 1990 census, this survey (called PES for post-enumeration survey) involved at least 150,000 households. For the 2000 census, a similar survey, called the accuracy in coverage evaluation (ACE), involved more than 300,000 households. In such a survey, the selected households are interviewed by census personnel and asked to provide the same information that is collected on the mail-out, mail-back forms sent to each household earlier in the year. The survey is conducted in a manner designed to gather from the group interviewed information that is more accurate than the headcount response from the same group. The responses are broken down by race, language group, age, gender, whether a person is a homeowner or a renter, and other factors and compared with the results from the headcount census. The bureau uses this comparison to evaluate the accuracy of the entire census and to determine the undercount among different groups of people.[33] After releasing the initial ACE number in March 2001 for the 2000 census undercount, a large number of erroneous enumerations that ACE failed to detect caused

the bureau to recalculate the ACE data in a manner that it determined was more accurate (ACE Revision II). Based on the PES survey following the 1990 census, the bureau found an overall undercount of 1.61 percent, with a 0.68 percent undercount of Anglos, a 4.57 percent undercount of black persons, and a 4.99 percent undercount of persons of Hispanic descent. Based on the ACE Revision II survey following the 2000 census, the bureau found an overall overcount of 0.49 percent, with a 1.13 percent Anglo overcount, a 1.84 percent black undercount, and a 0.71 percent Hispanic undercount.[34]

Following the 1990 census, because of the relatively high undercount of black and Hispanic persons, career personnel at the bureau and the director of the bureau recommended releasing an adjusted census. However, Commerce Secretary Robert Mosbacher decided that the adjusted numbers were not appropriate for official census purposes. The secretary's decision was challenged in federal court, but the supreme court upheld the decision, finding that "the Secretary's decision was well within the constitutional bounds of discretion over the conduct of the census provided to the Federal Government."[35]

When Bill Clinton took office as president in 1993, plans for the use of a statistical adjustment for the 2000 census received the backing of the new Democratic administration. The Republican majority in Congress did not agree with the movement to statistically adjust the 2000 census. In 1998, Congress enacted a law that allowed for a person aggrieved "by the use of any statistical method in violation of the Constitution or any other provision of law . . . to determine the population for purposes of the apportionment or redistricting of Members in Congress" to obtain declaratory, injunctive, or any other appropriate relief in federal court.[36] The law also provided for expedited review of such suits by federal courts and required the release of the unadjusted headcount data at the same time as any census numbers based on statistical sampling.[37] This law raised the specter that two sets of census numbers, one that was adjusted and one that was not, would be released by the Census Bureau in 2001.

After the passage of this law, two suits were brought seeking a declaration that the bureau's proposed plan to adjust the census data violated both the Census Act[38] and the constitution, and a permanent injunction barring the use of the proposed sampling procedures for the purposes of congressional apportionment.[39] In both cases, the district courts held that the Census Act prohibited the use of sampling in the state population counts used to apportion representatives. The two cases were appealed directly to the U.S. Supreme Court and consolidated for judgment in *Department of Commerce v. U.S. House of Representatives*.[40] By a vote of five to four, the court held in January of 1999 that the use of statistical sampling to apportion seats in the U.S. House of Representatives among the states would violate the Census Act. The court construed two federal statutes to reach this result. The court did not restrict the use of statistically adjusted data for any purpose other than the apportionment of members of the U.S. House of Representatives among the states, nor did the court decide any constitutional issue.

Following this decision, it became increasingly likely that a census derived from statistical sampling would not be the exclusive data released by the Census Bureau in 2001. As required by the *Department of Commerce* decision, the headcount totals for the states used to determine congressional apportionment were released by the bureau on December 28, 2000. But the change in the party controlling the executive branch as a result of the 2000 presidential election and other developments eliminated the prospects for the use of sampling to adjust the 2000 census. While Clinton administration officials had favored an adjustment and established procedures to allow the

career personnel at the Census Bureau to make the final decision on whether to make an adjustment, the Bush administration set aside those procedures and returned to the secretary of commerce the authority to make the ultimate decision after consulting with the career personnel. After reviewing the ACE survey, on March 1, 2001, a senior committee of career census personnel and the acting director of the bureau recommended to new commerce secretary Don Evans that the headcount numbers be designated as the official census numbers. The committee cited several deficiencies in the adjusted data that could not be resolved in time for the April 1, 2001, deadline for the release of the redistricting data.[41] Several days later, Secretary Evans accepted this recommendation and designated the headcount as the official federal census numbers required by federal law.[42] The Bush administration did not further pursue efforts to support programs that might be used to statistically adjust the 2010 census, and with the relative accuracy of the 2000 census as determined by the ACE Revision II, the 2010 census was destined to be conducted solely on the basis of a headcount. Indeed, when the Obama administration assumed office in 2009, its nominee to head the Census Bureau, Robert Groves, who had favored adjustment when he served as associate director of the census in the 1990s, told the senate committee that approved his nomination that "statistical adjustment will not be used for redistricting" because "no implementation infrastructure for adjustment was put in place for 2010."[43] Efforts to provide for statistical adjustments for future censuses likely depend on the real and perceived accuracy of the 2010 census.

C. Must Texas Use the Official Set of Data Released by the Census Bureau?

One might assume that the official decennial census released by the Census Bureau is the only acceptable base for a lawful redistricting plan. To the contrary, in 1966 the U.S. Supreme Court expressly stated that the requirement that both houses of a state legislature be apportioned substantially on a population basis does not require use of the official federal census *per se*.[44] The court held that in no "decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."[45] For drawing state legislative districts, a state may use an alternative count of total population, if shown to be accurate, such as a state-conducted census[46] or a systematic update of the federal census made during the latter part of a decade.[47] Caution should be taken when considering using data other than census data for legislative redistricting, since for states in the Fifth Circuit Court of Appeals, which includes Texas, federal courts have found that, in the context of a late decade challenge to local redistricting plans, census figures are presumed to be accurate unless proven otherwise and proof of changed figures must be "thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to overcome the presumptive correctness of the prior decennial census."[48] It is unclear whether this same standard would be used to evaluate the state's use of a database other than the total population as determined by the census in conducting legislative redistricting immediately after the release of census numbers.

As for congressional districts, the use of a population base other than the official federal decennial census for drawing congressional districts would be difficult to justify because the population equality standard for congressional districts is very exacting. The U.S. Supreme Court in 1969 indicated that for congressional redistricting a state could make adjustments to the federal census to account for anticipated population growth if the projections were thoroughly documented,

shown to have a high degree of accuracy, and systematically applied throughout the state.[49] In the 1983 congressional redistricting case *Karcher v. Daggett*, the court, while recognizing that the census may result in an undercount, referred to the census as the "best population data available" and stated that "it is the only basis for good-faith attempts to achieve population equality" in a congressional plan.[50] The court did, however, suggest that the state could use census data adjusted to correct the undercount if the adjustment methodology was sound and shown to be precise.[51]

1. Citizenship. Citizenship data has been considered in Texas voting rights cases in determining whether a plaintiff might have a cause of action under Section 2 of the Voting Rights Act.[52] Citizenship data is used to show that a minority group constitutes a majority of the citizens of voting age (CVAP) in a proposed district. More recently, some plaintiffs have argued that citizenship data is necessary to determine whether a redistricting plan illegally dilutes the influence of some voters by concentrating noncitizens in certain districts and enhancing the effect of voters in those districts.[53] Changes to the methods by which citizenship data is collected by the Census Bureau will greatly affect the uses of the data for either of these purposes.

In the 2000 and earlier censuses, citizenship data was derived from data collected on the long-form questionnaire that was sent to approximately one in six households in lieu of the shorter form that was sent to all households. The long form asked various questions about a person's income, family, education, housing, etc., and specifically asked whether a person was a citizen. This produced data that was a snapshot of the population on census day (April 1) of the year in which the census was taken. Because not all households received the long form, the data provided in the census is considered sampled data and is subject to a margin of error (as all sampled data sets are), though the margin was relatively small because of the sheer size of the sample. The margin of error is usually expressed as a number of people (sometimes called the midpoint number) plus or minus another number that establishes a range around the midpoint. The data resulting from the long-form survey was not released at the block level because of concerns about the privacy of the respondents and about the accuracy of sampled data applied to such a small area; thus, the smallest geographical unit for which the citizenship data was released was a block group. The data was usually released in the latter half of the year following the year in which the main demographic census data was released, and thus was not available for Texas legislative redistricting purposes, as most plans were required to be drawn before the citizenship data was available.

After the 2000 census, the Census Bureau eliminated the long form and replaced it with an annual survey, called the American Community Survey (ACS), to collect the same type of data. The ACS surveys approximately three million housing units each year as well as a small percentage of persons who live in group quarters (nursing homes, school dormitories, barracks, prisons, etc.).[54] Because of the relatively small sample size used, it is necessary to average several years together to derive usable data at smaller geographical levels. As with long-form citizenship data, the smallest geographic unit at which ACS data is released is the block group, and it is derived from an average of five years of sampled data. In the first few months of 2011, citizenship data at the block group level will be released derived from the average of the 2005-2009 surveys. The citizenship data to be available in early 2011 will be based on Census 2000 block groups, and it is unclear how closely those block groups will correlate with the 2010 block groups to be used for redistricting after the release of the 2010 census counts. When the citizenship data derived from the 2006-2010 survey average becomes available in late 2011 or early 2012, it will be based on Census 2010 block groups.

The use of the ACS citizenship data for redistricting in 2011 looks to be exceptionally challenging. Even with the five-year averaging, the margins of error at the block group level will likely exceed the margins of error of citizenship data at the block group level under the former long-form citizenship data because of the limited ACS sample size. More troublesome will be the fact that the geography containing the citizenship data may not match the 2010 census geography that will be used to draw redistricting plans and that the boundaries of new districts are unlikely to follow block group boundaries. It is uncertain whether a reliable method can be developed to accurately allocate ACS citizenship rates to the pieces of a split block group. Finally, the fact that the data is inherently backwards looking (the average of the previous five years) adds additional uncertainty to using the data to estimate current CVAP within a proposed district, since many persons who were under voting age in the five years used to determine the ACS average will have reached voting age as of census day (April 1, 2010), and it cannot be assumed that the ratio of those under 18 and those 18 and over remains constant over time.

Even with all these challenges it may still be possible to use the ACS citizenship data to assist in compliance with Section 2 of the Voting Rights Act. The requirement that minorities constitute a majority of CVAP in a potential district is only one facet of a Section 2 claim, and the CVAP data is primarily used to evaluate a district, not for actually drawing districts. For that purpose, CVAP data that is available as a range rather than a specific number may still be valuable. But an attempt to draw districts with equal numbers of citizens or citizens of voting age population, rather than with equal total populations, will be problematic because of the more exacting standards applied under the one-person, one-vote standard.[55] Given the margins of error in the data and the uncertainty of the allocation of split block groups, it is highly unlikely that a plan drawing congressional districts based on ACS citizenship data could ever pass scrutiny under the "zero-deviation" standard. Even the greater 10 percent overall deviation accorded legislative districts may not be sufficient to allow for the use of ACS citizenship data in drawing legislative districts, especially for house districts which are smaller in population and would be subject to a greater margin of error if drawn using that data.[56]

2. Prison Populations. The census generally counts people where they reside on census day, and this is true for persons who are incarcerated in prison on that day. Since those serving time after being convicted of a felony are ineligible to vote in Texas,[57] this creates concentrated islands of nonvoters who are placed in the larger realm of the total population. Prisons are not distributed uniformly throughout districts used to elect government officials, and thus some districts rely more on their prison population to make up their total population than others. As the number of persons incarcerated has grown, concentrations of prison populations may dilute the influence of some voters and enhance the influence of others. At the level of population needed for districts drawn by the legislature in 2011, the effect of prison populations is not likely to be significant for State Board of Education (ideal size 1,676,371), congressional (698,488), or state senate (811,147) districts, and whether it will be an issue for house districts (167,637) remains to be seen. But local governments that contain large prisons face a significant issue in that a large portion or even a majority of the population of a commissioners precinct, municipal ward, or other single-member election district is composed of prisoners. Also, since prisons are more likely to be located in rural areas and inmates are likely to be from urban areas, the presence of a prison may artificially enhance the voting strength of rural voters. Finally, because prisoners are disproportionately likely to be members of racial or ethnic minority groups, the presence of a prison could give the appearance that a district is a minority opportunity district when it is not.

If it is determined that prison populations might be used to unfairly affect the redistricting process, two possible solutions are available. The first is to reallocate the prisoners from where they are located to some other place for redistricting purposes. This other place would likely be the place the prisoner considers home or the place the prisoner resided at the time the crime was committed. Performing this allocation is a significant undertaking, as the prisoner must be assigned to a specific census block and this requires both time and funding to perform. Several states have adopted laws providing for this method.[58] The other solution is to remove the prison populations entirely from the population database used for redistricting. The Census Bureau has announced that it will make its count of prisoners living in group quarters on census day available at the block level sometime in May 2011. By subtracting this number from the total population of the census block in which the prison is located, it would be relatively simple to remove the prison population. Alternately, it may be possible to obtain from the prisons themselves the number of persons incarcerated in the facility on census day and subtract that number from the population of the census block in which the prison is located.

As of early 2011, no court case has mandated that prison populations be reallocated or excluded from the population counts used for redistricting. Because of the time and funding necessary for reallocation, this method is not practical for use in 2011 in Texas. Using the group quarters data from the Census Bureau to remove prisoners from the population database may not be possible if the May 2011 release of the data occurs too late in the regular legislative session to allow the legislature to consider it for state senate or house plans.

III. Implementation of Staggered Senate Terms After Redistricting

Section 3, Article III, Texas Constitution, provides, in part:

> The Senators shall be chosen by the qualified voters for the term of four years; but a new Senate shall be chosen after every apportionment, and the Senators elected after each apportionment shall be divided by lot into two classes. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter.

Section 3, Article III, requires that each senate district elect a new senator at the first statewide general election held after the effective date of a new senate redistricting plan. The policy behind such a provision is clear: if the new senate districts are significantly different from the old ones, each new district should elect its own senator immediately. Senators elected from the old districts should not continue to serve since the districts from which they were elected are obsolete, and they do not necessarily represent the voters of the new districts. In order to stagger the four-year terms of senators under the new plan, the senators elected at the first election after redistricting are divided into two classes: (1) one group to serve initial two-year terms; and (2) another group to serve initial four-year terms. After the initial terms, all senators are elected to four-year terms until the next redistricting goes into effect, with approximately half the seats up for election every two years. Ordinarily, Section 3 comes into play only for the first general election after the federal decennial census is published and the senate districts are redrawn under Section 28, Article III, Texas Constitution.

However, Section 3 applies by its terms each time a whole new senate redistricting plan is adopted.[59] The Texas attorney general has stated that Section 3 applies to a redistricting plan even if it makes changes to only a few districts.[60] However, drawing lots for new terms under Section 3 has been waived for a redistricting or apportionment of the senate by a federal court. In the litigation involving the LRB's 1981 senate plan, a federal district court approved a consent decree settling the case in which the court in effect allowed the parties to waive Section 3.[61] A similar instance occurred in a federal court order approving a settlement plan involved in a challenge to senate districts in 1995.[62] The Texas attorney general has stated in a letter opinion that Section 3 does not require the election of a new senate, with the senators redrawing lots, after a state or federal court has ordered a change in a redistricting statute that has been enacted.[63] A state appeals court has also held that the legislative enactment without changes of a court-ordered senate plan used in the previous election cycle does not constitute a new apportionment under Section 3.[64]

IV. Federal Redistricting Litigation and Three-Judge Courts

In ordinary federal litigation, cases are tried before a single district judge. Appeals are made to the applicable federal court of appeals, which for Texas is the Fifth Circuit Court of Appeals in New Orleans. The Fifth Circuit hears appeals from Texas, Louisiana, and Mississippi. A party wishing to appeal a decision of the court of appeals may petition the U.S. Supreme Court to hear an appeal, but the supreme court is not required to hear the appeal.[65]

However, Congress has recognized the need for quick resolution of state redistricting cases, and by statute has provided for a procedure for the conduct of those cases that differs from most other federal litigation.[66] The statute requires an action challenging the constitutionality of a congressional or state legislative redistricting plan to be tried by a three-judge district court.[67] An appeal of a decision of the three-judge district court is made directly to the U.S. Supreme Court, bypassing the intermediate court of appeals.[68] The supreme court is required to hear the appeal and may affirm or reverse the district court's decision.

Accordingly, most litigation in the federal courts challenging congressional, state house, or state senate districts will be heard by a three-judge court with appeals directly to the supreme court. Suits challenging those plans on the basis of the one-person, one-vote standard,[69] as violative of the Fourteenth and Fifteenth Amendment protections against racial discrimination or racial gerrymanders,[70] or as unconstitutional partisan gerrymanders[71] must be tried by three-judge district courts if brought in federal court. The federal statute does not apply to challenges against local governmental districts, so such a case will be tried by an ordinary federal district court with any appeal going to the Fifth Circuit Court of Appeals. Since the statute providing for a three-judge court applies only to cases challenging the constitutionality of a state redistricting plan, a suit filed in federal court exclusively under Section 2 of the Voting Rights Act[72] or another statute would be tried by a single district judge. In practice, however, plaintiffs filing a Section 2 suit usually include claims that the plan also violates the Fourteenth or Fifteenth Amendment. In that case, the entire suit, including the Section 2 claim, would be tried before a three-judge court.[73]

Notes, Chapter 1

[1] *Walker v. Baker*, 196 S.W.2d 324, 328 (Tex. 1946).

[2] Sec. 18, Art. V (county justice and commissioners precincts); Sec. 5, Art. XI (home-rule cities).

[3] *See, e.g.*, Secs. 11.052 (independent school districts) and 130.082 through 130.0822 (junior college districts), Texas Education Code.

[4] Secs. 7 and 7a, Art. V.

[5] *Smiley v. Holm*, 285 U.S. 355, 367-368 (1932).

[6] *Id*. at 370-373.

[7] S.B. 800, 67th Leg., Reg. Sess., 1981 (vetoed on June 18).

[8] S.R. 599, 68th Leg., Reg. Sess., 1983.

[9] *Terrazas v. Clements*, 581 F. Supp. 1319, 1321, 1327 (N.D. Tex. 1983).

[10] In a state, such as Texas, subject to Section 5 of the Voting Rights Act, a court may not adopt a legislative proposal as a permanent plan unless the proposal has been precleared under Section 5. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

[11] For the difference between the deference given to a properly enacted plan and that given to other expressions of legislative preference such as resolutions, *see Shayer v. Kirkpatrick*, 541 F. Supp. 922, 932-933 (W.D. Mo.), *aff'd*, *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

[12] See 2 U.S.C. Sec. 2a and *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), in which the supreme court found that federal law required the use of the actual headcount of persons for the apportionment that occurs under 2 U.S.C. Sec. 2a.

[13] Under Sec. 172.023(a), Texas Election Code, the filing period is the 30-day period ending on the second Monday in December of an odd-numbered year.

[14] In December 2000, after the release from the Census Bureau of the numbers that allow for apportionment of congressional seats, suits were filed against Texas congressional redistricting plans in both state and federal court on the theory that Texas lacked a plan that encompassed its 32 districts. *See Del Rio v. Perry*, No. GN 003665 (353rd Dist. Ct., Travis County, Tex. Dec. 27, 2000) and *Mayfield v. State*, Civ. No. 2-00 CV 268-DF (E.D. Tex. Dec. 28, 2000). In February 2011, a similar suit was filed on the theory that Texas lacked a plan with 36 districts. *See Teuber v. State*, No. 4:11-CV-0059 (E.D. Tex. Feb. 10, 2011).

[15] See the section of Chapter 2 of this publication discussing the requirement for equal populations among congressional districts.

[16] Chapter 12 (S.B. 1), Acts of the 62nd Leg., 1st Called Sess., 1971; Chapter 2 (S.B. 1), Acts of the 67th Leg., 1st Called Sess., 1981; Chapter 7 (H.B. 1), Acts of the 72nd Leg., 2nd Called Sess., 1991; Chapter 2 (H.B. 3), Acts of the 78th Leg., 3rd Called Sess., 2003.

[17] Sec. 5, Art. III, Texas Constitution; *Walker*, 196 S.W.2d at 328.

[18] *See, e.g.*, House Journal, 69th Leg., 2nd Called Sess., 1986, at 189-190.

[19] Sec. 7.101, Texas Education Code.

[20] *See* Sec. 7.104, Texas Education Code.

[21] *See* Judgment in *Miller v. Cuellar*, No. 3-01CV1072-G (N.D. Tex. Dallas Div. Nov. 2, 2001).

[22] 471 S.W.2d 570, 573 (Tex. 1971).

[23] *Id*. at 573-575.

[24] *See* Op. Tex. Att'y Gen. No. DM-6 (1991); Op. Tex. Att'y Gen. No. M-881 (1971).

[25] *See Terrazas v. Ramirez*, 829 S.W.2d 712, 726 (Tex. 1991).

[26] *Mauzy*, 471 S.W.2d at 573. The legislature did not redistrict house or senate districts at all between 1921 and 1951.

[27] *See Walker*, 196 S.W.2d at 328, in which the Texas Supreme Court stated that the senate's authority to approve or disapprove gubernatorial appointments under Sec. 12, Art. IV, should be narrowly construed since it is an exception to the general appointment power residing in the governor's office.

[28] In 1981, Governor Clements vetoed the senate plan, S.B. 800, 67th Leg., Reg. Sess., and the LRB proceeded to redistrict the senate without apparent objection.

[29] *Mauzy*, 471 S.W.2d at 574. The Texas Supreme Court extended its holding to a plan held invalid under *any* law, since "[a]n apportionment which is invalid, for whatever reason, is no apportionment." *Id*.

[30] Now codified as Chapter 551, Texas Government Code.

[31] *In re Perry*, 60 S.W.3d 857 (Tex. 2001).

[32] 13 U.S.C. Sec. 141(d).

[33] Mary Mulry, *Summary of Accuracy and Coverage Evaluation for Census 2000*, Research Report Series (Statistics # 2006-3), Statistical Research Division, U.S. Census Bureau (Feb. 28, 2006), at 1.

[34] *Id.* at 14.

[35] *Wisconsin v. City of New York*, 517 U.S. 1, 24 (1996).

[36] Pub. L. No. 105-119, Sec. 209(b) (1998).

[37] Pub. L. No. 105-119, Sec. 209(j) (1998).

[38] Title 13, United States Code.

[39] *See U.S. House of Representatives v. Dept. of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998); *Glavin v. Clinton*, 19 F. Supp. 2d 543 (E.D. Va. 1998).

[40] 525 U.S. 316.

[41] *See* Report of the Executive Steering Committee for Accuracy and Coverage Evaluation Policy (March 1, 2001).

[42] 66 Fed. Reg. 14520 (2001).

[43] *Census Nominee Shuns Sampling as Counting Method*, N.Y. Times The Caucus blog (May 15, 2009, 1:28 PM), http://thecaucus.blogs.nytimes.com.

[44] *Burns v. Richardson*, 384 U.S. 73, 91 (1966).

[45] *Id.* at 92.

[46] *Winter v. Docking*, 373 F. Supp. 308 (D. Kan. 1974).

[47] *Exon v. Tiemann*, 279 F. Supp. 603, 608 (D. Neb. 1967).

[48] *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F. 3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

[49] *Kirkpatrick v. Preisler*, 394 U.S. 526, 535.

[50] 462 U.S. 725, 738.

[51] *Id*.

[52] *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010); *Reyes v. City of Farmers Branch, Tex.*, 586 F. 3d 1019, 1023 (5th Cir. 2009).

[53] *Lepak v. City of Irving, Tex.*, No. 3:10-CV-00277-P (N.D. Tex. Feb. 11, 2010); *Teuber v. State*, No. 4:11-CV-00059 (E.D. Tex. Feb. 10, 2011).

[54] U.S. Census Bureau, *Design and Methodology*, American Community Survey (Apr. 2009).

[55] See Chapter 2 of this publication.

[56] For a more complete examination on legal issues, see Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32-3 Cardozo L. Rev. 755, 774-782 (2011).

[57] *See* Secs. 11.001, 11.002, Texas Election Code.

[58] *See* H.B. 384, Acts of the 145th Delaware General Assembly, 2010; H.B. 496 and S.B. 400, Acts of the 427th Maryland General Assembly, 2010; Part XX of A9710-D, Acts of the New York State Leg., 2010.

[59] *Spears v. Davis*, 398 S.W.2d 921, 924 (Tex. 1966).

[60] Op. Tex. Att'y Gen. No. DM-351 (1995); Op. Tex. Att'y Gen. No. M-349 (1969).

[61] *Terrazas v. Clements*, 581 F. Supp. at 1324-1325.

[62] *Thomas v. Bush*, No. A-95 CV 186-SS (W.D. Tex. Sept. 15, 1995 order).

[63] Tex. Att'y Gen. LO 95-046 (1995).

[64] *Armbrister v. Morales*, 943 S.W.2d 202 (Tex. App.—Austin 1997, no writ).

[65] A request to the supreme court to appeal a decision of the court of appeals is referred to as a petition for writ of certiorari. If the supreme court decides to hear the appeal, it grants a writ of certiorari. If it chooses not to hear the appeal, it refuses to grant the writ ("*cert. denied*" is the notation in legal citations), allowing the decision of the court of appeals to stand.

[66] 28 U.S.C. Sec. 2284(a).

[67] The three judges include the district judge of the court in which the case is filed and two others designated by the chief judge of the circuit court of appeals, at least one of whom is a judge of the appellate court. 28 U.S.C. Sec. 2284(b)(1).

[68] 28 U.S.C. Sec. 1253.

[69] See Chapter 2 of this publication.

[70] See Chapter 5 of this publication.

[71] See Chapter 6 of this publication.

[72] See Chapter 3 of this publication.

[73] *See, e.g.*, *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd mem.*, 498 U.S. 1019 (1991).

Chapter 2
One Person, One Vote: The Equal Population Requirement

I. Background

In *Reynolds v. Sims*,[1] the first case challenging state legislative districts to be decided on the merits by the U.S. Supreme Court after it opened the courthouse doors to such suits in 1962, the court summarized the principle now referred to by the phrase "one person, one vote" as follows: "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[2] When population disparities exist between legislative districts, a voter in a district having a population greater than most other districts has less influence in electing a representative than a voter in a district having a smaller population, since it takes fewer persons to elect a representative from an underpopulated district than from an overpopulated district. Significant population disparities between districts undermine the fairness of representative government and the principle of majority rule by giving the voters of underpopulated districts the same number of representatives, and thus the same political power, as the voters of overpopulated districts. Voters in underpopulated districts benefit from the plan's inequality and have a disproportionately greater influence on the electoral process compared to persons in overpopulated districts. For this reason, a person in an overpopulated district is said to be *underrepresented*, and a person in an underpopulated district is said to be *overrepresented*. A redistricting plan with unlawful population disparities among districts is said to be *malapportioned*.

The supreme court has derived the one-person, one-vote principle from two distinct federal constitutional sources. Specific language in Article I and the Fourteenth Amendment requires equal numbers of persons to be represented by each member of Congress. The court has held that the Equal Protection Clause of the Fourteenth Amendment requires elected representatives in most other governmental bodies, including state legislatures, to represent substantially equal numbers of persons.

Before *Reynolds*, congressional and legislative districts, as well as local electoral districts for bodies such as city councils and school boards, often varied in population by amounts that are inconceivable today.[3] Districts were often drawn to achieve political ends or to manipulate the composition of a legislative body or congressional delegation, with little consideration for population equality. Malapportionment was frequently the result of attempts to maintain rural representation in the face of rapid urban population growth. Also, redistricting was often neglected for long periods, and population shifts during these periods further exaggerated the disparity in population among districts.[4] Moreover, most states emphasized representation of counties in one or both houses of the state legislature, a factor that conflicted with or completely displaced the concept of equal population among districts.

In *Reynolds*, the supreme court held that the districts used to elect both houses of the Alabama Legislature violated the one-person, one-vote rule. Although the Alabama state constitution required population equality between house and senate districts as long as counties were not split, the districts in use in 1964 had not been redrawn since 1901. Under the 1960 census, one state senator represented over 600,000 persons in one particular urban district, while another represented

only 15,417 persons in one rural district.[5] Similar disparities existed in the Alabama House of Representatives. The court had little difficulty deciding that such population disparities were unconstitutional.

After *Reynolds*, state and federal courts struggled to define the standards of population equality required for congressional, legislative, and other state and local districts. After several decades of developing case law, a very stringent equality standard has been established for congressional districts, while a somewhat more flexible standard of substantial population equality applies to state legislative and other types of electoral districts. This chapter analyzes the one-person, one-vote principle as it applies to congressional, state legislative, and State Board of Education districts.

II. Measuring and Defining Population Equality

Courts have used a number of methods to assess population variances among districts. The following is a brief description of the terms and concepts commonly used in quantifying population deviation in a redistricting plan.

A. Ideal District Population

The ideal population of a district in a redistricting plan is determined by dividing the total state population by the total number of districts to be drawn. For example, the ideal district population for a Texas House district is calculated by dividing the total state population by 150. If every district were drawn to include exactly the ideal population, the plan would contain no population deviation and would comply perfectly with the one-person, one-vote requirement.[6]

B. Population Deviation of Individual Districts

The degree to which the population of a given district deviates from the ideal district population may be described in several ways. The methods most frequently used to quantify population deviation are the absolute deviation, the percentage deviation, and the ratio of district population to ideal or mean population.

Absolute Deviation. This term means the number of persons by which the population of a specific district differs from the ideal district population. The absolute population deviation of a district with a population greater than the ideal population is expressed as a positive number, and that of a district with a population less than the ideal population is expressed as a negative number. So, for example, a district with 3,000 persons less than the ideal population may be said to have an absolute deviation of -3,000. In practice, courts seldom use this term, preferring to simply state that a district has so many persons more or less than the ideal population.

Percent Deviation. Also referred to as *relative deviation* and *percent variance*, percent deviation is the percentage by which a district's population exceeds or falls short of the ideal population. It is calculated by dividing the absolute deviation of the district by the ideal population. For example, if the ideal population is 100,000, the percent deviation of a district with only 95,000 persons is -5 percent (-5,000 divided by 100,000 = -0.05). Courts frequently refer to this term simply as a district's deviation.

Ratio to Ideal or Mean Population. Courts occasionally compare a district's population to the ideal district population or to the mean (average) population for all districts in the plan as a ratio. For example, for a district having 105 percent of the ideal district population, the ratio might be expressed as 1.05 to 1.

C. Population Deviation of Entire Plan

Range of Deviation. Courts considering the population equality of a redistricting plan have focused primarily on the overall range of population deviation in the plan because the range indicates the extremes of the plan's inequality at which a person enjoys the greatest overrepresentation or suffers the greatest degree of vote dilution.[7]

1. Absolute Range. The numerical difference between the population of the most populous district and that of the least populous district is referred to as the absolute range of deviation. For Texas House districts used in the 1998-2000 elections, the most populous district had 118,575 persons under the 1990 census and the least populous district had 107,265 persons, so the absolute overall range of deviation for the plan was 11,310 persons.

2. Percentage Range. The most important and frequently used measurement of the overall range of population equality in a redistricting plan is the amount computed by adding together the percentage deviations of the most populous and least populous districts (disregarding the positive and negative signs). This measurement is referred to by a number of terms, including *total* (or *overall*) *range of deviation*, *total percentage deviation*, and *maximum deviation.* If the most populous district deviates from the ideal by +2 percent and the least populous district deviates from the ideal by -3 percent, the overall range of deviation is 5 percent. This method of expressing the range of deviation has become the standard method in the major one-person, one-vote decisions.

Pervasiveness of Deviation Throughout Plan. To give an indication of the general degree of population deviation within a redistricting plan, courts may refer to measurements that show how pervasive the population deviation is throughout the plan.

Average Population Deviation. The simplest method of describing the pervasiveness of population deviation in a plan is to average the population deviations of all the districts in the plan. The average (or mean) deviation may be expressed in absolute terms (the average number of people by which the districts exceed or fall short of the ideal population, or the average of the absolute deviations for all the districts) or as a percentage (the average of the percentage deviations for all the districts). The average deviation is seldom used alone, but rather in comparison to the total percentage deviation. For example, the Texas House of Representatives plan upheld by the U.S. Supreme Court in 1973 in *White v. Regester*[8] had a total deviation range (maximum deviation) of 9.9 percent, but an average percentage deviation of only 1.82 percent. The relatively low average deviation indicates that most districts in the plan were much closer to the ideal population than the two extremes, and that relatively few districts approached the extremes. Although courts focus on the extremes of a plan, the average percentage deviation is frequently examined in considering the total range of deviation of a plan as an indication of whether the extremes are indicative of a general disregard of population equality or whether they are rare exceptions within a plan. Having a large number of districts at the extreme ends of an otherwise permissible range of population deviation may enhance the likelihood that a plan will be invalidated.[9]

III. Equal Population for Congressional Districts

A. General Rule: Populations as Equal as Practicable

The Apportionment Clause of Section 2, Article I, of the U.S. Constitution, together with the amendment to that section made by Section 2 of the Fourteenth Amendment, requires seats in the

U.S. House of Representatives to be apportioned among the states according to the "whole number of persons in each State" and to be elected "by the People of the several States." These provisions have been construed to require not only that the total number of congressional seats be divided among the states according to population,[10] but also that congressional districts within a state be drawn according to population.

In the 1964 case of *Wesberry v. Sanders*,[11] the U.S. Supreme Court made it clear that the federal courts must consider constitutional challenges to congressional redistricting plans, just as the court had previously done for challenges to state legislative redistricting plans in the landmark 1962 case *Baker v. Carr*.[12] The Georgia congressional plan at issue in *Wesberry* contained districts that varied greatly in population: for example, one district contained two to three times the population of most other districts.[13] The court held that such population variance made votes in the overpopulated districts worth less than votes in underpopulated districts in electing representatives to Congress, and that this violated Section 2, Article I, and the Fourteenth Amendment, which require Congress to be apportioned and elected according to population.

Wesberry did not carefully define the level of population equality required among congressional districts. Other early cases applying the equal population rule to congressional districts used a standard of substantial equality that was essentially the same as the standard applied to state legislative districts at the time. The courts gave great deference to state legislative plans that were only roughly equal in population. In a case challenging the Texas congressional plan enacted in 1965, a federal district court upheld the plan despite a total range of deviation of 19.4 percent and an average deviation of 5.5 percent (more than half the districts varied by more than 5 percent from the ideal population).[14]

Ultimately, the federal courts defined the equal population standard for congressional districts as a requirement that congressional districts be drawn with equal populations "as nearly as practicable."[15] This standard is significantly stricter than the standard currently applied to state legislative districts. Congressional districts are now required to contain precisely equal populations, with exceptions only for population deviation that is either:

(1) unavoidable despite a good faith effort to achieve absolute equality; or

(2) necessary to achieve a legitimate state objective.

B. Good Faith Effort to Achieve Equality

The leading case applying the equal population rule to congressional districts is *Karcher v. Daggett*,[16] decided by the U.S. Supreme Court in 1983. The court in *Karcher* reaffirmed its previous decisions that "there are no *de minimis* population variations" permissible in a congressional redistricting plan unless otherwise justified by the state.[17] That is, substantial equality among districts is not enough; the legislature must make a good faith effort to draw districts of *precisely* equal population. The plan rejected by the court in *Karcher* had an average deviation per district of only 0.1384 percent (726 persons) from the ideal, and the overall range of deviation was only 0.6984 percent (3,674 persons).[18] The court rejected the state's attempt to justify these deviations on the theory that, since the federal census itself is not perfectly accurate, a small amount of inequity is mathematically insignificant. The court recognized that using the census as the basis of a perfect equality standard is somewhat artificial, since the census is admittedly not perfect to begin with and does not take into account population changes that occur over time.[19] The court was

nonetheless unwilling to open the door to erosion of the goal of perfect population equality on the basis of such statistical arguments. As the supreme court stated in a previous case striking down a congressional plan, "[w]e can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become de minimis. Moreover, to consider a certain range of variances de minimis would encourage legislators to strive for the range rather than for equality as nearly as practicable."[20]

This rule has led courts to strike down congressional plans with relatively small population deviations when the state offers no specific justification for those deviations. Total ranges of deviation of as low as 1.87 percent (10,667 persons) and 1.38 percent have been rejected in the absence of an articulated justification.[21]

The "as equal as practicable" rule suggests that if a single census block could be moved from one congressional district to another adjacent district or if census blocks could be switched between adjacent districts to achieve more equal population, the redistricting plan should be so changed (unless the change would substantially undermine a legitimate state objective incorporated into the plan, as discussed below). In *Karcher*, the supreme court noted that the population deviations in the New Jersey congressional plan could have been reduced simply by moving certain towns between districts and that the legislature offered no justification for not doing so.[22] Whether the courts would require the legislature to move or swap extremely small geographic units to achieve greater population equality is not clear, but there is some risk in not doing so without compelling justification. The census provides detailed population data to the census block level, the smallest geographic unit used by the Census Bureau, and the computer programs used in redistricting facilitate the switching of census blocks between proposed districts to achieve equal population. However, the supreme court has suggested that it will not necessarily require such switching of census blocks to achieve minute improvements in population equality. In *Karcher*, the court noted that "[f]urther improvement [in equality] could doubtless be accomplished with the aid of a computer and detailed census data. . . . [N]or do we indicate that a plan cannot represent a good-faith effort whenever a court can conceive of minor improvements."[23] Arguably, the court has left states a little flexibility to draw districts with rational boundaries, rather than requiring boundaries that zigzag to even out tiny population deviations. It is impossible to predict how a court would react to a plaintiff's challenge based entirely on tiny inequalities that can be remedied by moving a few extremely small census units between districts.

Bringing a challenge to a congressional redistricting plan based primarily on minor population deviations may not always be a fruitful approach for a plaintiff. If a court overturns a redistricting plan, it must give the legislature an opportunity to correct the unlawful plan.[24] The legislature may simply reenact the plan with minor changes to correct the population inequality.[25] However, such a challenge can serve as a Trojan horse. For example, following the supreme court ruling in *Karcher*, the new plan enacted by the New Jersey Legislature to correct the unlawful population deviation was vetoed, so the district court ultimately adopted a different plan proposed by the Republican plaintiffs.[26] In hindsight, it appears that the decision of the district court to reject a proposed plan that made minimal changes to the original legislative plan to correct the population deviation was not legally correct. The district court appeared to reject that legislative plan because it would have continued in effect what the court considered to be unfair partisan gerrymandering against Republican voters, even though the partisan effects of the plan were never held invalid.[27] However, the legislature appears to have conceded without appealing the district court's remedial

plan. The case demonstrates how a group that dislikes a congressional plan because of its political, racial, or other effects may use a challenge to the plan's population inequality as a tool to get a second chance at a more favorable plan in the legislature or in the courts.

As a procedural matter, the U.S. Supreme Court has held that a plaintiff challenging a congressional redistricting plan has the burden of proof to establish that the plan's population deviation could have been reduced through a good faith effort to achieve population equality.[28] Plaintiffs have met this burden of proof by offering alternative plans substantially similar to the plan under attack but with smaller population deviations than the adopted plan[29] or by showing that the legislature rejected alternative plans with higher levels of equality,[30] that the legislature did not use the official federal decennial census data to draw its plan,[31] that political subdivisions could be switched between adjacent districts to make them more nearly equal,[32] or that the legislature made changes to a more nearly equal plan during the legislative process for political reasons or without apparent justification.[33] Alternative plans introduced by a plaintiff must implement the same policy decisions made by the legislature while reducing the population deviation of the legislative plan.[34]

C. State's Justification of Deviations

Once a plaintiff establishes a prima facie violation of the federal constitution by showing that congressional districts are not as equal in population as could practicably be drawn, the plan will be held invalid unless the state shows that every avoidable population deviation, no matter how small, is necessary to achieve a legitimate state objective. The general standard for justifying such deviations is described at length in *Karcher* as follows:

> The State must . . . show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.[35]

Only Small Deviations May Be Justified. The degree of justifiable deviation in a congressional plan is much smaller than the degree permitted in state legislative or other redistricting plans. The supreme court in *Karcher* stated that the court is willing to defer to legitimate state policies "even if they require small differences in the population of congressional districts" and that such state objectives "on a proper showing could justify minor population deviations."[36]

Because the court has not discussed exactly what constitutes a "minor" population deviation in this context, it is not possible to set any ultimate numerical limit on permissible deviations in a congressional plan. It is clear, however, that total deviations in the relatively large range that may be permitted to further state policies in drawing state legislative districts will not be allowed in a congressional plan, and a total deviation of even a fraction of one percent in a congressional plan requires compelling justification. The court requires that "absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, Sec. 2 [of the United States Constitution], as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts

for representatives to state and local legislatures."[37] In *White v. Weiser*, the court stressed that local interests are largely irrelevant at the congressional level and that congressional districts are so large that each percentage point of variation represents several thousand persons.[38]

Most recent federal district court decisions have held that any deviation, no matter how small, in a congressional plan must be justified.[39] However, in one case, a federal district court found a deviation of nine persons between the largest and smallest of Ohio's 19 congressional districts as being insignificant and therefore requiring no justification.[40]

Consistency of State Policy. A legislative policy used to justify population deviations in congressional districts must be applied consistently throughout the state, not in an *ad hoc* manner. In many of the cases in which the courts have rejected a state's attempt to justify population deviation in a congressional plan, the failure of the legislature to be consistent in applying its professed policy is a major reason for the court's decision. For example, in *Kirkpatrick v. Preisler*, the supreme court refused to uphold Missouri's attempt to justify certain population variances on various grounds (such as the presence of large nonvoting military and college student populations and predictions of future population change) because no attempt was made to take the same considerations into account in other areas of the state.[41] If not applied uniformly, the state's purported policy may be seen as a mere pretext or after-the-fact rationalization for impermissible deviation in some districts.

Necessity of Deviation. The burden of justifying deviations in a congressional plan is a heavy one. The *Karcher* test requires not only that the population deviation be attributable to the application of a legitimate state policy, but also that it be a necessary result of that application. In *White v. Weiser*, the supreme court noted that the state's purported goal of preserving the core of existing districts in the new plan could have been achieved under an alternate plan that had less population deviation.[42] In other words, the chosen congressional plan must contain less population deviation than all others that accomplish the same state goals in a reasonable manner, or the courts may not consider the deviation necessary. General assertions that the deviation is necessary to effectuate the state policy are insufficient. The state must be prepared to document thoroughly its findings that, without the deviations present in the plan, the state policy would be seriously undermined.[43]

D. Possible Justifications for Deviation in Congressional Plan

The supreme court has expressly recognized several state objectives that may justify small population deviations in a congressional plan. In *Karcher*, the court stated: "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."[44] However, these or any other legitimate state objectives will not necessarily justify a particular deviation. As noted above, the court stated in *Karcher* that whether such legitimate objectives will be found to justify the population deviations in a congressional plan depends on the size of the resulting deviations, the consistency with which the policy is applied, and the state's ability to thoroughly document its findings that the deviations are necessary.

Preserving Subdivisions of a State. In *Kirkpatrick*[45] and *Wells v. Rockefeller*,[46] the supreme court rejected the state's argument that the deviations were necessary in part to avoid splitting

counties or municipalities, but in both cases the deviation levels were relatively large (ranges of 5.97 percent and 13.1 percent, respectively). In *White v. Weiser*, the court rejected the state of Texas' attempt to justify the 4.13 percent deviation range of its plan in part in order to maintain county integrity by citing the proposition approved in *Kirkpatrick* that the court does "not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."[47] This language strongly suggests that in 1973, when *White v. Weiser* was decided, the court intended to exclude this policy entirely from consideration in congressional redistricting. However, in 1983, the court's language in *Karcher* certainly left the door open for limited population deviation in order to preserve county or municipal boundaries in drawing congressional districts.

A 1992 case has elaborated on this justification. In Kansas, a federal district court found that a congressional plan that protected county lines but had a total deviation of 0.94 percent violated the one-person, one-vote rule. The court adopted a remedial plan that was very similar to the legislative plan but split two counties and had a total deviation of 0.01 percent.[48] This case suggests that preserving whole counties at the cost of nearly perfect population equality among congressional districts remains a risky proposition.

In 1992, the California Supreme Court upheld a congressional plan that did not divide census tracts even though the total deviation was 0.49 percent. The plan was drawn by several masters appointed by the court. The court found that the plan's consistent use of undivided census tracts constituted a legitimate justification since the tracts represented real communities of interest and were bounded by prominent natural or manmade geographical features.[49] This finding was not reviewed by the federal courts and thus may not be one on which other states may rely.

Making Districts Compact. The U.S. Supreme Court in *Karcher* included "making districts compact" in its list of potentially acceptable justifications for minor population deviations among congressional districts. This reference to compactness appears to refer to compact shape, not geographic size. In *Kirkpatrick*, the court, quoting at length from *Reynolds*, rejected the notion that population deviation among congressional districts may be justified by mere considerations of area. In the same passage, the court also rejected aesthetic considerations as a possible justification for population deviation, stating that "[a] State's preference for pleasingly shaped districts can hardly justify population variances."[50] However, in other contexts courts have recognized the importance of compactness in redistricting, since districts that are not compact may become confusing to the voters and interfere with effective representation.[51] In 1992, a federal district court found that a total deviation of 0.09 percent in West Virginia's congressional plan was in part justified by general principles of compactness relied on by the state.[52] It is important to note that the deviation in that case was relatively small, so the court appeared to give the state significant deference to its reliance on compactness.

Anticipated Population Changes. In *Kirkpatrick*, the supreme court stated that "[w]here these [future population] shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner."[53] In *Karcher*, the court, referring to Missouri's rejected attempt to justify population deviation by reference to projected population shifts in *Kirkpatrick*, explained that that rationale was rejected "not because those factors were impermissible considerations in the

apportionment process, but rather because of the size of the resulting deviations" and because the state's attempt to apply such a policy was haphazard, not systematic.[54] In another case in which a state attempted without success to justify population deviation in its congressional plan by arguing that the deviation was designed to take into account projected population changes, the deviation was extreme (total range of 31 percent), and the state's evidence, consisting of estimates of population change that only roughly coincided with the population deviations, led the district court to refer to the state's attempted justification as "feeble."[55] However, the court did not reject the basic premise that a state could use population projections to justify small population deviations in a congressional plan.

Preserving the Cores of Prior Districts and Avoiding Contests Between Incumbents. The supreme court in *Karcher* listed preserving the cores of prior districts and avoiding pairing of incumbents as possible justifications for population deviation in a congressional plan. In the 1990s, Arkansas and West Virginia were able to justify total deviations of 0.73 percent and 0.09 percent, respectively, in congressional redistricting plans by arguing that the deviations were needed to preserve the cores of previous districts.[56] It is not clear how such policies might be used in a state with as many congressional seats as Texas. It is unlikely that the courts will justify preserving underpopulated districts in more or less their current configurations on these grounds if the resulting population deviations would be very large. In *White v. Weiser*, the supreme court rejected Texas' attempt to justify the 1971 congressional plan's 4.13 percent range of deviation in part on the rationale that the plan was a good faith effort at maintaining prior "constituency-representative relationships," not because the state's interest in doing so was improper but because alternative plans were available that accomplished the same goal with less population deviation.[57]

E. Improper Justifications

The federal courts have expressly rejected certain justifications for population deviations in congressional redistricting plans. This list is not exclusive, but it may provide some insight into the kinds of justifications that carry little or no weight in applying the equal population principle to congressional districts.

Political Compromise. The supreme court in *Kirkpatrick* rejected Missouri's attempt to justify population deviation in part because the plan was satisfactory to both major political parties and was the result of a sensitive compromise among all factions.[58] Similarly, in *Doulin v. White*, the district court rejected Arkansas's attempt to justify its congressional plan's relatively small deviation (1.87 percent total range) on the same basis.[59]

Preserving Communities of Interest. In *Kirkpatrick*, the supreme court rejected the state's attempt to justify population deviation "to avoid fragmenting areas with distinct economic and social interests" to promote effective representation of those interests in Congress.[60] In *White v. Weiser*, the court elaborated on this statement by noting that such strictly local interests have little to do with congressional representation.[61] In *Wells*, the court invalidated New York's congressional plan in which the state attempted to apportion congressional seats among seven regions with defined interest orientations. The court refused to let such interests serve as the basis of an apportionment that resulted in large population deviations.[62] Accordingly, it would be difficult to justify any avoidable population deviation in a congressional district merely to avoid dividing an area of common interests or to make a district in which persons having a common interest constitute a majority.

Limiting the Geographic Size of Districts. In the areas of Texas with sparse and sometimes dwindling populations, drawing new congressional districts with the ideal district population may require substantial increases in the size of certain prior districts. The supreme court's discussion in *Kirkpatrick*, discussed above, relating to the justification of population deviation to make districts compact, strongly indicates that limiting the size of a congressional district in a sparsely populated area of the state for the convenience of the representative and his or her constituents would not constitute a proper justification of avoidable population deviation in the district.[63]

Population Deviations in 2010 Congressional Districts by State

State	Ideal District Population	Overall Range of Deviation	
		Percent	Absolute (Persons)
Alabama	636,300	0.00%	0
Alaska	N/A	N/A	N/A
Arizona	641,329	0.00%	0
Arkansas	668,350	0.10%	5,698
California	639,087	0.00%	1
Colorado	614,465	0.00%	2
Connecticut	681,113	0.00%	0
Delaware	N/A	N/A	N/A
Florida	639,295	0.00%	1
Georgia	629,727	0.00%	2
Hawaii	605,769	0.31%	1,899
Idaho	646,977	0.60%	3,595
Illinois	653,647	0.00%	0
Indiana	675,609	0.02%	102
Iowa	585,265	0.02%	134
Kansas	672,105	0.00%	33
Kentucky	673,628	0.00%	4
Louisiana	638,425	0.04%	240
Maine	637,462	0.00%	23
Maryland	662,060	0.00%	2
Massachusetts	634,910	0.39%	2,476
Michigan	662,563	0.00%	1
Minnesota	614,935	0.00%	1
Mississippi	711,165	0.00%	10
Missouri	621,690	0.00%	1
Montana	N/A	N/A	N/A
Nebraska	570,421	0.00%	0

State	Ideal District Population	Overall Range of Deviation	
		Percent	Absolute (Persons)
Nevada	666,086	0.00%	6
New Hampshire	617,893	0.10%	636
New Jersey	647,257	0.00%	2
New Mexico	606,349	0.03%	166
New York	654,361	0.00%	1
North Carolina	619,178	0.00%	1
North Dakota	N/A	N/A	N/A
Ohio	630,730	0.00%	0
Oklahoma	690,131	0.00%	1
Oregon	684,280	0.00%	1
Pennsylvania	646,371	0.00%	2
Rhode Island	524,160	0.00%	6
South Carolina	668,669	0.00%	1
South Dakota	N/A	N/A	N/A
Tennessee	632,143	0.00%	5
Texas	651,619	0.00%	15
Utah	744,390	0.00%	1
Vermont	N/A	N/A	N/A
Virginia	643,501	0.00%	38
Washington	654,902	0.00%	7
West Virginia	602,781	0.22%	1,313
Wisconsin	670,459	0.00%	5
Wyoming	N/A	N/A	N/A

Note: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming received only one seat in the U.S. House of Representatives, so their congressional plans did not have an overall range.

Source: National Conference of State Legislatures, 2009.

IV. Equal Population for State Legislative Districts

A. Source: Equal Protection Clause

While the equal population rule for congressional districts is grounded in provisions of the federal constitution that call for the apportionment of the members of the U.S. House of Representatives, the rule applied to other representative districts, including state legislative districts, is derived from the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The Equal Protection Clause requires the state to treat all persons substantially alike unless the difference in treatment is justified by a legitimate state interest. Application of this general test for equal protection to legislative and other state and local representative districts has led to the development of a distinct body of case law. While the general guidelines to be applied appear to have been firmly established since the early 1970s, a more recent court decision may affect those guidelines in unpredictable ways in the coming years.

B. General Rule: Substantial Equality

As previously discussed in this chapter, the supreme court held in the 1962 case *Baker v. Carr* that equal protection claims by persons who reside in overpopulated legislative districts may be brought in the federal courts.[64] In *Reynolds v. Sims*, the first case to reach the supreme court on the merits under the *Baker* rule, the court held that the Equal Protection Clause requires the seats in both houses of a bicameral state legislature to be apportioned on the basis of population, to ensure "substantially equal state legislative representation for all citizens."[65]

For years after *Reynolds*, lower federal courts struggled to establish a threshold for equal population in various redistricting plans for state legislative bodies, congressional delegations, and local governments. Before the supreme court clearly established a less strict standard for legislative districts than for congressional districts, many lower courts construed the court's language in *Reynolds* that a state must "make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable"[66] as substantially the same as the congressional standard. This construction required even the smallest avoidable deviations to be justified as necessary to advance an important state objective.[67] Other courts read *Reynolds* as requiring only a very rough population equality, upholding plans with levels of population inequality unlikely to be upheld today.[68]

C. The 10 Percent Rule: Minor Deviations Need No Justification

From the earliest one-person, one-vote cases, the supreme court had suggested that "[m]athematical exactness or precision is hardly a workable constitutional requirement" in state legislative redistricting cases and that "[s]omewhat more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting."[69] In a series of cases beginning in 1973, the court developed from these two seminal ideas a relatively simple starting point for testing the validity of population deviation in a state legislative redistricting plan. In *Mahan v. Howell*,[70] the court established that population deviations in state legislative redistricting plans are not to be judged by the more stringent standards applicable to congressional districts. In *Gaffney v. Cummings*,[71] the court reiterated the distinction made in *Mahan* between state and congressional population deviation, and went on to uphold a state house plan with a total range of population deviation of 7.83 percent. While the court appears to have approved the state's

purported justifications for that deviation (not splitting towns, balancing partisan representation),[72] the opinion indicates that no justification was necessary for that range of deviation. The court stated that the population deviation alone failed to make out a prima facie violation of the Equal Protection Clause and that the state was not required to justify it.[73]

In *White v. Regester*,[74] the third major one-person, one-vote case of 1973, the supreme court upheld a total range of population deviation of 9.9 percent in the Legislative Redistricting Board's plan for the Texas House of Representatives. In doing so, the court stated:

> [W]e do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. . . . [W]e cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9% . . . . Very likely, larger differences between districts would not be tolerable without justification.[75]

These three 1973 cases established the well-settled rule that a total deviation range under 10 percent in a legislative plan does not require justification by the state. In the 1983 case *Brown v. Thomson*, the supreme court's most recent comprehensive opinion on application of the one-person, one-vote rule to state legislative redistricting, the court repeated its statement from *Gaffney* that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State," and went on to say that "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."[76] Lower courts have since consistently adopted this language and the 10 percent threshold in one-person, one-vote cases.[77] Accordingly, it is reasonably clear that, so long as the total deviation range of a state legislative plan remains under 10 percent, the state is not required to strive for a more exacting level of population equality. Within this range, the state is relatively free to use population deviation for any rational purpose. However, as discussed in Section D below, a discriminatory scheme of population deviation may be invalid for other reasons, even if the range of deviation is less than 10 percent.

Caveat: Significance of Average Deviation. While the one-person, one-vote cases establishing the 10 percent threshold have focused almost exclusively on the total range of population deviation, the supreme court in *Gaffney* and *Regester* noted that the average population deviations in the challenged plans were relatively small. In *Regester*, the court noted that, in addition to the 9.9 percent total deviation range, the average deviation for all Texas House districts was only 1.82 percent, and that only 23 of the 150 districts were overrepresented or underrepresented by more than 3 percent. The court in upholding the plan stated that it was unable to conclude "from these deviations alone" that those challenging the plan had established a one-person, one-vote violation.[78] Similarly, in *Gaffney*, the court simply noted that the total range of deviation of 7.83 percent together with the average deviation of 1.9 percent did not constitute a prima facie violation of the equal population rule.[79] Nevertheless, in neither case nor in any subsequent case referring to the 10 percent deviation threshold has the court clearly established the role, if any, of the average deviation in establishing the validity of a redistricting plan.

Because of that uncertainty, a house or senate plan with a total range of deviation under 10 percent in which a large proportion of the districts contain deviations close to the limits of that

range (that is, close to upper or lower limits of the total range) runs some risk of being held invalid despite the apparently valid total range. It is possible to read the supreme court's decisions as holding that the average population deviation is irrelevant if the total range is under 10 percent, but a more definitive judgment on the question is not possible without further judicial development. A plan with a relatively high average population deviation would probably be more likely to be held to violate the equal population standard if the excessive deviation is a result of an attempt to discriminate for partisan or other noncompelling reasons or appears to be completely arbitrary.[80] If a house or senate plan with an average population deviation significantly higher than that upheld in cases such as *Regester* and *Gaffney* is adopted, the plan is more likely to survive a one-person, one-vote challenge if those deviations are the result of one or more systematically applied policies, such as the preservation of political subdivisions or identifiable communities of interest.

D. Possible Discriminatory Deviation Under 10 Percent

The 10 percent rule established in the supreme court's legislative equal population cases does not guarantee that the population deviations within a plan with a total range of population deviation under 10 percent will not be subject to a legal challenge on a basis other than one person, one vote. Even if a legislative plan has an overall range of population deviation of less than 10 percent, a pattern of population deviation within that range to further invidious intentional discrimination or that inadvertently results in the systematic underrepresentation of a racial or ethnic group may be held invalid on other grounds.

Before 2004, no case had invalidated a legislative plan with an overall deviation of less than 10 percent and it began to be assumed that the 10 percent rule represented a "safe harbor" in which no deviation of less than 10 percent would be invalidated. However, some courts still found it appropriate to provide an analysis for a plan with a deviation of less than 10 percent. In the 1994 case *Marylanders for Fair Representation, Inc. v. Schaefer*,[81] a federal district court considered a challenge to Maryland's state senate plan in which the overall deviation was 9.84 percent. The court determined that in such a case the plaintiffs had the "burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy."[82] Further, a plaintiff must prove that the deviation was "*not* caused by the promotion of legitimate state policies."[83] The district court concluded that the plaintiffs had not met either requirement.[84]

In the 1996 case *Daly v. Hunt*, reviewing the apportionment of the electoral districts used for the board of commissioners and education of Mecklenburg County, North Carolina, a federal court of appeals also considered the standard by which deviations under 10 percent are judged.[85] In *Daly*, the Fourth Circuit also concluded that deviations under 10 percent were not absolutely protected by the "safe harbor," but rather the burden was on the plaintiff to provide evidence that the plan was the product of "bad faith, arbitrariness, or invidious discrimination."[86] In its remand to the district court, the appellate court instructed the district court to receive any evidence the plaintiffs had to offer showing bad faith, arbitrariness, or invidious discrimination, but did not provide specifics as to the level of evidence the plaintiffs had to provide as was discussed in the *Marylanders* case.[87]

In 2004, the U.S. District Court for the Northern District of Georgia reviewed both the Georgia House and Senate plans for compliance with the one-person, one-vote standard in *Larios v. Cox*.[88] Both plans had a total deviation of 9.98 percent. The court found that the deviations were not

supported by "*any* legitimate, consistently-applied state interests but, rather, resulted from the arbitrary and discriminatory objective of increasing the political power of southern Georgia and inner-city Atlanta at the expense of voters living in other parts of the state, and from the systematic favoring of Democratic incumbents and the corresponding attempts to eliminate as many Republican incumbents as possible."[89] The U.S. Supreme Court summarily affirmed the lower court decision. Justice Stevens concurred, writing that there should be no "safe harbor" from population deviation as the case represented an obvious partisan gerrymander.[90] Justice Scalia dissented, finding that the 10 percent rule should represent a "safe harbor" at least in regard to claims that the deviations result from improper political motives rather than being based on race or some other suspect classification.[91]

One month after *Larios* was decided by the district court, a challenge to the redistricting plan for the New York Senate that contained a total deviation of 9.78 percent further emphasized that there is no safe harbor when it comes to population deviations in legislative plans. In *Rodriguez v. Pataki*,[92] the federal District Court for the Southern District of New York could find "no reason to give a state operating within the ten-percent margin immunity from all review as to whether it is acting irrationally or undertaking invidious discrimination."[93] The court found that appropriate review was provided under the standard in the *Marylanders* case, in which the plaintiffs bear the burden of showing that the deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy and that policy is the actual reason for the deviation. Any lesser burden on the plaintiffs would allow for a challenge on "any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of *Brown*'s 'ten percent rule.'"[94] The *Rodriguez* court found that the plaintiffs' allegation that the state had underpopulated upstate districts and overpopulated downstate ones failed to meet the burden because the definitions of "upstate" and "downstate" were somewhat arbitrary and because the actual effect of the alleged malapportionment (New York City was apportioned 26 seats instead of the 26.2 that its population entitled it to) was minimal.[95]

After *Larios*, total deviations under 10 percent in plans for legislative districts will be the subject of substantial scrutiny. In *Larios*, the court had ample evidence of a systematic effort by the state's redistricters to reduce the influence of suburban Republican districts by overpopulating those districts while underpopulating the rural and inner-city Democratic ones. After thorough consideration, the court determined that the deviations were not attributable to any legitimate traditional redistricting criteria. In short, the court effectively determined that the deviations were exclusively the result of illegitimate criteria. However, despite an ample factual basis, the *Larios* court failed to articulate a clear standard by which these deviations should be evaluated other than to cite broad language from the earliest one-person, one-vote cases to support its holding.[96] Reliance on this earlier broad language virtually ignores the later formulation of the 10 percent rule and the burden of proof that courts have placed on plaintiffs in cases where the deviation is less than 10 percent. If the *Larios* court's reasoning is adopted by other courts, any deviation in a legislative plan can be challenged in much the same manner as a deviation in a congressional plan following *Karcher*. By contrast, the standard applied in *Marylanders* and *Rodriguez* builds on the prevailing one-person, one-vote analysis for legislative plan deviations and retains a meaningful distinction between plans with a total deviation of less than 10 percent and those with a deviation of 10 percent or more. Since both *Larios* and *Rodriguez* are federal district court decisions that were summarily affirmed by the supreme court, they both have equal weight as precedent. No case in a

federal court in Texas has dealt with this question since *Larios* and *Rodriguez* were handed down. To minimize the chance of a successful challenge under the somewhat amorphous *Larios* standard, mapmakers may want to consider, in a legislative redistricting plan with an overall deviation of less than 10 percent, avoiding deviations that consistently advantage or disadvantage a particular political, racial, or ethnic group or region of the state.

E. Justification for Population Deviation of 10 Percent or More

From the earliest one-person, one-vote redistricting cases, the supreme court recognized that a legislative redistricting plan may contain some minor population deviation to allow the legislature to design a plan that the legislature considers best suited for the needs of the state. In *Reynolds*, the court stated: "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible" in a legislative plan.[97] Since the development of the 10 percent *de minimis* threshold for population deviations, the court has made it clear that a plan with disparities of 10 percent or more "creates a prima facie case of discrimination and therefore must be justified by the State."[98]

There is no simple test to determine whether a particular state policy justifies population deviation of 10 percent or more and how great a level of deviation may be justified. In *Brown*, the supreme court stated that "[t]he consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities" in determining whether a state policy justifies specific population deviations.[99] In other words, a balancing test is to be used: the greater the population deviations, the more "neutral" and consistent the state's policy must be.

Failure to consistently apply a policy used to justify population deviations is often cited as an important factor in judicial decisions rejecting those deviations.[100] Inconsistency suggests that the policy is not really very important, and that it might be a mere pretext for favoritism or other impermissible motives for deviation. In *Mahan*, the supreme court noted with approval that the state's policy of preserving counties in redistricting was "consistently advanced."[101]

The court has not expressly stated that population deviations of 10 percent or more must be necessary in order to carry out the state's policy, as it did in the case of population deviations in congressional districts. In theory, a state may justify deviations of 10 percent or more through a rational state policy even if other plans with less deviation that accomplish the same goals are available, although, as discussed below, such a plan would run a substantial risk of invalidation. In *Mahan*, the court accepted a plan with a 16.4 percent deviation range that was apparently the least deviation possible without splitting any counties.[102] However, it is possible that the court would have approved a different plan with a slightly greater deviation range if the state had been able to articulate its preference for that other plan. For example, the whole-county plan with the least deviation could have included combinations of counties that created unusually elongated or other oddly shaped districts, or might have resulted in the division of communities or other regions that the state legislature desired to keep intact. The *Mahan* holding certainly suggests that whether the population deviation in a plan is unavoidable in whole or in part or could have been reduced without substantially undermining the state's policy is an important part of the equal population analysis. In *Connor v. Finch*, the supreme court indicated that a state policy such as maintaining whole counties may not be used to justify population deviation of 10 percent or more if a plan

with less population deviation could also be drawn to achieve the same goal, "[i]n the absence of a convincing justification" for adherence to the preferred plan with greater population deviation.[103] If a state adopts a plan with deviations of 10 percent or more, it would be significantly easier to defend the plan if the state had no reasonable alternative that carries out the same policies while resulting in lower deviations. However, the cases suggest that a state has some leeway to adopt a slightly less equal plan if it can justify making that choice.

Level of Deviation That May Be Justified. In *Mahan*, the supreme court approved a total range of population deviation of 16.4 percent as justified by the state's policy of keeping counties intact, and in so doing stated that this deviation "may well approach tolerable limits."[104] Some courts and commentators have taken this statement and the court's other opinions to suggest that 16.4 percent is in effect the maximum deviation range that may ever be justified.[105]

In a number of other cases, the supreme court has stated that slightly higher deviations (ranges of 16.5 to 33.55 percent) are invalid in the absence of a rational state policy to justify them,[106] suggesting that 16.4 percent is not necessarily the maximum acceptable deviation range. The court has refrained from setting a specific upper limit to justifiable deviation, preferring to consider each case on its own facts for the time being. As a practical matter, there is significant risk in adopting a plan with a population deviation beyond the 16.4 percent range approved in *Mahan.*

Because the plan in *Brown* had a total deviation of 89 percent, it is occasionally cited as support for the proposition that a high range of deviation may be justified by adherence to county lines. However, *Brown* has little or no application to Texas or to any other circumstances outside that case itself. The Wyoming plan involved in *Brown* was a pure reapportionment, in which each county was given at least one house seat all to itself, as required by the Wyoming Constitution.[107] In contrast, the Texas Constitution expressly allows the use of multicounty districts in the house,[108] and implicitly requires them in the senate, since there are 254 counties and only 31 senators. In addition, as the majority in *Brown* carefully noted, the plaintiffs attacked only the effects on other voters in the state of the population deviation of a single county: the court did not approve the population deviation of the entire plan.[109] Finally, the question of whether *Brown* may be used to support an overall range of deviation of as much as 89 percent may be laid to rest by the court's statement in a later case in which *Brown* is specifically cited: "We note that no case of ours has indicated that a [total range of] deviation of some 78% could ever be justified."[110] Indeed, in the 1990s, plaintiffs successfully challenged Wyoming's house plan, with a total deviation of 83 percent, on a one-person, one-vote basis.[111] A subsequent plan adopted by the Wyoming Legislature for its state house containing a total deviation of 9.973 percent was upheld in federal court.[112]

F. Justifications for Deviations in Excess of 10 Percent in Legislative Plan

As previously noted, to justify population deviations of 10 percent or more, a state policy must be rational and neutral. In this context, these terms appear to mean that the policy must promote a legitimate, articulable purpose and may not have a built-in bias for or against any particular area or group of persons.

Preserving County Lines or Other Subdivision Boundaries. To date, the only justification that has been definitively accepted by the supreme court for a deviation range of 10 percent or more is a state's policy of maintaining whole counties in legislative districts. Preserving county integrity is one of the strongest possible justifications for deviation. Many other policies offered to justify population deviation are flexible or indefinite goals whose application is rather subjective.

A plan either maintains county lines or it does not, and the population deviation that results is clearly caused by the preservation of county lines. Other justifications, such as preserving the cores of prior districts or preserving a community of interest, are less concrete, and the degree to which they are applied is not a matter that can be easily measured or described. The objective and verifiable nature of a policy of preserving county lines and the direct causal link between that policy and resulting population deviations distinguish it from most other policies that may result in some population deviation. In addition, as has often been observed, a policy of preserving county lines is unlikely to be an excuse for gerrymandering to achieve some less legitimate purpose, and likely reduces the opportunity for blatant gerrymandering.[113] The maintenance of whole counties is also neutral, since it does not distinguish between or take into account political, racial, social, economic, or regional interests.

The supreme court in *Mahan* upheld Virginia's house plan with a total range of deviation of 16.4 percent in order to avoid splitting counties between districts.[114] More recently, the court held that the *Mahan* case was still appropriate in considering whether population deviations in excess of 10 percent were justified by the policy of preserving the integrity of political subdivision lines.[115] Several lower courts have also recently upheld total deviations between 10 and 16.4 percent when justified by this policy.[116] However, the state still must show that the excess deviation was necessary to advance the policy. A plan with a deviation in excess of 10 percent will not be approved by the courts if it is shown that an alternate plan could be created that had a lower deviation and split the same number of or fewer counties, absent an additional state purpose justifying the greater deviation in the state's plan.[117]

The Texas Constitution appears to provide a strong basis for justification of population deviation above 10 percent. Section 26, Article III, Texas Constitution, requires state house districts to consist of whole counties. In the 1970s, 1980s, and 2000s, the house plans adopted by the Legislative Redistricting Board split a few counties in violation of Section 26 to avoid population deviations of 10 percent or more. The house plan adopted by the legislature for the 1990s took the same approach. However, the state may be able to justify population deviations of 10 percent or more to comply with Section 26. The supreme court in *White v. Regester* recognized the validity of Section 26 and compared it to the similar state provision used by Virginia in *Mahan* to justify a population deviation range of 16.4 percent.[118] While state plans adopted in the 1970s, 1980s, 1990s, and 2000s by both the legislature and the Legislative Redistricting Board sacrificed the county line rule when necessary to maintain an overall deviation range of less than 10 percent, there does not appear to be a legal impediment to the state's returning to a more strict compliance with the county line rule in 2011. The interrelationship of the state constitutional provision and the equal population requirement is discussed in more detail in Chapter 7 of this publication.

Justification of a total range of population deviation in excess of 10 percent for Texas Senate districts is also a possibility. While the Texas Constitution does not contain any provision requiring senate districts to consist of whole counties or prohibiting senate district lines from splitting cities or other political subdivisions, the state legislature is free to adopt this policy through its redistricting plan. However, any deviation of 10 percent or more must be justified by keeping county lines intact consistently within the population deviation used in the plan.

Deviations of 10 percent or more theoretically may be justified in order to avoid splitting cities or other political subdivisions besides counties. Any such policy may not be used on an *ad hoc* basis only where politically expedient but, as with counties, would have to be applied uniformly.

Such a policy could be conditioned on the level of population deviation that results, so that a city or other political subdivision is kept intact only if the resulting deviation is not above some predetermined level.

Other Potential Justifications. These possible justifications for a total deviation of 10 percent or more are distilled from statements in early one-person, one-vote cases. For the most part, states have not used these justifications, and a legislature that relies on them does so without clear precedent on exactly how to apply them.

1. Making Districts Compact. The supreme court in *Reynolds* stated that a state may legitimately desire to provide for compact districts in legislative redistricting.[119] In addition, the court has stated that keeping districts compact may constitute an acceptable justification for minor population deviations among congressional districts.[120] It is possible that, in an appropriate situation, the state could justify some population deviation in a legislative plan of 10 percent or more in order to maintain compact districts. As noted in several cases, however, compactness must be distinguished from geographic size and elegance of shape, which are not valid justifications for population deviation.[121]

2. Anticipated Population Changes. In several congressional redistricting cases, the supreme court appears to have approved the use of population projections to justify some variance in a redistricting plan's population equality, as long as the projections are shown to be highly accurate and are applied uniformly throughout the state.[122] A plan that uses predictions of future population changes to justify population deviations of 10 percent or more is unlikely to be upheld unless the projections are statistically sound, supported by a reasonable consensus of demographic experts, and applied uniformly statewide. The state must be wary of making decisions to allow population deviations based on guesses—even apparently reasonable ones—about future populations in individual districts. Similar deviations have expressly been rejected in several cases because the likelihood and exact degree of the anticipated population changes could not be established and because no attempt was made to apply the policy uniformly throughout the state.[123] One federal court, in rejecting the use of population projections to justify underpopulating some districts, noted not only the speculative nature of such predictions, but also that the government has an alternative remedy to uneven population growth: it could redistrict more often than every 10 years if population changes rapidly led to gross malapportionment.[124]

As noted in Chapter 7, using population projections to apportion Texas House districts among the counties may violate the express requirement of Section 26, Article III, Texas Constitution, that the apportionment be made according to the federal census. This restriction does not apply to the drawing of house districts within a multidistrict county or to Texas Senate districts.

3. Preserving the Cores of Prior Districts and Avoiding Contests Between Incumbents. While the supreme court in *Karcher* listed preserving the cores of prior districts and avoiding pairing of incumbents as possible justifications for population deviation in a congressional plan, the court has not suggested that such policies may be used to justify population deviations in excess of the 10 percent range in a state legislative redistricting plan. While the court has held that a state may legitimately attempt to avoid the pairing of incumbents in a redistricting plan,[125] this statement merely indicates that a redistricting plan is not invalid simply because incumbency has been taken into account, and should not be read as permitting deviations of 10 percent to do so. It seems unlikely that the courts would uphold deviations beyond 10 percent solely for political purposes such as the protection of incumbents.

Preserving the core of a prior district is more likely to be considered a legitimate goal, particularly if the district constitutes a significant community of interest such as a minority district. However, such a policy probably would not justify deviations significantly outside the 10 percent range. Under closer analysis, a redistricting plan that retains some or all of the population disparities among prior districts may be seen simply as an attempt to ignore population changes. In effect, a policy of preserving prior district alignment that maintains major population deviations directly undermines the one-person, one-vote principle that makes redistricting necessary after each census. One federal court has held that these rationales could not justify a total range of population deviation of 22 percent, while noting that they could perhaps justify a deviation range "slightly in excess of 10%."[126] Another federal court found that preserving the cores of prior districts helped to justify, along with other policies, a total deviation of 10.67 percent in a legislative plan.[127]

4. Preserving Natural or Other Geographic Boundaries. Unlike the deference given to the preservation of existing political lines as a justification for population deviations, the courts have given little or no weight to the preservation of natural or traditional boundaries having no significant political function. In *Chapman v. Meier*, the supreme court rejected a lower federal court's attempt to justify certain population deviations in part on an attempt to use the Missouri River as a boundary between districts as the state of North Dakota had traditionally done.[128] In one isolated case, a federal district court accepted using a mountain range to divide legislative districts as a partial justification for population deviation of slightly more than 10 percent.[129] Unlike most natural geographic boundaries, however, a mountain range may pose a real obstacle to communication and effective representation. Perhaps similar treatment could be afforded to a large body of water, a desert, or another major geographic barrier, but using other geographic lines—such as roads, rivers, or the boundaries of geological regions—as district boundaries will not justify deviations of 10 percent or more. Finally, one case from the 1990s makes passing reference to giving "due regard to natural boundaries" as among the justifications that would permit a total deviation of 10.67 percent.[130]

Improper Justifications. The federal courts have expressly rejected certain justifications for substantial population deviations in legislative redistricting plans. In some cases, the courts have clearly indicated that a particular rationale may never be used to justify large population deviations. In other cases, the courts have refused to approve a state's rationale as justifying a particular deviation level, but have not expressly ruled out use of that rationale in different circumstances. In general, the courts have rejected as justifications for deviations of 10 percent or more policies that are inherently inconsistent with the basic premise of equal representation. A policy that simply favors one geographic area or community of interest over another without regard to population or that specifically provides representation of an area or interest group in excess of that to which it is entitled by population is unlikely to be upheld. As the supreme court stated in an early equal population case, "we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests."[131]

1. Preserving Communities of Interest. In *Reynolds*, the supreme court stated that "economic or other sorts of group interests" are not permissible factors in attempting to justify disparities from population-based representation.[132] The legislature may not give a group of persons or an area with common economic or other interests substantially more representation than the population of the group or area merits. For example, in *Davis v. Mann*, the court rejected a state's attempt to justify population deviations by reference to a policy of balancing urban and rural power in the legislature, saying that that rationale lacks "legal merit."[133]

2. Historical Considerations. In *Reynolds*, the supreme court stated that "history" is not a permissible justification for population deviation in a redistricting plan.[134] In another case, the court rejected a state's attempt to justify population deviation by "considerations of history and tradition."[135]

3. Limiting the Geographic Size of Districts. The supreme court in *Reynolds* found unconvincing Alabama's argument that some population deviations were necessary "to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large [in area] that the availability of access of citizens to their representatives is impaired." The court noted that modern developments in transportation and communications make such claims rather hollow.[136] The court reaffirmed that basic position a decade later in *Chapman*, in which, citing *Reynolds*, it stated that "sparse population is not a legitimate basis for a departure from the goal of [population] equality."[137] These cases appear to firmly establish that limiting the size of a legislative district for the convenience of representatives and their constituents may not constitute a proper justification for otherwise impermissible population deviation in the district.

Deviations in 2010 Legislative Districts Nationwide

State	State House		State Senate	
	Ideal District Population	Overall Range of Deviation	Ideal District Population	Overall Range of Deviation
Alabama	42,353	9.93%	127,060	9.73%
Alaska	15,673	9.96%	31,346	9.32%
Arizona	171,021	3.79%	171,021	3.79%
Arkansas	26,734	9.87%	76,383	9.81%
California	423,395	0.00%	846,792	0.00%
Colorado	66,173	4.88%	122,863	4.95%
Connecticut	22,553	9.20%	94,599	8.03%
Delaware	19,112	9.98%	37,314	9.96%
Florida	133,186	2.79%	399,559	0.03%
Georgia	45,480	1.95%	146,187	1.93%
Hawaii	22,046	20.10%	44,973	38.90%
Idaho	36,970	9.71%	36,970	9.71%
Illinois	105,248	0.00%	210,496	0.00%
Indiana	60,805	1.92%	121,610	3.80%
Iowa	29,263	1.89%	58,526	1.46%
Kansas	21,378	9.95%	66,806	9.27%
Kentucky	40,418	10.00%	106,362	9.53%
Louisiana	42,561	9.88%	114,589	9.95%
Maine	8,443	9.33%	36,426	3.57%
Maryland	37,564	9.89%	112,692	9.96%
Massachusetts	39,682	9.68%	158,727	9.33%
Michigan	90,350	9.92%	261,538	9.92%

State	State House		State Senate	
	Ideal District Population	Overall Range of Deviation	Ideal District Popula-tion	Overall Range of Deviation
Minnesota	36,713	1.56%	73,425	1.35%
Mississippi	23,317	9.98%	54,705	9.30%
Missouri	34,326	6.08%	164,565	6.81%
Montana	9,022	9.85%	18,044	9.81%
Nebraska	N/A	N/A	34,924	10.00%
Nevada	47,578	1.97%	95,155	9.91%
New Hampshire	3,089	9.26%	51,491	4.96%
New Jersey	210,359	1.83%	210,359	1.83%
New Mexico	25,986	9.70%	43,311	9.60%
New York	126,510	9.43%	306,072	9.78%
North Carolina	67,078	9.98%	160,986	9.96%
North Dakota	13,664	10.00%	13,664	10.00%
Ohio	114,678	12.46%	344,035	8.81%
Oklahoma	34,165	2.05%	71,889	4.71%
Oregon	57,023	1.90%	114,047	1.77%
Pennsylvania	60,498	5.54%	245,621	3.98%
Rhode Island	13,978	9.88%	27,587	9.83%
South Carolina	32,355	4.99%	87,218	9.87%
South Dakota	21,567	9.71%	21,567	9.69%
Tennessee	57,468	9.99%	172,403	9.98%
Texas	139,012	9.74%	672,639	9.71%
Utah	29,776	8.00%	77,006	7.02%
Vermont	4,059	18.99%	20,294	14.73%
Virginia	70,785	3.90%	176,963	4.00%
Washington	120,288	0.30%	120,288	0.30%
West Virginia	18,083	9.98%	106,374	10.92%
Wisconsin	54,179	1.60%	162,536	0.98%
Wyoming	8,230	9.81%	16,451	9.51%

Note: The overall range of deviation is the difference in the percent deviation of the most populous and least populous districts.

Source: National Conference of State Legislatures, 2009.

V. Equal Population Standard for State Board of Education

The one-person, one-vote requirement applies to State Board of Education districts. The U.S. Supreme Court has held that, as a general rule, whenever the state decides to provide for the popular election of a public office, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires each qualified voter to be given an equal opportunity to participate in that election, and that, when members of a governmental body are to be elected from separate districts, those districts must contain substantially equal populations.[138]

The equal population standard for State Board of Education districts is essentially the same as that applicable to state house and senate districts, discussed in the preceding section of this chapter. The supreme court has expressly applied the state legislative standard to local district plans,[139] and there is no reason to believe that a different rule would apply in the case of State Board of Education districts.

The supreme court has recognized a narrow exception to the *Reynolds* one-person, one-vote rule for certain special-purpose governmental units, such as irrigation districts, whose activities affect only a narrow, identifiable group of persons and the costs of which are assessed only to those persons.[140] In *Ball v. James*, the court noted that the water district at issue in that case "does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. . . . [N]or does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services."[141] The State Board of Education plays an important role in the operation of the public schools, which the court in *Ball* listed as an example of a general governmental function that invokes the one-person, one-vote principle in the election of the board.[142] Among its duties are the establishment of school curricula and graduation requirements and the investment of the permanent school fund. Accordingly, the narrow exception from the one-person, one-vote standard for special districts does not apply to the State Board of Education.

VI. Effect of Population Change After Redistricting

During the decade after a redistricting plan has been enacted, the population equality of the districts in the plan will ordinarily decrease over time as the state's population changes. In the latter part of a decade of significant population change, it would be relatively easy to establish using generally accepted population estimates that population deviations exist in many districts that would not have been valid if those deviations had existed when the plan was enacted.

The federal courts have not, however, required a state to revise a redistricting plan that complies with the applicable one-person, one-vote standard according to the most recent federal decennial census to correct population deviation that occurs after the census. At least one district court has expressly so stated, and its rationale seems sound, especially as long as the federal decennial census continues to be the only viable set of population data complete and detailed enough to be used for redistricting. The district court stated that "[s]uch discrepancies are unavoidable and must be tolerated for a time, till the next census."[143] This position is supported by the supreme court's language in *Reynolds*:

> Decennial reapportionment appears to be a rational approach . . . in order to take into account population shifts and growth. . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period . . . .[144]

A more recent case found that a state was allowed but not required to redraw its legislative plan following the release of corrected census data.[145]

Unless a state constitution contains some express or implicit limitation, the legislature may revise a redistricting plan on its own initiative between federal censuses to maintain population equality.[146] As discussed in Chapter 1, it is clear that the Texas Legislature has the authority (and probably a duty) to redistrict if a plan is held invalid during the decade.[147] Whether the Texas Legislature has authority to revise a redistricting plan entirely on its own initiative is a matter of state law that has never been directly addressed. The U.S. Supreme Court in *LULAC v. Perry* implicitly upheld the state of Texas' authority to conduct a mid-decade redistricting of congressional districts using three-year-old federal census data, though in *LULAC v. Perry* the legislature was replacing a federal court-ordered plan rather than a prior state plan. However, the fractured nature of the court's opinion makes the precedential value of the court's holding difficult to decipher.[148] Texas law does not appear to limit the legislature's authority to redistrict congressional seats or the State Board of Education at any time. In the absence of such a limitation, the general legislative power granted to the Texas Legislature by Section 1, Article III, Texas Constitution, probably includes a continuing authority to redistrict for any valid purpose, including the maintenance of population equality.

Notes, Chapter 2

[1] 377 U.S. 533 (1964).

[2] *Id*. at 560-561.

[3] For example, in Connecticut in 1964, one multimember state house district had a population 425 times greater than another district with the same number of house seats. *See Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn.), *aff'd sub nom*. *Town of Franklin v. Butterworth*, 378 U.S. 562 (1964).

[4] The Texas Legislature was not redistricted at all between 1921 and 1951.

[5] 377 U.S. at 545-546.

[6] Of course, absolute equality under the federal census or any other set of population data is not the same as actual population equality, since the census is not absolutely accurate and populations are constantly changing. As noted in Chapter 1 of this publication, redistricting is usually based on and analyzed under the federal census, primarily because of the lack of any viable alternative data.

[7] This point is usually assumed by the courts without discussion, *but see, e.g.*, *Bush v. Martin*, 251 F. Supp. 484, 499, n.45 (S.D. Tex. 1966).

[8] 412 U.S. 755. The house plan was upheld with respect to its population deviation, although certain multimember districts were found to be racially discriminatory.

[9] *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1326-1327 (N.D. Ga.) (per curiam), *aff'd*, 542 U.S. 947 (2004) (summarily aff'd).

[10] Under federal law, each state is allocated one congressional seat and the remaining seats are apportioned using a formula, known as the method of equal proportions, that minimizes population deviation among districts nationwide. *See* 2 U.S.C. Section 2a(a).

[11] 376 U.S. 1, 8.

[12] 369 U.S. 186.

[13] 376 U.S. at 7.

[14] *Bush*, 251 F. Supp. 484. *See also Connor v. Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (per curiam), *aff'd*, 386 U.S. 483 (1967), in which the court approved a congressional plan for Mississippi with a total deviation range of 5.98 percent.

[15] *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *White v. Weiser*, 412 U.S. 783 (1973).

[16] 462 U.S. 725.

[17] *De minimis* is a Latin term referring to anything legally insignificant.

[18] 462 U.S. at 728.

[19] *Id.* at 732.

[20] *Kirkpatrick*, 394 U.S. at 531.

[21] *See*, respectively, *Doulin v. White*, 528 F. Supp. 1323 (E.D. Ark. 1982); *Doph v. Munro*, No. C82-233T, slip op. (W.D. Wash. Nov. 30, 1982).

[22] 462 U.S. at 739.

[23] *Id.* at 739, n.10.

[24] See Chapter 8 of this publication.

[25] *See Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 483 n.3 (M.D. Pa. 2003) (per curiam), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[26] *Daggett v. Kimmelman*, 580 F. Supp. 1259 (D. N.J. 1984).

[27] *Id.* at 1262-1263.

[28] *Karcher*, 462 U.S. at 730-731.

[29] *White v. Weiser*, 412 U.S. at 786-787.

[30] *Karcher*, 462 U.S. at 728; *Kirkpatrick*, 394 U.S. at 529.

[31] *Kirkpatrick*, 394 U.S. at 529.

[32] *Id.*

[33] *Doulin v. White*, 528 F. Supp. at 1326.

[34] *Id.* at 1328.

[35] 462 U.S. at 741.

[36] *Id.* at 740.

[37] *Id.* at 732-733.

[38] 412 U.S. at 793.

[39] *See Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 395-397 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (10-person deviation); *Vieth v. Pennsylvania*, 195 F. Supp. 2d at 675 (19-person deviation); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280 (D. Kan. 2002) (per curiam) (33-person deviation).

[40] *Miller v. Ohio*, No. C2-94-1116, slip op. (S.D. Ohio May 29, 1996), *aff'd*, 519 U.S. 1003 (1996).

[41] 394 U.S. at 534-535.

[42] 412 U.S. at 791-792.

[43] *Karcher*, 462 U.S. at 741.

[44] *Id.* at 740.

[45] 394 U.S. at 533-534.

[46] 394 U.S. at 546.

[47] 412 U.S. at 790-791.

[48] *State of Kan. ex rel. Stephan v. Graves*, 796 F. Supp. 468, 470-472 (D. Kan. 1992).

[49] *Wilson v. Eu*, 823 P.2d 545, 551-552 (Cal. 1992).

[50] *Kirkpatrick*, 394 U.S. at 535-536.

[51] *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

[52] *Stone v. Hechler*, 782 F. Supp. 1116, 1127-1128 (N.D. W. Va. 1992) (per curiam).

[53] 394 U.S. at 535.

[54] 462 U.S. at 741.

[55] *Exon v. Tiemann*, 279 F. Supp. 603 (D. Neb. 1967) (per curiam).

[56] *Turner v. State of Ark.*, 784 F. Supp. 585 (E.D. Ark. 1991); *Stone*, 782 F. Supp. at 1126-1127.

[57] 412 U.S. at 791-792.

[58] 394 U.S. at 533.

[59] 528 F. Supp. at 1330.

[60] 394 U.S. at 533.

[61] 412 U.S. at 793.

[62] 394 U.S. at 545-546.

[63] *Id.* at 535-536.

[64] 369 U.S. 186.

[65] 377 U.S. at 568.

[66] *Id.* at 577.

[67] *E.g.*, *Skolnick v. Ill. State Electoral Bd.*, 307 F. Supp. 698 (N.D. Ill. 1969) (per curiam); *Hensley v. Wood*, 329 F. Supp. 787 (E.D. Ky. 1971).

[68] *E.g.*, *Thompson v. Thomson*, 344 F. Supp. 1378 (D. Wyo. 1972) (plan with population ratio between least populous and most populous districts of 1 to 2.08 upheld); *Burns v. Gill*, 316 F. Supp. 1285 (D. Haw. 1970) (senate plan deviation range of 29.6 percent and house plan range of 31.3 percent upheld).

[69] *Reynolds*, 377 U.S. at 577-578.

[70] 410 U.S. 315, 324 (1973).

[71] 412 U.S. 735 (1973).

[72] *Id.* at 737-738.

[73] *Id.* at 740-744.

[74] 412 U.S. 755.

[75] *Id*. at 764.

[76] 462 U.S. 835, 842.

[77] *E.g.*, *Fund for Accurate and Informed Representation v. Weprin*, 796 F. Supp. 662 (N.D. N.Y.) (per curiam), *aff'd*, 506 U.S. 1017 (1992); *Gorin v. Karpan*, 775 F. Supp. 1430 (D. Wyo. 1991); *McBride v. Mahoney*, 573 F. Supp. 913 (D. Mont. 1983) (per curiam).

[78] 412 U.S. at 764.

[79] 412 U.S. at 750-751.

[80] *See Larios*, 300 F. Supp. 2d 1320, 1326-1327.

[81] 849 F. Supp. 1022 (D. Md.) (per curiam).

[82] *Id.* at 1032.

[83] *Id.*

[84] *Id.* at 1033-1036.

[85] *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996).

[86] *Id.* at 1222.

[87] *Id.* at 1228.

[88] 300 F. Supp. 2d 1320.

[89] *Id.* at 1352-1353.

[90] *Cox v. Larios*, 542 U.S. 947 (2004) (Stevens, J., concurring).

[91] *Id.* (Scalia, J., dissenting).

[92] 308 F. Supp. 2d 346 (S.D. N.Y.) (per curiam), *aff'd*, 543 U.S. 997 (2004) (summarily aff'd).

[93] *Id.* at 365.

[94] *Id.*

[95] *Id*. at 368-369.

[96] *Larios*, 300 F. Supp. 2d at 1353. The court found that the plaintiffs had presented more than the "taint of arbitrariness or discrimination" required in *Roman v. Sincock*, 377 U.S. at 710, and that the plan violated the Equal Protection Clause because it did not represent "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable" and did not contain only "divergences from a strict population standard [that] are based on legitimate considerations incident to the effectuation of a rational state policy" (citing from *Reynolds*, 377 U.S. at 577, 579).

[97] 377 U.S. at 579.

[98] *Brown*, 462 U.S. at 842-843.

[99] *Id.* at 845-846.

[100] *See Sullivan v. Crowell*, 444 F. Supp. 606, 611 (W.D. Tenn. 1978).

[101] 410 U.S. at 329.

[102] *Id*. at 326.

[103] 431 U.S. 407, 420-421 (1977).

[104] 410 U.S. at 329.

[105] *See, e.g.*, *Cosner v. Dalton*, 522 F. Supp. 350, 357-358 (E.D. Va. 1981); *Sims v. Amos*, 365 F. Supp. 215 (M.D. Ala. 1973); Guido, *Deviations and Justifications: Standards and Remedies in Challenges to Reapportionment Plans*, 14 Urb. Law. 57 (1982).

[106] *See, e.g.*, *Connor v. Finch*, 431 U.S. at 418 (deviation ranges of 16.5 and 19.3 percent); *Chapman v. Meier*, 420 U.S. 1, 24 (1975) (deviation range of 20.14 percent); *Swann v. Adams*, 385 U.S. 440, 442-444 (1967) (deviation ranges of 25.65 and 33.55 percent).

[107] 462 U.S. at 837.

[108] Section 26, Article III.

[109] 462 U.S. at 846.

[110] *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 702 (1989).

[111] *Gorin*, 775 F. Supp. 1430.

[112] *Gorin v. Karpan*, 788 F. Supp. 1199 (D. Wyo. 1992).

[113] *Reynolds*, 377 U.S. at 580-581; *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part).

[114] 410 U.S. 315.

[115] *Voinovich v. Quilter*, 507 U.S. 146, 160-162 (1993).

[116] *In re Apportionment of State Legislature*, 486 N.W.2d 639 (Mich. 1992) (total deviations of 15.81 percent and 16.13 percent justified); *Marylanders*, 849 F. Supp. 1022 (total deviation of 10.67 percent justified); *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D. Ohio 1994) (total deviations of 10.54 percent and 13.81 percent justified); *Deem v. Manchin*, 188 F. Supp. 2d 651 (N.D. W. Va. 2002) (total deviation of 10.92 percent justified).

[117] *Rural W. Tenn. African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993), *aff'd sub nom*. *Millsaps v. Langsdon*, 510 U.S. 1160 (1994) (13.9 percent total deviation not justified when alternate plan with deviation under 10 percent split fewer counties).

[118] 412 U.S. at 764-765, n.8.

[119] 377 U.S. at 578.

[120] *Karcher*, 462 U.S. at 740-741.

[121] *Kirkpatrick*, 394 U.S. at 535-536; *Reynolds*, 377 U.S. at 580.

[122] *Karcher*, 462 U.S. at 741; *Kirkpatrick*, 394 U.S. 526.

[123] *Karcher*, 462 U.S. at 741; *Hensley*, 329 F. Supp. 787.

[124] *Martin v. Venables*, 401 F. Supp. 611, 619 (D. Conn. 1975).

[125] *Burns v. Richardson*, 384 U.S. 73, 89, n.16 (1966).

[126] *Cosner*, 522 F. Supp. at 360-361.

[127] *Marylanders*, 849 F. Supp. at 1037.

[128] 420 U.S. at 25.

[129] *Wold v. Anderson*, 335 F. Supp. 952, 957 (D. Mont. 1971) (per curiam).

[130] *Marylanders*, 849 F. Supp. at 1037.

[131] *Abate v. Mundt*, 403 U.S. 182, 185-186 (1971).

[132] 377 U.S. at 579-580; *see also Swann*, 385 U.S. at 447.

[133] 377 U.S. 678, 692 (1964).

[134] 377 U.S. at 579-580.

[135] *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675 (1964).

[136] 377 U.S. at 580.

[137] 420 U.S. at 24.

[138] *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970). The supreme court has affirmed a lower court's holding that the one-person, one-vote rule does not apply to judicial districts, *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973), but that case has no application to districts drawn for an executive agency such as the State Board of Education that exercises quasi-legislative policy-making power.

[139] *Avery v. Midland Cnty.*, 390 U.S. 474 (1968).

[140] *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973).

[141] 451 U.S. at 366.

[142] *See* Sec. 7.102, Texas Education Code, for the State Board of Education's powers and duties.

[143] *Md. Citizens Comm. for Fair Congressional Redistricting v. Tawes*, 253 F. Supp. 731, 733 (1966).

[144] 377 U.S. at 583.

[145] *Dean v. Leake*, 550 F. Supp. 2d 594 (E.D. N.C. 2008).

[146] *Exon*, 279 F. Supp. at 608.

[147] This authority does not, of course, exist for purposes of Texas House and Senate redistricting during the jurisdictional period of the Legislative Redistricting Board.

[148] Justice Kennedy addressed this issue in Part II D of the *LULAC v. Perry* opinion, 548 U.S. at 420-423. However, only Justices Souter and Ginsburg expressly joined in Part II D. *See id.* at 483 (Souter, J., concurring in part and dissenting in part). Chief Justice Roberts and Justice Alito joined in "the Court's disposition in Part II without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy." *Id*. at 493 (Roberts, C. J., concurring in part and dissenting in part).

Chapter 3
Minority Vote Dilution and Section 2 of the Voting Rights Act

I. Introduction

A. Background

Section 2 of the Voting Rights Act of 1965[1] prohibits a state or a political subdivision of a state from using any "standard, practice, or procedure," including a redistricting plan, "which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a protected language minority group.[2] In this way, Section 2 protects the voting rights of racial and ethnic minority groups, including blacks, Hispanics, Asians, and Native Americans, in Texas. Congress enacted the Voting Rights Act in general, and Section 2 in particular, primarily to enforce the Fifteenth Amendment to the U.S. Constitution, which prohibits denial or abridgement of the right to vote on account of race, color, or previous condition of servitude.[3]

Originally, Section 2 simply tracked the language of the Fifteenth Amendment. In 1980, the U.S. Supreme Court construed that language as requiring the more difficult proof of discriminatory intent, rather than proof of a discriminatory impact, to establish that an apparently racially neutral voting practice is unlawful.[4] In response, in 1982 Congress amended Section 2 to clarify that it instead intended a results test for Section 2 vote dilution claims. Rather than requiring a showing of a discriminatory purpose on the part of the government body using a given electoral standard, practice, or procedure, a plaintiff could prevail simply by showing that the "totality of circumstances" demonstrates that "the political processes leading to nomination or election . . . are not equally open to participation" by members of a protected class, because the members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[5] The legislative history of the amendment sets out a lengthy but nonexhaustive list of factors to be considered under the "totality of circumstances," referred to commonly as the "Senate factors."[6] Although Section 2 is neutral on its face, the requirement that plaintiffs base such a showing on "the totality of circumstances" probably excludes nonminority plaintiffs from the scope of Section 2, and cases under Section 2 have been almost exclusively brought and won by minority plaintiffs.

Section 2 has been an effective tool for challenging the legality of a redistricting plan because it focuses on the plan's *effect* on protected minority groups, rather than on the *intent* of the governing body that enacted the plan. Under Section 2, protected groups may show that a redistricting plan abridges the voting rights of their members without having to prove that the plan was adopted with an intent to discriminate. Indeed, a plan may violate Section 2 even if established in a good faith effort to be fair to all persons. Because Section 2 does not require proof of discriminatory intent, in many cases it may offer more protection of minority voting rights than the Fifteenth Amendment itself.

In the context of redistricting, the U.S. Supreme Court noted that the phrase "vote dilution" is used to refer to "the impermissible discriminatory effect that a . . . districting plan has when it

operates 'to cancel out or minimize the voting strength of racial groups.'"[7] The court reiterated that dilution of a minority group's voting rights can be brought about "[1] by the dispersal of [group members] into districts in which they constitute an ineffective minority of voters or [2] from the concentration of [group members] into districts where they constitute an excessive majority."[8] Indeed, the most common redistricting practices that plaintiffs have attacked under Section 2 as making nomination or election not equally open to minority participation involve the creation of multimember districts, fragmenting of racial or ethnic minority groups into several districts, or packing of a protected group into a single district.

Multimember Districts. The use of a multimember or an at-large district can dilute the voting strength of a protected group if the district places a large concentration of a protected group of voters in the district so that the protected group represents a numerical minority in the district. If one or more single-member districts could be drawn in which the group would constitute a majority, the group's members may claim that using the multimember district instead violates Section 2 because it results in a denial of the ability that they would have in single-member districts to elect candidates of their choice. A similar claim, based on the Fourteenth Amendment's Equal Protection Clause, led to the elimination of multimember state house districts in Texas in the 1970s.[9] Though multimember or at-large districts are not necessarily unconstitutional,[10] if the use of such districts denies to members of a protected group an equal opportunity to participate in the political process, a court may find a violation of Section 2.[11]

Fragmenting. Members of a concentrated protected group that are divided between two or more districts, so that in one or more of those districts members of the minority group are left as a numerical minority, may contend that their division violates Section 2 by depriving the group of the ability to win or influence elections that it would have if it were left united in a single district. Other terms, such as "cracking" and "fracturing," are also used to describe this practice.

Packing. Minority group members who have been placed into one or more districts in concentrations clearly in excess of the amount needed to win elections may argue that the arrangement violates Section 2 by preventing the minority group from winning elections in other districts in which the excess minority voters could have been located.

Although Section 2 is an effective vehicle for challenging these discriminatory voting practices, it is intended to protect voters' rights to elect their candidates of choice, not to create racial quotas among elected officials. Section 2 expressly does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population."[12]

Likewise, the purpose of Section 2 is to ensure that minority groups have the same ability to participate in elections and affect their outcomes as do other members of the electorate. Section 2 does not require a state to create the maximum number of districts possible in which the majority of the population is composed of members of a minority group. The U.S. Supreme Court specifically rejected the establishment of a rule that would require governing bodies to maximize the number of so-called "majority-minority" districts.[13] In 2009, the U.S. Supreme Court rejected the proposition that Section 2 would require the creation of "cross-over" districts with a minority population of less than 50 percent of the district population.[14]

B. Procedural Considerations

Although the U.S. Attorney General is authorized to bring a suit to enforce Section 2, it has been enforced primarily through private litigation brought by representatives of minority groups. The Voting Rights Act encourages that kind of litigation by allowing for the award of attorney's fees to prevailing parties.[15]

Unlike Section 5 of the Voting Rights Act,[16] Section 2 applies nationwide. Section 2 is not limited to the jurisdictions that, under Section 5, must obtain federal "preclearance" of a redistricting plan or other electoral change. Further, preclearance of a plan under Section 5 does not preclude a later judicial finding that the plan violates Section 2.[17]

Although a plaintiff may litigate a Section 2 challenge in state court,[18] the overwhelming majority of Section 2 cases are brought in federal district courts.

A plaintiff may bring a Section 2 challenge at any time a redistricting plan or other law affecting voting is in effect. However, a court may find that a plaintiff who delays challenging a redistricting plan for many years is barred from litigating the claim by laches (failure to bring suit in a timely manner). While some federal courts have held that laches bars Section 2 suits brought long after the implementation of a redistricting plan,[19] other courts have rejected the laches defense.[20] Whether laches will prevent a successful Section 2 challenge depends on the unique facts of each case, such as the length of time between the passage of a previous redistricting plan and the next census, the number of redistricting plans and election cycles to which voters have already been subjected,[21] or whether circumstances have changed since districts were drawn and the defendant failed to redistrict adequately to account for the change.[22]

In reviewing a trial court's finding of a violation of Section 2, an appellate court is required to give the finding great deference, reversing it only if it is "clearly erroneous."[23] Further, Section 2 plaintiffs may include additional constitutional claims in their lawsuits invoking Section 2. Federal law requires an action challenging the constitutionality of a redistricting plan to be tried by a three-judge panel in a federal district court,[24] with appeal of the decision made directly to the U.S. Supreme Court.[25] Because the court hears relatively few cases each year, the great majority of these panel decisions, including the decisions on Section 2 claims, are not reversed.

The U.S. Supreme Court has stated that the trial court's determination of whether a violation of Section 2 exists is "'peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact'" of the challenged provision.[26] "Thus, the application of the clearly-erroneous standard . . . preserves the benefit of the trial court's particular familiarity with the indigenous political reality" of the redistricting plan or other voting provision under attack.[27]

Although Section 2 cannot be used to challenge the size of a government body,[28] it has been widely used to successfully challenge the makeup of elected bodies.[29] Section 2 also applies to judicial elections, including the election of judges in Texas.[30] However, the most frequent targets of Section 2 suits in Texas and other states have been local governments with governing bodies that are elected at large rather than from single-member districts.[31] Redistricting plans established by state legislatures[32] or mandated by courts[33] have also been the targets of Section 2 challenges.

II. Applying Section 2 to Redistricting

A. The *Thornburg v. Gingles* Framework

Under Section 2 of the Voting Rights Act, a redistricting plan or any part of the plan is unlawful if it results in members of a racial or language minority group having less opportunity than the general electorate to elect representatives of their choice. In 1986, the U.S. Supreme Court in *Thornburg v. Gingles*[34] established a framework for applying Section 2 to a claim of "vote dilution."

The plaintiffs in *Gingles* challenged the inclusion of a geographically compact black population within a multimember state legislative district that was dominated by white voters who generally voted differently from black voters. The plaintiffs successfully argued that the arrangement diluted the voting strength of the black voters, because those voters could have elected a representative of their choice if they had been included within a single-member district.

In analyzing the plaintiffs' claim under Section 2, the *Gingles* court focused on two specific factors: demographics and voting behavior. Noting that multimember districts are not inherently invalid under Section 2, the court required the plaintiffs to prove three threshold factors:

(1) the minority group submerged in the multimember district is sufficiently large and geographically compact to constitute a majority in at least one single-member district;

(2) the minority group is politically cohesive and votes as a bloc; and

(3) the majority in the multimember district votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidates in the multimember district.[35]

Although *Gingles* involved a multimember district, the supreme court later held that the three *Gingles* factors also apply to single-member districts, including single-member districts where plaintiffs have alleged racial gerrymandering by fragmenting or packing.[36] To succeed under a Section 2 claim, all plaintiffs initially must establish the existence of the three *Gingles* conditions. A plaintiff's failure to establish any one of the *Gingles* factors precludes a finding of a Section 2 violation.

If a court finds that the three *Gingles* factors are present, the court will then examine the "totality of circumstances" surrounding the challenged political process, as Section 2 specifically requires, to determine whether the process has diluted or otherwise abridged the voting rights of a racial or language minority group.

However, a finding that the three *Gingles* factors are present is often tantamount to a finding of a Section 2 violation.[37] As a practical matter, representatives of minority groups challenging a plan have had little difficulty proving that the totality of circumstances supports a finding that a redistricting plan violates Section 2 once the court is satisfied as to all three *Gingles* factors.

B. Racially Polarized Voting: Analyzing Electoral Behavior Under *Gingles*

The first *Gingles* condition focuses on the geographic demography of minority voters and is discussed in more detail below. The second *Gingles* condition requires plaintiffs to demonstrate that the minority group in a given area is politically cohesive and votes as a bloc. The third *Gingles* condition requires a distinct showing that the majority votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidates in the challenged district.[38] Proof of these last two conditions—political cohesion and bloc voting—demonstrates a pattern referred

to as "racially polarized" voting. When evaluating whether voting exhibits a racially polarized pattern, courts consider the electoral behavior of both the minority population and the surrounding majority population. The primary tools used in evaluating this behavior are statistical analyses of elections. Therefore, to apply the *Gingles* conditions, courts must also evaluate both the statistical methods that plaintiffs use for analysis and their choice of elections.

Statistical Methods. Because ballots are cast secretly, a count of the votes according to membership in different racial groups is impossible to obtain. Consequently, parties in Section 2 litigation usually use one or more of several standard techniques for proving whether and to what extent racially polarized voting occurs in a particular area. A few cases have used exit polls of actual voters,[39] but these polls are not ordinarily available, particularly in large geographic areas, and may not be found reliable.[40] Instead, the best available data usually is derived from voting precinct information. The votes cast in each precinct within an area can be compared, using statistical methods, to the racial or ethnic makeup of the precinct's population to determine whether voting patterns in the area follow racial lines and, if so, to what extent.

In *Gingles*, the supreme court accepted the district court's finding of racially polarized voting based on data derived from two standard statistical methods: bivariate ecological regression analysis and extreme case analysis.[41]

Bivariate ecological regression analysis is a mathematical technique that examines the relationship between two factors, called variables, such as the racial composition of voting precincts and the votes cast in those precincts. An analysis showing a strong correlation between the racial composition of precincts and the votes cast for particular candidates indicates that voting is probably split along racial lines. This analysis requires data from an area containing a number of precincts, although the minimum number needed depends on statistical considerations.[42]

In extreme case analysis, also called homogeneous precinct analysis, the voting patterns in precincts containing predominately white populations are compared with the voting patterns in precincts containing predominately minority populations. This method is simple to understand but is generally considered less reliable than bivariate regression analysis, primarily because it relies on a small, possibly unrepresentative, number of precincts[43] to project overall voting patterns for an area. For this reason, extreme case analysis is seldom relied on by itself in vote dilution cases and is used instead to supplement bivariate regression analysis.[44]

Because bivariate regression analysis uses only two variables, several post-*Gingles* cases have suggested that its use is flawed in situations where more than two factors that might affect voting patterns are present.[45] In those situations, a multivariate regression analysis that examines the effects of multiple factors could be used instead. The Fifth Circuit Court of Appeals, the federal appellate court having jurisdiction in Texas, Louisiana, and Mississippi, has said that plaintiffs are not required to present a multivariate regression analysis.[46] However, the court has encouraged its use in cases where it has found shortcomings in plaintiffs' analyses of racial bloc voting.[47]

As the racial and ethnic makeup of different districts becomes more complex, and as federal courts begin to probe further into the causes of apparent racial bloc voting, the use of multivariate regression analysis will likely become common. Of course, a court may be persuaded to consider any credible method of analyzing voting behavior. A method called "reconstituted election analysis" was approved in 2004 by the Fifth Circuit in a challenge to Bexar County's constable and justice precincts.[48] Different approaches were taken by different federal judges in challenges covering the same geographical area in 2009 and 2010 in Irving, Texas.[49]

Choice of Elections. Another critical aspect of a Section 2 analysis of racially polarized voting involves the selection of elections. The elections that the parties choose to present or that the court chooses to analyze are often virtually determinative of the outcome of a case.

1. Elections Extending Over a Period of Time. In *Gingles*, the supreme court offered some guidance regarding elections to be used in an analysis of racial bloc voting. The court stated that "a pattern of racial bloc voting that extends over a period of time is more probative of . . . legally significant polarization than are the results of a single election."[50] The court made the reasonable assumption that voting behavior in past elections can be an accurate and reliable predictor of future voting trends. Where there are aberrations in past behavior, courts generally view them within the context of overall voting patterns. For example, where the past behavior of voters has usually been polarized along racial lines, the absence of racial bloc voting in a few individual elections does not necessarily negate a finding of racial polarization.[51] Even strong minority success in recent elections may be insufficient to overcome a showing of racially polarized voting over a long period in the past, particularly if the recent success has resulted from special circumstances, such as the absence of a serious opponent, a split among majority group voters, or the presence of a minority incumbent.[52] Thus, successful plaintiffs have usually been able to show racially polarized voting in a number of elections extending over a reasonably long period.

Nevertheless, in cases involving regions that have seen only a few elections with serious minority candidates, courts have given great weight to evidence from those few elections. As the *Gingles* court stated, "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim."[53]

2. Elections With Minority Candidates. In *Gingles*, the court split on the relevance, in analyzing racially polarized voting, of the race of a candidate. Some of the justices reasoned that the candidate's race is theoretically irrelevant to a Section 2 inquiry, noting that Section 2 simply prohibits districts that result in the minority group members having "less opportunity than other members of the electorate to . . . elect representatives of their choice," without reference to the race of those chosen representatives.[54] Other justices appeared to disagree with that assessment, implying that an examination of racial bloc voting in an election with a minority candidate was more telling than an examination of an election without a minority candidate.[55]

In practice, the federal courts that have addressed racially polarized voting have focused primarily on elections with minority candidates.[56] If an analysis of those elections establishes polarized voting, the absence of polarized voting in elections without minority candidates is of limited relevance.[57] Therefore, most courts, including the Fifth Circuit Court of Appeals, have held that racial bloc voting analyses should focus primarily on elections in which a serious minority candidate is opposed by a nonminority candidate, and that elections without a minority candidate are of little importance.[58]

3. Elections for Same or Similar Office. Previous elections for the same government body challenged by the plaintiffs are the logical starting place for a racial bloc voting analysis. However, courts may consider evidence from similar elections, or even somewhat dissimilar elections, as needed to establish a clear picture of voting patterns in the area under consideration.[59] Courts may even consider an analysis of elections submitting policy propositions to the voters, such as city charter amendments or state constitutional amendments.

Some plaintiffs who have been unable to obtain data from elections for the same office have used a so-called "building block" or "mosaic" theory of demonstrating racially polarized voting. Under this theory, plaintiffs combine results from different elections in smaller areas within a region under consideration to demonstrate broader patterns in the region overall. Although the Fifth Circuit has not expressly approved the use of this technique, it has stated that plaintiffs who employ it must use more than "a scattering of voting subsets" of a given district to show racial bloc voting throughout the district.[60]

In determining whether racially polarized voting exists, courts appear to demand more data from plaintiffs who use elections for offices that are different from the offices they are challenging, or elections from a different geographic area. Although they demand more data, courts still tend to give less weight to the use of those elections.[61] As a general rule, courts permit the use of any elections to analyze racial bloc voting, but will consider the relevance of data from each election separately.

4. Use of 2008 Presidential Election Data. Following the election of Barack Obama to the presidency in 2008, some might argue that racially polarized voting no longer exists in the United States since an African American prevailed over a white candidate for the nation's highest elected office. Using this defense to a Section 2 challenge of a redistricting plan is perhaps the ultimate example of placing too much emphasis on a single election. A court will have to consider whether the 2008 presidential election represents an isolated election that departs from the norm of racially polarized voting in an area or whether it represents a general trend away from racially polarized voting in the area. Indeed, in some areas the 2008 presidential election results may actually reinforce existing evidence of racially polarized voting even though an African American won the overall election.

III. The Three *Gingles* Threshold Conditions

A. First *Gingles* Condition—Minority Demographics

The *Gingles* decision requires a minority group plaintiff claiming vote dilution under Section 2 "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[62] To satisfy this requirement, a plaintiff must show that one or more reasonably compact districts could be drawn in which members of a protected minority group would constitute a majority. Drawing this hypothetical district involves answering two questions:

(1) How compact must the hypothetical minority district be?

(2) What constitutes a majority in a single-member district?

Compactness. *Gingles* requires a minority group plaintiff to demonstrate that the group's population is sufficiently compact within a given geographic area to constitute a majority in a hypothetical district (often called a "demonstration district"). In many Section 2 cases, the minority populations represented by plaintiffs have not been geographically dispersed, and thus, compactness has not been an issue.[63]

In cases where compactness has been an issue, courts have not been consistent in determining what types of population distributions qualify as being sufficiently compact.[64] The difficulty courts have had in describing compactness arises, in part, because neither the courts nor the social scientists who study the issue have been able to agree on a single set of measures to use.[65]

Nevertheless, courts have been fairly unified in finding that demonstration districts with convoluted shapes or highly irregular boundaries fail to satisfy the *Gingles* compactness requirement, particularly if such a district attempts to unite a relatively dispersed minority population. The supreme court has noted that in regions where the minority population is dispersed, "nothing in Section 2 requires the race-based creation of a district that is far from compact."[66] Therefore, districts that do not "branch out in an unacceptable manner in an effort to take in an isolated concentration of minority voters"[67] are most likely to withstand scrutiny in federal court.

A demonstration district with a majority-minority population united by strained boundaries is problematic not only under the *Gingles* analysis, but also because, as a practical matter, it could be subject to a racial gerrymandering charge under the Equal Protection Clause of the Fifteenth Amendment. A non-compact minority district would trigger suspicion that a potentially unacceptable principle, such as race, served as the primary motive for drawing the district's lines. The constitutional prohibitions against racial gerrymandering are discussed in Chapter 5.

In 2006, the compactness issue in regard to Section 2 challenges was further explained by the U.S. Supreme Court in *League of United Latin American Citizens (LULAC) v. Perry*.[68] In that case, the state had eliminated a performing Hispanic majority congressional district (District 23) and replaced it with a Hispanic majority district in a different geographic area of the state (District 25). Two distinct Hispanic communities were located at either end of the approximately 300-mile-long District 25. The court distinguished the *Gingles* compactness standard from the racial gerrymandering standard developed in the *Shaw v. Reno* line of cases. Under a *Gingles* analysis, the court found that it should consider the compactness of the minority group rather than the shape of the entire district. The court found District 25 was not required to be drawn under Section 2 as the district's concentrated minority communities were geographically widely separated. Thus, District 25 could not serve as a replacement district for the eliminated Hispanic majority in District 23.[69]

Potential Majority Population in Single District. In *Gingles*, the supreme court stated that a multimember district does not violate Section 2 unless a hypothetical single-member district could be drawn in which the submerged minority group could constitute a majority. When applied to a claim that a redistricting plan dilutes minority votes, *Gingles* requires plaintiffs to demonstrate the possibility of creating more than the plan's existing number of reasonably compact districts, each with minority populations sufficiently large to elect the candidates of their choice.[70] Federal courts have struggled with defining the characteristics of a population that is "sufficiently large" to satisfy this aspect of *Gingles*, and guidance from the supreme court has been lacking[71] until recently.

The Fifth Circuit, however, directly addressed the issue some time ago, stating that vote dilution claimants must "prove that their minority group exceeds 50 percent of the relevant population in the demonstration district" and that the relevant population is limited to voting-age citizens.[72] For example, in *Valdespino v. Alamo Heights Independent School District*,[73] Hispanic plaintiffs challenged an at-large system for electing trustees to the board of a Texas school district. The trial court found the plaintiffs had failed to show that a demonstration district could be drawn with a population of at least 50 percent Hispanic voting-age citizens. On appeal, plaintiffs argued that the district court erred in requiring them to meet such a "bright line" test.[74] The Fifth Circuit countered that it "has interpreted the *Gingles* factors as a bright line test" and held that the district court applied the correct test to the plaintiffs' case.[75]

Therefore, in Fifth Circuit states, including Texas, if a minority group would constitute more than 50 percent of the voting-age citizen population in a reasonably shaped hypothetical district, the group has met the first factor of the *Gingles* test. If the minority population is widely dispersed in a bizarrely shaped district or falls short of the required majority of voting-age citizens, the group has failed to meet the first prong of *Gingles*, and Section 2 cannot provide the group with a basis for a vote dilution claim.

In the 2011 round of redistricting, determination of the voting-age citizen population of a proposed district is likely to be especially problematic. As mentioned in Chapter 1,[76] citizenship data is now derived from a new program administered by the Census Bureau, called the American Community Survey (ACS), rather than the decennial census itself. The quality of this data is unknown, but it is likely to have a far greater margin of error than the 2000 citizenship data. In all likelihood, competing analyses from expert witnesses of what this data means will leave redistrictors and the courts with difficult evaluations to make.

Following *Gingles*, there remained some doubt concerning the U.S. Supreme Court's position on the extent to which a governing body must avoid redistricting that may cause "the dispersal of blacks [or other protected minorities] into districts in which they constitute an ineffective minority of voters."[77] Arguably, a minority group in a district may be numerous enough that, by relying on some proportion of majority group "crossover" votes, its voting strength could lead to the election of the group's candidates of choice even if the group did not constitute a numeric majority of the district and in spite of a general pattern of majority group bloc voting. By extension, Section 2 could be seen as requiring the establishment of such an "effective minority" district to avoid the dilution of the minority group's voting strength. The U.S. Supreme Court rejected that proposition in *Bartlett v. Strickland*,[78] holding that the first *Gingles* factor, "the majority-minority rule," relies on "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?"[79]

In *Bartlett v. Strickland*, the U.S. Supreme Court did not, as the Fifth Circuit Court of Appeals and other courts have done, articulate that the "50 percent of the voting-age population" test relied on citizenship data. However, the consideration of citizenship is consistent with the consideration of the age of the population—both citizenship and age are factors for voting eligibility and Section 2 is designed to protect the rights of voters.[80] It would appear that the "50 percent of the voting-age population" rule articulated by *Bartlett v. Strickland* may be taken to presume that citizenship data is not necessary where the citizenship of the minority population is not an issue raised in a particular districting controversy.

B. Second *Gingles* Condition—Minority Political Cohesiveness

Under the Section 2 analysis adopted in *Gingles*, a redistricting plan does not dilute minority voting strength if the minority population at issue is not politically cohesive and does not vote as a bloc. Proving political cohesiveness involves demonstrating that the minority group exercises enough political unity to wield effective political power under nondiscriminatory conditions. As the *Gingles* court explained, "showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim."[81]

For the purpose of proving political cohesiveness, the reasons for minority bloc voting are not relevant.[82] For example, bloc voting that appears to be due to socioeconomic or political differences

between the minority and majority groups still may establish minority political cohesiveness.[83] As the Fifth Circuit stated, "[i]t follows that a minority group is politically cohesive if it votes together."[84] Conversely, a minority group is probably not politically cohesive if it is divided into political camps that usually support different candidates.[85]

Degree of Political Cohesion. The supreme court in *Gingles* did not establish a particular degree of minority bloc voting that would be required for demonstrating political cohesiveness, preferring that the issue of degree be decided on a case-by-case basis. However, plaintiffs probably must show a degree of bloc voting for the minority group's preferred candidate that is significantly higher than 50 percent. For example, in *Gingles*, minority group voters usually supported their preferred candidates at rates of 71 to 92 percent in primary elections and 87 to 96 percent in general elections.[86]

Nevertheless, lower courts in Texas have rejected suggestions that similar supermajorities of the vote be required to gauge whether a minority group is politically cohesive. One court found political cohesion among Hispanic voters in school board elections where candidates received percentages of the Hispanic vote ranging from 41.7 to 80.2 percent,[87] while another court rejected a standard of 75 percent as "unrealistic" to determine political cohesiveness.[88] Because the *Gingles* court did not articulate a bright line rule on cohesion, court decisions regarding voting percentages and political cohesion have varied.

Minority Group Coalitions. Analyzing the political cohesiveness of different minority populations can be complicated by other demographic factors. A given area may be composed of different minority populations in close proximity to one another or may include a community of members of more than one minority group. Section 2 plaintiffs may argue that in such an area a "coalition district" combining different minority groups should be drawn.

Although the *Bartlett v. Strickland* decision asserts as a bright line rule that a minority group must constitute 50 percent of the voting-age population in a proposed district to assert a claim of vote dilution under Section 2, the decision does not address the creation of a coalition district using two or more minority groups under Section 2.[89]

The supreme court has stated that when ethnic and language minority groups are combined for the purpose of assessing compliance with Section 2, "proof of minority political cohesion is all the more essential."[90] Plaintiffs failed to meet that proof in *Brewer v. Ham*, in which the Fifth Circuit upheld a lower court finding that a proposed district encompassing black, Hispanic, and Asian communities lacked political cohesiveness.[91]

In contrast, in *Campos v. City of Baytown*,[92] the Fifth Circuit upheld the district court's finding that Baytown violated Section 2 by failing to draw a city council district that included a combined voting majority of blacks and Hispanics. The district court had found that a single-member district could have been drawn to include a voting majority of blacks and Hispanics who demonstrated political cohesiveness. Likewise, in *LULAC v. North East Independent School District*,[93] a district court accepted evidence that black and Hispanic voters were politically cohesive and voted together as a bloc for either Hispanic or black candidates. Courts are likely to continue to determine the degree of political cohesiveness between different minority groups on a case-by-case basis.

C. Third *Gingles* Condition—Majority Bloc Voting

Crossover Votes. If minority group plaintiffs can pass the first two parts of the *Gingles* test—demonstrating that a compact district could be drawn with a majority-minority population and that minority political cohesiveness exists—they must then meet the third threshold condition: demonstrating that they are submerged in a district in which majority group voters, through bloc voting, consistently frustrate the minority's chances for electoral success. The supreme court in *Gingles* described the level of majority bloc voting required to meet this condition as "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes."[94]

Accordingly, under *Gingles*, an examination of majority group bloc voting should also take into account crossover voters who do not vote with the majority, but instead support the minority group's preferred candidates in the district under consideration. In some areas, voting patterns may show voting so polarized that the level of majority group members' support for minority candidates is insignificant.[95] Patterns in other areas, however, may show a history of significant white crossover voting, although it may fluctuate from election to election.[96]

The Fifth Circuit has noted that in assessing whether plaintiffs have met the third *Gingles* condition, "[t]he determinative question . . . is not whether whites generally vote as a bloc, but rather, whether such bloc voting is legally significant,"[97] and thus, frustrates the minority's chances for electoral success. Even where members of a minority group constitute a registered voter majority, the Fifth Circuit has said that Anglo bloc voting may be legally significant, particularly if voter turnout rates for the majority-minority group are low. Determining "the legal significance of white bloc voting is a factual inquiry that will vary with the circumstances of each case."[98]

Relevance of Reasons for Polarized Voting. The *Gingles* court did not arrive at a clear consensus on one key component of the racial bloc voting analysis. The justices disagreed over whether a statistical showing of racial bloc voting may be rebutted by evidence showing that the cause of the bloc voting is not race or language. Such evidence may show that the bloc voting is the result not of race but of other factors, such as party affiliation, age, religion, income, incumbency, education, and campaign expenditures. Four justices in *Gingles*, in a portion of the opinion that Justice Brennan authored, argued that such alternative explanations are irrelevant to a Section 2 claim. Considering the causes of racial bloc voting would undermine the result-oriented purpose of Section 2, Justice Brennan argued, by requiring minority group plaintiffs to prove that white bloc voters are motivated by racial considerations.[99]

However, four other justices disagreed with Justice Brennan, arguing in an opinion by Justice O'Connor that bloc voting should be analyzed in light of the reasons that explain why it occurs in a particular district.[100] Justice White, the fifth justice, also disagreed with Justice Brennan's position, but used different reasoning than Justice O'Connor and did not directly address the relevancy of the causes of racially polarized voting.[101]

After the *Gingles* court issued these conflicting opinions, most lower courts appeared to follow Justice Brennan's view. Those courts relied almost exclusively on a showing of racial bloc voting as proof that plaintiffs satisfied the third *Gingles* condition, without delving into the causes of bloc voting. For example, one federal district court held that "the fact that . . . no individual black candidate had ever received more that 15% of the white vote . . . is probative of the extent and strength of the white bloc vote in Dallas."[102] In *Westwego Citizens for Better Government v. City*

of Westwego, the Fifth Circuit Court of Appeals likewise held that in an election where 89 percent of black voters voted for a black candidate and 84 percent of white voters did not, and where the black candidate finished 12th out of 16 candidates, those results were sufficient to show that white bloc voting was present.[103]

However, in *Westwego*, the defendants did not offer a nonracial explanation for the correlation between race and the selection of candidates.[104] In a later case in which the defendants did present such evidence, the Fifth Circuit chose to accept it. In *League of United Latin American Citizens (LULAC) v. Clements*[105] the appellate court was faced with deciding whether evidence of racial bloc voting could be rebutted by a showing that such bloc voting was attributable to partisan affiliation rather than racial considerations. The *LULAC v. Clements* plaintiffs alleged, in part, that the system of electing state trial judges in several Texas counties violated Section 2. Among the evidence that plaintiffs offered to support their claim were election analyses showing racially polarized voting.

The appellate court, however, accepted the state's argument that the divergent voting patterns in the applicable Texas counties "are in most instances attributable to partisan affiliation rather than race."[106] The plaintiffs had failed to establish racial bloc voting as required by *Gingles* because partisan affiliation "best explained" the differences in voting patterns among white and minority voters.[107] After *LULAC v. Clements*, evidence of racially divergent voting appeared no longer sufficient in the face of an alternative explanation for the voting pattern.

Nevertheless, the court did not hold that plaintiffs must always negate evidence of partisan politics in bloc voting in order to maintain a Section 2 claim. Instead, the court acknowledged that "partisan affiliation may serve as a proxy for illegitimate racial considerations,"[108] and warned that "courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation."[109]

The *LULAC v. Clements* court's decision to analyze the causes of bloc voting may invite in the Fifth Circuit more subjective analysis of voting patterns. Courts may now have to make difficult and often controversial decisions about voters' motives in bloc voting situations. The totality of circumstances language Congress included in Section 2 implies that the analysis of a vote dilution claim must consider the causes behind minority electoral losses, while not requiring a plaintiff to bring evidence of purposeful discrimination as an initial part of the claim. According to the U.S. Supreme Court, a court must consider "the further circumstances with arguable bearing on the issue of equal political opportunity."[110]

IV. The Totality of Circumstances

Satisfying the three *Gingles* factors is a threshold requirement that Section 2 plaintiffs must meet.[111] Once plaintiffs have established the threshold conditions, they must then demonstrate:

> based on the totality of circumstances . . . 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 [protected] class of citizens . . . 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.[112]

To determine whether a plaintiff meets this "totality of circumstances" test, a court examines the circumstances surrounding the development of the challenged political process, such as

a redistricting plan. The court must determine whether, taken as a whole, these circumstances demonstrate that the political process has diluted or otherwise abridged the voting rights of a racial or language minority group. The determination is not subject to mechanical precision but instead is, necessarily, somewhat subjective.

To assist courts in making determinations on the totality of circumstances, the Senate Judiciary Committee majority report that accompanied a 1982 revision of Section 2 elaborated on the circumstances that might be probative in analyzing an alleged Section 2 violation. The report lists the following as "typical factors" to be evaluated:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;[113]

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.[114]

The Senate Judiciary Committee derived these factors from the framework that federal courts had developed in earlier cases analyzing the dilution of minority voting rights under both Section 2 and the Fourteenth and Fifteenth Amendments.[115] Courts have applied these factors in most Section 2 cases since 1982.[116]

Both the senate report and federal courts emphasize that the list should not be used in an artificial way. Plaintiffs do not have to prove a majority or other specific number of these factors to establish a violation, and the absence of one or more factors does not necessarily disprove a claim of vote dilution.[117]

In addition, the list is not exclusive. A court may consider any other relevant factor in determining whether a political procedure reduces the voting strength of a protected group.[118] As the supreme court stated, a court must consider "the further circumstances with arguable bearing on the issue of equal political opportunity."[119]

However, not all of the listed factors carry the same weight. The *Gingles* court noted that in Section 2 challenges, some of the senate report factors are more important than others. In particular, the *Gingles* court focused on the extent to which members of a minority group have been elected to public office and the extent to which voting is racially polarized.[120] If members of a protected group use these factors to show that they have less opportunity than other members of the electorate to elect candidates of their choice, courts have seldom found that the absence of some of the other factors rebuts that showing, especially if the protected group also demonstrates socioeconomic disparities between itself and the majority population.[121]

Plaintiffs challenging a Texas redistricting plan will ordinarily be able to provide at least some evidence relating to many of the senate report factors. However, with respect to several factors, conditions in Texas in the past several decades have dramatically changed. For example, official racism, racially motivated slating, racial appeals in campaigns, and unresponsiveness by government to the concerns of minority citizens have substantially decreased in this state. In addition, the number of minority group members elected to public office has increased.

As a result, plaintiffs in Texas and elsewhere cannot assume that if they satisfy the *Gingles* conditions they can readily meet the totality of circumstances requirement. In *Johnson v. De Grandy*,[122] for example, the supreme court let stand a lower court's finding that Hispanic plaintiffs in Florida had satisfied the three *Gingles* conditions, and focused instead on the totality of circumstances test. The court noted that the number of Hispanic-majority districts in the challenged redistricting plan was in substantial proportion to the Hispanic share of Florida's voting-age population. Because the plan "apparently provid[ed] political effectiveness in proportion to voting-age numbers," it did not deny equal political opportunity to Hispanics.[123] Thus, the court held that plaintiffs had not met the Section 2 totality of circumstances test and reversed the district court's finding of vote dilution under Section 2.[124]

A. Supermajorities

Analyzing whether the totality of circumstances supports a vote dilution claim has raised other specific issues. For example, when a concentrated minority population can meet the "majority" threshold of the first prong of the *Gingles* test, courts have had to consider the related question of what percentage above the minimum of 50 will provide the group, under the totality of circumstances, with an opportunity for electoral success. The average age of racial and ethnic minority groups may often be lower than that of the population as a whole, and those groups will contain a lower proportion of persons of voting age. Because some minority groups include sizable numbers of recent immigrants, those groups also tend to contain a high proportion of noncitizens who are ineligible to vote. In addition, voters of minority groups may register and turn out to vote at lower rates than the population as a whole.[125] Other subtle factors, such as the limited financial resources available to minority candidates,[126] also affect the ability of minority groups to elect their preferred candidates, even in a district with a majority-minority population.

Some redistricting plans in early cases apparently attempted to address these issues by establishing a requirement that a minority district contain a 65 percent minority population. Following this so-called "65 percent rule" would provide the minority group with a reasonable opportunity to win elections while avoiding a "packing" claim.[127] However, in light of rising voter registration rates and voter participation among minority groups, several courts in more recent cases have found that such a fixed percentage is no longer applicable. Instead of strictly following

the 65 percent rule, these courts have looked at the specific demographics and political behavior of voters to determine the percentage of minority population needed for electoral success in a given district.[128] The U.S. Department of Justice has specifically disavowed the 65 percent rule when used as an inflexible standard.[129]

The Fifth Circuit has refrained from adopting a uniform percentage as the appropriate minority population required by Section 2, noting that "the appropriate method [for determining that minority population] and its results in a given case are matters of fact which the plaintiffs must prove."[130]

B. Minority Influence Districts

Demographics in some areas may not easily permit a districting plan to include safe or even competitive minority districts. Accordingly, plaintiffs have argued that some districting plans should include so-called "influence" districts in which minority voters, with the help of nonminority crossover votes, may elect the candidates of their choice. In *Gingles*, the supreme court acknowledged the question of whether Section 2 permits a claim that an electoral process impairs the ability of minorities to influence elections, and then expressly stated that it would not address the issue.[131]

Several years later, the court directly faced the issue. In *Voinovich v. Quilter*,[132] black voters in Ohio argued that the state's redistricting plan violated Section 2 by failing to create influence districts in which they would have constituted an influential minority. In certain areas in Ohio, "[t]he totality of the circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population."[133] The supreme court noted that the goals of creating majority-minority districts and creating minority influence districts can be contradictory.

> On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, ... [p]lacing black voters in a district in which they constitute a sizeable and therefore 'safe' majority ensures that they are able to elect their candidate of choice. Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.[134]

Where the facts and circumstances of a case reveal coalition voting between whites and minorities in districts where minority voters are not the majority, minority-preferred candidates can win elections.

The court in *Voinovich* declined to decide whether the failure to create such influence districts can provide minority voters with a viable Section 2 claim.[135] Instead, the court held that, assuming such claims are valid, they must "show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class."[136]

The court then noted that the *Gingles* test "cannot be applied mechanically and without regard to the nature of the claim," and acknowledged that the test might need to be modified or eliminated when applied to an influence dilution claim. The court nevertheless applied the third *Gingles* precondition without modification to the *Voinovich* plaintiffs' claim and reversed the lower court's finding of a Section 2 violation. The court reasoned that the plaintiffs had failed to meet the third precondition based on a lack of white bloc voting sufficient to frustrate the

election of minority-preferred candidates.[137] Thus, the presence of white crossover voting, the very circumstance that permits the creation of a minority influence district, is the same circumstance that could lead to a plaintiff's failure to meet the third threshold condition of *Gingles*.

While a legislative body may choose to create minority influence districts in a manner consistent with Section 2, the bright line test for the *Gingles* first factor for Section 2 liability in the Fifth Circuit and as articulated by the U.S. Supreme Court in *Bartlett v. Strickland* does not easily accommodate an influence dilution claim.

V. Conclusions

Following its amendment in 1982, Section 2 of the Voting Rights Act became a powerful tool for racial and language minority groups to challenge the discriminatory effects of a redistricting plan. The supreme court, quoting the Senate Judiciary Committee report on the 1982 amendments, has stated that a determination of whether the makeup of a redistricting scheme dilutes minority voting strength should be based on a "searching practical evaluation" of "past and present reality."[138] That evaluation includes the three-part *Gingles* threshold test, with the ultimate determination to be based on the "totality of circumstances."

In general, a redistricting plan may violate the Section 2 rights of a politically cohesive racial or language minority group if:

(1) it dilutes the voting power of a minority group that is populous enough to constitute a voting majority in a single district by distributing the voters of that group among several districts ("fracturing") so that the electoral choices of the minority group are frustrated by the bloc voting of other voters in those districts; or

(2) it "packs" members of such a minority group into a district in excess of the total number needed to give that group an effective voting majority in the district and, as a result, reduces the number of districts in which the minority group has a reasonable opportunity to elect candidates of its choice.

In any area where a reasonably compact district may be drawn in which politically cohesive black, Hispanic, or other racial or language minority group voters could constitute an effective voting majority, failure to draw such a district will probably violate Section 2. Of course, the legislature should avoid drawing majority-minority districts with highly irregular boundaries because such districts inevitably present problems, not only in meeting the compactness requirement of *Gingles*, but also in passing the more rigorous constitutional scrutiny triggered when racial considerations serve as the predominate explanation for a district's shape.

As Section 2 vote dilution claims become increasingly technical, no simple formula can determine whether a particular aspect of a redistricting plan violates Section 2. In general, a plan that adversely affects the overall or regional voting strength of members of a racial or language minority group may be suspect if alternative plans could be drawn that result in greater electoral success for minorities. A plan that undermines such potential minority electoral success is unlikely to withstand a judicial challenge.

Notes, Chapter 3

[1] 42 U.S.C. Sec. 1973.

[2] 42 U.S.C. Sec. 1973*l*(c)(3) defines "language minority group" as persons who are "American Indian, Asian American, Alaskan Natives or of Spanish heritage."

[3] At least one lower federal court has held that Section 2 of the Voting Rights Act is a constitutionally valid means for carrying out the requirements of the Fifteenth Amendment. *Major v. Treen*, 574 F. Supp. 325, 342-349 (E.D. La. 1983). The supreme court has also affirmed lower court decisions upholding the constitutionality of subsequent amendments to Section 2. *See, e.g.*, *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), *aff'd sub nom. Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

[4] *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980).

[5] 42 U.S.C. Sec. 1973(b).

[6] The Senate Committee on the Judiciary issued a report on the 1982 legislation amending Section 2. The report listed factors suggested for a court to consider when determining whether, considering the totality of the circumstances in a state's or political subdivision's jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2. The report describes the listed factors as neither exclusive nor comprehensive. *See* S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-207, and the discussion in Part IV of this chapter. Note that the factors listed are based on the court's factors expressed in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). The factors are discussed further in Part IV of this chapter.

[7] *Thornburg v. Gingles*, 478 U.S. 30, 87 (1986) (O'Connor, J., concurring) (quoting *White v. Regester*, 412 U.S. 755, 765 (1973)).

[8] *Gingles*, 478 U.S. at 46 n.11.

[9] *White v. Regester*, 412 U.S. 755 (1973). Multimember districts are no longer used for house districts and may not be used in senate or congressional districts. Multimember districts have never been used for State Board of Education districts.

[10] *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom., City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1984).

[11] *Marengo*, 731 F.2d at 1565.

[12] 42 U.S.C. Sec. 1973(b).

[13] *Johnson v. De Grandy*, 512 U.S. 997, 1016-1017 (1994). *See also Terrazas v. Slagle*, 821 F. Supp. 1162, 1171 (W.D. Tex. 1993) (per curiam), and cases cited there.

[14] *Bartlett v. Strickland*, --- U.S. ----, 129 S. Ct. 1231 (2009).

[15] 42 U.S.C. Sec. 1973*l*(e).

[16] See Chapter 4 of this publication.

[17] *See, e.g.*, *Major*, 574 F. Supp. at 328, 355.

[18] Note that the U.S. Supreme Court case *Bartlett v. Strickland*, discussed later in this chapter, grew out of state court litigation considering Section 2, *Pender Cnty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007).

[19] *MacGovern v. Connolly*, 637 F. Supp. 111 (D. Mass. 1986); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991); *Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907-909 (D. Ariz. 2005).

[20] *Garza v. Cnty. of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991); *Knox v. Milwaukee Cnty. Bd. of Election Comm'rs*, 607 F. Supp. 1112 (E.D. Wis. 1985).

[21] *See, e.g.*, *Fouts*, 88 F. Supp. 2d at 1354.

[22] *Blackmoon v. Charles Mix Cnty.*, 386 F. Supp. 2d 1108, 1114-1115 (D.S.D. 2005).

[23] *Gingles*, 478 U.S. 30, 78-79 (1986); *Abrams v. Johnson*, 521 U.S. 74, 90-95 (1997). In *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 427 (2006), citing *Gingles* and *De Grandy*, the court repeats the "clearly erroneous" standard while noting that a finding of vote dilution based on a misreading of the law is reversible error.

[24] 28 U.S.C. Sec. 2284.

[25] 28 U.S.C. Sec. 1253.

[26] *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621-622 (1982)).

[27] *Id.* at 79.

[28] *Concerned Citizens for Equality v. McDonald*, 863 F. Supp. 393 (E.D. Tex. 1994), *aff'd*, 63 F.3d 413 (5th Cir. 1995) (denying a Section 2 challenge to the number of justice of the peace precincts in a Texas county, although the Texas Constitution would permit an increase in the number of precincts). A plurality of the supreme court held that a federal court cannot modify the size of an elected governing body in order to remedy a Section 2 violation because the court could find no principled reason why one size should be preferred over another size as a benchmark for determining whether vote dilution has occurred. *Holder v. Hall*, 512 U.S. 874 (1994). The 11th Circuit held in *Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1083 (1995), that "under *Holder*, federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies." *See also White v. Alabama*, 74 F.3d 1058, 1072 (11th Cir. 1996) (holding, under *Holder* and *Nipper*, that Section 2 did not authorize a federal court to require Alabama to increase the size of its appellate courts).

[29] *See, e.g.*, *Holder*, 512 U.S. 874.

[30] *Chisom v. Roemer*, 501 U.S. 380 (1991); *League of United Latin Am. Citizens No. 4434 (LULAC) v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

[31] *See, e.g.*, *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991); *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990); *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709 (N.D. Tex. 2009); *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010).

[32] *See, e.g.*, *Gingles*, 478 U.S. 30 (North Carolina General Assembly); *Jeffers*, 730 F. Supp. 196 (Arkansas General Assembly); *Bush v. Vera*, 517 U.S. 952 (1996) (Texas congressional districts).

[33] *Abrams*, 512 U.S. 74.

[34] 478 U.S. 30.

[35] *Id.* at 50-51. The court derived the three-part test from factors listed in a 1982 Senate Judiciary Committee report on amendments to Section 2. See *supra* at note 6.

[36] *See, e.g.*, *Growe v. Emison*, 507 U.S. 25 (1993) (fragmenting); *Voinovich v. Quilter*, 507 U.S. 146 (1993) (packing).

[37] *See, e.g.*, *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1249 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989). *But see De Grandy*, 512 U.S. 997 (court assumed *Gingles* factors were satisfied but held that totality of circumstances did not support a finding that the challenged plan diluted minority votes).

[38] 478 U.S. at 50-51.

[39] *See, e.g.*, *League of United Latin Am. Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 847 n.1 (5th Cir. 1997).

[40] *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010), *petition for cert. filed* (U.S. Sept. 1, 2010) (No. 10-335) (on appeal, the court noted that the trial court did not err in discounting exit polls, based on the trial court's determination that exit polls "generally are 'prone to high nonresponse rates which can seriously bias estimates and distort inferences' . . . and that 'exit poll respondents may lie.'").

[41] 478 U.S. at 52-53 n.20. For a useful basic discussion of these methods, see Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Law. 369 (1985).

[42] *See, e.g.*, *Ewing v. Monroe Cnty., Miss.*, 740 F. Supp. 417, 420 (N.D. Miss. 1990) (county commissioner districts with only six or seven voting precincts used in ecological regression analysis).

[43] *See Campos v. City of Baytown*, 840 F.2d at 1246 n.10.

[44] *See, e.g.*, *Smith v. Clinton*, 687 F. Supp. 1310, 1316 (E.D. Ark. 1988).

[45] *Williams*, 734 F. Supp. at 1399-1400.

[46] *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1219 (5th Cir. 1996). The court noted that "although the plaintiffs were not *required* under existing case law to present a multi-variate regression analysis comparing the impact of other factors affecting voting, had they done so this evidence may have helped them to prove the existence of a significant bloc vote in the present case."

[47] *LULAC v. Clements*, 999 F.2d at 859; *Rollins*, 89 F.3d at 1219.

[48] *Rodriguez v. Bexar County, Tex.*, 385 F.3d 853, 860-863 (5th Cir. 2004) ("[r]econstituted election analysis is a relatively simple method that extracts actual election results from a variety of statewide and local races that subsume the area being analyzed and determines, precinct-by-precinct within the new district, the racial composition of the vote and the 'winner' within the new district. This method of aggregation allows a researcher to determine how an individual candidate performed within the boundaries of the target district even though the actual election covered a different geographical area").

[49] *See Benavidez v. City of Irving*, 638 F. Supp. 2d 709 (at-large election of city council violated Section 2), and *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 451 (at-large election of school board did not violate Section 2 based on court's interpretation of Fifth Circuit opinion in *Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019 (5th Cir. 2009)).

[50] 478 U.S. at 57.

[51] *Id.*

[52] *See, e.g.*, *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1241-1242 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (quoting *Gingles*); *Rollins*, 89 F.3d at 1213-1214.

[53] 478 U.S. at 57, n.25.

[54] *Id.* at 67.

[55] *Id.* at 82-83 (White, J., concurring) and 101 (O'Connor, J., concurring).

[56] *See Westwego*, 946 F.2d at 1119; *Williams*, 734 F. Supp. at 1387.

[57] *Williams*, 734 F. Supp. at 1393.

[58] *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 503-504 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989); *Smith*, 687 F. Supp. at 1316-1317.

[59] *See Rangel v. Morales*, 8 F.3d 242, 246 (5th Cir. 1993); *Gretna*, 834 F.2d at 502.

[60] *Rangel*, 8 F.3d at 247-248.

[61] *LULAC v. Roscoe Indep. Sch. Dist.*, 123 F.3d at 846-847; *Rollins*, 89 F.3d at 1221.

[62] 478 U.S. at 50.

[63] *See, e.g.*, *Williams*, 734 F. Supp. at 1387; *Westwego*, 946 F.2d at 1117; *League of United Latin Am. Citizens (LULAC) v. North East Indep. Sch. Dist.*, 903 F. Supp. 1071, 1084 (W.D. Tex. 1995).

[64] *See, e.g.*, Pildes and Niemi, *Excessive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich. L. Rev. 483, 527-536 (1993).

[65] *See id.* at 553-559.

[66] *Bush*, 517 U.S. at 979.

[67] *LULAC v. North East Indep. Sch. Dist.*, 903 F. Supp. at 1084 n.99 (finding that plaintiff's proposed district was geographically compact within the meaning of *Gingles*).

[68] 548 U.S. 399 (2006).

[69] *Id.* at 427-435.

[70] *De Grandy*, 512 U.S. at 1008.

[71] *See, e.g.*, *De Grandy*, 512 U.S. at 1008-1009 (declining to address the issue of whether a district with a population of voting-age citizens greater than 50 percent is required under *Gingles*).

[72] *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-853 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). *See also Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (requiring a showing of a majority of voting-age minority residents in demonstration district); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (requiring the use of citizenship data in its *Gingles* analysis).

[73] 168 F.3d 848.

[74] *Id.* at 852.

[75] *Id.* at 852-853. *See also Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Reyes*, 586 F.3d at 1023-1024 (holding that Fifth Circuit rule requiring a majority of citizen voting-age population was not overruled by the U.S. Supreme Court in *Bartlett v. Strickland*).

[76] See pages 14 to 15.

[77] 478 U.S. at 46, n.11 (vote dilution "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters").

[78] --- U.S. ----, 129 S. Ct. 1231 (2009).

[79] *Id.*

[80] See the discussion and cases cited in *Pender Cnty. v. Bartlett*, 649 S.E.2d at 370-371. *Pender County* was the case reviewed by the U.S. Supreme Court in *Bartlett v. Strickland*, and the North Carolina Supreme Court reasoned that since Section 2 addressed voting rights, and since only citizens have voting rights, citizenship must be considered along with the voting-age population in Section 2 cases. Note also that dissenters in *Bartlett v. Strickland*, in the opinion by Souter, J., analyzed the Kennedy, J., opinion announcing the judgment of the court as if the "objective numerical test" considered citizenship of the voting-age population at issue.

[81] 478 U.S. at 56.

[82] *See id.* at 63-64, 100 (Brennan, J., plurality opinion; O'Connor, J., concurring).

[83] *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989).

[84] *Campos v. City of Baytown*, 840 F.2d at 1244.

[85] *See Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990).

[86] 478 U.S. at 59.

[87] *LULAC v. North East Indep. Sch. Dist.*, 903 F. Supp. at 1082.

[88] *Williams*, 734 F. Supp. at 1400.

[89] 129 S. Ct. at 1242-1243.

[90] *Growe*, 507 U.S. at 41.

[91] 876 F.2d at 452-453.

[92] 840 F.2d 1240.

[93] 903 F. Supp. at 1081.

[94] 478 U.S. at 56.

[95] *See, e.g.*, *Brown v. Bd. of Comm'rs*, 722 F. Supp. 380, 395 (E.D. Tenn. 1989); *Gunn v. Chickasaw Cnty., Miss.*, 705 F. Supp. 315, 324-325 (N.D. Miss. 1989); *Ewing*, 740 F. Supp. at 421.

[96] *See, e.g.*, *Gingles*, 478 U.S. at 59.

[97] *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1332 (5th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990).

[98] *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1555 (5th Cir. 1992).

[99] *Gingles*, 478 U.S. at 63-67.

[100] *Id.* at 100-101 (O'Connor, J., concurring).

[101] *Id.* at 82-83 (White, J., concurring).

[102] *Williams*, 734 F. Supp. at 1393-1394. *See also LULAC v. North East Indep. Sch. Dist.*, 903 F. Supp. at 1081.

[103] 946 F.2d at 1119.

[104] *Id.* at 1119 n.14.

[105] 999 F.2d 831.

[106] *Id.* at 859. The Fifth Circuit later refined the *LULAC v. Clements* standard, establishing that it falls on the defendant to raise the issue of causation by offering probative evidence of a non-race-based explanation for racially divergent voting patterns, in that way rebutting the presumption in the plaintiff's favor established by statistical evidence of racially polarized voting. If the defendant fails to raise the issue and rebut the presumption, a plaintiff may meet the racially polarized voting factor by demonstrating a simple correlation between race and vote. *Teague v. Attala Cnty., Miss.*, 92 F.3d 283, 290-291 (5th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

[107] *LULAC v. Clements*, 999 F.2d at 861.

[108] *Id.* at 860.

[109] *Id.* at 860-861.

[110] *De Grandy*, 512 U.S. at 1013.

[111] *Growe*, 507 U.S. at 39-40.

[112] 42 U.S.C. Sec. 1973(b).

[113] This factor is of special significance since it is set out in the text of Section 2: "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." 42 U.S.C. Sec. 1973(b).

[114] S. Rep. No. 97-471, at 28-29.

[115] *Gingles*, 478 U.S. at 36 n.4.

[116] *See, e.g.*, *Gingles*, 478 U.S. at 36-38; *Campos v. City of Baytown*, 840 F.2d at 1249-1250; *Westwego*, 946 F.2d at 1120-1123; *LULAC v. North East Indep. Sch. Dist.*, 903 F. Supp. at 1090-1091.

[117] S. Rep. No. 97-471, at 29; *Gingles*, 478 U.S. at 45.

[118] *Gingles*, 478 U.S. at 45.

[119] *De Grandy*, 512 U.S. at 1013.

[120] 478 U.S. at 48 n.15.

[121] *See, e.g.*, *Gunn*, 705 F. Supp. at 322; *Jackson v. Edgefield Cnty., S.C. Sch. Dist.*, 650 F. Supp. 1176, 1180-1181, 1204 (D.S.C. 1986); *Williams*, 734 F. Supp. at 1409. The tendency of social and economic conditions to depress minority political participation was an important part of the vote dilution analysis that courts used before 1980. In the 1982 amendments to Section 2, Congress intended to restore this aspect of the analysis. *See, e.g.*, *White v. Regester*, 412 U.S. at 768.

[122] 512 U.S. 997.

[123] *Id.* at 1014.

[124] *Id.* at 1014-1015, 1022.

[125] Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Pol'y 43 (1988).

[126] *See, e.g.*, *Williams*, 734 F. Supp. at 1415.

[127] *See, e.g.*, *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 152 (1977); *Concerned Citizens*, 863 F. Supp. at 402 n.21; *Williams*, 734 F. Supp. at 1380 (districts with 60 percent to 65 percent minority voting-age population considered "safe," while districts with 75 percent considered "packed").

[128] *See, e.g.*, *Garza*, 918 F.2d at 769.

[129] Letter of April 9, 1985, from William Bradford Reynolds, assistant attorney general, to the Honorable George C. Carr, United States district judge, set out in *James v. City of Sarasota, Fla.*, 611 F. Supp. 25, 32-33 (M.D. Fla. 1985).

[130] *Brewer*, 876 F.2d at 452.

[131] 478 U.S. at 46 n.12.

[132] 507 U.S. 146.

[133] *Id.* at 151-152.

[134] *Id.* at 154-155.

[135] *Id.* at 154.

[136] *Id.* at 157.

[137] *Id.* at 158.

[138] *Gingles*, 478 U.S. at 79.

Chapter 4
Federal Preclearance:
Section 5 of the Voting Rights Act

I. Background

A. Origins and General Scope

The Fifteenth Amendment to the U.S. Constitution, adopted in 1870, guarantees that a citizen's right to vote may not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. Following the ratification of the Fifteenth Amendment, some state and local governments found ways to circumvent the intent of the constitutional provision. Almost a century after the amendment's ratification, Congress enacted the Voting Rights Act of 1965 to enforce the rights guaranteed by the Fifteenth Amendment.[1] The Voting Rights Act provided new remedies against the most common violations of the constitutional provision.

In response to the common practice by some jurisdictions of passing new discriminatory voting laws as soon as the old ones had been struck down, Congress adopted the extraordinary remedy of requiring certain jurisdictions to obtain prior federal approval of all voting changes. This requirement, contained in Section 5 of the act,[2] was the most controversial provision of the Voting Rights Act. Many believed that this novel remedial measure encroached on the rights reserved to the states under the federal constitution. In 1966, in *South Carolina v. Katzenbach*, the U.S. Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act as a permissible enforcement measure within the authority expressly granted to Congress by Section 2 of the Fifteenth Amendment to enforce the amendment "by appropriate legislation."[3]

Section 5 applies only to certain jurisdictions, including the State of Texas.[4] A covered jurisdiction and its political subdivisions are required to obtain approval of all voting changes from either the U.S. District Court for the District of Columbia or the U.S. Department of Justice.[5] This required federal approval is commonly referred to as "preclearance." A voting change will be precleared if the jurisdiction proves that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.[6] The burden of proof is on the jurisdiction seeking preclearance of its voting change. What makes Section 5 an extraordinary remedy is its application to only certain jurisdictions and its placement of the burden of seeking preclearance as well as the burden of proof on those jurisdictions.

Although the Voting Rights Act itself provides limited guidance concerning the coverage of Section 5 and the proper procedures for submitting and reviewing voting changes, judicial interpretation has answered many of the major issues involved in preclearance.

B. 2006 Reauthorization and Future of Section 5

In 2006, with Section 5 scheduled to expire in 2007, Congress enacted legislation to extend Section 5 coverage for another 25 years.[7] For the first time since its original enactment, the text of Section 5 itself was amended to include both a cosmetic wording change in the existing language and several new substantive subsections enacted in reaction to two U.S. Supreme Court

holdings in regard to Section 5.[8] In its committee report accompanying the 2006 reauthorization of Section 5, the House Judiciary Committee sought to build a legislative record to explain why the temporary remedy of Section 5 needed to be extended for another 25 years.[9] Legal scholars questioned whether a simple reauthorization of Section 5 for another 25 years, without an updating of the coverage provisions, would survive constitutional scrutiny by the courts.[10] However, the reauthorization was overwhelmingly passed by Congress without any change to the provisions that allow a jurisdiction to remove itself from coverage ("bailout") or the original coverage formulas that use voter turnout in elections in the 1960s and 1970s to determine which jurisdictions are covered by preclearance.

Renewed judicial scrutiny predictably befell the reauthorized Section 5. A utility district in Travis County, Texas, sought review by a three-judge panel of the United States District Court for the District Court of Columbia of whether the district could bail out from coverage under Section 5 and alternatively whether the extension of Section 5 for 25 years was constitutional. The three-judge court determined that the district was not eligible under the bailout provisions and, in an extensive opinion, that the reauthorization of Section 5 was constitutional.[11] When the U.S. Supreme Court agreed to hear the case, many believed that the constitutional challenge to Section 5 would finally be resolved by a supreme court that was considered more conservative and attentive to states' rights than at the time of *South Carolina v. Katzenbach*. But instead, the supreme court applied the doctrine of constitutional avoidance to avoid ruling on the constitutional issue on Section 5 since it found the district was eligible to seek removal from coverage of Section 5 under the bailout provisions.[12] The court's ruling appears to have merely delayed the inevitable challenge to the constitutionality of Section 5. However, for covered jurisdictions such as Texas, the time required for the supreme court to accept and dispose of another challenge to the constitutionality of Section 5 is probably too long to affect 2011 redistricting and current preclearance requirements.[13]

II. Coverage of Section 5

There are two primary issues involved in the coverage of Section 5: (1) which jurisdictions are covered; and (2) what types of changes in law must be precleared.

A. Covered Jurisdictions; Applicability to Texas

Section 4 of the Voting Rights Act[14] contains the formulas for determining which jurisdictions are covered by Section 5 based on certain former discriminatory voting practices and historical voting patterns. Although Texas was not a covered jurisdiction when the Voting Rights Act was enacted in 1965, it became a covered jurisdiction in 1975 when Congress expanded the scope of the act beyond race and color to include language minorities. When the justice department reviewed Texas under the language minority coverage provisions of Section 4, the department determined the state was subject to Section 5. The state challenged that determination, but in *Briscoe v. Bell*, the supreme court refused to review the department's determination, holding that Congress had clearly intended to exempt such determinations from judicial review.[15] The court noted that a jurisdiction may bail out of Section 5 by meeting certain requirements listed in Section 4,[16] and in *Northwest Austin Municipal Utility District No. 1 v. Holder*, the court clarified that all political subdivisions, not just those that register voters, are eligible to file a bailout suit.[17] Because the bailout provisions are so stringent, the state as a whole will likely remain a covered jurisdiction on account of any Section 5 objections involving local governments in the state until Section 5 expires in 2031, unless Congress modifies the statute.[18]

B. Voting Changes Subject to Preclearance

Any voting change adopted by a covered jurisdiction must be precleared before implementation. Although the text of Section 5 seems to apply only to changes in state law related to the qualification of voters or the manner in which elections are conducted, the supreme court has broadly interpreted Section 5 to require preclearance of any changes in state law that have the potential for diluting the value of the vote of protected minority groups. The court has identified four traditional categories of covered voting changes: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office.[19] The court has specifically held that statewide redistricting plans are included in the types of changes in state law that must be precleared.[20] The court has specifically rejected the justice department's interpretation that Section 5 covered modifications of an elected official's decision-making power.[21] The court reasoned that if such actions were considered a voting change, the types of actions requiring preclearance would be dramatically increased beyond the four traditional categories. The court left open the question of whether those four categories exhaust the statute's coverage.[22]

III. Preclearance Procedures

Before implementing a voting change, a covered jurisdiction must either (1) obtain a declaratory judgment from the U.S. District Court for the District of Columbia that the voting change does not violate the substantive standards under Section 5; or (2) submit the voting change to the justice department for preclearance without the department interposing an objection to the change. If a covered jurisdiction attempts to implement a voting change that has not been precleared in one of these ways, the justice department or a private party may file an enforcement suit in a local federal district court to prevent implementation of the voting change.[23] In such a suit, the local federal district court does not have jurisdiction to grant or deny preclearance of the voting change. Section 5 expressly reserves that determination for the U.S. District Court for the District of Columbia or the justice department. The only questions in an enforcement suit before a local court are:

(1) whether the jurisdiction is covered by Section 5;

(2) whether the disputed law makes a "voting change";

(3) whether preclearance of the voting change has been obtained; and

(4) if preclearance is required but has not been obtained, what is the appropriate remedy.[24]

The remedy usually granted in an enforcement suit is an injunction prohibiting implementation of the voting change until it has been precleared.

A. Submission to Justice Department

Because of the expense and delay involved in seeking a declaratory judgment from the U.S. District Court for the District of Columbia, jurisdictions usually seek preclearance of a voting change from the justice department.[25] A submission is made when the covered jurisdiction, in an unambiguous and recordable manner, submits a voting change to the department with a request for review under Section 5. The voting section in the civil rights division of the justice department reviews all submissions made under Section 5. The justice department has adopted

regulations governing the submission process that establish procedures for submissions and detail the department's interpretation of the duties and rights of the department and covered jurisdictions under Section 5.[26]

Person Authorized to Make Submission. Section 5 and the justice department's regulations provide that a voting change shall be submitted to the department by the chief legal officer or other appropriate official of the covered jurisdiction or by any other authorized person on behalf of the covered jurisdiction.[27] In Texas, the secretary of state, the state's chief election officer, routinely submits voting changes adopted by the state. However, Texas law does not specifically grant the authority to make those submissions to the secretary of state or to any other state officer. This lack of clarity resulted in the Texas secretary of state and the Texas attorney general making conflicting submissions in 1981 of the state's senate and house redistricting plans.[28]

Date and Contents of Submission. The justice department's regulations provide that a voting change should be submitted as soon as possible after final enactment.[29] Although this standard grants a covered jurisdiction some discretion in making a submission, the state's discretion is limited by its need to obtain preclearance of its new redistricting plans before the next election cycle.

The justice department's regulations require that each submission contain certain information. In addition to basic information required for all submissions, for a redistricting submission the covered jurisdiction must submit:

(1) maps showing both the new and preexisting district boundaries;

(2) demographic information showing the total population and voting-age population by race and language group; and

(3) a statement of the anticipated effect of the redistricting plan on protected minority groups.[30]

In addition to the required information, the regulations strongly suggest that the initial submission include certain supplemental information. Failure to include this supplemental information may result in an unnecessary delay in obtaining preclearance if the justice department determines that the information is needed and requests it at a later date. The supplemental information includes:

(1) the number of registered voters by race and language group in each voting precinct;

(2) detailed maps showing the location of voting precincts, protected minority groups, and any geographical features that influenced the selection of boundaries;

(3) election returns and voter registration data relevant to the voting strength of protected minority groups;

(4) evidence of public notice of and participation by the public in the redistricting process, including the extent of participation by protected minority groups; and

(5) names of protected minority group members who are familiar with the new redistricting plan.[31]

The regulations also provide specifications for the electronic submission of geographic, demographic, and election data. The 2011 amendments to the regulations substantially revised these specifications.[32]

Justice Department Review. The justice department's review of a voting change under Section 5 is extremely informal. Unlike a court proceeding, there is no prohibition on private

communications with the department and no formal hearing is held, record developed, or opinion issued containing formal findings of fact and conclusions of law. The justice department is interested in receiving relevant information from the general public.[33] The information is not limited by the rules of evidence and is generally obtained through private communications, such as letters or telephone calls. The justice department's determination under Section 5 is based on a review of the material submitted by the covered jurisdiction, information provided by the general public, including organizations that work on behalf of affected minority groups and individual members of those minority groups, and the results of any investigation conducted by the department. The responsibility and authority for determinations under Section 5 are formally delegated to the assistant attorney general in charge of the civil rights division and in part to the chief of the voting section of the division.[34]

Expedited consideration of a submission is possible under certain circumstances.[35] Section 5 requires the justice department to complete its review within 60 days of receipt of a submission.[36] However, if the justice department requests in writing additional information from the covered jurisdiction, which it often does, the department's regulations provide that the period allowed for review is extended. Under the regulations, on receipt of the requested additional information from any source, or a statement from the submitting jurisdiction that the requested information is unavailable, the justice department has a new 60 days to complete its review of the submission. The justice department can request further information within the new 60-day period, but such a request does not suspend the running of the 60-day period.[37] The 2011 amendments to the regulations provide that, in most cases, an oral request for more information does not restart the 60-day period.[38] The justice department's failure to make a written response to a proper submission within the period allowed for review, including any extensions, constitutes preclearance of the voting change.[39]

If the justice department determines that a submitted voting change does not violate the substantive standards applicable under Section 5, the department will preclear the change by notifying the covered jurisdiction of its decision not to interpose an objection. The decision of the justice department to grant preclearance is final at the expiration of the review period and is not subject to judicial review.[40] However, preclearance by the justice department does not constitute certification that a voting change satisfies any other requirement of the law beyond that of Section 5.[41] Private parties may, notwithstanding preclearance, challenge a voting change under another law, including the federal constitution or Section 2 of the Voting Rights Act.[42] The justice department itself may initiate a suit under Section 2 challenging a voting change regardless of whether the department precleared the change under Section 5.[43]

The justice department will interpose an objection if the department determines that a submitted voting change violates the substantive standards applicable under Section 5 or is unable to determine that the change does not violate those standards because evidence as to the purpose or effect of the change is conflicting.[44] The department must notify the covered jurisdiction of its decision to interpose an objection and the reasons for the decision.[45] The covered jurisdiction at any time may request in writing that the justice department reconsider its objection.[46] Section 5 does not provide for direct judicial review of the decision of the justice department to interpose an objection or to continue an objection following receipt of a request for reconsideration. However, the covered jurisdiction may effectively reverse the decision of the justice department by subsequently obtaining preclearance of the voting change from the U.S. District Court for the District of Columbia.

B. Suit for Judicial Preclearance

The other method of obtaining preclearance of a voting change is for the covered jurisdiction to file a suit for a declaratory judgment in the U.S. District Court for the District of Columbia. A covered jurisdiction may file a preclearance suit without regard to whether a submission of the voting change has been made to the justice department[47] or whether an objection to the voting change has been interposed or continued by the justice department.[48]

Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges." A three-judge district court, usually consisting of two district court judges and one circuit judge of the federal court of appeals, must hear and determine all preclearance suits filed in the U.S. District Court for the District of Columbia. The defendant in such a suit is the United States, represented by the justice department, but members of affected groups may be allowed to intervene in the proceedings.[49] Although a decision of the justice department to interpose or continue an objection is admissible, it is persuasive to the court only to the extent that it is supported by law and fact. On the issuance of a final judgment by the three-judge court, either party may appeal the decision to grant or deny preclearance directly to the U.S. Supreme Court.[50] Although the supreme court must review the decision of the three-judge court, the court's decision in preclearance appeals is often issued in summary fashion, without a written opinion.

A covered jurisdiction's decision to seek judicial preclearance of a redistricting plan, either initially or after the plan has been denied preclearance by the justice department, may be influenced by several factors, including: (1) the jurisdiction's judgment of the substantive standards applied by the federal courts and those applied by the justice department; (2) the cost and inconvenience of litigating a declaratory judgment suit in Washington, D.C.; (3) the effect on the redistricting process of the delay inherent in such a suit; and (4) the possibility that intervenors may attempt to appeal a judgment granting preclearance.

IV. Substantive Standards for Preclearance Under Section 5

To obtain preclearance under Section 5, a covered jurisdiction must demonstrate that the voting change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race or color, or membership in a language minority group.[51] Congress left the development of specific substantive standards to those who enforce Section 5: the federal courts and the justice department. The courts found that preclearance was subject to a two-prong standard. For nearly three and a half decades, the substantive standards for preclearance under Section 5 remained unsettled. Recently, the supreme court has defined with some particularity both the effect standard and the purpose standard of Section 5, though these definitions were modified by Congress in the 2006 reauthorization of the Voting Rights Act. Before the 2006 reauthorization, the effect standard generally was the determinative test for preclearance. Only in rare cases was there specific evidence of a discriminatory purpose by the state or political subdivision involved, so the preclearance analysis was usually focused on the potential effects of the voting change, regardless of its purpose. Changes made to Section 5 in the 2006 reauthorization could allow for increased attention to the purpose prong.

A. Effect Standard: No Retrogression

In 1976 the U.S. Supreme Court, in *Beer v. United States*,[52] first considered the proper substantive standard for determining whether a redistricting plan has the discriminatory effect

proscribed by Section 5. The case concerned the redistricting of the New Orleans City Council. At the time of the suit, the black population constituted approximately 45 percent of the city and 35 percent of the city's registered voters. Two of seven city council members were elected at large, and the other five were elected from single-member districts that had last been redrawn in 1961. In one district under the 1961 plan, the black population constituted a majority, but only about half of the registered voters. In the other four districts, white voters clearly outnumbered black voters. No black candidate had been elected under the 1961 plan. The district court determined that elections in New Orleans had been marked by bloc voting along racial lines.

Based on the 1970 census, the city council redrew the five single-member districts. Under the new redistricting plan, one district had a black population majority and a black voter majority, another district had a black population majority but a white voter majority, and the other three districts had white population and voter majorities. When the city submitted the redistricting plan to the justice department for preclearance, the department interposed an objection. The justice department noted that the predominantly black neighborhoods in the city were located generally in an east-to-west progression and that the city's use of north-to-south districts had the effect of diluting the maximum potential impact of black voters.

The U.S. District Court for the District of Columbia also denied the city's request for preclearance, and the city appealed to the U.S. Supreme Court. The supreme court determined that "the purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[53] The court stated that, unless it so discriminates on the basis of race or color as to violate the federal constitution, a redistricting plan that enhances the voting strength of a protected minority group does not have the "effect" of diluting or abridging the right to vote within the meaning of Section 5. Under the preexisting plan, none of the districts had a clear black voter majority and no black candidate had been elected to the city council. Under the new redistricting plan, in contrast, the black population constituted a majority in two of the five districts and a clear majority of the registered voters in one district. Noting that at least one and possibly two black candidates would likely be elected to the city council under the new plan, the court determined that the plan enhanced black voting strength. Because the new plan enhanced black voting strength, the court held that the plan did not have the discriminatory effect proscribed by Section 5.

In *City of Lockhart v. United States*,[54] the supreme court reaffirmed the retrogression standard. The case concerned a change in the method by which members were elected to the governing body of Lockhart, Texas. The city was previously governed by a commission consisting of a mayor and two commissioners, each elected at large by place for two-year terms. In 1973, the city adopted a home-rule charter that provided for a city council consisting of a mayor and four council members serving staggered two-year terms. The council members, like the commissioners, were required to run at large by place. The justice department interposed an objection to the new election method because the at-large elections combined with the place system and staggered terms would undermine opportunities for minority groups to elect preferred candidates.

The U.S. District Court for the District of Columbia, noting an established pattern of racial bloc voting in Lockhart, also denied the city's request for preclearance, and the city appealed to the supreme court. The supreme court reaffirmed the retrogression standard adopted in *Beer*, holding that the new election scheme did not have the discriminatory effect proscribed by Section

5 because the Hispanic voters were no worse off than they were under the old scheme. The court stated that although there may have been no improvement in the voting strength of the city's Hispanic residents, there had been no retrogression either.

In 1982, Congress amended and reenacted portions of the Voting Rights Act. Section 2 of the act, which prohibits discriminatory voting practices by any state or local government, was substantially strengthened, and Section 5, which was scheduled to expire, was extended for 25 more years. Many argue that Congress, by strengthening Section 2, also intended to strengthen the effect standard under Section 5. Although the issue was raised in *City of Lockhart*, which was decided shortly after the 1982 amendments, the supreme court's majority opinion declined to address the issue because the district court had not considered it.[55] However, in his dissent, Justice Marshall concluded that Congress had intended that a voting change that violated the new effect standard applicable under Section 2 should be denied preclearance under Section 5, even if the voting change were not retrogressive.[56] In 1987, the justice department took this approach by adopting a rule, now repealed, that stated that a voting change that "clearly" violated the effect standard applicable under Section 2 must be denied preclearance under Section 5.[57] The justice department's now-abandoned approach essentially replaced the retrogression standard from pre-1982 case law and substantially increased the threshold required for preclearance from the department. In fact, critics of the department accused it of denying preclearance unless a state maximized the number of minority opportunity districts available.

The supreme court revisited the standards for preclearance in the 1997 case *Reno v. Bossier Parish School Board* (*Bossier I*).[58] The case concerned the redistricting of the school board in Bossier Parish, Louisiana. The school board adopted a redistricting plan that contained 12 single-member districts. The plan was identical to a redistricting plan that had been adopted for the governing body of Bossier Parish and precleared by the justice department. In both the prior plan and the new plan, none of the districts contained a black majority. In adopting the new plan, the school board rejected a plan proposed by the local NAACP chapter that would have created two districts with a majority of black voting-age residents. The school board submitted its plan to the justice department for approval.[59]

The justice department denied preclearance of the school board plan, stating that the NAACP plan demonstrated that black residents were sufficient in number and geographically compact enough to constitute a majority in two single-member districts. Given this evidence, the department found that the school board's plan violated Section 2 of the Voting Rights Act, and thus, the department denied preclearance under Section 5.[60] The school board then instituted suit in the U.S. District Court for the District of Columbia to preclear the plan. Because the school board's plan was not retrogressive to minority voting strength as compared to the existing plan, the district court granted preclearance, holding that whether the plan violated Section 2 was not relevant for preclearance under Section 5.[61]

On appeal by the justice department, the supreme court upheld the portion of the district court's opinion finding that a Section 2 inquiry is not appropriate in a determination under the effect prong of Section 5. The supreme court stated that the two sections were designed to "combat different evils" and imposed "different duties upon the States."[62] To adopt the view that preclearance must be denied whenever a covered jurisdiction's plan violates Section 2 would, the court believed, substantially increase the already heavy burden to which covered jurisdictions were subject in proving the absence of discriminatory purpose and effect and "increase further the serious federalism costs already implicated by [Section] 5."[63]

However, while the court determined that the challenged plan satisfied Section 5's effect standard because it was not retrogressive, based on the record in *Bossier I*, the court was unwilling to hold that evidence of vote dilution was irrelevant in demonstrating a discriminatory purpose under Section 5. It remanded this issue to the district court for further consideration.[64]

Bossier I further solidified the retrogression effect standard for preclearance: if a voting change either has no effect on or actually enhances the voting strength of protected minority groups, the change does not have the discriminatory effect prohibited under Section 5.

B. Purpose Standard: No Discriminatory Purpose

Section 5 of the Voting Rights Act requires a covered jurisdiction to demonstrate that a voting change "neither has the purpose nor will have the effect" of denying or abridging minority voting rights. The extent to which the purpose standard under Section 5 prohibits preclearance of any voting change adopted with a discriminatory intent has been an issue of debate and legal development for the last several decades. In *Busbee v. Smith*, a case involving the 1982 Georgia congressional plan, the U.S. District Court for the District of Columbia denied preclearance of the plan despite concluding that the plan had no retrogressive effect.[65] Instead, the court determined that the entire process by which the plan was adopted revealed a clear discriminatory purpose to dilute black voting strength. The supreme court summarily affirmed the decision in 1983. The supreme court cited *Busbee* as a potential example of a discriminatory purpose analysis in its remand of *Bossier I* to the district court.[66] Thus, it came as a bit of a surprise when the supreme court, reviewing the district court's subsequent decision after the remand in *Bossier I*, held by a 5-4 vote that Section 5 did not prohibit the preclearance of a redistricting plan enacted with a discriminatory purpose unless the purpose was to cause retrogression in minority voting strength.

After the *Bossier I* remand, the district court once again found that the Bossier Parish School Board plan was entitled to preclearance. In reviewing the lower court's new decision, the supreme court majority, in *Reno v. Bossier Parish School Board* (*Bossier II*), found it necessary only to address whether, in light of the court's long-standing interpretation of the effect prong of Section 5, the purpose inquiry may extend beyond the search for retrogressive intent.[67] Justice Scalia, writing for the court majority, found it untenable that, given the holding in *Beer*, the purpose prong could apply to a nonretrogressive discriminatory intent in adopting a voting change. In *Beer*, the court limited the effect prong to retrogressive effect. Justice Scalia noted that the language of Section 5 in effect at that time placed the purpose and effect clauses in close proximity to each other by providing that preclearance may be granted if the voting change in question "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Given the proximity of the two clauses and the *Beer* limitation of the effect clause to retrogression, Justice Scalia could not see how the purpose clause could have a broader expanse than the effect clause without overruling or modifying the *Beer* decision.[68] The majority was unwilling to do this. Thus, the search for discriminatory purpose under Section 5 was limited by *Bossier II* to one of only retrogressive intent.

The limitation of the purpose prong in *Bossier II* created sufficient controversy that Congress amended Section 5 in the 2006 reauthorization of the Voting Rights Act. A new subsection was added stating that the purpose prong includes any discriminatory purpose.[69] The house report accompanying the 2006 reauthorization of the Voting Rights Act makes clear that Congress intended the additional language to undo the effects of the *Bossier II* decision and to restore

the purpose prong to its traditional status as including any discriminatory purpose.[70] The report suggested using the factors listed in the U.S. Supreme Court case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[71] as a framework for determining whether a change submitted for preclearance was motivated by a discriminatory purpose. In adopting its new rules for the administration of the reauthorized Section 5, the U.S. Department of Justice accepted Congress's invitation and specifically included the analysis from *Arlington Heights* into its rules.[72]

Even though the changes to Section 5 were enacted in 2006, no new court cases have been decided on the purpose prong since that time. The final rules for the reauthorized Section 5 were adopted by the justice department on April 15, 2011, and no further interpretation by the department of the purpose prong has been made since that date. It is unclear whether the purpose prong will return to its traditional, pre-*Bossier II* status, or whether the addition of the *Arlington Heights* analysis will cause a more expansive use of the purpose prong in preclearance decisions.

C. Application of Substantive Standards by Justice Department

Preclearance is not a simple matter. In discussing the probative value of a jurisdiction's intent to dilute minority voting strength when determining an intent to retrogress, the court in *Bossier I* stated, "[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'"[73] In *Bossier II*, the court stated that determining retrogressive effect in vote dilution cases "is often a complex undertaking."[74] Given this complexity, one may find it helpful to review the justice department's Section 5 regulations when creating a redistricting plan. In addition to stating that "[i]n making determinations the [department] will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts,"[75] the justice department's regulations list factors that the department considers when making a substantive determination under Section 5.[76] These factors are contained in three separate regulations.

Section 51.57 of the department's Section 5 regulations states that the department will consider the following factors in reviewing all types of voting changes:

(a) the extent to which a reasonable and legitimate justification for the change exists;

(b) the extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

(d) the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change; and

(e) the factors set forth in *Arlington Heights*:

(1) whether the impact of the official action bears more heavily on one race than another;

(2) the historical background of the decision;

(3) the specific sequence of events leading up to the decision;

(4) whether there are departures from the normal procedural sequence;

(5) whether there are substantive departures from the normal factors considered; and

(6) the legislative or administrative history, including contemporaneous statements made by the decision makers.

Section 51.58(b) of the regulations states that the department will consider the following "background" factors in reviewing redistricting plans, changes in electoral schemes, and annexations:

(1) the extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction;

(2) the extent to which voting in the jurisdiction is racially polarized and election-related activities are racially segregated; and

(3) the extent to which voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

Section 51.59(a) of the regulations states that the department will, in addition to the factors listed above, consider the following in reviewing redistricting plans:

(1) the extent to which malapportioned districts deny or abridge the right to vote of minority citizens;

(2) the extent to which minority voting strength is reduced by the proposed redistricting;

(3) the extent to which minority concentrations are fragmented among different districts;

(4) the extent to which minorities are overconcentrated in one or more districts;

(5) the extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;

(6) the extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and

(7) the extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards. Section 51.59(b) provides that a jurisdiction's failure to adopt the maximum number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.

These three sections remain basically unchanged since their 1987 adoption but were slightly modified in 2011.

The justice department's comments that accompanied the 1987 revision of the Section 5 regulations state that "[a] Section 5 determination is in most instances based on the appraisal of a complex set of facts that do not readily fit a precise formula for resolving the preclearance issues. The [regulations] therefore [concentrate] principally on the process that is followed, rather than attempting to set out any firm and fast rules of mechanical application."[77] In other words, the justice department's regulations provide little specific guidance to jurisdictions attempting to comply with Section 5. In addition, the department's Section 5 objection letters provide only limited insight into the application of Section 5 because the letters often fail to cite with specificity the law and facts on which the department relies.

The department's comments that accompanied the 1987 revision of the Section 5 regulations state that "determining whether a new practice is retrogressive can be difficult and problematical. New practices can be different without being clearly better or worse for any particular group of voters; they can be better in some respects and worse in others; they can be better for some minority

voters and worse for others." The comments conclude that "any determination of retrogression must go beyond a simple numerical analysis and include the consideration of all the factors that could be relevant to an understanding of the impact of the change."[78]

V. Determining Whether Statewide Plan Has Retrogressive Effect

While it is now well established that a voting change such as a statewide redistricting plan violates the discriminatory effect standard under Section 5 only if the change is retrogressive, neither Congress, the justice department, nor the federal courts have provided definitive guidelines for establishing retrogression. The 2006 reauthorization of Section 5 did, however, clarify that the focus of retrogression should be on the ability of minority voters to elect candidates of their choice, rather than on a more general examination of minority voting strength.[79] In this chapter, a reference to minority voting strength refers to the ability of the minority group in question to elect its preferred candidates as provided by the revised language of Section 5.

In attempting to comply with Section 5, a covered jurisdiction must consider several issues in developing an analysis for determining whether a redistricting plan created by the state satisfies the retrogressive effect standard. These issues include:

(1) the appropriate geographic area to consider when analyzing a redistricting plan;

(2) whether the voting strength of each distinct minority group should be analyzed separately;

(3) how to measure minority group voting strength;

(4) the lack of a simple formula for determining retrogressive effect; and

(5) circumstances that may cause an unavoidable decrease in minority group voting strength.

A. Geographic Area

Two opinions of the U.S. District Court for the District of Columbia involving Section 5 indicate that the entire state is the appropriate geographic area for comparing minority voting strength under the current and proposed plans.[80] It is also the practice of the justice department to consider the entire state as the appropriate geographic area for comparison.[81] A statewide geographic standard has the practical effect of permitting the legislature some flexibility in balancing a decrease in minority voting strength in one part of the state with a corresponding increase in minority voting strength in another part of the state. Of course, regardless of its relevance to Section 5, a decrease in minority voting strength in one district or one part of the state might be held to violate Section 2 of the Voting Rights Act.[82] While those involved in redistricting often refer to a decrease in minority voting strength in one county, region, or district as "retrogression," it is reasonably clear that such a local decrease in minority voting strength in itself is not determinative under Section 5.

B. Separate Analysis for Each Minority Group

Generally, a preclearance analysis should be made separately with respect to each identifiable racial or language minority group in the jurisdiction. There are, however, circumstances in which a combined minority district, a district that contains significant numbers of different minority groups, can be considered a minority coalition district, a district in which two or more cohesive minority groups combine to form an effective voting majority able to elect candidates of choice

of the voters of both groups. The issue is important in Texas, which has more than one minority group present in substantial numbers. For any proposed Texas plan, the overall voting strength of black voters and Hispanic voters should be compared under the existing and proposed plans to determine whether the proposed plan can be considered retrogressive with respect to either group. To determine whether a mixed minority district constitutes an effective minority coalition district, a detailed analysis of the voting patterns of the minority groups constituting the mixed minority district would have to indicate similar voting patterns between those minority groups.[83]

C. Measuring Retrogression of Minority Group Voting Strength

Determining whether a new redistricting plan enhances, has no effect on, or decreases the ability of a protected minority group to elect its preferred candidates requires measuring the minority voting strength of the group under the new redistricting plan against the group's voting strength under the most recent legally enforceable redistricting plan, often referred to as the benchmark.[84] The voting strength of protected minority groups under the benchmark plan is analyzed district by district based on the conditions existing at the time of the submission, according to justice department regulations.[85] An accurate measurement of minority voting strength requires a thorough district-by-district analysis of current minority population, of racial bloc voting,[86] and of minority voter eligibility, registration, and election participation, since each of these factors affects the ability of minority group voters to elect their preferred candidates. The minority population and voting strength a district had when it was originally adopted and the existence of racial bloc voting at that time is not directly relevant to the retrogression analysis.[87] After all the districts in both the new and benchmark plans are analyzed, the two plans must be compared to determine whether the new plan enhances, has no effect on, or decreases minority voting strength. For example, the appropriate benchmark for preclearance of a senate plan enacted in 2011 will be determined by analyzing the new 2010 census data, along with recent and current election data, related to minority groups in each of the current 31 state senate districts. The application of this new data to the current senate plan will establish the benchmark against which any new senate plan adopted in 2011 will be compared for retrogression analysis.

D. Lack of a Simple Formula for Retrogressive Effect

Although comparing minority voting strength under current and proposed plans may appear to be simple, determining whether a new statewide redistricting plan enhances, has no effect on, or decreases minority ability to elect candidates of choice at the statewide level is complex. Most of the Section 5 cases have focused solely on comparing the number of districts with strong minority majorities and do not address more complex issues in applying the retrogression standard.

A simple method of retrogression analysis that was sometimes used in the past was to determine the number of districts contained in the new plan that have a minority population of 65 percent or more, a percentage some considered indicative of an effective minority district, and to compare that number to the number of minority representatives currently serving under the existing plan or to the number of 65-percent minority districts in the existing plan. Such a method is far too simplistic to be valuable[88] and is no longer recognized as valid. In a hearing before the Texas house and senate special interim committees on redistricting in February 2000, a member of the voting rights section of the civil rights division of the justice department cautioned "against using magic numbers, 65 percent say" in drawing effective minority districts.[89]

Before the 2006 revision of Section 5 focused retrogression analysis on the ability of minority voters to elect candidates of choice, the analysis for comparing minority voting strength under the new and benchmark plans sometimes took into account the number of "effective" minority districts (in which minority voters have the opportunity to elect representatives of their choice) and other districts with enough minority voting strength to influence the outcome of elections, often referred to as minority impact or minority influence districts. This method required that each district contained in the new and benchmark plans be categorized as either an effective minority district, a minority impact district, or a district in which minority votes have no significant effect on elections. Determining whether a plan was retrogressive under such an analysis was problematic because there was no agreement on the relative value of effective minority districts and minority impact districts. As a result, the outcome of a retrogression determination made using such a method was often dependent on the reviewer's subjective opinion of the relative value of effective minority districts and minority impact districts.[90]

Determining the number of districts in which minority voters have the opportunity to elect a candidate of their choice requires a sophisticated analysis that may "vary in various parts of the state."[91] Elected officials, who are often experts on the voting patterns in their own districts, are in a unique position to help determine what is required to preserve minority voting strength in those districts.

The consideration of minority influence districts in analyzing retrogression was the primary issue in the 2003 decision of the U.S. Supreme Court in *Georgia v. Ashcroft*.[92] In that case, the State of Georgia had submitted its 2001 senate redistricting plan to the U.S. District Court for the District of Columbia seeking a declaratory judgment for preclearance of the plan under Section 5. The district court refused to preclear the plan, citing a reduction in effective black districts in the new plan compared to the benchmark plan.[93] In a decision that immediately incited controversy, the supreme court reversed the lower court and remanded the case, stating that the district court had applied the wrong standard for measuring retrogression. In the supreme court's majority opinion, Justice O'Connor applied a "totality of the circumstances" analysis, in which a reviewing court "should not focus solely on the comparative ability of a minority group to elect a candidate of its choice."[94] The additional factors that the court should consider included whether the minority members of the legislative body supported the plan and whether any reduction in effective minority districts was offset by an increase in minority influence in other districts.

Congress reacted to the decision in *Georgia v. Ashcroft* in the 2006 reauthorization of Section 5 by adding new Subsections (b) and (d) to Section 5. Subsection (b) states in part that a voting change violates Section 5 if it has the purpose or will have the effect of diminishing the ability of minority citizens "to elect their preferred candidates of choice." Subsection (d) states that the purpose of Subsection (b) is to "protect the ability of such citizens to elect their preferred candidates of choice."[95] The house committee report on the 2006 amendments discusses at length that the intent of Subsection (d) was to reject the totality test articulated in *Georgia v. Ashcroft*, concluding that "[t]he [new] language in subsection (d) makes clear that it is the intent of Congress that the relevant analysis [for preclearance] is a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change."[96] In light of the 2006 amendments to Section 5, it is clear that the focus of a retrogression analysis of a redistricting plan should be on the effect of the plan on the ability of minority voters to elect candidates of their choice, not just to influence the outcome of elections.

E. Unavoidable Decreases in Minority Group Voting Strength

As discussed earlier, the U.S. Supreme Court held in *Beer* and *City of Lockhart* that a voting change such as a statewide redistricting plan that either enhances or has no effect on the voting strength of protected minority groups complies with the retrogressive effect standard. Under certain circumstances, however, it may be impossible to draw a valid redistricting plan without decreasing minority voting strength. The Fourteenth Amendment to the U.S. Constitution requires that election districts contain substantially equal population.[97] If minority population concentrations have become more dispersed, it may be impossible to maintain current minority voting strength when redrawing existing minority districts that require a substantial population increase.

The justice department's Section 5 regulations do not discuss this issue. However, the department's comments that accompanied the 1987 revision of those regulations state that the department does not interpret the retrogression standard to require a preclearance objection in total disregard of the legitimate justifications in support of changes that incidentally may be less favorable to protected minority groups and that, in the redistricting context, "there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though 'retrogressive,' i.e., districts where compliance with the one-person, one-vote standard necessitates the reduction of minority voting strength."[98] Therefore, a statewide redistricting plan that decreases the voting strength of protected minority groups when necessary to comply with the one-person, one-vote standard does not for that reason violate the retrogression standard. Similarly, the department has stated that preventing retrogression does not require a jurisdiction to violate *Shaw* and related cases.[99]

However, the decrease in minority voting strength must be truly unavoidable—that is, for example, there must be no alternative plan available that complies with the one-person, one-vote standard while retaining a higher level of minority voting strength.[100] In determining whether the decrease is unavoidable, the justice department has stated that the jurisdiction seeking preclearance of a retrogressive redistricting plan "bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn." If the department determines that a "reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the [d]epartment will interpose an objection."[101]

Tension between the requirements of Sections 2 and 5 of the Voting Rights Act[102] might allow states such as Texas that have more than one protected minority group present in substantial numbers to decrease the voting strength of one of those minority groups without violating the retrogression standard. In a part of the state where minority coalition districts[103] are present under the benchmark redistricting plan, drawing a district for the benefit of one minority group in order to satisfy the requirements of Section 2 might require the elimination of a coalition district and thus a decrease in the voting strength of another minority group. However, as with the equal population exception discussed above, the decrease in the voting strength of the other minority group must be truly unavoidable.

VI. Effect of Section 5 on the Texas Redistricting Process

Preclearance of a redistricting plan for some jurisdictions has been an onerous and uncertain process requiring multiple submissions of different plans before one was finally precleared. It is hard to predict the exact effect the 2006 amendments to the Voting Rights Act will have on preclearance. A state will need to consider both the new discriminatory effect and the new discriminatory purpose prongs when drawing maps.

The state must choose whether to initially seek preclearance of a redistricting plan from the justice department, from the U.S. District Court for the District of Columbia, or from both simultaneously. During the 1990s, Texas took the relatively unusual approach of seeking preclearance of its legislative redistricting plans from the justice department and filing a Section 5 suit with the U.S. District Court for the District of Columbia while the justice department was considering the plans. Several factors supported this approach for Texas. The amount of time between the submission of a legislative plan for preclearance and the beginning of the next election cycle is likely to be less than six months. Generally, this time crunch will not allow for submission first to the justice department and then, following any denial of preclearance by the department, the pursuit of a preclearance suit in the U.S. District Court for the District of Columbia. In addition, the efforts involved in preparing a preclearance submission and in filing for a Section 5 declaratory judgment suit are similar. For example, if a state uses the same information and analysis submitted to the justice department in a simultaneous preclearance case before the U.S. District Court for the District of Columbia, the state may substantially reduce the cost and delay associated with a full trial.[104] Moreover, the state may decide that seeking preclearance from both the department and the court increases the possibility that the state will receive favorable treatment of its plans by one or the other of those entities.

However, seeking preclearance simultaneously from both the justice department and the U.S. District Court for the District of Columbia may cause controversy. Since the justice department has traditionally been viewed as an advocate for the protection of minority voting rights, seeking preclearance directly from the district court before receiving a ruling from the justice department may be viewed with suspicion by some minority group advocates.

If the justice department interposes an objection to a redistricting plan, the state might request the justice department to reconsider its objection or seek preclearance from the U.S. District Court for the District of Columbia. If the state is unable to obtain preclearance of a new redistricting plan before the beginning of the 2012 election cycle, the state may not hold elections under the unprecleared plan,[105] and the 2012 elections would be held under a court-ordered redistricting plan. Even if the state obtains timely preclearance of its new redistricting plans, Section 5 preclearance does not bar a subsequent challenge to the new plans under other law, such as the federal constitution or Section 2 of the Voting Rights Act.

Notes, Chapter 4

[1] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. Sec. 1973 et seq.).

[2] 42 U.S.C. Sec. 1973c.

[3] 383 U.S. 301.

[4] Eight other states are fully covered: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. However, political subdivisions in both Virginia and Georgia have been excluded from the act under the "bailout" provisions of Section 4. Portions of seven other states are also covered: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

[5] Section 5 literally refers to the U.S. attorney general, the federal officer in charge of the justice department. However, this chapter follows the common practice of referring to the justice department rather than the attorney general as the federal agency responsible for administering and enforcing Section 5.

[6] The Voting Rights Act defines "language minority group" as persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. 42 U.S.C. Sec. 1973l(c)(3).

[7] Pub. L. No. 109-246, 120 Stat. 577. The date the extension of Section 5 coverage now expires is "at the end of the twenty-five year period following the effective date of the amendments made" by the 2006 reauthorization act. 42 U.S.C. Sec. 1973b(a)(8). The reauthorization act was approved and became effective on July 27, 2006 (120 Stat. 577), meaning that Section 5 now lasts until July 27, 2031.

[8] In the now designated Subsection (a) of 42 U.S.C. Sec. 1973c, the phrase "does not have the purpose and will not have the effect" was replaced by "neither has the purpose nor will have the effect," Subsections (b) and (d) were added to 42 U.S.C. Sec. 1973c to overturn portions of the supreme court's ruling in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and Subsection (c) was added to overturn the court's ruling in *Reno v. Bossier Parish Sch. Bd. II*, 528 U.S. 320 (2000).

[9] H.R. Rep. No. 109-478 (2006). The report found that despite significant progress in minority voting rights in the first 40 years of Section 5's existence and Section 5 effectiveness in protecting these rights during that period, disparities in voting rights between whites and minorities still existed in the covered jurisdictions to warrant another extension.

[10] *See* testimony of Profs. Samuel Issacharoff and Richard Hasen before the Senate Judiciary Committee, May 9, 2006, as archived on Election Law Blog at http://electionlawblog.org/archives/issach-testimony.pdf and http://electionlawblog.org/archives/hasen-testimony-final.pdf.

[11] *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221 (D.D.C. 2008).

[12] *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, --- U.S. ----, 129 S. Ct. 2504 (2009).

[13] The U.S. District Court for the District of Columbia dismissed a suit based on standing to a challenge to Section 5 brought by citizens of Kinston, North Carolina, seeking to implement a voting change that was passed by citizen initiative and denied preclearance by the department of justice. *See LaRoque v. Holder*, Civ. Action No. 10-0561 (D.D.C. December 20, 2010). The dismissal was overturned by the United States Court of Appeals for the District of Columbia Circuit on July 8, 2011, and remanded to the trial court for further consideration. Another challenge to the constitutionality of Section 5, brought by Shelby County, Alabama, is currently pending before the same court. *Shelby Cnty., Ala. v. Holder*, Civ. Action No. 10-0651 (D.D.C.). Since both cases involve a single federal judge, appeals must go to the District of Columbia Circuit Court before reaching the U.S. Supreme Court.

[14] 42 U.S.C. Sec. 1973b.

[15] 432 U.S. 404 (1977). If the supreme court had reached the merits of the lawsuit, it would have likely held that Texas was a covered jurisdiction under Section 5. The legislative history of the 1975 reenactment of Section 5 indicates that Congress intended to bring Texas under the provision.

[16] 42 U.S.C. Sec. 1973b(a). When reenacting Section 5 in 1982, Congress substantially modified the bailout standard.

[17] 129 S. Ct. at 2513-2516.

[18] Under 42 U.S.C. Sec. 1973b(a)(1)(E), a jurisdiction is not eligible for bailout if the department of justice has objected to any of the changes made by the state or any governmental unit of the state in the previous 10 years.

[19] *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 502-503 (1992); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

[20] *Georgia v. United States*, 411 U.S. 526, 531-535 (1973). *See also McDaniel v. Sanchez*, 452 U.S. 130, 148-152 (1981), in which the supreme court held that a redistricting plan ordered by a federal court must be precleared to the extent that the plan implements a legislative proposal or otherwise reflects the policy choices of the covered jurisdiction; *Hathorn v. Lavorn*, 457 U.S. 255, 265 n.16 (1982), which indicates that a redistricting plan ordered by a state court would probably have to be precleared.

[21] *Presley*, 502 U.S. at 506.

[22] *Id*. at 502.

[23] *Allen*, 393 U.S. at 557-560.

[24] *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984).

[25] Although there were roughly 435,000 voting changes in jurisdictions subject to preclearance from 1965 through 2005, there were only 68 filed preclearance lawsuits. *Voting Rights Act: Section 5-Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 13 (2005) (statement of Mark A. Posner).

[26] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. Part 51 (2011). Although Section 5 does not expressly grant the justice department authority to issue regulations, the supreme court has held that the department may issue regulations governing the submission process. The regulations are valid if they are reasonable and do not conflict with the Voting Rights Act. *Georgia*, 411 U.S. at 536.

[27] 28 C.F.R. Sec. 51.23(a) (2011).

[28] The justice department accepted the secretary of state's submission as the official state submission. That submission admitted that portions of both the senate and house plans violated the substantive standards applicable under Section 5. Objections were subsequently interposed to both plans. However, the justice department has orally indicated that such an admission does not prevent the department from granting preclearance on the basis of information received from other sources.

[29] 28 C.F.R. Sec. 51.21 (2011).

[30] 28 C.F.R. Secs. 51.27 and 51.28 (2011).

[31] 28 C.F.R. Secs. 51.27(r) and 51.28 (2011).

[32] Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239, 21,244-21,246 (April 15, 2011).

[33] 28 C.F.R. Sec. 51.29 (2011).

[34] 28 C.F.R. Sec. 51.3 (2011).

[35] 28 C.F.R. Sec. 51.34 (2011).

[36] 42 U.S.C. Sec. 1973c.

[37] 28 C.F.R. Sec. 51.37(a) (2011). The supreme court specifically approved the part of Section 51.37 that extends the review period when the department requests additional information. *Georgia*, 411 U.S. at 539-541. The regulation was approved despite the fact that the text of Section 5 provides no exception to the statutory requirement that the justice department must make a substantive determination within 60 days of the date of submission.

[38] 28 C.F.R. Sec. 51.37(b) (2011).

[39] 28 C.F.R. Sec. 51.42 (2011).

[40] *Morris v. Gressette*, 432 U.S. 491, 504-505 (1977); 28 C.F.R. Sec. 51.49 (2011).

[41] 28 C.F.R. Sec. 51.49 (2011).

[42] *E.g.*, *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1261-1262 (N.D. Miss. 1987), *aff'd*, *Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

[43] 42 U.S.C. Sec. 1973j(d); *United States v. E. Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 59 n.9 (5th Cir. 1979); 66 Fed. Reg. 5412 (Jan. 18, 2001).

[44] *See* 28 C.F.R. Sec. 51.52(c) (2011).

[45] 28 C.F.R. Sec. 51.44(a) (2011).

[46] 28 C.F.R. Sec. 51.45 (2011). The definition of "preclearance" provided by Section 51.2 of the regulations states that the withdrawal by the department of an objection constitutes preclearance of the voting change.

[47] *Allen*, 393 U.S. at 549.

[48] *See* 28 C.F.R. Sec. 51.11 (2011).

[49] *See, e.g.*, *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 695-698 (D.D.C. 1983), in which the district court granted a motion to intervene filed by seven black residents of the county. The group had alleged that the justice department could not adequately represent its interests because those interests might diverge from the department's conception of the public interest.

[50] 42 U.S.C. Sec. 1973c.

[51] *Id*. According to the house committee report accompanying the 2006 reauthorization of Section 5, this language was changed from the previous "does not have the purpose and will not have the effect" to make "clear that both prongs must be satisfied before a voting change may be precleared." *See* H.R. Rep. No. 109-478, at 65 n.168. Since this was also the case before the wording change, it appears that this change in wording is not substantive.

[52] 425 U.S. 130.

[53] *Id*. at 141.

[54] 460 U.S. 125 (1983).

[55] *Id*. at 133 n.9. The majority opinion noted that the issue "remains open on remand."

[56] *Id*. at 145-147.

[57] 28 C.F.R. Sec. 51.55(b)(2) (now repealed).

[58] 520 U.S. 471.

[59] *Id*. at 474-476.

[60] *Id*. at 475-476.

[61] *Id*. at 476.

[62] *Id*. at 477.

[63] *Id*. at 480.

[64] *Id*. at 486.

[65] 549 F. Supp. 494 (D.D.C. 1982), *summarily aff'd*, 459 U.S. 1166 (1983).

[66] *Bossier I*, 520 U.S. at 489.

[67] 528 U.S. at 327-328.

[68] *Id*. at 329-338.

[69] 42 U.S.C. Sec. 1973c(c).

[70] H.R. Rep. No. 109-478, at 66-68.

[71] 429 U.S. 252 (1977).

[72] *See* 28 C.F.R. Secs. 51.54(a), 51.57(e) (2011).

[73] 520 U.S. at 488 (quoting *Arlington Heights*, 429 U.S. at 266).

[74] 528 U.S. at 332.

[75] 28 C.F.R. Sec. 51.56 (2011).

[76] 28 C.F.R. Secs. 51.57-51.61 (2011).

[77] 52 Fed. Reg. 486 (Jan. 6, 1987).

[78] 52 Fed. Reg. 486, 487-488 (Jan. 6, 1987).

[79] Pub. L. No. 109-246, enacting new Section 5(d); H.R. Rep. No. 109-478.

[80] *Texas v. United States*, 802 F. Supp. 481, 486 (D.D.C. 1992); *Mississippi v. United States*, 490 F. Supp. 569, 575-577 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980); *see also Seamon v. Upham*, 536 F. Supp. 931, 948 (E.D. Tex. 1982), a non-Section 5 case, in which the district court "acknowledges the point of view that an apportionment plan must be evaluated [under Section 5] on a statewide basis and focus should not be isolated on individual areas of the state that may be less favorable to a minority."

[81] Letter from Isabelle Katz Pinzler, acting assistant attorney general, civil rights division, U.S. Department of Justice, to John W. Drummond, president pro tempore, South Carolina Senate (Apr. 1, 1997); Letter from Wm. Bradford Reynolds, assistant attorney general, civil rights division, U.S. Department of Justice, to Charles Graddick, attorney general, State of Alabama (May 6, 1982). *See also* 66 Fed. Reg. 5413 (Jan. 18, 2001).

[82] *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

[83] *See Texas* at 486; Letter from Bill Lann Lee, acting assistant attorney general, civil rights division, U.S. Department of Justice, to Barbara E. Roberts, city attorney, City of Galveston, State of Texas (Dec. 14, 1998).

[84] *Abrams v. Johnson*, 521 U.S. 74, 97 (1997); 28 C.F.R. Sec. 51.54(c) (2011).

[85] 28 C.F.R. Sec. 51.54(c)(2) (2011).

[86] The justice department's comments that accompanied the 1987 revision of the Section 5 regulations emphasize the importance of bloc voting. The comments state that "[t]he extent to which race remains relevant is an important factor in the Section 5 review of voting changes involving representation. An acceptable redistricting plan for a city in which a large portion of the white electorate regularly votes for minority candidates (or other candidates favored by the bulk of the minority electorate) could be quite different from an acceptable plan in a city in which such candidates, no matter how well qualified, never receive the votes of more than a small handful of the white electorate." 52 Fed. Reg. 486, 488 (Jan. 6, 1987).

[87] While the majority opinion in *Georgia v. Ashcroft*, 539 U.S. 461, 487-488 (2003), included the original voting strength of the benchmark plan at the time of its adoption, Congress appears to have largely rejected that factor as irrelevant to the *current* ability of a minority group to elect its preferred candidates. H.R. Rep. No. 109-478, at 94.

[88] For example, the analyses used under this method to determine minority voting strength under the new and existing plans are often inaccurate. First, the method assumes that a district is an effective minority district if its population is 65 percent or more minority. However, in a district in which minority voter eligibility, registration, and participation are extremely low, a 65 percent minority population would likely be insufficient to allow the minority group a reasonable opportunity to elect a representative of its choice. In addition, the method incorrectly assumes that every district with a minority population of less than 65 percent denies the minority group a reasonable opportunity to elect a representative of its choice. Second, a method that equates minority voting strength under the existing plan with the number of minority representatives currently serving can be misleading if a district controlled by a minority group has elected a nonminority representative or, conversely, if a district controlled by nonminority voters has elected a minority representative. Another weakness of this method is its failure to consider the effect of the new plan on minority impact districts contained in the existing plan.

[89] *Redistricting: Hearing Before the H. and the S. Special Interim Comms. on Redistricting*, 76th Leg., Tape 2, p. 15 (Feb. 16, 2000) (statement of Gaye Tenoso) [hereinafter Tenoso, *Austin Redistricting Hearing*]. In *Bartlett v. Strickland*, --- U.S. ----, 129 S. Ct. 1231, 1246 (2009), the supreme court said the minority population in a potential election district must be greater than 50 percent to require the creation of a majority-minority district under Section 2 of the Voting Rights Act, but that number may not be enough to constitute an effective minority district for purposes of Section 5.

[90] *See Beer*, 425 U.S. at 153 n.12 (Marshall, J., dissenting).

[91] Tenoso, *Austin Redistricting Hearing*, Tape 2, p. 15.

[92] 539 U.S. 461.

[93] *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002).

[94] 539 U.S. at 480.

[95] 42 U.S.C. Sec. 1973c(d).

[96] H.R. Rep. No. 109-478, at 71.

[97] *See Mississippi v. United States*, 490 F. Supp. at 582, in which the district court acknowledged that senate and house redistricting plans drawn with higher total population deviations than the plans submitted for preclearance, which had total deviations of 11.4 percent and 10.8 percent, would probably enable a larger number of minority representatives to be elected. However, the court held that "departure from equal protection one-person-one-vote strictures cannot be required or justified simply as an affirmative act to maximize [minority] voting strength."

[98] 52 Fed. Reg. 486, 488 (Jan. 6, 1987).

[99] 66 Fed. Reg. 5413 (Jan. 18, 2001).

[100] *See Wilkes County, Ga. v. United States*, 450 F. Supp. 1171, 1177-1178 (D.D.C.), *aff'd*, 439 U.S. 999 (1978).

[101] 66 Fed. Reg. 5413 (Jan. 18, 2001).

[102] *See* Chapter 3 of this publication for a discussion of the effect standard applicable under Section 2.

[103] A minority coalition district is a district in which two or more cohesive minority groups combine to form an effective voting majority.

[104] *See State of N.Y. v. United States*, 874 F. Supp. 394, 402 (D.D.C. 1994), in which the district court granted preclearance by summary judgment based solely on the analyses submitted by the state and other parties. Of course, it may not be appropriate to dispose of all Section 5 cases by summary judgment. *See State of Tex. v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994), and *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995), *cert. dism'd*, 516 U.S. 1155 (1996).

[105] Opening the candidacy qualification period constitutes "implementation" of a redistricting plan. *South Carolina v. United States*, 585 F. Supp. 418, 422 (D.D.C.), *cert. dism'd*, 469 U.S. 875 (1984).

Chapter 5
Constitutional Prohibitions Against Racial Discrimination and Racial Gerrymandering

I. Introduction

The three amendments to the federal constitution ratified in the aftermath of the Civil War fundamentally altered the relationship between the states and the federal government and that between the state and the individual. The Thirteenth Amendment abolished slavery, the Fourteenth Amendment guaranteed to all persons equal protection and due process under law, and the Fifteenth Amendment prohibited the abridgment or denial of the right to vote on the basis of race or color. After the U.S. Supreme Court in 1962 decided that constitutional challenges to state redistricting plans were justiciable, members of racial and ethnic minority groups began to bring suit under the amendments, particularly under the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, alleging that redistricting plans discriminated against them. As applied by the courts in redistricting, the Equal Protection Clause and the Fifteenth Amendment are generally indistinguishable.[1] Occasionally, plaintiffs have included the Thirteenth Amendment as an additional basis for a voting rights suit.[2]

In voting rights suits and other litigation alleging racial discrimination under the Fourteenth and Fifteenth Amendments, the supreme court has stated that, if a law is racially neutral (that is, it does not expressly treat persons of one race or ethnicity differently from other persons), a plaintiff must prove that the challenged law was enacted or is being maintained as a purposeful device to further racial discrimination.[3] In many early redistricting cases, the courts were reluctant to infer racially discriminatory motives for the drawing of districts, treating with great deference the states' purported nonracial justifications for the makeup of districts that appeared to minimize or completely prevent minority electoral success.[4]

In time, the courts began to scrutinize discriminatory redistricting plans more carefully. Racial and ethnic groups were so completely locked out of the political system in many states and localities that judicial relief was inevitable. Since direct proof of discriminatory purpose is difficult to establish, many courts began to rely primarily on the harmful effects of challenged districts on minority groups, the discriminatory social and political climate in which the districts operated, and the combined effect of the districts with other racially motivated elements of the electoral system to support a finding that those districts were unconstitutional.[5] But in 1980, the supreme court in *City of Mobile, Alabama v. Bolden* firmly reminded lower federal courts that, to prevail, plaintiffs challenging a redistricting plan or other election provision under the constitution must prove a racially motivated intent to discriminate as well as discriminatory effect.[6]

Bolden posed a significant barrier to successful constitutional challenges by racial and ethnic minority group voters to redistricting plans and at-large election systems when no direct evidence of a discriminatory motive was available, which was often true for electoral systems enacted many years before. More importantly, after the 1982 amendment of Section 2 of the Voting Rights Act to allow vote dilution claims to proceed based solely on the discriminatory effects of a challenged plan, there was significantly less reliance on the constitutional provisions in minority voting rights cases.

Accordingly, there was little significant development of the application of the Fourteenth Amendment to redistricting after *Bolden* until the 1990s, when the supreme court, in a series of cases beginning with *Shaw v. Reno*,[7] held that the Equal Protection Clause could be used to challenge a district when race was the predominant factor motivating the governmental body in creating the district, even if race was considered solely to enhance minority voting opportunity. The *Shaw* cases in effect established a new cause of action in which plaintiffs need not be members of a racial or ethnic minority group or show specific harm to themselves, but could be any voters of a racially motivated district. The *Shaw* doctrine was the most significant development in redistricting law in the 1990s but quickly faded from prominence in the 2001 round of redistricting.

II. Constitutional Protection of Minority Voting Rights

A. Impact of Voting Rights Act on Constitutional Vote Dilution Claims

Until 1982, the federal constitution served as the primary basis for suits challenging discriminatory redistricting plans. However, in 1982 Congress amended Section 2 of the Voting Rights Act of 1965, which had previously contained substantially the same language as the Fifteenth Amendment prohibiting abridgment or denial of the right to vote on the basis of race or color, to create a new cause of action that dispensed with the requirement that a racially discriminatory motive be proved as required by the supreme court in *Bolden*.[8] Since its amendment in 1982, Section 2 has become the primary basis of minority voting rights litigation, moving federal constitutional claims by minority groups into the background. Other than the *Shaw* cases, discussed in Section III of this chapter, there has been little recent development in the application of the Fourteenth and Fifteenth Amendments to alleged racial discrimination in redistricting plans.[9] In minority voting rights cases in which both constitutional and Section 2 challenges have been made, federal courts often determine whether there has been a violation of Section 2 of the Voting Rights Act before considering claims that a plan is intentionally discriminatory in violation of the Fourteenth and Fifteenth Amendments.[10] Since the effects standard applied under Section 2 is more easily proved than the intent test used in constitutional claims, in most circumstances the litigation focuses on the Section 2 effects test.

However, the Fourteenth and Fifteenth Amendments are important complements to Section 2 for some minority plaintiffs. In *Garza v. County of Los Angeles*, discussed later in this chapter, a federal court of appeals held that a finding of intentional discrimination justifies stricter scrutiny of the effects of a redistricting plan on minority voting influence than the test applied in Section 2 cases.[11] *Garza* illustrates the potential importance of intentional racial discrimination claims in redistricting despite the predominance of the effects test of Section 2 of the Voting Rights Act to protect minority voting rights.

B. Proving Constitutional Violation: Invidious Purpose Plus Discriminatory Effect

The supreme court has established that a redistricting plan may be held to violate the Equal Protection Clause of the Fourteenth Amendment as racially discriminatory only if the plaintiffs demonstrate that the plan:

(1) was enacted or is being maintained for the invidious purpose of diluting the voting strength of members of a racial or ethnic group; and

(2) has an actual discriminatory effect on the voting strength of the racial or ethnic group.[12]

While the supreme court appears to have left the application of the Fifteenth Amendment to vote dilution cases open,[13] some lower courts have applied the Fifteenth Amendment to redistricting and other voting rights claims using this same basic test.[14]

Invidious Purpose. The supreme court has stated that "determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[15] Of course, it is seldom possible to prove discriminatory intent by direct evidence alone: the proponents of a redistricting plan are unlikely to confess to racial motivation on the witness stand or in depositions, and openly racist statements are unlikely to be made in public debates or committee hearings.

However, the supreme court has held that the requisite discriminatory intent may be proved by indirect evidence, either alone or in conjunction with direct evidence. An invidious discriminatory purpose may be inferred from the totality of the relevant facts. Any relevant circumstantial evidence may be used to prove discriminatory intent. In *Rogers v. Lodge*, the supreme court's last minority vote dilution case decided before the 1982 amendments to Section 2 of the Voting Rights Act, the court identified and examined the following factors to determine whether a county's at-large election system had been enacted or maintained with a discriminatory intent:

(1) the existence of racially polarized voting and the fact that few or no members of the minority group had been elected in the jurisdiction;

(2) evidence of historical discrimination, contributing to low minority voter participation, especially if that discrimination was widespread and was not eliminated voluntarily but only through litigation and civil rights legislation;

(3) unresponsiveness and insensitivity of elected officials to the needs of the minority group in matters such as appointment to public office, the provision of governmental services, and the addressing and resolving of minority complaints;

(4) the depressed socioeconomic status of the minority group, which may in part result from past and present official discrimination; and

(5) other components of the electoral system that in conjunction with the redistricting plan tend to minimize minority voting strength, such as large size of districts (which makes it harder to draw minority districts and harder for minority candidates to effectively campaign) and the use of a majority vote requirement in at-large elections (which allows the majority to control every seat).[16]

Other evidence may also be used to show that a plan was drawn with racially discriminatory intent, such as evidence that the legislative process excluded members of minority groups from effective participation in the formulation of the plan, that the challenged portion of a plan contains unexplained departures from the general standards applied throughout the plan,[17] or that the body adopting the plan ignored proposed plans that would have achieved more effective minority representation.[18]

One of the most compelling ways to prove that a plan was enacted with intent to discriminate against minority group voters is to show that the adverse effect of the plan on minority voters was or should have been known to the legislature or other body enacting the plan. Using the racial effects of a law to help establish the racial animosity of the body enacting it rests on the sensible observation that "normally the actor is presumed to have intended the natural consequences of his

deeds."[19] In *Rogers*, the court repeated its observation in a previous racial discrimination case that "'the fact, if it is true, that the law bears more heavily on one race than another'" is relevant to whether the law was intended to have that effect.[20]

Lower courts have based findings of intentional discrimination in large part on the fact that the adverse effect of a challenged law was obvious when the law was enacted. In *Garza*, the district court based its finding that the county's redistricting plan was adopted with discriminatory intent on the fact that the county board of supervisors, in attempting to preserve the incumbent commissioners, "chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation."[21]

Discriminatory Motive Need Not Be Primary or Sole Motive. Redistricting plans and other governmental actions that have a discriminatory effect on a racial or ethnic minority group have often been defended with the argument that the discriminatory effect is merely an incidental result of an otherwise legitimate and racially neutral purpose. However, the courts have clearly indicated that a plaintiff is not required to prove that racial discrimination was the sole, primary, or dominant motivation behind a law that adversely affects a minority group.[22] A court may find that a redistricting plan with a clearly foreseeable and significant adverse effect on a minority population was enacted with discriminatory intent even if that adverse effect results from the application of a neutral state redistricting policy. However, as the *Shaw* cases have demonstrated, concern for maintaining minority voting strength does not trump important legitimate state redistricting policies. A policy that is inherently important, such as the maintenance of relatively compact districts, may justify some adverse impact on potential minority voting strength. Less compelling state policies, such as protecting incumbents or achieving a partisan result, will not justify significant discriminatory impact on potential minority voting strength.

Discriminatory Effect. Some actual discriminatory effect on a racial or ethnic group must be demonstrated before a redistricting plan will be held to violate the federal constitution. An attempt to discriminate against a racial or ethnic group that has no actual effect on that group does not amount to a constitutional violation. The types of redistricting devices that have discriminatory effect have generally been classified into one of three categories:

(1) use of multimember districts in which the minority group's voting strength is submerged in a much larger group of voters;[23]

(2) fracturing of a minority voting bloc between districts; and

(3) packing of minority voters into one or more districts in excess of the level needed to give them an opportunity to elect representatives, wasting the excess number of votes.

In general, the test for proving discriminatory effect is the same as that provided for a violation of Section 2 of the Voting Rights Act. In *Rogers*, the supreme court stated that vote dilution devices do not have a discriminatory effect unless racially polarized voting occurs: "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race."[24] Other cases since *Rogers* have indicated that the three-part threshold test developed in *Thornburg v. Gingles*[25] and other Section 2 cases to establish whether a redistricting plan dilutes minority voting strength applies in proving discriminatory effect in constitutional cases as well.[26] Under that test, the minority group must show:

(1) that it could constitute a majority of the voting-age population in one or more reasonably compact districts;

(2) that it is politically cohesive; and

(3) that bloc voting by the majority is usually sufficient to defeat the candidates preferred by the minority group.[27]

C. Minority Influence Claims

The first part of the *Gingles* test has been applied to deny Section 2 relief to a minority community that is too small to constitute a voting majority in a single district. However, it is not clear that such a limitation applies to a suit under the Fourteenth and Fifteenth Amendments. While the text of Section 2 of the Voting Rights Act specifically refers to the ability of a minority group to "elect" representatives of its choice, the constitutional provisions protecting minority groups contain no such limiting language. Some courts have held that a plan having any adverse effect on minority voting rights that is enacted in whole or part with discriminatory intent may be held to violate the constitutional provisions.[28] If a cohesive and concentrated minority population that falls short of the Section 2 majority threshold can nevertheless demonstrate that a proposed district configuration would have the effect of substantially reducing or destroying its electoral influence, the legislature cannot safely ignore that evidence simply because a district with a majority of minority group voters cannot be drawn.

In *Garza*, the Ninth Circuit Court of Appeals held that failure to keep the Hispanic core of Los Angeles County intact in a single county supervisors district violated the Fourteenth Amendment and Section 2 of the Voting Rights Act because the failure was the result of intentional discrimination.[29] The Hispanic population at the time the districts were drawn was insufficient to create a majority Hispanic district, so the county's splitting of the Hispanic core would not have violated the effects test under Section 2. However, because the discriminatory effect was the result of racial motivation, the court found that the plan was invalid despite the inability of the plaintiffs to meet the majority voting-age population requirement of the Section 2 effects test.[30] The *Garza* case strongly suggests that a racial or ethnic minority group may challenge any aspect of a redistricting plan that the group feels is intended, even incidentally, to reduce or minimize its political power, including the group's ability to influence elections where a majority-minority district itself cannot be drawn.

D. Conclusion

Given the past history of officially sanctioned and officially tolerated discrimination[31] in Texas against black and Hispanic citizens, and what many consider the lingering socioeconomic effects of that discrimination, the legislature must be sensitive to the effect of its redistricting plans on black and Hispanic communities and pay special attention to how proposed districts affect not only their ability to elect candidates of their choice but also their political influence. Public hearings and other means of minority participation in the redistricting process are vital to allow the legislature to identify and address minority concerns. A finding of discriminatory motivation may result in a heightened level of judicial scrutiny of a redistricting plan. Adverse racial or ethnic impact may be found to violate the federal constitution if it results from intentional or knowing discrimination.

Any trace of discriminatory motivation by a significant participant in the redistricting process may become important evidence in an intentional discrimination case. Even a single remark made in private by a member of the legislature in a position to influence a redistricting bill could influence a court's decision on whether a plan was adopted with an invidious purpose.[32] Minority group representatives—including individuals, spokespersons for minority interest organizations, state and local officials, and members of the legislature—should be given a meaningful opportunity to participate in the redistricting process, to present testimony, submit proposals, or make comments on proposed plans.

Purported legislative policies, such as the protection of incumbents or the maintenance of communities of interest, must be applied consistently, and even then must yield if their application would substantially undermine minority voting strength. Deference shown to the desires of other communities and groups of voters must be extended to minority groups as well, and the incidental adverse effects of a plan on minority populations must be carefully examined, especially if called to the attention of the legislature during redistricting.

Use of the Fourteenth and Fifteenth Amendments by minority group voters to challenge redistricting plans has decreased sharply since the 1982 revision of Section 2 of the Voting Rights Act. However, claims under the constitutional provisions may be used to challenge racially discriminatory effects of redistricting plans, such as the dilution of minority voting influence, not covered by the effects test of Section 2.

III. Racial Gerrymandering Prohibited

A. Background

During redistricting after the 1990 census, many jurisdictions, including Texas, struggled to balance the duty to avoid violating the voting rights of minority groups covered by the Voting Rights Act and the other constraints of redistricting. In some states, several factors united to tip the balance toward aggressive creation of majority-minority districts. The strengthening of Section 2 of the Voting Rights Act in 1982 and the supreme court's application of Section 2 in *Thornburg v. Gingles* gave the states a heightened awareness of the duty to recognize and protect a concentration of minority voters. The Voting Section of the U.S. Department of Justice had recently adopted new guidelines for the preclearance of redistricting plans under Section 5 of the Voting Rights Act, which strongly suggested that a state had an affirmative duty to create a majority-minority district whenever possible if racially polarized voting existed.[33]

In addition, in many states, including Texas, the creation of single-member districts and elimination of other discriminatory practices had led to the election of a significant number of minority representatives, who were influential in the drawing of redistricting plans. For example, in 1991 the Democratic majority in the Texas House of Representatives needed the support of most of the black and Hispanic members to pass a redistricting plan without Republican support. A similar situation existed in the Texas Senate, where the votes of black and Hispanic Democratic senators were needed for Democrats to reach the two-thirds majority required by senate rules to consider and pass a redistricting plan. Finally, the power of the computers used for drawing districts combined with the census block data that included race and ethnicity made it easier than ever to identify minority voters and to draw districts while considering their racial composition.

In 1991, there was no case law establishing a clear limit to the authority of a state to intentionally promote minority voting strength. In states such as Texas, whose previous districts had frequently been challenged as violating minority voting rights and in which racially polarized voting had been prevalent, it was considered a reasonably safe course of action to vigorously enhance minority districts. In some states, including North Carolina and Georgia, initial redistricting plans drew objections from the U.S. Department of Justice, leaving the states with little apparent choice but to create additional minority districts.

In the 1990s, plaintiffs began to challenge the more extreme efforts of some states to increase or maximize minority voting strength through unusually shaped districts. In a sequence of cases, the supreme court has held that plaintiffs could challenge the constitutionality of a redistricting plan by proving that one or more districts were drawn with race as the predominant factor. Such districts are commonly referred to as being "racially gerrymandered." If a district is held to have been racially gerrymandered, a reviewing court must apply strict scrutiny to determine whether the state had a compelling governmental interest in creating the district and whether the district was narrowly tailored to achieve that interest. This test has proved difficult for a district to pass when the district is not relatively compact and does not follow traditional criteria, regardless of the motives of the state in drawing it.

B. *Shaw v. Reno*: Racial Gerrymandering Claim Recognized

In 1991, the North Carolina Legislature enacted a congressional plan with one majority black district. The U.S. Department of Justice objected to the plan when submitted for preclearance under Section 5 of the Voting Rights Act, and the state legislature responded by enacting a new plan with two majority black districts, which the department claimed was required to avoid a violation of Section 5. The new districts with black majorities were unusually shaped: they were elongated and meandering, with small protrusions and bottlenecks, winding their way for many miles and carving out portions of numerous counties and cities to connect separate concentrations of black voters. Several residents of one of the black majority districts and of an adjacent district brought suit in federal court alleging that the legislature had violated the Equal Protection Clause by purposefully creating black districts without regard to other legitimate considerations. Relying on prior racial discrimination cases, the district court dismissed the suit, holding that white voters' rights are violated only if they can show that a redistricting plan was "adopted with the purpose and effect of discriminating against white voters."[34]

On appeal under the name *Shaw v. Reno* (*Shaw I*), the supreme court by a 5-4 vote reversed the district court. The supreme court majority held that a violation of the Equal Protection Clause could be established, even in the absence of an intent to harm white voters, if the state in drawing a minority district so relied on race and neglected other considerations that the resulting districts were "unexplainable on grounds other than race."[35] The majority reasoned that a redistricting plan drawn primarily to achieve an intended racial result is comparable to any other law enacted with a racial purpose, such as a literacy test for voters enacted with a "grandfather clause" intended to disenfranchise black voters while exempting white voters because their forebears had been eligible to vote.[36] In effect, the court determined that a state action based on race is always suspect no matter how benevolent the intent.

In *Shaw I*, applying the same analysis as in non-voting-rights cases, the court noted that a law motivated primarily by racial considerations is not automatically invalid, but is subject to

very exacting judicial scrutiny (referred to as "strict scrutiny") to ensure that it is justified to achieve an important and legitimate purpose.[37] Citing earlier cases involving laws and practices discriminating against racial minorities, such as the landmark school desegregation case *Brown v. Board of Education*, the *Shaw I* majority noted that racially motivated laws are presumed to be invalid and can be upheld only with "an extraordinary justification."[38]

The supreme court in *Shaw I* remanded the case back to the district court for appropriate action under the strict scrutiny test. Those involved in redistricting immediately realized from the majority's emphatic language that *Shaw I* was a landmark case that would change the way redistricting was conducted.

C. The Critical Issue: Was Race the Predominant Motive?

The key issue in racial gerrymandering claims under the test announced in *Shaw I* is whether race was the predominant motive behind the drawing of a district. Such a finding invokes strict scrutiny, which means almost certain invalidation of a district that is not reasonably compact. The supreme court majority in *Shaw I* provided some initial guidance on how to determine whether race was the predominant factor in a district's creation. The court indicated that the tortured, bizarre shape of a district corresponding to racial population patterns might establish racial motive even in the absence of other, more direct evidence. The court also suggested that a racial motive could be proved in "a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions."[39]

After *Shaw I*, many initially assumed that race would be found to be the predominant motive in a racial gerrymandering case only if the districts were visibly bizarre or unusual in shape. However, in the 1995 Georgia case *Miller v. Johnson*, a majority of the supreme court held that plaintiffs "may rely on evidence other than bizarreness to establish race-based districting."[40] The majority black congressional district at issue in *Miller* was significantly less unusual in shape than the district challenged in *Shaw I*. Nonetheless, the supreme court determined that the district was racially gerrymandered despite its less than bizarre shape. The court upheld the district court's determination that race was the predominant motivation for the district based on (1) the district's internal composition of disparate black population concentrations carved out of various urban counties connected by large rural areas with little population; and (2) the legislative record, which indicated that the district was constructed almost entirely to meet repeated justice department objections under Section 5 of the Voting Rights Act to previous plans with fewer black majority districts.[41] The court again noted that traditional redistricting principles were subordinated to racial objectives.

A year later in the Texas case *Bush v. Vera*, the supreme court further articulated factors that may contribute to a finding that race was the predominant factor in drawing a majority-minority district.[42] The court in *Bush* examined a complex array of motives offered by the state or alleged by the plaintiffs. The court noted that the Texas Legislature had drawn the challenged congressional districts in part to preserve communities of interest among minority voters, and conceded the validity of the state's argument that the bizarre shapes of the challenged black and Hispanic districts were largely the result of an effort to avoid removing minority voters from the districts of Democratic incumbents or to achieve other partisan or personal political goals, such as adding affluent minority neighborhoods to minority districts. Even so, the court found that the

legislature's effort had been dominated by the goal of achieving specific, predetermined black and Hispanic district population percentages. The court noted that the unusual "corridors," "tentacles," "hooks," "fingers," and other features of the challenged districts served to gather dispersed minority concentrations into those districts or to divide Hispanic voters from black voters into districts to achieve specific minority population goals without disturbing other preexisting districts. This effort, the court noted, was facilitated by use of the detailed bloc-level racial data available on the state's redistricting computers and resulted in the splitting of voting precincts, counties, and cities on racial lines. The court held that, even to the extent the motives for this effort were to aid Democratic incumbents and individual office-seekers, it was nonetheless accomplished using racial data as a "proxy" to find Democratic voters and thus was racially motivated.[43] The court also rejected the credibility of the state's argument that legislators had considered other nonracial factors, such as common transportation systems and land use maps, without proof that they had actually considered those factors when the districts were drawn.[44]

In *Bush*, as in *Miller*, the court referred to the legislative record, including the materials submitted to the justice department pursuant to preclearance under Section 5 of the Voting Rights Act, to bolster the finding that race was the legislature's predominant consideration in drawing the three districts at issue.[45]

This is not to say that establishing race as the predominant factor is somehow automatic whenever race plays an important factor in the drawing of a redistricting plan. In the third installment of the North Carolina *Shaw* case (styled *Hunt v. Cromartie*), the supreme court found that a summary judgment finding that race was the predominant factor in creating replacement districts for those invalidated by *Shaw* was improper when evidence was presented to the trial court that suggested that politics may have been a more important factor.[46] The case was remanded to the district court for a trial on the issue. After a three-day trial, the district court determined that despite evidence of incumbent protection and protecting the existing partisan balance, race had been the predominant factor.[47] When the case returned to the supreme court, the justices found in a 5-4 decision that the district court's findings were clearly erroneous.[48] The majority held that in a *Shaw* challenge:

> where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional redistricting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here.[49]

In its review of the 2003 Texas Congressional redistricting plan, the Federal District Court for the Eastern District of Texas also considered a *Shaw* challenge to a plan in which both political and racial and ethnic factors were involved. The district court, rejecting the claim that certain unusually shaped districts were the result of impermissible racial gerrymandering, found that the decisions in the plan were best explained "by Texas's geography and population distribution and its Legislature's predominantly political intent" rather than a conclusion that ethnicity was predominant or that districts in South and West Texas cannot be explained except by ethnic considerations.[50]

Finally, it should be noted that the supreme court has clearly rejected the argument that members of racial or ethnic groups can be assumed, without substantial race-neutral evidence in a particular

case, to constitute a "community of interest" simply because of race or ethnicity. Indeed, the court majority in the *Shaw* cases was openly hostile to such an argument, pointing out that it relies on racial stereotypes and comparing it to other, clearly invidious, racially discriminatory practices.[51]

Traditional Redistricting Principles Subordinated to Race. Court decisions finding that racial gerrymandering has occurred are based largely on direct evidence, such as bizarre district shape, internal racial composition, predetermined goals for racial population levels or the number of majority-minority districts to be created, excessive reliance on racial data, legislative records, testimony of legislators, and other documentary evidence such as submissions to the justice department for preclearance. But in cases in which a *Shaw* violation was found, the courts have also stressed that the state subordinated other nonracial considerations, usually referred to as traditional redistricting principles, to racial considerations.

In *Miller*, the supreme court laid out the basic framework for a *Shaw* case largely in terms of the state's treatment of such nonracial factors, stating:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines.[52]

Much misunderstanding and disagreement has arisen from the discussion of traditional redistricting principles in the *Shaw* cases. It is sometimes stated that *Shaw* requires states to consider traditional redistricting principles, but the court has clearly stated that compliance with compactness and other "traditional districting principles" is not constitutionally required. Instead, they are "objective factors" that may provide indirect evidence of legislative motivation.[53]

In the *Shaw* cases, the courts have identified a number of what are generally referred to as traditional, race-neutral redistricting criteria. The most prominent of these are:

(1) compactness;

(2) contiguity;

(3) preserving counties, voting precincts, and other political subdivisions;

(4) preserving communities of interest;

(5) preserving the cores of existing districts;

(6) protecting incumbents; and

(7) achieving legitimate partisan objectives.[54]

Compactness and respect for political subdivisions have been the most important of these factors, largely because they are reasonably objective standards to apply. In post-*Shaw* cases, the district courts have closely examined the compactness of districts as circumstantial evidence of legislative motivation.[55] A racial gerrymander may occur even when the state does not totally

ignore these traditional factors. In *Miller* and *Bush*, the court's decisions emphasized that the legislatures had paid significant attention to incumbency, partisan considerations, and communities of interest, but that race clearly had more influence on the particular composition of the districts than those or other legitimate factors.

Taken together, the *Shaw* cases indicate that a determination that race was the predominant factor in a redistricting plan will be based on a combination of (1) direct and circumstantial evidence of a racial motivation or desire to achieve race-conscious results; and (2) the state's apparent disregard of traditional redistricting principles or other reasonable, race-neutral criteria that were examined during the redistricting process.

D. Narrowly Tailored Remedy to Further Compelling State Interest

The supreme court in *Shaw I* did not say that a state may not draw districts motivated predominantly by race. Rather, a redistricting plan found to have been drawn predominantly on the basis of race is unconstitutional only if it cannot withstand strict judicial scrutiny. To do so, a racially gerrymandered plan must be narrowly tailored to further a compelling state interest. Taken together, the "narrowly tailored" and "compelling state interest" requirements pose a significant obstacle for districts drawn predominantly on the basis of race.

In several of the *Shaw* cases, the states defended their challenged minority districts by arguing that, to the extent that they were racially motivated, they had been drawn to further a compelling state interest. These claimed compelling interests fall into three groups: (1) eradicating the effects of past and present racial discrimination, including racially polarized voting; (2) complying with Section 2 of the Voting Rights Act; and (3) obtaining preclearance under Section 5 of the Voting Rights Act. After *Shaw I*, the district court held that the black majority district at issue in that case satisfied the strict scrutiny test because the North Carolina Legislature had drawn the district to comply with Sections 2 and 5 of the Voting Rights Act.[56] When the *Shaw* case reached the supreme court for the second time as *Shaw v. Hunt* (*Shaw II*), the court addressed these issues in some detail.

Remedying Past and Present Discrimination. In *Shaw II*, the supreme court agreed with North Carolina that remedying discrimination might in some cases justify a government's remedial action based on race, citing cases involving affirmative action in employment and government contracting. But the court, as in those types of cases, set a high standard for remedial race-based action by a state. The state must have before it, at the time the remedy is adopted, evidence of specific discrimination and strong evidence that the remedial action is necessary to remedy the discrimination. The remedial action must be shown to have been the actual motivation of the state in enacting the remedy. In addition, the alleviation of general societal discrimination is not by itself a compelling state interest.[57] Taken together, these requirements create too high a hurdle to justify a racial gerrymander in most cases. The court's discussion in *Shaw II* appears to cut off a remedial action to address racially polarized voting, which is in essence a form of "general societal discrimination."

Complying With Section 2 of the Voting Rights Act. The supreme court in *Shaw II* and *Bush* discussed whether complying with Section 2 of the Voting Rights Act is a compelling state interest that would justify remedial, race-based districting. The court did not definitively decide the issue, but the court's discussion in those cases strongly suggests that Section 2 compliance is a compelling state interest.[58] However, the court has made it clear that Section 2 compliance as a justification for drawing minority districts is very limited. In *Shaw II*, the court discussed

the circumstances in which a state might have to draw a minority district to avoid liability under Section 2, citing the test for Section 2 liability established in the 1986 case *Thornburg v. Gingles*.[59] The *Shaw II* court noted that a state could not justify drawing districts based on race to avoid Section 2 liability unless it was reasonably clear that a Section 2 claim would succeed and that the particular district at issue was necessary to avoid that claim.[60] In *Bush*, the justices writing the controlling opinion were even more direct, stating that the noncompact minority districts at issue could never be justified by Section 2, because Section 2 can be violated only if a reasonably compact minority district could be created.[61]

To date, there is only one notable case in which a district determined to be racially gerrymandered survived strict scrutiny. In *King v. State Board of Elections*,[62] a three-judge federal court examined an oddly shaped Hispanic congressional district in Chicago. The district was part of a plan ordered for 1992 congressional elections in Illinois by a different federal court. Following *Shaw I*, plaintiffs challenged the district, which used a narrow corridor to connect Hispanic communities in different parts of Chicago, as a racial gerrymander. The court held that despite being created by a federal court, the district was subject to strict scrutiny as it was clear that race was the predominant factor in its creation.[63] However, the court found that the creating court's stated purpose of compliance with Section 2 was a compelling state interest, and that the creating court had conducted a *Gingles* analysis when it drew the district. Review of the creating court's findings convinced the *King* court that the district was narrowly tailored to avoid violating Section 2.[64] Following the supreme court's decisions in *Shaw II* and *Bush*, the *King* court reaffirmed its findings.[65] However, given its unique status as a racially gerrymandered district ordered by a federal court just before *Shaw I*, the Chicago Hispanic district upheld in *King* provides little precedent for racially based districts enacted by legislatures that become subject to strict scrutiny.

Obtaining Preclearance Under Section 5 of the Voting Rights Act. The supreme court in *Miller* and *Shaw II* held that complying with Section 5 of the Voting Rights Act[66] is a compelling state interest, but imposed strong limits on how far a state may go in relying on the need to obtain preclearance under Section 5. In *Miller*, the court stated that a state may not rely on Section 5 preclearance to justify drawing minority districts in excess of those necessary to avoid retrogression of minority voting strength. The court rejected the argument that a state could go beyond the avoidance of retrogression to satisfy the demands of the justice department that are inconsistent with the retrogression standard. In short, the court makes clear in *Miller* that Section 5 preclearance cannot justify noncompact minority districts for much the same reason that Section 2 cannot.[67]

E. Standing: Plaintiff Must Reside in Minority District

When minority districts of unusual shape are created, voters in adjacent districts have sometimes challenged the districts because they appear to have affected the makeup of those adjacent districts. For example, such voters may argue that they have been incidentally segregated into a mostly white district that is also racially gerrymandered, that they suffer from partisan packing of voters into their district, or that the convoluted shape of their district caused by the drawing of an adjacent minority district causes voter confusion.

However, the supreme court has held that only residents of a district drawn predominantly on the basis of race have standing to bring a racial gerrymandering challenge. In *United States v. Hays*,[68] the court vacated a district court decision that Louisiana's 1991 congressional redistricting plan violated the rights of all voters in the state because at least one district was gerrymandered

to create a majority-black district. The plaintiffs resided in a different, though adjacent, district. The court held that the plaintiffs did not prove that their own district was drawn predominantly on the basis of race, and thus suffered no legal harm from the alleged gerrymandering of the black district.[69] This rule is similar to that for one-person, one-vote cases, in which the court has held that only a resident of an overpopulated district may challenge the redistricting plan, since residents of underpopulated districts do not suffer from the malapportionment.[70]

The standing rule recognized in *Hays* was applied without much discussion in *Bush*[71] and was reaffirmed by the supreme court in a case challenging legislative districts in Alabama as racially gerrymandered.[72] In the Alabama case, the court emphasized that a racial gerrymandering challenge must show harm to the plaintiffs from the districts in which they reside. Perhaps in some exceptional circumstances, a plaintiff in a neighboring district will be able to show that the composition of a challenged minority district directly affected the composition of the plaintiff's own district to the plaintiff's detriment. But the court stated that the existence of a racial gerrymander in one district does not in itself prove anything about an adjacent majority-white district.

F. Creation of Minority Districts and Consideration of Race

The *Shaw* cases establish the principle that race may not be the predominant factor in drawing a district unless the district is narrowly tailored to further a compelling state interest. However, the supreme court did not go so far in those cases as to establish that a state may not consider race or intentionally establish a majority-minority district. Indeed, the *Shaw* cases and other contemporary supreme court opinions generally acknowledge that minority districts may be intentionally created in many circumstances.

In *Shaw I*, the court noted that officials drawing a redistricting plan cannot be expected to be color-blind. Such a requirement would be unrealistic and largely unenforceable. Those drawing new districts are usually generally aware of the racial demographics of their jurisdictions, and it would be impossible to require them to ignore such inherent knowledge.[73] Racial demographics often coincide with other demographic characteristics, such as income, educational levels, and party affiliation. A concentrated racial or ethnic population often shares a strong sense of community and may be a politically cohesive voting bloc. Taking these kinds of characteristics into account is an inevitable and inherent part of redistricting. In *Miller*, the court stated:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."[74]

In short, the *Shaw* cases have held that merely establishing that race and ethnicity were considered during the redistricting process is not enough to invalidate a plan under the federal constitution. A state may properly consider race and ethnicity if the plan does not stigmatize or fence out a particular racial or ethnic group or cancel out or minimize the group's voting strength. In addition, a state may draw majority-minority districts to recognize minority voting strength in the presence of the *Gingles* factors, including racially polarized voting, and other circumstances indicating that without those districts minority voters would not have equal electoral opportunity.[75]

G. Conclusions

Under the *Shaw* cases, districts found to have been created "predominantly on the basis of race" are subject to strict judicial scrutiny under the Equal Protection Clause. To be upheld under strict scrutiny, a racially motivated district must be proved to have been narrowly tailored to further a compelling state interest. Promoting minority voting strength or representation or countering racially polarized voting will not in themselves justify a racial gerrymander. To date, the only compelling state interests that the supreme court has considered as possible justifications for racially motivated districts are complying with Section 2 or 5 of the Voting Rights Act and remedying past and present racial discrimination. However, as a practical matter, the requirement that a state narrowly tailor any plan furthering those interests means that a state may not rely on them to draw anything other than a reasonably compact minority district that probably would not be subject to strict scrutiny in the first place.

No state has yet been able to satisfy strict scrutiny in any of the *Shaw* cases in which districts were found to have been drawn by a legislature predominantly on the basis of race. A state is likely to succeed in a *Shaw* challenge only if it proves to the satisfaction of the court that race was not the predominant factor behind its challenged minority districts.[76]

In *Shaw I*, *Bush*, and several other racial gerrymandering cases, the courts have shown little receptiveness to a state's assertions that factors other than race were the basis of plans with unusual minority districts. This judicial skepticism appears to stem from several factors present in these cases: the extreme degree of gerrymandering apparent from the shapes of the districts, the absence of direct evidence (as opposed to after-the-fact testimony) that considerations other than race were taken into account in drawing the districts, and apparent "admissions" in the record that race was the primary motive for drawing certain districts. Even when the court accepts a state's assertions that it considered nonracial factors, districts of an unusual shape or composition that appear to be intended to achieve a racial result are unlikely to be upheld.

To minimize the risk of a successful *Shaw* challenge, a state should ensure that its minority districts are drawn with significant regard to valid considerations other than race. Minority districts should be reasonably compact and community-based and should avoid unusual features that artificially increase the minority population of the district, such as arms or bridges that include minority populations that are not part of the community constituting the core of the district. A minority district that would not exist without artificially connecting isolated or distant minority population concentrations is almost certain to be held invalid. The redistricting record, such as official bill analyses, committee and floor debates, and other contemporary discussions and reports, should include a detailed discussion or analysis of the nonracial basis on which the districts were drawn, with particular focus on those racially neutral criteria the supreme court has identified as traditional redistricting principles.

At the start of the 2001 round of redistricting, the *Shaw* cases led many observers to assume that effectively balancing the requirements of the Voting Rights Act and the prohibitions imposed by *Shaw* is nearly impossible, and that drawing districts for minority voters is fraught with peril. However, the near absence of successful *Shaw* challenges following the 2001 round of redistricting indicates that the supreme court has left a significant "safe haven" in the middle of these competing concerns. As the court stated in *Miller*, where "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that

a district has been gerrymandered on racial lines."[77] In *Voinovich v. Quilter*, in reversing a lower court determination that the state had unlawfully drawn majority black districts without proving that they were necessary under *Gingles* to remedy racially polarized voting, Justice O'Connor wrote for a unanimous court:

> [The district court] held that [Section] 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation. We disagree. Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. . . . Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited.[78]

Finally, in *Bush*, Justice O'Connor offered the states some breathing room with this statement:

> A [Section] 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests." The dissenters misread us when they make the leap from our disagreement about the facts of this suit to the conclusion that we are creating a "stalemate" by requiring the States to "get things just right," or to draw "the precise compact district that a court would impose in a successful Section 2 challenge." Rather, we adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan. . . . Under our cases, the States retain a flexibility that federal courts enforcing Section 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, Section 2 liability. And nothing that we say today should be read as limiting "a State's discretion to apply traditional districting principles," in majority-minority, as in other, districts. The constitutional problem arises only from the subordination of those principles to race.[79]

The dramatic downturn in reported case law of successful *Shaw* challenges for the 2001 round of redistricting indicates that the states achieved the balance between the Voting Rights Act and *Shaw* or perhaps that the original conditions that led to the creation of the districts challenged in *Shaw* are no longer prevalent.

Any discussion of the racial gerrymandering cases would not be complete without a discussion of the fractured opinions of the supreme court justices in those cases. For purposes of simplicity, this chapter draws from the majority opinions in most cases, or from controlling minority opinions in others (most notably *Bush*). It should be noted that there were four justices who consistently dissented from the majority or controlling opinions in the principal racial gerrymandering cases *Shaw I*, *Shaw II*, *Bush*, and *Miller*. Those four justices combined with Justice O'Connor in 2001 to produce a different majority in *Easley v. Cromartie*, which invalidated a trial court's finding that race was the predominant factor in the North Carolina congressional redistricting plan drawn to remedy the original plan struck down in *Shaw*. The retirement of four justices since *Easley* and the emergence of Justice Kennedy as a swing vote in most voting rights cases make it challenging to predict what direction legal challenges involving the conscious use of race in redistricting will take in future supreme court cases.

Notes, Chapter 5

[1] *See, e.g.*, *Jeffers v. Clinton*, 740 F. Supp. 585, 587-589 (E.D. Ark. 1990), *dism'd*, 498 U.S. 1129 (1991); *Perkins v. City of W. Helena, Ark.*, 675 F.2d 201, 207 (8th Cir.), *aff'd mem.*, 459 U.S. 801 (1982).

[2] *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 615 (1982).

[3] *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Wright v. Rockefeller*, 376 U.S. 52 (1964).

[4] *See, e.g.*, *Wright*, 376 U.S. 52; *Kilgarlin v. Martin*, 252 F. Supp. 404, 434-441 (S.D. Tex. 1966), *aff'd in part*, *rev'd in part*, *Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam); *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (per curiam).

[5] *See, e.g.*, *White v. Regester*, 412 U.S. 755, 765-767 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam on other grounds sub nom*. *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

[6] 446 U.S. 55, 62-65 (1980).

[7] 509 U.S. 630 (1993).

[8] See Chapter 3 of this publication.

[9] This effect of the 1982 amendment of Section 2 of the Voting Rights Act to virtually eliminate cases that rely on the Fourteenth and Fifteenth Amendments was predicted relatively soon after Section 2 cases began to be litigated. *See, e.g.*, *Lee Cnty. Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1478 (11th Cir. 1984).

[10] *Escambia Cnty., Fla. v. McMillan*, 466 U.S. 48 (1984) (per curiam). *Escambia* follows a cardinal rule of constitutional construction that courts "do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-155 (1951) (Frankfurter, J., concurring).

[11] 918 F.2d 763, 771 (9th Cir. 1990).

[12] *Bolden*, 446 U.S. 55; *Rogers*, 458 U.S. at 617-618.

[13] *See Rogers*, 458 U.S. at 619, n.6.

[14] *See, e.g.*, *McCarty v. Henson*, 749 F.2d 1134 (5th Cir. 1984). *See also Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1393 (S.D. Cal. 1989).

[15] *Rogers*, 458 U.S. at 618, quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

[16] *Rogers*, 458 U.S. at 623-627.

[17] *See, e.g.*, *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983); *Graves v. Barnes*, 343 F. Supp. 704, 723-724 (W.D. Tex.) (per curiam), *aff'd mem. sub nom*. *Archer v. Smith*, 409 U.S. 808 (1972), *modified sub nom*. *White v. Regester*, 412 U.S. 755 (1973).

[18] *See, e.g.*, *Garza*, 918 F.2d at 768, n.1, finding no. 176.

[19] *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

[20] 458 U.S. 613, 618, quoting *Washington v. Davis*, 426 U.S. at 242. *See also Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981); *Busbee*, 549 F. Supp. at 516-517.

[21] 918 F.2d at 771.

[22] *Arlington Heights*, 429 U.S. at 265-266.

[23] Multimember districts, once used in metropolitan areas for Texas House districts, are no longer used for the house, and may not be used in senate or congressional districts. Multimember districts have never been used for State Board of Education districts. Multimember districts, unlike single-member districts, have an inherent tendency to submerge minority groups and dilute their voting strength. *Terrazas v. Clements*, 581 F. Supp. 1329, 1347 (N.D. Tex. 1984).

[24] 458 U.S. at 623.

[25] 478 U.S. 30 (1986).

[26] *See, e.g.*, *Skorepa*, 723 F. Supp. 1384, 1392-1393.

[27] The Section 2 effects test and its application are discussed at length in Chapter 3 of this publication.

[28] *See, e.g.*, *Garza*, 918 F.2d at 770-771; *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467-1468, n.10, and accompanying text (M.D. Ala. 1988).

[29] 918 F.2d at 771. In *Garza*, while the court found the county redistricting plan invalid as intentionally discriminatory under both Section 2 and the Fourteenth Amendment, it relied primarily on Section 2. The court's reasoning, however, applies to any case alleging intentional discrimination, whether under Section 2 or the federal constitution. Most redistricting challenges alleging intentional discrimination include both constitutional and statutory claims.

[30] *Id*. at 770-772.

[31] For instance, black persons were once prohibited by law from voting in the Democratic primary (*see Nixon v. Herndon*, 273 U.S. 536 (1927)) and from participating in political party nominating conventions (*see Smith v. Allwright*, 321 U.S. 649 (1944)).

[32] *See Busbee*, 549 F. Supp. at 500, in which the court found that the chairman of the Georgia house reapportionment committee was a racist.

[33] *See* 52 Fed. Reg. 486, 486-487 (Jan. 6, 1987), comments accompanying amendment of 28 C.F.R. Sec. 51.55.

[34] *Shaw v. Barr*, 808 F. Supp. 461, 472 (E.D. N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630 (1993).

[35] 509 U.S. 630, 643 (1993), quoting *Arlington Heights*, 429 U.S. at 266.

[36] *See Guinn v. United States*, 238 U.S. 347 (1915), discussed in *Shaw I* 509 U.S. at 644.

[37] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

[38] 509 U.S. at 643-644.

[39] 509 U.S. at 647.

[40] 515 U.S. 900, 913 (1995).

[41] *Id.* at 917-920.

[42] 517 U.S. 952 (1996).

[43] *Id.* at 959-976.

[44] *Id.* at 966-967.

[45] *Id.* at 975.

[46] *Hunt v. Cromartie*, 526 U.S. 541 (1999).

[47] *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D. N.C. 2000).

[48] *Easley v. Cromartie*, 532 U.S. 234 (2001).

[49] *Id.* at 258.

[50] *Session v. Perry*, 298 F. Supp. 2d 451, 513 (E.D. Tex. 2004) (per curiam), *vacated on this issue by League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442-443 (2006).

[51] *See Shaw I*, 509 U.S. at 647-648.

[52] 515 U.S. at 916 (internal citation and quotation marks omitted).

[53] 509 U.S. at 647.

[54] No single case lists all of the "traditional" principles in one place. *See, e.g.*, *Miller*, 515 U.S. at 916; *Abrams v. Johnson*, 521 U.S. 74, 84 (1997).

[55] *See, e.g.*, *Johnson v. Mortham*, 926 F. Supp. 1460, 1471-1473 (N.D. Fla. 1996); *Vera v. Richards*, 861 F. Supp. 1304, 1338, 1340 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

[56] *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

[57] 517 U.S. at 909-910.

[58] *See* Justice O'Connor's concurring opinion in *Bush*, 517 U.S. at 990-995.

[59] 478 U.S. 30. See the discussion of *Gingles* in Section II of this chapter and in Chapter 3 of this publication.

[60] 517 U.S. at 915-916.

[61] 517 U.S. at 977-981.

[62] 979 F. Supp. 582 (N.D. Ill.), *vacated mem. sub nom. King v. Ill. Bd. of Elections*, 519 U.S. 978 (1996).

[63] *Id.* at 602-610.

[64] *Id*. at 611-617.

[65] *King v. State Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem. sub nom. King v. Ill. Bd. of Elections*, 522 U.S. 1087 (1998).

[66] See Chapter 4 of this publication.

[67] *Miller*, 515 U.S. at 921-927; *Shaw II*, 517 U.S. at 911-913.

[68] 515 U.S. 737 (1995).

[69] *Id*. at 744-745.

[70] *Fairley v. Patterson*, 493 F.2d 598, 603-604 (5th Cir. 1974).

[71] 517 U.S. at 957-958.

[72] *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (per curiam).

[73] *Shaw I*, 509 U.S. at 646.

[74] 515 U.S. at 920, quoting *Shaw I*, 509 U.S. at 646.

[75] *See Johnson v. De Grandy*, 512 U.S. 997 (1994).

[76] *See Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

[77] 515 U.S. at 916 (internal citation omitted).

[78] 507 U.S. 146, 155-156 (1993) (internal citations omitted).

[79] 517 U.S. at 977-978 (internal citations omitted).

Chapter 6
Partisan Gerrymandering

I. Background

Justiciability of Partisan Gerrymandering Claims. In one of the earliest redistricting cases of the 1960s, the U.S. Supreme Court indicated that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution not only requires districts to contain substantially equal populations but also prohibits redistricting plans that "minimize or cancel out the voting strength of racial or *political* elements of the voting population."[1] On this apparent invitation, political parties disgruntled by the effects of redistricting plans began to bring claims that the plans discriminated against them in violation of the Equal Protection Clause.[2] Such claims were, in effect, parallel to those alleging racial discrimination, which the supreme court had already recognized to be justiciable under the Fourteenth and Fifteenth Amendments.[3] However, for two decades, these claims did not produce any significant developments in the application of the Equal Protection Clause to so-called political or partisan gerrymandering. The federal courts generally disposed of such claims without fully addressing the issue of whether the attempt to control partisan outcomes through redistricting at the partial expense of other "neutral" or "fair" criteria violates the Equal Protection Clause.[4]

The uncertainty over whether the federal courts could hear partisan gerrymandering claims at all was partially settled by the supreme court in 1973. In *Gaffney v. Cummings*, the court held that a congressional redistricting plan was not invalid even though the state apportionment board that drew the plan had openly considered partisan voting patterns and attempted to draw a plan that gave each party a share of congressional seats in proportion to its share of the state's voters.[5] The court's decision indicated that it considered the plaintiff's partisan gerrymandering claim to be properly before the court, though it did not expressly hold such a claim to be justiciable.

Finally, in 1986, the supreme court in *Davis v. Bandemer*[6] expressly held that claims by members of a political party that a redistricting plan discriminates against them in violation of the Equal Protection Clause were justiciable. The 6-3 decision that the claim is justiciable means that courts are required to adjudicate cases alleging partisan gerrymandering and cannot dismiss them without considering their merits. Because of the importance of redistricting to the major political parties, *Bandemer* opened the door for lawsuits filed in the 1990s by state and local political parties alleging unfair treatment by one or more redistricting plans.

By 2004, the failure of virtually all of these lawsuits caused the supreme court to revisit the justiciability of a partisan gerrymander claim. In *Vieth v. Jubelirer*,[7] five justices agreed that the claim was justiciable, while four would have overruled *Bandemer* and made the claim nonjusticiable. While the five justices agreed that partisan gerrymander claims are justiciable, they could not agree on a standard by which a claim would be judged. A subsequent case from Texas in 2006 did not result in any clarification of the issue.[8] The court's revisitation of the matter of partisan gerrymandering without articulating a standard makes it increasingly likely that partisan gerrymandering claims will be no more than a footnote in the future of redistricting law.

II. The *Bandemer* Test

A. History of *Bandemer* Litigation

Bandemer arose out of the 1981 redistricting process in Indiana. At that time, Indiana Republicans controlled both houses of the state legislature and the governorship. Dummy redistricting bills were introduced in each house. Both passed on party-line votes and were sent to a conference committee. All the conferees were Republicans, though some nonvoting Democratic advisors were present. The conference committee voted to fill the dummy bills with a Republican-sponsored redistricting plan. The legislation then went back to the two houses, where it passed on a party-line vote. Democrats had less than two days to review the final plan before they voted on it.

Both Indiana Democrats and the NAACP brought suit against the plan. A divided three-judge district court found that the plan unconstitutionally diluted the voting strength of Indiana Democrats.[9] As the framework for its opinion, the district court majority adopted Justice Stevens's concurrence in *Karcher v. Daggett* (discussed in greater detail in Part IV of this chapter).[10]

The supreme court issued a fractured reversal of the district court.[11] Six members of the court agreed that claims of partisan gerrymandering were justiciable. The remaining three argued that partisan gerrymandering should not be justiciable, primarily because of the lack of a judicially manageable standard to decide such cases and the undesirability of involving federal courts in the politics of redistricting. Four of the majority on the justiciability issue found that the district court erred in applying too low a threshold to prove a claim of unconstitutional vote dilution for political groups. They were joined by the three dissenters on the justiciability issue to form a majority reversing the district court's holding that an unconstitutional gerrymander existed. Only Justices Powell and Stevens would have affirmed the district panel.

B. The Plurality Test in *Bandemer*

A majority of the supreme court agreed that the test to determine whether a partisan gerrymander violated the Equal Protection Clause was generally the same as the test in a racial gerrymandering case. The plaintiff challenging a plan must show:

(1) an intent to discriminate against a political group; and

(2) an actual discriminatory effect on that group.[12]

Justice White, writing for the four-justice plurality, believed that the plaintiffs had failed to show sufficient discriminatory effects on their group. The plurality found that in previous racial gerrymandering cases the court had required a showing of adverse effects that were substantially greater than a mere lack of proportional representation. Thus, to demonstrate a discriminatory effect in a partisan gerrymandering case, the plaintiffs must show that, in addition to experiencing disproportionate electoral defeat, they have been effectively shut out of the political process.[13] Several courts, including the federal district court for the Western District of Texas, have organized this discriminatory effect test into two prongs, the first requiring a showing of an actual or projected history of disproportionate election results and the second requiring a showing of a consistent degradation of voter influence on the political process as a whole.[14]

After *Bandemer* provided plaintiffs with the option of a partisan gerrymandering claim, candidates for political office in different states, frustrated by the ability of incumbents to draw districts that preserved the status quo, began to add such claims to their laundry lists of complaints

about redistricting plans. Plaintiffs have also used *Bandemer* to challenge a statewide system for electing judges.[15] In evaluating these claims, lower courts have repeatedly accepted and applied the plurality's test.

C. Application of the Plurality Test

As the *Bandemer* court predicted, plaintiffs in partisan gerrymandering cases have usually met the discriminatory intent requirement without difficulty, but have had trouble demonstrating discriminatory effects. Court after court has dismissed these claims for failing to show a discriminatory effect.[16] The self-preservation instinct that incumbents demonstrate in redistricting plans usually does not prove that the plans consistently degrade voters' influence on the political process as a whole.

Intent to Discriminate. The plurality in *Bandemer* indicated that proving the intent to discriminate would usually not be difficult because if one party is largely in control of the redistricting process, intentional discrimination is virtually inevitable. The plurality upheld the district court's finding of intentional discrimination without much discussion, noting that political considerations (and by implication partisan discrimination) were inherent and inevitable in redistricting.[17] In subsequent years, lower federal courts have readily acknowledged that the standard for establishing discriminatory intent is relatively undemanding.[18] Such a finding of discriminatory intent may be supported by any relevant evidence, direct or circumstantial.

1. Direct Evidence. Statements by those in control of the redistricting process, such as legislative leaders, party leaders, and redistricting committee members, that indicate an intent to maximize the influence of one party or to minimize the influence of another through redistricting may provide strong evidence that a plan was adopted with a discriminatory purpose.[19] Similar direct evidence supported the lower court's finding in *Bandemer v. Davis* of partisan intent to discriminate.[20]

2. Circumstantial Evidence

a. Protecting Incumbents. The manner in which a redistricting plan attempts to protect incumbents may also provide proof of discriminatory intent. If incumbents of the party not in control of the redistricting process are paired to a greater extent than incumbents of the controlling party or if their constituencies are dismantled to a significantly greater extent than those of the controlling party, a court may consider these factors as evidence of an intent to discriminate.[21]

One court has suggested that such evidence could also be used to negate an inference of discriminatory intent. In *Marylanders for Fair Representation, Inc. v. Schaefer*, a federal district court noted that the redistricting plan for the Maryland Legislature pitted very few incumbent Republicans against incumbents of either party, yet it did pair more than 20 incumbent Democrats in various districts.[22] The court stated that these factors could be used to counter charges that the majority Democrats intended to discriminate against the Republican minority.

A statewide system for electing judges that protected incumbents has also been held to provide evidence of discriminatory intent. In *Republican Party of North Carolina v. Martin*, the Fourth Circuit federal appellate court held that the rejection by a Democrat-controlled legislature of Republican proposals to change the system for certain judicial elections in North Carolina revealed an intent to discriminate against the Republican party.[23]

The importance of such evidence to either support or negate a charge of discriminatory intent probably depends on the difference between the treatment of incumbents in both parties and whether that difference can be explained on neutral grounds. As the supreme court has stated, "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."[24]

b. Configuration of Districts. The unusual shapes of districts, including the extent to which they are not compact and whether they divide political subdivisions or communities of interest without apparent reason, may also be used to show that a plan was drawn with the intent to discriminate, especially if the party making the challenge can show a direct connection between these features and the political effects of the plan.[25] For example, if a county or community is split in an unusual way so that a heavily Democratic portion of the county is placed in a district that as a result becomes a "safe" Democratic district, that split may indicate an intent to favor Democrats at the expense of a more rationally shaped district. In addition, dismantling existing districts controlled by the minority party without a compelling need indicates an intent to hurt that party's electoral success. Similarly, population deviations among districts that disfavor the minority party may also help to prove an intent to discriminate. Overpopulating districts of the party not in control may be used as a type of packing designed to waste the votes of that party's supporters so that the party's electoral influence in other districts is diminished.[26]

However, claims based even in part on an unusual configuration of district shapes may not always prove discriminatory intent. In a challenge to the North Carolina congressional redistricting plan instituted after the 1990 census, Republican party plaintiffs claimed that these types of distortions in district shapes disrupted the party's political activities. A federal district court panel held that disruption in political activities as a result of such districts was a possibility for both political parties and thus could not form the basis for a partisan gerrymandering claim.[27]

c. Fairness of Redistricting Process. The fairness of the process used to devise and adopt a redistricting plan may also help prove whether the party in control of the process intentionally discriminated against the other party.[28] In addition, the failure of the party in control to explain why it rejected proposals of the other party or the failure to state the criteria used to arrive at a plan may add to the appearance that the process was driven primarily by partisan motives.[29] While an apparently fair process will not insulate a plan from attack if the plan itself is very one-sided, a finding of discriminatory intent is likely if the minority party is denied full access to redistricting computers, data, and staff, is not represented on redistricting committees, or is denied an effective opportunity to propose plans and to analyze and comment on proposed plans.[30] For example, a federal panel held that the exclusion of Republicans from the 1991 redistricting process in North Carolina was relevant to proving discriminatory intent and was probative of an anti-Republican bias in the state's general assembly.[31]

d. Use of Partisan Voting Data. Courts have frequently stated that the majority party's mere consideration of the political effects of a redistricting plan does not automatically invalidate the plan. In *Gaffney*, the supreme court upheld a Connecticut congressional plan in which the state's apportionment board admittedly studied partisan voting patterns in drawing districts designed to result in the election of Democrats and Republicans in proportion to the voting strength of each party. The *Gaffney* court discussed at length the use of partisan electoral data in redistricting, acknowledging that it is an inherent part of redistricting:

> Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.
>
> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.[32]

The plurality opinion in *Bandemer* repeated this passage at length, but in a different context. The *Bandemer* plurality quoted it to suggest that at least some purposeful discrimination by the party in control against its rival party is a given in redistricting.[33] Plaintiffs in a partisan gerrymandering case will certainly point to the availability of partisan electoral information to suggest that the party in control of the redistricting process was fully aware of and in fact intended the potentially discriminatory effect of the plan. Of course, the extent to which the availability of the data contributes to a finding of intentional discrimination will depend on factors such as how the data is used and to whom it is made available.

Ironically, it is arguably essential for legislatures to use such data to analyze the political ramifications of any plans they draw in order to avoid illegal gerrymandering, just as they may study evidence of racial and ethnic voting patterns to avoid violations of the Voting Rights Act. However, a party's superficial assertion that the data was used only to achieve political fairness would not minimize the appearance that the party used the data to further its political aims. Thus, the legislature should be aware that its use of partisan electoral data would certainly be scrutinized in any partisan gerrymandering litigation.

Discriminatory Effect. A plaintiff who satisfies the intent requirement of *Bandemer* faces a much tougher test in meeting the effect requirement. Under *Bandemer*, the plaintiff must make a two-pronged showing, consisting of "a history (actual or projected) of disproportionate [election] results"[34] in conjunction with evidence that the "electoral system is arranged in a manner that will consistently degrade [the plaintiff's] influence on the political process as a whole."[35] Meeting the effect requirement has proven so difficult that many plaintiffs have lost their partisan gerrymandering claims at the summary judgment stage.[36]

1. Disproportionate Election Results. To meet the first prong of the effect test, the *Bandemer* plurality made it clear that the required level of disproportionate election results suffered by a party challenging a redistricting plan must be based on more than the results of one election. In *Bandemer*, the Indiana Democrats based their gerrymandering claim on the results of the 1982

elections under the challenged plan, in which they received 51.9 percent of the votes cast in house elections but won only 43 percent of the seats. The court held that the results of one election under a challenged plan are not sufficient to meet the test since such a result may be transitory, the product of special circumstances, or in some other way unrepresentative of the long-term outcomes of elections under the plan.[37]

However, the plurality stated that a party need not wait for disproportionate results to occur. Instead, a party may satisfy this part of the test by using projected election results under a new plan, based on past voting patterns.[38] Although several federal and state courts have since rejected partisan gerrymandering claims in situations where elections had not yet been held under the disputed plans, plaintiffs in those cases also failed to present any projected results for the courts to analyze.[39]

In contrast, in *Badham v. March Fong Eu*,[40] plaintiffs were able to present a federal district court with evidence of a history of disproportionate election results. *Badham* involved a challenge to the California congressional redistricting plan that followed the 1980 census. At that time, California stood to gain two additional congressional seats. Democrats controlled both the legislature and the governorship. Before redistricting, Democrats held a 22-21 edge in the state's congressional delegation. In 1982, after the first election under the new plan, Democrats held a 27-18 edge in congressional seats. Although California Republicans had successfully invalidated the plan through a statewide referendum, the invalidated plan was used for the 1982 elections because the legislature did not have sufficient time to develop a viable alternative. After the election, the lame-duck Democratic governor called the legislature back into emergency session in order to draw up a new plan. The new plan allegedly did not differ significantly from the plan invalidated at the referendum. Members of the California Republican Party challenged the plan in court, alleging among other claims that the plan constituted an unconstitutional partisan gerrymander. A three-judge district panel ruled against the plaintiffs.[41]

In its analysis, the court noted that the plaintiffs had presented evidence of disproportionate election results. For example, in 1984, California Republicans had received 50.1 percent of the vote statewide, while winning only 40 percent of the congressional seats. In 1986, they won 47 percent of the vote, while still retaining the same 40 percent of the seats. However, the court declined to decide whether these results were sufficient to satisfy a partisan gerrymandering claim because it concluded that the plaintiffs had failed to meet the second prong of the effect test: showing that they had also been shut out of the political process as a whole.[42]

Because no definitive guidelines have emerged from these cases, exactly how disproportionate the election results must be and for exactly how long they must be likely to continue remain open questions. Certainly a party's case would be much stronger if the party could start with the results of at least one election under a new plan and offer additional evidence to show that disproportionate results would continue well into the future.

2. Degradation of Voter Influence. Proof of disproportionate election results alone is not enough to pass the effect requirement of *Bandemer*. The party challenging a plan must also meet the second prong of the requirement by showing "strong indicia of lack of political power and the denial of fair representation."[43] On this point, the plurality repeated the court's often-stated position in minority vote dilution cases that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the

political process as a whole."[44] The court did not expand on the factors that might demonstrate a degradation of voters' influence. The plurality opinion simply concluded that 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."[45]

Because the plurality did not expand on this point, lower courts have looked elsewhere in the opinion for guidance. In *Marylanders*, a federal district court noted that the plurality "appeared to have concentrated on two areas of inquiry: participation in the electoral process and the responsiveness of elected officials."[46] Accordingly, the court examined these two areas in evaluating the partisan gerrymandering claim of Republican party voters against a redistricting plan for the Maryland state legislature. The court analyzed the extent to which the minority party played a role in the legislative process and whether the majority party ignored minority party interests. The court noted that the Republican party's minority status in the state legislature did not mean that its members:

> have been unconstitutionally shut out of the political process as a whole. There is a difference between having a voice and being listened to. *Bandemer* requires that Republicans have no voice in the political process, which . . . they clearly do. When and to what extent, and on which issues they are listened to are questions that are quite properly resolved by the political process, not by the courts.[47]

3. Political Process as a Whole. Other courts have attempted to apply the second prong of the effect requirement by developing measures for determining whether the minority party has a voice in the political process. These measures have depended on the courts' interpretation of the *Bandemer* plurality's phrase "political process as a whole."

At least one federal court has taken a fairly narrow view of the phrase. In *Republican Party of North Carolina v. Martin*,[48] the Republican party plaintiffs raised a partisan gerrymandering claim against North Carolina's method for selecting superior court judges (trial court judges of general jurisdiction). In determining whether the Republican party could survive the defendants' motion for summary judgment, the Fourth Circuit analyzed the merits of the party's partisan gerrymandering claim, including the party's influence on the political process as a whole. The appellate court acknowledged that Republicans in North Carolina had won election to other local and statewide offices,[49] that Republicans had no complaints concerning the performance of superior court judges, and that Republican party members were not excluded from participating in the affairs of the party or in the processes by which candidates are nominated and elected.[50] Nevertheless, the appellate court disavowed any interpretation of *Bandemer* that would require plaintiffs to prove exclusion from these types of political processes.[51]

Instead, the court focused solely on the challenged political process of selecting superior court judges. It found that because the process encouraged straight-party voting against Republican candidates and because such a system discouraged viable Republican candidates from running for superior court judge, the party had been locked out of the political process and thus had presented sufficient evidence to withstand a summary judgment challenge.[52]

The narrow view of the "political process as a whole" that the *Republican Party of N.C. v. Martin* court used has not been widely adopted. Instead, other courts have taken a more expansive definition of the phrase, holding that it encompasses not only the challenged political process, but also the functioning of the political party itself. For example, the *Badham* court required the

plaintiffs to show majority party interference with the plaintiffs' "registration, organizing, voting, fund-raising, or campaigning" or other impediments to the group's participation in public debate.[53] The *Badham* panel took judicial notice of facts that indicated that the plaintiffs were not shut out of these processes. In the year of the panel's decision, Republicans held a 40 percent block of the congressional seats--far from token representation, the court noted. In addition, California had a Republican governor and a Republican U.S. senator, and former California governor Ronald Reagan was president. California Republicans had also proven their political power by initiating the defeat of the earlier redistricting plan in a referendum. Thus, when the court compared the *Badham* case to prior racial gerrymandering cases, it found that the plaintiffs had a long way to go to establish a successful claim.[54]

In contrast, in *Terrazas v. Slagle*, the federal district court for the Western District of Texas stated that "it serves no useful purpose to graft the requirements for that sort of racial gerrymandering case onto partisan gerrymandering."[55] The Texas federal panel reasoned that a dominant political party likely would not attempt to dilute the influence of another political group through outside influence. Instead, because the dominant group controls the state's political system, it typically would use that system to perpetuate its power at the expense of minority political groups. Under this analysis, the second prong of the *Bandemer* effect requirement would be satisfied if the majority political group perpetuates "its power through gerrymandering in one political structure and . . . the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures."[56] Thus, the *Terrazas* court held that "the term 'political process as a whole' means straightforwardly all the structures of the state governmental system," but contrary to *Badham*, "not the internal structures of the partisan group."[57]

Because the *Badham* decision was subsequently affirmed by the supreme court, the broader *Badham* interpretation of the phrase "political process as a whole" serves as a better guide than the more narrow interpretation in *Republican Party of N.C. v. Martin*, which may remain unique to the facts of that case. However, the Texas court's modification in *Terrazas* of the *Badham* interpretation would probably be the more persuasive analysis in this state and represents a reasonable middle ground between the contrasting analyses of *Badham* and *Republican Party of N.C. v. Martin.*

III. The Partisan Gerrymandering Claim Turns 18

A. *Vieth v. Jubelirer*

In 2002, plaintiffs in Pennsylvania brought suit in federal district court against the state's congressional districting plan alleging a variety of complaints, including one claim that the plan was an illegal partisan gerrymander.[58] In the 2000 election results for congressional races in Pennsylvania, Republicans held 11 seats and Democrats held 10. The aggregate vote for congressional candidates in that year was 50.6 percent for the Democrats and 49.4 percent for the Republicans. Following the release of census data in late 2000, Pennsylvania was reduced to 19 congressional seats. The Republican-controlled Pennsylvania General Assembly enacted a redistricting plan that the plaintiffs alleged would allow Republicans to elect 13 members of Congress while leaving Democrats only 6.[59] The court used the *Bandemer* plurality test to review the claim. After extensively citing the *Badham* ruling, the court found that the plaintiffs had failed to state a claim because they could not show that the alleged malapportionment of congressional seats by the general assembly had effectively shut Pennsylvania Democrats out of the political

process.[60] The court also recognized that partisan gerrymandering was a justiciable claim, over the objections of the state defendants.[61] In a subsequent opinion, the court invalidated the plan over one-person, one-vote issues.[62] The general assembly slightly modified the plan to correct these deficiencies, and the court incorporated its earlier opinion on partisan gerrymandering into a later opinion approving this revised plan.[63]

On review by the U.S. Supreme Court, the judgment of the lower court was upheld.[64] However, only four judges, under an opinion written by Justice Scalia, were willing to expressly overrule *Bandemer* and find that partisan gerrymandering claims were not justiciable.[65] The fifth justice who voted to affirm the lower court opinion, Justice Kennedy, wrote separately to say that though the plaintiffs had not reached the standard for proving a partisan gerrymander, he was unwilling to say that such a claim should be nonjusticiable.[66] The other four justices dissented and proposed various standards by which they thought the plaintiffs might have evidence to prove a claim of partisan gerrymandering.[67] Notably, none of the five justices who found the claim of partisan gerrymandering to be justiciable proposed using the plurality test from *Bandemer*. Justice Kennedy in particular almost seemed to suggest that a talent search be conducted to find the elusive workable standard.[68]

B. *LULAC v. Perry*

At least one employee of the supreme court must have noted Justice Kennedy's search, because a lower court case out of Texas pending before the supreme court at the time of *Vieth*, *Session v. Perry*,[69] had its opinion vacated and was remanded for further consideration in light of *Vieth*. In *Session*, the lower court evaluated a number of claims against the 2003 Texas congressional plan. In an otherwise lengthy opinion, the court briefly considered the issue of a partisan gerrymandering claim against the plan. The court said that it had "no hesitation in concluding that, under current law, this court cannot strike down [the plan] on the basis that it is an illegal partisan gerrymander."[70] The court noted that the supreme court was currently considering *Vieth* and that a judicial remedy to partisan gerrymandering might be inferior to ones offered by the political process or Congress through a change in federal law.[71] Following the remand from the supreme court, the lower court in a lengthy treatment of the issue found that the plaintiff's proposed standard of judging a plan's constitutionality based on whether it was driven solely by a partisan agenda (as evidenced by a mid-decade redrawing of the plan) was inconsistent with the holding in *Vieth* and also failed to articulate a measure of substantive fairness to guide the courts.[72] Plaintiffs pursued an appeal of the case on several grounds, including the partisan gerrymandering claim.

In *LULAC v. Perry*,[73] the supreme court once again considered partisan gerrymandering claims in a fractured opinion. Justice Kennedy, writing for the court, upheld the lower court's holdings rejecting a proposed standard that a plan might be invalidated if it was adopted for the sole purpose of advancing a partisan agenda.[74] Justice Kennedy wrote that evaluating such claims based on the sole purpose standard always presented problems because there are always mixed motives in line drawing. Justice Kennedy also wrote that such a standard failed to "show a burden, as measured by a reliable standard, on the complainants' representational rights."[75] Finally, focusing on a standard that only restrained mid-decade redistricting might promote even greater partisanship in the initial drawing of the districts at the beginning of a decade following the release of new census numbers. As many as seven members of the court may have supported Justice Kennedy's opinion on this

matter, though it is difficult to tell since only Justice Stevens wrote extensively on this question in a separate opinion.[76] Once again, no justice suggested using the plurality test from *Bandemer* as the standard by which partisan gerrymanders should be judged.

IV. One Person, One Vote: A Proxy for Defeating a Partisan Gerrymander Claim?

While the route of defeating a redistricting plan through a partisan gerrymander claim has been almost impossible, plans that have been considered gerrymanders by many have been attacked under the one-person, one-vote standard. In 1983, before *Bandemer*, the supreme court decided *Karcher v. Daggett*,[77] which involved a Republican challenge to a New Jersey congressional plan. The Democrat-controlled state legislature had devised the plan's 14 oddly shaped districts, and the outgoing Democratic governor signed the plan into law on the day before his Republican successor took office. Republicans immediately sought review of the plan under the one-person, one-vote principle. By a 5-4 vote, the court disposed of the case by finding that the plan violated that principle. However, one justice, Justice Stevens, agreed with the majority opinion but wrote separately to say that he would recognize a partisan gerrymandering claim because he believed the equal population requirement was an insufficient guarantee of equal representation.[78]

When Stevens examined the plan in *Karcher*, he found districts that were strangely drawn into shapes with nicknames such as "the swan" and "the fishhook." The traditional redistricting criterion of compactness had been ignored. County lines had been hacked to pieces to produce long districts packed with suburban Republicans. Democrats had dominated the process at all levels, and a high degree of partisanship was present. The legislature never explained the guidelines it used and rejected several other plans with lesser population deviations.[79] Stevens apparently was sufficiently disturbed by the plan to suggest a new three-pronged approach to reviewing the constitutionality of suspected political gerrymanders that formed the basis of the lower court's decision in *Bandemer*.[80]

In *Larios v. Cox*,[81] a federal district court in Georgia invalidated legislative plans that were also alleged to be a Democratic-drawn gerrymander against Republicans. The court found that the plans favored rural and inner-city interests at the expenses of suburban ones, underpopulated districts held by Democrats while overpopulating those represented by Republicans, and unnecessarily deliberately paired Republicans while avoiding the pairing of Democrats.[82] This caused the court to invalidate the plan even though its population deviations were within the traditional overall 10 percent range tolerated for state legislative districts. The supreme court summarily affirmed the lower court,[83] but Justice Stevens again wrote separately. Justice Stevens stated that after the court failed to articulate a standard in *Vieth*, "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength. It bears emphasis, however, that had the court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case."[84]

Using the equal population standard to defeat a partisan gerrymander may offer only illusory relief. Following *Karcher*, most congressional plans migrated to a zero deviation standard in part to defeat such claims. While the congressional plan at issue in *Vieth v. Pennsylvania* was invalidated by the district court over a 19-person population deviation,[85] a quick trip back to the general assembly resulted in minor changes that corrected the imbalance in the plan.[86] In *LULAC*

v. Perry, the equal population standard was not available since the maximum deviation in the plan's districts was one person. It remains to be seen whether drawers of state legislative districts will adopt a similar zero deviation strategy to defeat equal population challenges to plans that might be considered partisan gerrymanders.

V. Conclusions

In *Bandemer*, the supreme court held that partisan gerrymandering claims were justiciable and set forth a test to determine whether a redistricting plan discriminates against members of a political group in violation of the Equal Protection Clause of the Fourteenth Amendment. That test requires plaintiffs to prove:

(1) that the plan was passed with the intent to discriminate against a political group; and

(2) that the plan will have an actual discriminatory effect on that group, as shown by (a) an actual or projected history of disproportionate election results; and (b) the consistent degradation of the influence of the group's voters on the political process as a whole. Given the difficulty of maintaining a partisan gerrymandering claim, claims under *Bandemer* have represented a very small percentage of the overall challenges to redistricting plans in different states.

Following the *Vieth* and *LULAC v. Perry* decisions, proving an unconstitutional gerrymander likely becomes more burdensome as even the nearly impossible standard from the *Bandemer* plurality is called into question by the court's failure to expressly validate or reject it. These decisions may have the effect of removing the guidance that had previously been offered by the *Bandemer* plurality to lower courts. While the claim of partisan gerrymandering is technically justiciable, it is unclear how the court could have made the claim effectively more plainly nonjusticiable other than to provide a fifth vote for that holding. Unless a major shift occurs in the court, it is unlikely that any claim of partisan gerrymandering against a redistricting plan will be successful in the coming decade.

Notes, Chapter 6

[1] *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added).

[2] *See, e.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 926-927 (S.D. N.Y.), *aff'd per curiam*, 382 U.S. 4 (1965), *vacated per curiam in part as moot*, 384 U.S. 887 (1966); *Bush v. Martin*, 251 F. Supp. 484, 513-514 (S.D. Tex. 1966).

[3] *See Wright v. Rockefeller*, 376 U.S. 52 (1964).

[4] *See, e.g.*, *Bush*, 251 F. Supp. at 513 (partisan claim nonjusticiable); *Sims v. Baggett*, 247 F. Supp. 96, 104-105 (M.D. Ala. 1965) (per curiam) (partisan claim nonjusticiable); *Wells v. Rockefeller*, 394 U.S. 542, 544 (1969) (case decided on one-person, one-vote standard).

[5] 412 U.S. 735, 751-754 (1973).

[6] 478 U.S. 109 (1986).

[7] 541 U.S. 267 (2004).

[8] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

[9] *Bandemer v. Davis*, 603 F. Supp. 1479, 1495 (S.D. Ind. 1984). The court unanimously concluded that the plan did not discriminate against black voters because of their race, and the NAACP did not challenge this ruling on appeal.

[10] 462 U.S. 725 (1983).

[11] *Bandemer*, 478 U.S. 109.

[12] *Id.* at 127, 161 (White, J., plurality opinion, and Powell, J., concurring in part and dissenting in part).

[13] *Id.* at 127-143.

[14] *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993) (per curiam). *See also Badham v. March Fong Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D. N.C.), *aff'd mem.*, 506 U.S. 801 (1992).

[15] *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992).

[16] *See, e.g.*, *Republican Party of Va. v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Holloway v. Hechler*, 817 F. Supp. 617, 627-628 (S.D. W.Va. 1992) *aff'd mem.*, 507 U.S. 956 (1993); *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 141-142 (Pa. 1992); *Legislative Redistricting Cases*, 629 A.2d 646, 664-665 (Md. 1993).

[17] *Bandemer*, 478 U.S. at 128-129.

[18] *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1038 (D. Md. 1994) (per curiam).

[19] *See, e.g.*, *Karcher*, 462 U.S. at 763-764 (Stevens, J., concurring).

[20] 603 F. Supp. at 1484.

[21] *See, e.g.*, *Karcher*, 462 U.S. at 764 n.33 (Stevens, J., concurring).

[22] 849 F. Supp. at 1038 n.13.

[23] 980 F.2d at 955.

[24] *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966).

[25] *See Bandemer*, 478 U.S. at 176-177 (Powell, J., concurring in part and dissenting in part), and the district court opinion, 603 F. Supp. at 1486-1488.

[26] *See Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part).

[27] *Pope*, 809 F. Supp. at 397.

[28] *See Bandemer*, 478 U.S. at 175-176 (Powell, J., concurring in part and dissenting in part).

[29] *See Karcher*, 462 U.S. at 759 (Stevens, J., concurring).

[30] *See Bandemer*, 478 U.S. at 175-176 (Powell, J., concurring in part and dissenting in part).

[31] *Pope*, 809 F. Supp. at 397.

[32] 412 U.S. at 753.

[33] 478 U.S. at 128-129.

[34] *Id*. at 139.

[35] *Id*. at 132.

[36] *See, e.g.*, *Badham*, 694 F. Supp. 664; *Pope*, 809 F. Supp. 392; *Terrazas*, 821 F. Supp. 1162; *Marylanders*, 849 F. Supp. 1022.

[37] *Bandemer*, 478 U.S. at 139-140.

[38] *Id*. at 140 n.17.

[39] *See, e.g.*, *Republican Party of Va. v. Wilder*, 774 F. Supp. at 405; *Ajamian v. Montgomery Cnty.*, 639 A.2d 157, 170 (Md. App. 1994).

[40] 694 F. Supp. 664.

[41] *Id*. at 669-671.

[42] *Id*. at 670.

[43] *Bandemer*, 478 U.S. at 139. *See also Marylanders*, 849 F. Supp. at 1041 ("A mere showing of disproportionate election results is insufficient").

[44] *Bandemer*, 478 U.S. at 132.

[45] *Id*. at 133.

[46] 849 F. Supp. at 1040.

[47] *Id*. at 1043.

[48] 980 F.2d 943.

[49] *Id*. at 957.

[50] *Id*. at 958.

[51] *Id*.

[52] *Id*. at 957-958. Following the appellate court's decision and subsequent litigation on remand, the North Carolina Legislature changed the state's method for electing superior court judges from a system of statewide, partisan elections to one of nonpartisan elections by districts.

[53] 694 F. Supp. at 670. *See also Republican Party of Va. v. Wilder*, 774 F. Supp. at 405-406.

[54] *Badham*, 694 F. Supp. at 673.

[55] 821 F. Supp. at 1173.

[56] *Id*. at 1174.

[57] *Id*.

[58] *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002).

[59] *Id.* at 536.

[60] *Id.* at 543-547.

[61] *Id.* at 538.

[62] *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (per curiam).

[63] *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (per curiam), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[64] *Vieth v. Jubelirer*, 541 U.S. 267.

[65] *Id.* at 271-306.

[66] *Id.* at 306-317 (Kennedy, J., concurring).

[67] *Id.* at 317-342 (Stevens, J., dissenting); *id.* at 343-355 (Souter, J., dissenting); *id.* at 355-368 (Breyer, J., dissenting).

[68] *Id.* at 306 (Kennedy, J., concurring).

[69] 298 F. Supp. 2d 451 (E.D. Tex.) (per curiam), *vacated and remanded sub nom. Jackson v. Perry*, 543 U.S. 941 (2004).

[70] *Id.* at 474.

[71] *Id.* at 474-475.

[72] *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005).

[73] 548 U.S. 399.

[74] *Id.* at 416-420.

[75] *Id.* at 418.

[76] *Id.* at 447-483 (Stevens, J., concurring in part and dissenting in part). Justice Breyer appears to have agreed with some of the Stevens analysis, while restating his own unconstitutional entrenchment standard he developed in his *Vieth v. Jubelirer* dissent. *See id.* at 491-492 (Breyer, J., concurring in part and dissenting in part).

[77] 462 U.S. 725.

[78] *Id.* at 744-765 (Stevens, J., concurring).

[79] *Id.* at 761-765.

[80] *Id.* at 754-755.

[81] 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *aff'd mem.* 542 U.S. 947 (2004).

[82] *Id.* at 1327-1329.

[83] *Cox v. Larios*, 542 U.S. 947 (2004).

[84] *Id.* at 949-950 (Stevens, J., concurring).

[85] *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672.

[86] *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478.

Chapter 7
Substantive Redistricting Standards in the Texas Constitution

I. Introduction

Although the substantive standards that govern statewide redistricting plans are provided primarily by federal law, the Texas Constitution contains several significant provisions that also govern some of those plans. The Supremacy Clause, contained in Article VI of the U.S. Constitution, provides that federal law is the supreme law of the land. In the event of a conflict, the federal constitution or a federal statute controls over state law. However, state law may impose requirements in addition to or not inconsistent with those imposed by federal law. This chapter discusses the substantive redistricting standards provided by the state constitution and the interrelationship between those standards and the federal law governing redistricting.[1]

II. Congressional Districts; State Board of Education Districts

The Texas Constitution does not provide substantive standards directly applicable to the state's congressional or State Board of Education redistricting plan. Therefore, under state law, the composition of the state's congressional and State Board of Education districts is left entirely to the discretion of the legislature.[2]

The number of State Board of Education districts is established by statute,[3] and the legislature could increase or decrease the number of board districts from the current 15 when it redistricts the board.

III. Legislative Districts: Interrelationship Between State and Federal Law

Sections 25 and 26, Article III, Texas Constitution, provide substantive standards for state senate and house districts. Section 25 governs redistricting of the Texas Senate and was substantially amended in 2001. Section 26, which governs redistricting of the Texas House of Representatives, has not been amended since the current state constitution was adopted in 1876. These state constitutional provisions were originally adopted during an era in which the redistricting of state legislatures was a matter left to the discretion of the states, with the federal government claiming no authority over the content of state legislative redistricting plans. However, since adoption of Sections 25 and 26, the federal government has entered the political thicket of legislative redistricting.

In 1964, the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that state legislative districts be substantially equal in population.[4] One year later, Congress enacted the Voting Rights Act of 1965 to enforce the rights guaranteed by the Fifteenth Amendment to the U.S. Constitution. The act, as amended, prohibits states from enacting a redistricting plan that dilutes the voting strength of racial or language minority groups.

In past redistricting cycles, the substantive redistricting standards provided by Sections 25 and 26 have been sometimes at odds with the federal constitutional and statutory provisions that govern

redistricting. The conflicts, unforeseeable when these provisions of the Texas Constitution were adopted, injected significant uncertainty into the redistricting process. In 2001, several provisions of Section 25 that were likely invalid because of federal law were repealed.

As a result of conflicting federal law, Section 26 cannot be given full effect as written. In *Smith v. Craddick*,[5] the Texas Supreme Court considered the interrelationship between the state constitutional provisions governing house redistricting plans and federal law. The plaintiffs asserted that the legislature's 1971 house redistricting plan failed to comply with the state constitution. The court, noting the supremacy of federal law, held that if application of a substantive standard provided by the state constitution violates federal law, the state standard cannot be fully enforced. However, the court also held that a state substantive standard yields only to the extent necessary to comply with federal law and that compliance with the state substantive standards that do not conflict with federal law remains necessary for enactment of a valid redistricting plan. The court stated that "[w]e understand some of the difficulties of every undertaking to redistrict this state. However, this court may not abrogate any provision of the [state] constitution for the sake of simplicity."[6] In summary, the legislature or Legislative Redistricting Board must comply with each valid substantive standard provided by the Texas Constitution or be prepared to prove in state court that each violation of the state constitution is necessary to comply with federal law. Given the evolving condition of both federal and state law governing redistricting, the proper balance between the two is not always clear.

IV. Texas Senate Districts

Section 2, Article III, Texas Constitution, provides that "[t]he Senate shall consist of thirty-one members."

Section 25, Article III, Texas Constitution, the only provision of the state constitution that provides substantive standards directly applicable to senate redistricting plans, states:

> The State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.

The substantive standards provided by Section 25 may be listed as follows:

(1) each senate district elects only one senator; and

(2) each senate district must be composed of contiguous territory.

A. Single-Member Districts

The requirement that each senate district elect only one senator does not conflict with federal law, and, therefore, a senate redistricting plan must be composed entirely of single-member districts.

B. Contiguity

The requirement that senate districts be composed of contiguous territory is consistent with federal law.[7] A legislative district is composed of contiguous territory if all the territory within the district shares a common boundary line.[8] The requirement that legislative districts be composed of contiguous territory is intended to ensure that, to some extent, persons residing in a district have common interests and an opportunity to communicate among themselves and with their legislator.

C. Repealed Provisions

Prior to its amendment in 2001, Section 25 also required that:

(1) no county may be represented by more than one senator;

(2) the state must be divided into senate districts according to the number of qualified electors; and

(3) the number of qualified electors in each senate district must be equal to other districts "as nearly as may be."

The requirement that no county be represented by more than one senator was a clear violation of the one-person, one-vote standard.[9] Courts held that the use of the "qualified elector" standard for drawing senate districts also violated federal law.[10] Not only did the "qualified elector" standard violate federal law, there was a practical problem with drawing districts based on this standard because there was no readily available database of qualified electors upon which districts could be drawn. In 2001, the legislature proposed eliminating these provisions from Section 25 as a part of the constitutional amendment proposed by H.J.R. No. 75, which sought to eliminate obsolete, archaic, redundant, and unnecessary provisions of the Texas Constitution. On November 6, 2001, the voters approved this constitutional amendment.

D. Substantive Standards Not Contained in Section 25

Section 25 does not contain two substantive standards that are found in many other states' constitutional provisions governing legislative redistricting. First, Section 25 does not require that senate districts be compact. Despite the absence of such a requirement, the legislature probably should attempt to create reasonably compact senate districts because the existence of noncompact districts is often viewed by a federal court as circumstantial evidence of an illegitimate purpose.[11] Second, Section 25 does not require that senate districts follow the boundaries of any type of political subdivision.[12] This is important because the courts have permitted significant population deviations in legislative redistricting plans adopted by states if necessary to follow the boundaries of political subdivisions in accordance with the state constitution or historical practice.[13]

E. Summary

As stated above, Section 25, Article III, is the only provision of the state constitution that provides substantive standards directly applicable to senate redistricting plans. The provisions of the section require that the state be divided into single-member senate districts that are composed of contiguous territory.

V. Texas House Districts

Section 2, Article III, Texas Constitution, provides in part that "[t]he House of Representatives shall consist of 150 members."

Section 26, Article III, Texas Constitution, provides substantive standards applicable to house redistricting plans. Section 26 reads:

> The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

A. Substantive Standards Provided by Section 26

Section 26 provides three rules for house redistricting:

(1) the districts must be apportioned among the counties according to population "as nearly as may be";

(2) the most recent federal census must be used to apportion districts among the counties; and

(3) districts must be apportioned among whole counties in accordance with the proviso contained in Section 26.

These three rules are discussed below.

Population Equality. Section 26 requires that house districts be apportioned among the counties according to population "as nearly as may be." As discussed below, Section 26 also prohibits the splitting of counties between districts, and the population equality requirement must be read in conjunction with those other provisions of the same section. This state equal population provision does not require violation of the county integrity provisions, while the federal equal population rule at least potentially requires the division of at least some counties to achieve acceptable levels of population equality between districts.[14] The state provision literally applies only to the apportionment of representatives among counties, not to the creation of districts completely within a populous county to which more than one representative is apportioned. Accordingly, the state constitution does not appear to specifically require any population equality among those districts, leaving that matter to be governed solely by federal law.

It could be argued that a house plan adopted by the legislature or Legislative Redistricting Board that complies with federal law still contains an invalid level of population deviation under Section 26 in some situations. For example, if the state aims at a level of population equality roughly the same as that approved in the 1971 Legislative Redistricting Board house plan (9.9 percent total range of population deviation, 1.8 percent average deviation), a plaintiff might present one or more alternative plans that comply with all federal standards and all other state standards, but in which the apportionment of representatives among the counties achieves a *greater* level of population equality than the adopted plan. No party challenging a house plan in previous state litigation appears to have made such an argument based on the "as nearly as may be" population equality provision. It is not clear whether Texas courts would apply the standard so rigidly as to void a plan that complies with the federal one-person, one-vote standard.

Use of Federal Census. Section 26 requires that the most recent federal census be used to apportion the Texas House of Representatives. When the current Texas Constitution containing that section was adopted in 1876, the only "federal census" was the federal decennial census required by Section 2, Article I, of the U.S. Constitution. That decennial census is clearly the census Section 26 refers to. Section 28, Article III, Texas Constitution, adopted in 1948, requires redistricting of the Texas House and Senate after each federal decennial census, and Section 26 apparently refers to that same census.

One possible effect of the reference in Section 26 to the federal census is that of prohibiting the use of population projections or other legislative adjustments to the federal census in apportioning house districts. As noted in Chapter 1 of this publication, federal law does not require the use of the federal census in redistricting a state legislature, although any other population data used must be shown to be valid. In addition, federal law allows the states to make nondiscriminatory adjustments to the census, such as eliminating certain nonresidents, for purposes of redistricting. However, the requirement of Section 26 that the federal census be used appears to prohibit the legislature from making such adjustments to the census for use in apportioning house seats among the counties. Section 26 does not, however, expressly require the use of the federal census for drawing districts within multidistrict counties.

Apportionment of Representatives Among Whole Counties: The County Line Rule. Apportionment is the allocation of representatives among already established units of government. For example, the distribution of congressional seats among the states under Section 2, Article I, of the U.S. Constitution constitutes an apportionment. Section 26, Article III, of the Texas Constitution provides for the apportionment of Texas House seats among the state's counties, and the proviso that concludes Section 26 provides specific guidelines for that apportionment.

The proviso that concludes Section 26 clearly prohibits the division of counties between districts in apportionment and generally limits the redistricting body to the creation of districts that consist of whole counties or groups of whole counties. This Section 26 prohibition against dividing counties is commonly referred to as the "county line" rule. Preserving the integrity of counties in redistricting promotes several significant state interests. Each county has its own identifiable representative or delegation of representatives, an important factor in a state in which a significant amount of legislation directly affects individual counties and county government.[15] The natural constituencies and communities of interest that form within a county are not divided. Voter confusion regarding district boundaries is minimized, and administering elections, organizing constituencies, and conducting campaigns are facilitated.[16] In addition, the opportunity for gerrymandering is limited.[17]

Interrelationship of County Line Rule and Federal Law. No house district divided a single county before 1965. Beginning in 1964, the federal courts began to enforce the one-person, one-vote requirement, making the state's interest in preserving county integrity subservient to the federal mandate of substantial population equality between districts. Initially, some persons apparently assumed that the federal equal population requirement had eviscerated the state county line rule,[18] and in 1971 the legislature adopted a house plan that divided 33 counties between multicounty districts in violation of the county line rule.[19] As previously discussed in this chapter, the Texas Supreme Court in *Craddick* held that the provisions of Section 26 must be enforced as written to the extent possible without violating federal redistricting standards, and that the state failed to show that the splitting of each divided county in the legislature's 1971 house plan was necessary in order to comply with federal law.[20]

A decade later, in *Clements v. Valles*, the Texas Supreme Court reiterated its previous position when it invalidated the legislature's 1981 house redistricting plan. The court reaffirmed the rule announced in *Craddick* that plaintiffs may establish a *prima facie* violation of Section 26 by showing that the adopted plan divides one or more counties between house districts in violation of Section 26, and that the burden then shifts to the state to prove that each county split is necessary to comply with federal law. In that case, the plaintiffs established a *prima facie* violation by showing that 34 counties had been divided between districts. The state offered an explanation for each such county, arguing that dividing it was necessary to comply either with the one-person, one-vote standard or with Section 5 of the Voting Rights Act, to which Texas had become subject in 1975. The court refused to accept all of the state's rationale for the divided counties, in large part because plaintiffs presented numerous alternative plans that complied with those federal laws without dividing nearly as many counties as the legislature's plan. The court held that the plan violated the county line rule of Section 26 and permanently enjoined its implementation.[21]

Apportionment of Representatives in Compliance With Section 26 Proviso. The proviso that concludes Section 26 imposes three conditions on the apportionment of representatives among the counties. Part of the third condition is completely unenforceable under federal law. Balancing the remainder of the proviso with federal law, in particular with the one-person, one-vote requirement, is a crucial step in formulating a house redistricting plan that will survive a challenge in both state and federal courts.

1. Single County Entitled to Exactly One Representative. The first clause of the proviso requires that a county be formed into a separate district if it has sufficient population to be entitled to a representative. Therefore, a county with sufficient population for exactly one representative may be divided between two or more districts that extend outside the county only if failure to divide the county would violate federal law. The Texas Supreme Court has twice interpreted this clause to mean that a county must constitute a separate district by itself if the population of the county is "slightly under or over" the population of an ideal district.[22] Neither decision defines what range of population deviation constitutes "slightly under or over." Balancing the requirements of this clause and federal law requires that three difficult legal determinations be made: (1) what range of population variance constitutes "slightly under or over" the population of an ideal district; (2) what degree of population inequality is allowed by the federal one-person, one-vote standard in the context of this clause; and (3) whether application of the clause to a particular county violates the Voting Rights Act.[23] On the basis of those determinations, each county with a population that is "slightly under or over" the population of an ideal district must be formed into a separate district unless forming the county into a separate district would result in a violation of the one-person, one-vote standard or the Voting Rights Act. As a practical matter, the conflict between this clause and federal law most likely to occur would be a situation in which maintaining a county as a single whole district would prevent the equalizing of populations among other districts because of the location of the county in question.

Federal case law suggests that the legislature may create as a single house district any whole county whose population falls within an overall range of population deviation of 10 percent without violating the federal one-person, one-vote standard.[24] If the legislature does not draw such a county as a single district, that failure is likely to be held invalid under the first clause of the Section 26 proviso.

Whether the first clause of the proviso requires any counties outside the 10 percent range of population deviation to be maintained as single-county districts is unclear. However, because

creation of a district outside the 10 percent range would constitute a *prima facie* violation of the one-person, one-vote standard, and because such relatively great deviations do not appear to be "slightly under or over" the ideal district population, a plan that creates single-county districts outside the 10 percent range could be challenged under federal law. A federal court would likely find the first clause of the Section 26 proviso insufficient justification for single-county house districts with population deviations in excess of the 16.4 percent total range approved in *Mahan v. Howell*,[25] discussed in more detail in the next section of this chapter.

Whatever level of population deviation the legislature determines constitutes "slightly under or over" the ideal population, the legislature should attempt to apply its standard consistently. A state court is far more likely to invalidate a plan that maintains one or more counties intact as single-county districts while dividing others with the same or less deviation from the ideal population than one in which the legislature applies a reasonable interpretation of the first clause of the proviso consistently to every county.[26]

2. County Entitled to Less Than One Representative. The second clause of the Section 26 proviso requires a county with a population too low to entitle the county to its own representative to be joined with one or more contiguous counties in a district. In other words, such counties may not be split between districts but must be placed in their entirety in districts that consist of a cluster of whole counties. Most of the state's counties are affected by this clause of the proviso because they have less than the ideal district population. According to the 2000 census, 231 of the 254 counties fell five percent or more below the ideal district population of 139,012.

Creating districts that consist only of whole counties is simple enough, but the legislature must ensure that those districts comply with the federal requirement that districts contain substantially equal populations. As discussed in detail in Chapter 2 of this publication, the U.S. Supreme Court has established a rule of thumb that a legislative redistricting plan with a total range of population deviation of less than 10 percent is not invalid solely because of the population deviation, but a plan with larger disparities in population is invalid unless the deviation is justified by the state. The preservation of political subdivision integrity, particularly when required by the state constitution, has been held to justify a total range of deviation of as much as 16 percent in some cases,[27] and it is possible that the federal courts would approve a Texas House plan with similar population deviation in order to comply with the Section 26 county line rule. It is reasonably clear that the legislature may not split a county with less than sufficient population for a whole representative if a plan could be drawn that maintains the county in a single district without exceeding an overall range of population deviation of 10 percent. In *Valles*, the court noted that the challenged house plan divided at least three counties with less than the ideal district population in violation of this clause of the proviso. While the state argued that it was necessary to split those counties in order to comply with federal equal population requirements, those challenging the plan presented numerous alternative plans, some complete statewide plans, that kept those counties intact while maintaining a total range of population deviation well under 10 percent.[28]

If the legislature adopts a house plan that falls outside the 10 percent range solely to avoid splitting counties in violation of this or another clause of the Section 26 proviso, it runs some risk that the federal courts will refuse to accept the county line rule as sufficient justification for those deviations, especially if alternative plans are presented that maintain county integrity while achieving a lower level of population deviation. On the other hand, the state courts could conceivably find a house plan to be invalid for failing to maintain whole counties even if

maintaining whole counties would result in some districts falling outside the 10 percent range. The legislature may find itself in a quandary in trying to strike the proper balance between the Section 26 proviso and the federal equal population rule since it is difficult to be certain exactly how great a population deviation is permissible under federal law. It should be noted that the state has not found it difficult to avoid the division of counties having significantly less than the ideal district population while staying within the "safe" 10 percent range. The house plan adopted by the Legislative Redistricting Board in 1971 divided only one such county, the house plan adopted by the board in 1981 did not divide any such counties, the house plan adopted by the legislature in 1991 divided only two such counties, and the house plan adopted by the Legislative Redistricting Board and modified by the federal district court in 2001 divided only one such county. All other counties split under those plans had more than the ideal district population and were divided in order to allocate excess population to other counties, as required by the third clause of the proviso discussed below.

The requirement in the second clause of the proviso that counties combined in a multicounty district be contiguous has raised few serious questions. Texas courts have not had occasion to define "contiguous" for purposes of Section 26, and so a few questions are as yet unanswered. For example, it is not clear whether counties that touch at only one point, such as where two opposite corners meet in the rectangular counties of North and West Texas, may be considered contiguous in order to allow them to be joined in the same house district under this clause. At least one court in another state has held that contact at a single point does not constitute contiguity for purposes of such a provision,[29] so such a practice probably should be avoided unless absolutely necessary. In 1961, the Texas attorney general indicated that counties on the Gulf of Mexico that are not contiguous on dry land are considered contiguous for purposes of Section 26 only if the portions of the counties extending under the Gulf of Mexico are themselves contiguous. This opinion suggests that counties separated by any body of water are contiguous only if the territories of the counties in that body of water actually adjoin one another.[30]

3. County Entitled to More Than One Representative. The final clause of the Section 26 proviso provides that if a county "has more than sufficient population to be entitled to one or more" representatives, that number of representatives must be apportioned to that county. It further provides that if there is a surplus population (that is, if the county is entitled to one or more whole representatives and a fraction of an additional representative), the county may be joined with one or more adjacent counties in another district.

The first part of this clause in effect requires that, however many representatives a county is entitled to by population, that number of representatives must be elected entirely from that county and no part of the county may be joined with other counties. So, for example, a county with a population that entitles it to precisely four representatives must be assigned four whole representatives. Other arrangements would violate Section 26, such as apportioning three whole representatives to the county and dividing the remaining population between two or more other districts that extend outside the county.

The second part of this clause literally requires the whole county to be added to one or more adjacent counties if there is a "surplus population" (that is, the population left over after apportioning a whole number of representatives to the county). This provision calls for the creation of what is known as a "flotorial district." A flotorial district is a large district that elects one or more representatives and that has embedded within it all or part of one or more smaller districts that

also elect representatives, and is in effect a kind of multimember district in which some or all of the voters vote for more than one representative. Flotorial districts as used in some states are not necessarily invalid, although they have fallen into disuse because of the modern preference for single-member districts in redistricting plans and the need to avoid diluting minority voting strength through use of multimember districts. As long as each person in a flotorial district votes for the same number of representatives and the total number of representatives elected from the flotorial district and the smaller districts within it is that to which the area is properly entitled according to population, such a district does not violate the federal requirement that each voter's vote be of substantially equal weight.[31] For example, a flotorial district that elects one representative to a legislative body and that is subdivided into three smaller districts of equal population that each elects one additional representative does not result in unequal representation if the total population of the flotorial district is entitled to four representatives. Such use of flotorial districts is analogous to the use of a mixed single-member and at-large system in a local governing body, such as a city council.

Until 1965, flotorial districts were routinely used in Texas House redistricting to comply with the "surplus population" provision. As required by Section 26, however, a flotorial district consisted of the entire county having the excess population as well as the smaller adjacent county or counties whose population, when added to that excess population, was enough for a whole representative. The effect of this practice was to give the voters of the dominant multimember county with the excess population, ordinarily far more populous than the adjacent counties included in the flotorial district, effective control of the flotorial district, depriving the other counties in the flotorial district of any real voting power. The voters in the populous county in effect elected several representatives from within that county and another representative for the flotorial district. The voters in the adjacent counties had little impact on the election of their single representative since their votes were overwhelmed by the votes cast in the more populous county. This use of flotorial districts in Texas has been held to violate the right of voters in the adjacent counties to equal representation and has been completely abandoned.[32]

After the federal courts outlawed such flotorial districts, the Texas Supreme Court made it clear that the remainder of the third clause of the proviso was still partially effective. In *Craddick*, the court stated that, with the nullification of the requirement that the whole county with surplus population be joined with other adjacent counties in a flotorial district, "it becomes permissible to join a portion of that county (in which the surplus population reside and which is not included in another district within that county) with contiguous area of another county to form a district. For example, if a county has 100,000 population, and if a district of 75,000 is formed wholly within that county, the *county* is given its district, and the [remaining] area wherein the 25,000 live may be joined to a contiguous area."[33] (Emphasis in original.) The court went on to emphasize that this new "surplus population" rule, designed to avoid the improper use of flotorial districts, does not authorize the legislature to ignore the requirement that the county with surplus population be apportioned whole representatives to the extent possible.

A decade later, in *Valles*, the court appeared to question the division of a surplus population between more than one district extending outside the county. The court noted that the legislature's house plan contained three counties (Nueces, Denton, and Brazoria) whose surplus population was joined to two adjoining districts rather than one.[34] But after making this observation the

court did not list it as one of the reasons the court found the plan invalid under Section 26. The Legislative Redistricting Board's house plan used in the 1980s also treated three counties (Collin, Montgomery, and Brazoria) in that manner. But in 1991, cognizant of the court's observation in *Valles*, the legislature in enacting a house plan did not divide the surplus population between more than one district, and the plan adopted by the Legislative Redistricting Board in 2001 did not divide the surplus population between more than one district. No litigation that involved an alleged violation of Section 26 was brought against the 1991 house plan. As mentioned in Part D, below, litigation under Section 26 in 2001 was foreclosed by the federal court's assumption of the case.

When Does a County Have a "Surplus Population"? Application of the third clause of the Section 26 proviso requires the legislature to determine whether a county entitled to more than one representative has "surplus population" for purposes of Section 26. If the county does not have surplus population, it must be assigned a whole number of representatives, and no part of the county may be part of a district that extends outside the county. If there is surplus population, the surplus population should be joined with one or more adjacent counties in a single district. Obviously, a county will almost never have the population necessary for exactly two or more representatives (that is, an exact multiple of the ideal district population). After subtracting from the total population of a county the population that entitles the county to as many whole representatives as possible, the remaining leftover population must be examined to determine whether the county has a "surplus population." For example, if a county has a total population of 712,000 and the ideal district population is 100,000, the county is entitled to seven whole representatives representing 700,000 persons, with a leftover population of 12,000 (712,000 minus 700,000). Under the third clause of the proviso, there are three possible ways of treating this leftover population:

(1) distributing it among the whole districts apportioned to the county, increasing the population of each district slightly above the ideal population;

(2) apportioning an additional whole representative to the county, reducing the population of each district below the ideal population; or

(3) treating that leftover population as "surplus population" by placing it in a district with one or more adjacent counties.

The key to application of the third clause of the proviso is establishing the range of the leftover population that requires adding the surplus population to a district that extends outside the county, as opposed to distributing the leftover population among the other districts wholly in the county or adding a whole additional representative to the county.

The Texas Supreme Court in *Valles* suggested that the determination to treat a county as having surplus population must be based solely on the need to comply with federal law. The court noted that the 1981 house plan at issue in that case placed portions of eight counties (Potter, Webb, Gregg, El Paso, Tarrant, Bexar, Dallas, and Harris) into districts with other counties under the surplus population provision, and held that the state failed to show that the retention of all the population of each county in districts wholly within the county would have resulted in population deviations impermissible under federal law. The court seemed to give significant weight to the fact that the plaintiffs challenging the plan had introduced a number of alternative plans that maintained more of the leftover population within the counties.[35] The court seems to have established a general rule that the legislature must treat a county as having no surplus population if it can be divided

into a whole number of districts with population deviations permissible under federal law. As noted previously in the discussion of the proviso's second clause, federal law generally permits population deviations within an overall range of approximately 10 percent, but allows even greater population deviation, as much as 16 percent or slightly more, if justified by legitimate state policies such as the county line rule in Section 26. Therefore, it is uncertain exactly when the legislature must split a county to avoid excessive population deviations. Conceivably, federal law would allow the legislature to avoid splitting a county even if the resulting districts fell slightly outside the 10 percent range. However, splitting counties to avoid any deviations outside the 10 percent range is the approach that was taken by the Legislative Redistricting Board in 1971 and 1981, by the legislature in the enactment of house plans in the 1990s, and by the board in 2001. This approach was never challenged in state court.

A county with at least 10 times the ideal district population must ordinarily be assigned a whole number of representatives without joining any surplus population to other counties since it is always mathematically possible to divide such a county into a whole number of districts with an average population deviation allowable under federal law. For example, if the ideal population of a district is 100,000, a county with more than 10 times that population (more than one million) can always be divided into a whole number of districts with at least 95,000 and not more than 105,000 persons, the outer limits of the 10 percent range of deviation. Dividing the county to place a small part of the county's population in a district extending outside the county is almost certainly not necessary to comply with the federal equal population standard and so would violate the third clause of the Section 26 proviso as interpreted by the Texas Supreme Court. Harris, Dallas, Bexar, and Tarrant Counties fall into this category, and population from those counties almost certainly may not be included in any districts extending into other counties unless the inclusion of that population would result in a county split being avoided in another county.

Application of this clause of the proviso to counties having sufficient population for more than one but fewer than 10 districts requires the legislature to determine at what point assigning a whole number of representatives to a county would result in invalid population deviation. For example, the 2000 census indicated that exactly six house members could be apportioned to Travis County with an average population deviation for those six districts of only 2.6 percent below the ideal, well within the 10 percent range. Accordingly, Travis County was apportioned exactly six house members. On the other hand, if assigning a whole number of representatives to a county would result in districts that are not within an acceptable range of population deviation, the county must be treated as having surplus population, and part of that county must be separated and joined with adjacent counties. For example, in the 1981 house plan adopted by the Legislative Redistricting Board, Travis County was assigned four whole representatives and the surplus population was added to three adjacent counties in a fifth district. If Travis County had been assigned only four representatives without separating out any surplus population, the average population deviation of those districts would have been 10.36 percent over the ideal district population (9,832 too many persons per district); if five whole representatives were assigned to Travis County, the average deviation of each district would have been 9.43 percent under the ideal (8,946 too few persons per district). It was apparently assumed that either of these options would have resulted in impermissible population deviation under federal law and that it was thus necessary to treat Travis County as having a surplus population.

As mentioned above, the state might be justified under federal law in keeping districts wholly within a county up to a total deviation range of 16.4 percent. This greater range would allow for fewer counties to have surplus population. However, leaving the 10 percent total range of deviation would require the state to justify that the excess deviation was necessary to keep counties whole and that the policy was uniformly applied to all such counties. If a plaintiff produced an alternative plan with a lower total range of deviation that split the same or a lower number of counties, a federal court would likely reject the state's plan without some further justification.

Compliance With County Line Rule: An Overview. Because violations of the county line rule were so egregious in both the 1971 and 1981 house plans invalidated in *Craddick* and *Valles*, respectively, the Texas Supreme Court did not have to develop detailed guidelines for balancing the rule and federal law. It is clear from this prior litigation under Section 26 that a plaintiff's ability to draw alternative plans that more closely comply with the valid provisions of Section 26 while complying with federal law is a key factor in determining whether a house plan adopted by the legislature or Legislative Redistricting Board is valid. It is not entirely clear what criteria will be used to judge whether alternative plans introduced by plaintiffs challenging a legislative plan comply with the county line rule to a greater degree than the legislative plan. A court might compare the number of counties divided in violation of Section 26, the number of districts that do not comply with Section 26, or the number of persons affected by the violation of Section 26. New technology enables persons wishing to challenge the 2011 house plan to produce a large number of alternative plans. The existence of this technology increases the burden on the legislature or Legislative Redistricting Board to justify violation of Section 26, a burden the state was unable to satisfy in the 1971 and 1981 litigation. The redistricting bodies must be fully cognizant of the need to analyze proposed house plans against the apparent dictates of Section 26 and develop specific explanations for why each apparent violation of Section 26, if any, is required by federal law. In addition, in striking a balance between state and federal law, the redistricting bodies should be able to articulate the reasons for their actions and should apply the criteria established for the application of Section 26 consistently in any house plan that is adopted.[36]

B. Summary

Because of conflicts with the federal law governing redistricting, Section 26, Article III, Texas Constitution, cannot be given full effect as written. That section and the federal and state court decisions that discuss the interrelationship between that section and federal law provide that:

(1) the most recent federal decennial census figures must be used to apportion the house of representatives among the counties;

(2) the apportionment of representatives among the multidistrict counties and districts consisting of one or more whole counties must achieve population equality "as nearly as may be";

(3) unless violative of federal law, a county with a population that is "slightly under or over" the population of an ideal district must be formed into a separate district;

(4) unless violative of federal law, a county that does not have sufficient population for at least one representative must be joined in its entirety with one or more contiguous counties to form a district with sufficient population for a representative;

(5) a county that is entitled by population to one or more representatives must be apportioned the appropriate number of whole representatives;

(6) "surplus population" contained in a county apportioned one or more whole representatives must be severed from that county and joined with one or more other contiguous counties to form a district; and

(7) the provision contained in Section 26 that requires a county with surplus population to be joined in its entirety with one or more less populous counties in a flotorial district violates the federal one-person, one-vote standard and is unenforceable.

C. Substantive Standards Not Provided by Texas Law

There are two substantive standards often found in other state constitutions that are not present in Texas law governing its house districts.

Compactness. The Texas Constitution does not require house districts to be compact. As noted previously in this chapter, there is no state compactness requirement for senate districts either. Federal law does not require compact districts, but failure to draw reasonably compact districts may be viewed as evidence that the districts have been illegally gerrymandered.[37]

Single-Member Districts. The Texas Constitution does not state whether representatives apportioned to a county with two or more representatives must be elected from either single-member or multimember districts. In the absence of a specific limitation, Texas law leaves to the legislature the discretion to create single-member or multimember districts within those counties.[38] Until 1975, countywide at-large election of the entire Texas House delegation for such counties was the norm (because the Harris County house delegation was so large, the county was divided into several multimember districts under the legislature's 1967 plan, with each multimember district electing several representatives at large).[39]

Federal law, however, makes the creation of multimember districts extremely problematic. Theoretically, multimember districts are legally permissible, even if not used uniformly throughout the state.[40] The Supreme Court in *White v. Regester* held that the use of multimember house districts in Bexar and Dallas Counties diluted the voting rights of black and Hispanic voters in those counties, constituting invidious discrimination in violation of the Fourteenth Amendment to the U.S. Constitution.[41] Section 2 of the Voting Rights Act, which generally prohibits any voting procedure that dilutes the voting strength of racial or language minority groups, prohibits the use of multimember districts in which black or Hispanic communities would be deprived of an effective chance to elect representatives of their choice. It is doubtful that a multimember district including any significant black or Hispanic population would be precleared under Section 5 of the Voting Rights Act because it would be difficult to do so without having at least some negative effect on the voting strength of the minority community.

D. Litigation of Standards in Federal Court

The standards for apportioning seats to counties and keeping counties intact contained in Section 26 would appear to be sufficiently complex to invite frequent litigation. As mentioned above, the state supreme court issued opinions on the matter in 1971 and 1981. But despite some unresolved questions, the matter has not been raised since 1981. This may primarily be because the forum for litigation involving redistricting claims has shifted to the federal courts to resolve the enforcement of the federal Voting Rights Act and discrimination claims under the Fourteenth Amendment to the U.S. Constitution. The three-judge federal panel in the 2001 challenge to the

state house plan, *Balderas v. State*, noted that claims that ask a federal court to enforce state law against the state "are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief."[42] The Eleventh Amendment to the federal constitution generally denies federal courts jurisdiction to hear a case in which a person brings a suit against a state for a violation of state law, even if the claim is related to another claim ("pendent jurisdiction") based on the same facts over which the federal court has jurisdiction.[43] Thus, a federal court may not litigate whether a state-enacted plan complies with Section 26, Article III, Texas Constitution. But the court probably would be required to comply with that provision in developing its own remedy in the absence of a valid state-enacted plan.

Notes, Chapter 7

[1] Except for the statutes that set forth current district boundaries, there are no Texas statutes that govern statewide redistricting plans.

[2] *Bush v. Martin*, 224 F. Supp. 499, 509 (S.D. Tex. 1963), *aff'd per curiam*, 376 U.S. 222 (1964); Op. Tex. Att'y Gen. No. V-1160 (1951).

[3] Sec. 7.101(a), Texas Education Code.

[4] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[5] 471 S.W.2d 375 (Tex. 1971).

[6] *Id.* at 379.

[7] *See Reynolds*, 377 U.S. at 578, and *Shaw v. Reno*, 509 U.S. 630, 646-647 (1993), in which the U.S. Supreme Court recognizes contiguity as a legitimate state interest in redistricting.

[8] Op. Tex. Att'y Gen. No. WW-1041 (1961). *See also in re Apportionment Law*, 414 So.2d 1040, 1051 (Fla. 1982), in which the Florida Supreme Court adopts *Webster's* definition of contiguity (being in actual contact) with the exception that areas that touch only at a common corner are not contiguous.

[9] *Kilgarlin v. Martin*, No. 63-H-390 (S.D. Tex. 1965) (summary judgment).

[10] *Id.*; *Terrazas v. Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983); and *see also* Op. Tex. Att'y Gen. No. MW-350 (1981), which states that the legislature need not take into account the number of qualified electors when redistricting the senate because the requirement that "the state be divided into senatorial districts on the basis of qualified electors is unconstitutional on its face as inconsistent with the federal constitutional standard." The opinion does not provide any detailed legal analysis supporting this position.

[11] *See, e.g.*, *Shaw v. Reno*, 509 U.S. at 644-649.

[12] *See* Op. Tex. Att'y Gen. No. MW-350, which states that senate districts need not follow county lines.

[13] *See Brown v. Thomson*, 462 U.S. 835, 843-844 (1983).

[14] *Smith v. Craddick*, 471 S.W.2d 375, 377 (Tex. 1971).

[15] *See Mahan v. Howell*, 410 U.S. 315, 325-326 (1973).

[16] *See S.C. State Conference of Branches of NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D. S.C.), *aff'd sub nom. Stevenson v. S.C. State Conference of Branches of NAACP*, 459 U.S. 1025 (1982).

[17] *See Reynolds*, 377 U.S. at 578-579.

[18] *See* brief of the attorney general, quoted at length in *Craddick*, 471 S.W.2d at 387.

[19] *See Craddick*, 471 S.W.2d at 378.

[20] *Id*.

[21] *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981).

[22] *See Valles*, 620 S.W.2d at 114-115; *Craddick*, 471 S.W.2d at 378.

[23] Forming a county that has a large, politically cohesive minority community located only partially within it into a single-county district, thus dividing the minority community between districts, may violate Section 2 of the Voting Rights Act.

[24] See pages 35-44 of this publication.

[25] 410 U.S. 315 (1973).

[26] *See Valles*, 620 S.W.2d at 115, where the Texas Supreme Court appears to disapprove of the legislature's failure to apply the "surplus population" rule in the third clause of the proviso uniformly throughout the house plan.

[27] See pages 39-44 of this publication.

[28] 620 S.W.2d at 115.

[29] *In re Apportionment Law*, 414 So.2d at 1051 (Fla.).

[30] Op. Tex. Att'y Gen. No. WW-1041 (1961) at 3-4.

[31] *Reynolds*, 377 U.S. at 579.

[32] *Kilgarlin v. Martin*, 252 F. Supp. 404 (1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 369 U.S. 120 (1967).

[33] 471 S.W.2d at 378.

[34] 620 S.W.2d at 114.

[35] *Id*. at 115.

[36] *Id*. at 115.

[37] See the discussion on pages 107-111 of this publication.

[38] *Craddick*, 471 S.W.2d at 377; *Hainsworth v. Martin*, 386 S.W.2d 202 (Tex. Civ. App.—Austin, *writ ref'd n.r.e.*), *vacated as moot*, 382 U.S. 109 (1965).

[39] Ch. 531, Acts of the 60th Leg., Reg. Sess., 1967.

[40] *White v. Regester*, 412 U.S. 755, 765-766 (1973).

[41] *Id*.

[42] 2001 WL 34104833 n.9 (E.D. Tex. 2001).

[43] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984).

Chapter 8
Court-Ordered Redistricting Plans

I. Introduction

When the legislature or the Legislative Redistricting Board fails to enact a plan, or when an enacted plan is invalidated in whole or in part through judicial action or failure of the plan to receive preclearance under Section 5 of the Voting Rights Act, courts may become the map-drawers of last resort, and a slightly different set of rules applies than when legislatures draw the plan. This chapter briefly reviews the law pertinent to court-drawn and court-ordered plans.

Redistricting is essentially a legislative policy-making function that the courts undertake only when the state or local government involved fails to successfully draw its own plan. Courts defer to legislative action whenever possible, and if a court finds that a redistricting plan is invalid, as a general rule it must grant the legislature a reasonable opportunity to draw a substitute plan that is valid.[1] Only when the legislature or other redistricting body fails altogether to redistrict in a manner consistent with federal law, the state constitution, or other applicable state law will a court step in and draw a plan. Despite this principle of restraint, in recent decades courts have become the map-drawers for an increasing number of states.

Courts have drawn both legislative and congressional redistricting plans. They have drawn plans involving a whole state[2] and plans that cover just one part.[3] Some courts have selected from several plans submitted as exhibits,[4] while others have created a plan from whole cloth.[5] Deference to the legislature has ranged from making as few changes as possible in an invalid legislative plan to starting from scratch and drawing a whole new plan.

The legal provisions governing redistricting by a court are generally the same as those for a legislative body. However, the courts lack the legal mandate to implement their own preferences and policies that are not prescribed by law. Federal courts in particular have a duty to limit encroachment on state sovereignty to the extent possible in drawing a plan[6] and for that reason will attempt to comply with valid state legal requirements and to implement state policies when imposing a court-drawn redistricting plan.

A court's role in redistricting is essentially remedial, one that is very different from the policy-making role of a legislature or redistricting board. This remedial role includes approving settlement agreements to resolve redistricting litigation. In reviewing redistricting settlement agreements, courts must take a slightly different approach than that taken in settlements in other civil litigation. In redistricting cases, a court must consider not only the rights and interests of the parties involved in the settlement, but also those of the public as a whole.[7] Thus, before approving any settlement agreement, a court may have to offer all interested persons a reasonable opportunity to intervene and be heard.[8]

II. Federal Requirements

In drawing or adopting redistricting plans, courts first consider federal constitutional and statutory requirements, particularly in two main areas: (1) the one-person, one-vote requirements of Section 2, Article I, of the U.S. Constitution for congressional districts and of the Equal Protection Clause of the Fourteenth Amendment for legislative and other districts; and (2) the prohibitions against minority vote dilution in Section 2 of the Voting Rights Act and in the Fourteenth and Fifteenth Amendments.[9]

A. Equal Population

Courts must adhere strictly to the one-person, one-vote rule in congressional map drawing,[10] although greater deviations are permitted in state legislative redistricting to accommodate legitimate state policies.[11] Courts, however, are subject to a higher standard of population equality than are legislatures. In drawing state legislative districts, a legislature is allowed a certain amount of latitude to draw a plan with some population deviations without specific justification. By contrast, a court must articulate precisely why it cannot adopt a plan of minimal population variance and must support each significant population variance in its plan by reference to a historically significant state policy or other discernible state interest that necessitates the deviation.[12] For example, a court may construct a redistricting plan with a greater than minimal population deviation if the census data that the court uses is more than a few years old.[13]

B. Protection of Minority Voting Rights

In addition to satisfying the one-person, one-vote standard, a court must comply with the provisions of the U.S. Constitution prohibiting intentional discrimination against racial or ethnic minority groups and with the provisions of the Voting Rights Act that enforce those constitutional provisions. Before the 1982 revision of Section 2 of the Voting Rights Act, courts generally interpreted this requirement to mean that a court-drawn plan should preserve existing minority voting strength. Increasing minority voting strength was often considered outside the authority of the courts. The prevailing view was that the court drawing a plan should be color-blind. A court-drawn plan was considered valid despite an incidental adverse effect on minority voters if the court drew the plan following entirely nonracial, "neutral" criteria, such as population equality, compactness, and the preservation of boundaries of political subdivisions.[14]

With the strengthening of Section 2 of the Voting Rights Act in 1982, both state and federal courts drawing remedial redistricting plans came under a greater duty to protect the voting strength of racial and language-group minorities. While Section 2 does not literally apply to federal or state courts, the supreme court has assumed that courts should comply with Section 2 when exercising their authority to redistrict.[15] Of course, a federal court adopting a state redistricting plan may not authorize a state to use a plan that dilutes or enhances minority voting strength in a way that would be invalid if enacted by the legislature.

III. State Constitutional Requirements

After federal requirements are met, courts attempt to comply with any applicable state constitutional requirements that do not conflict with federal law. The Texas Constitution provides no requirements for congressional districts. As discussed in Chapter 7, the Texas Constitution requires legislative districts to be contiguous and state house districts to respect county lines. Similar requirements in other states have been found to be valid to the extent their application does not violate federal law.[16]

State courts are bound by the requirements of the Texas Constitution when drawing a redistricting plan. A federal court is not strictly required to comply with state constitutional requirements when drawing a redistricting plan. However, a plan that is ordered by a federal district court and that gives only lip service to a state constitutional requirement or that ignores the state requirement altogether is subject to review by appellate courts on that basis. The appellate courts have occasionally rejected a plan ordered by a lower court that trampled indiscriminately on valid state policies, especially those derived from state law.[17]

IV. Other State Policies

After all requirements of federal law and the state constitution are fulfilled, courts imposing court-ordered redistricting plans usually observe other rational state policies that are not expressed in the state constitution. Courts find these policies in redistricting bills that received substantial support but did not become law or in redistricting plans enacted in past decades. Typical state policies recognized by the courts include keeping intact, when possible, communities of interest such as cities and other urban areas[18] or counties.[19] Drawing compact and contiguous districts has also been identified as a state policy in redistricting,[20] as well as preserving incumbencies and the cores of old districts[21] and recognizing the differences between a dominant metropolitan area and the rest of a state.[22] In some cases, courts have been unable to find sufficient direct expressions of state policy applicable to the body for which a plan is to be drawn to fully guide them in drawing a remedial plan. These courts have looked for guidance in other district court decisions that have tended to use the same redistricting criteria for drawing plans: compactness, contiguity, and preservation of municipal and county boundaries and communities of interest.[23]

V. Federal Court Deference to States

A. Legislative Plans

Federal courts do not enjoy the same latitude in redistricting as does a state legislature. A plan that would pass muster if drawn by a legislature might fail if ordered by a federal court.[24] For example, while state legislatures may choose to incorporate some multimember districts into a plan, court-drawn plans must use single-member districts exclusively, absent unusual circumstances.[25] Consequently, federal courts will defer to state-drawn plans whenever possible. This deference does not mean that a court is bound by a legislative plan that failed to become law.[26] Such plans may provide clues as to state policy, but they do not provide the policy in its entirety. Further, in drawing a new plan, the court should redraw only those areas that are invalid, rather than the whole map. Those features of the legislature's plan that may be given legal effect should be preserved by the court in its plan.[27] By contrast, a legislature drawing a plan to correct a legal violation may change any features of the district it chooses as long as the additional changes do not violate the law.

B. State Courts

When developing a redistricting plan, federal courts must also defer to state courts. A federal court must consider a redistricting plan ordered by a state court as that state's official plan rather than as a plan submitted to the federal court as a mere proposal.[28] A federal court must reasonably defer its proceedings while a state court is attempting to implement a redistricting plan for the state.[29] Only when both the state legislature and the state courts fail to act in time to adopt a valid redistricting plan may a federal court proceed with implementing its own plan.[30]

VI. Review of Court-Drawn Plans

A. Preclearance Under Voting Rights Act

The U.S. Supreme Court has held that plans drawn by a federal court are exempt from the preclearance requirements of Section 5 of the Voting Rights Act.[31] However, in *McDaniel v.*

Sanchez, the court also said that if a covered jurisdiction submits a plan to a federal court that reflects the policy choices of the elected representatives of the people, preclearance is required before the federal court may adopt that plan.[32] The line between these two rulings is not altogether clear. The court has attempted to reconcile the exemption from preclearance for federal court-drawn plans with the *McDaniel* preclearance requirement by stating that "*McDaniel* may best be read merely as an effort to isolate and protect wholly court-developed plans from preclearance."[33]

It seems reasonable to assume that if the entire legislature submits a plan to the court through any means, even through a resolution, the plan would require preclearance. But policy is rarely heard through one voice on the state level, particularly during redistricting litigation. Many elected officials, such as individual legislators, the governor, and the attorney general, as well as any other state officials who are parties to a suit, are in a position to suggest policy choices on behalf of the state. Redistricting battles have not clarified the degree to which a court must change a plan submitted by the legislature or by a state official to render the plan into a wholly court-drawn plan that is exempt from preclearance.

B. Standard for Judicial Review of Court Plan

Ordinarily, a federal challenge to a statewide redistricting plan is heard by a three-judge federal district court, with appeal directly to the supreme court. When the supreme court agrees with the district court, it usually summarily affirms the district court's decision without issuing an opinion. When the supreme court rejects a district court's plan, it does not always state what standard of review it is applying.[34] However, the ordinary standard for review of a court's equitable remedy is the abuse of discretion standard, and several cases have expressly applied that standard as the appropriate level of review of a court-ordered redistricting plan.[35]

Given the difficulty of establishing that a trial court has abused its discretion, use of that standard of review will generally insulate a court-ordered plan from claims that the plan does not comply precisely with the equal population standard or the Voting Rights Act, or that the court has not properly balanced a legitimate state policy with federal standards. However, a court-ordered plan drawn in complete disregard of valid state policies or with an easily reducible population inequality may be successfully challenged. It is also likely that an appellate court will scrutinize a court-ordered plan closely for its effect on racial or language-group minorities if a party alleges that the plan dilutes or promotes minority voting strength in a way that would be invalid in a legislatively drawn plan. But because the appellate standard of review grants broad deference to a trial court's decisions, the majority of court-drawn plans will not be overturned.

VII. Recent Court-Drawn Redistricting Plans in Texas

In the 2001 round of redistricting, federal courts in Texas had occasion to modify or draw statewide redistricting plans in two instances. The court orders implementing those plans are instructive examples of how the courts apply the principles discussed in this chapter.

A. *LULAC v. Perry*: Correction of Partially Invalid Plan

In 2006, the U.S. Supreme Court held that one of Texas' congressional districts enacted in 2003 resulted in the dilution of Hispanic voting strength in violation of Section 2 of the Voting Rights Act.[36] With the 2006 general election imminent, state officials indicated that there would be no special session of the legislature to enact corrections to the plan and requested the federal district

court hearing the case to order corrective changes. In ordering changes to correct the Voting Rights Act violation, the district court noted that its task was to "do no more than necessary to correct the [legal] flaws" found by the supreme court.[37] While many parties, including the successful plaintiffs, legislative representatives, and the Texas attorney general, submitted proposals, the court determined that it was not compelled to treat any of them as the state's official proposal in the way it would treat a remedy enacted by the legislature.

In remedying the invalid plan without official state guidance, the court focused on the district (District 23) that resulted in dilution of Hispanic voting strength and made changes to the original plan only as the court considered necessary to undo that vote dilution. After redrawing District 23 as a more effective Hispanic majority district, the court redrew four surrounding districts (which it considered the fewest possible) consistent with what it considered to be state policy and traditional redistricting principles. First, the court maintained the Hispanic voting strength of other districts. In moving territory between districts, the court attempted to keep regions, groupings of counties, or other communities of interest intact. It based these considerations largely on how these areas had been treated in the plan being modified or in former legislative plans. When major changes had to be made to adjacent districts, the court turned to traditional principles, such as keeping political subdivisions (such as Webb County) whole and avoiding elongated districts in favor of more compact ones. Where possible, specific elements of the legislative plan were retained to reflect the decisions of the legislature, such as maintaining the split of Travis County among three districts or preserving the "anchor" of District 15 in Hidalgo County. The court expressed an intent to avoid changing the partisan makeup of the plan enacted by the legislature any more than necessary to remedy the voting rights violation in District 23, and intentionally avoided pairing any incumbents or removing them from districts with a "comfortable level" of voters of the same party.

B. *Balderas v. State of Texas*: Statewide Court-Ordered Plan

In 2001, the legislature failed to enact a congressional redistricting plan after Texas received two additional districts under the national reapportionment. Subsequently, multiple lawsuits challenging the state's old congressional districts as malapportioned were filed in both state and federal courts. In accordance with case law directing federal courts to defer to state authorities, including state courts, as having the primary responsibility for redistricting, the federal court that ultimately assumed jurisdiction of the federal suits gave the state district court that heard the consolidated state claims until October 15, 2001, to adopt a congressional plan. The state district court held hearings and adopted a plan, but the Texas Supreme Court invalidated the district court's plan after determining that the district court had used flawed procedures to make last-minute changes to its plan.[38] On failure of the legislature and state courts to fashion a valid plan, the three-judge federal court assumed that task.[39]

In adopting a new statewide congressional plan, the federal court first examined whether the existing redistricting plan or the state court's plan provided the court with any significant guidance as to the state's redistricting policy. The court concluded that neither plan did, since the existing legislative plan was based on the previous federal census and had fewer districts than were necessary under the new apportionment, and the state court plan had never been finally adopted as the state's official plan.

In the absence of a valid state plan, the court looked to "neutral districting factors" to guide it in crafting a plan. First, the court drew updated versions of the existing minority districts that the court considered "protected" under the Voting Rights Act. Then, relying in part on what it considered the legislature's past practice, the court placed the two new congressional districts in regions with the greatest population growth, the Dallas-Fort Worth Metroplex and the suburban areas around Houston and Austin. The court then looked to the "general historic locations" of other districts to avoid unnecessarily deviating from the state's official preferences as discerned from prior legislative plans. In establishing the new districts with the former districts as a general guide, the court emphasized compactness and, to the extent possible, respected municipal and county lines that the court determined historically define communities in Texas plans. Counties and cities were split only as necessary to achieve population equality or to follow the court's other neutral standards. The court felt that it was not in a position to draw gerrymandered districts with "ripples" in their boundaries as the legislature had done in its 1991 plan, since such districts reflect legislative policy choices of the time but are not based on "neutral" criteria that limit a court's authority to draw districts.

Finally, the *Balderas* court attempted to avoid changes that were avoidably detrimental to incumbent members of Congress from both parties, based in part on the court's determination that the legislature had traditionally respected congressional seniority, distinct from partisan affiliation, in drawing congressional redistricting plans. The court also looked to the partisan makeup of the resulting congressional delegation in comparison to statewide partisan voting patterns as a neutral check on the overall makeup of its revised plan.

At the request of several parties to the case, the district court considered but refrained from creating additional African American and Hispanic districts that were not present in the previous legislatively adopted plan because drawing such districts is "a quintessentially legislative decision" outside the court's authority in the absence of a determination that the additional districts are required by law. Presumably, had the legislature included such districts in its plan, the court would have attempted to retain them out of respect for the valid policy decisions of the legislature. But citing the supreme court in *Voinovich v. Quilter*, the court concluded that it had no authority to order the creation of additional majority-minority districts unless necessary to remedy a violation of federal law and that the parties' request for such districts must be directed to the legislature.

Notes, Chapter 8

[1] *Reynolds v. Sims*, 377 U.S. 533, 585-586 (1964).

[2] *De Grandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), *aff'd in part, rev'd in part*, *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Burton ex rel. Republican Party v. Sheheen*, 793 F. Supp. 1329 (D. S.C. 1992).

[3] *Farnum v. Burns*, 561 F. Supp. 83 (D. R.I. 1983) (state senatorial districts); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (13 of 32 congressional districts).

[4] *People ex rel. Burris v. Ryan*, 588 N.E.2d 1033 (Ill.), *cert. denied sub nom*. 504 U.S. 973 (1992); *Vigo Cnty. Republican Cent. Comm. v. Vigo Cnty. Comm'rs*, 834 F. Supp. 1080 (S.D. Ind. 1993).

[5] *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982).

[6] *Reynolds*, 377 U.S. at 585-586.

[7] *Terrazas v. Ramirez*, 829 S.W.2d 712, 718-720 (Tex. 1991).

[8] *Id*. at 726.

[9] *Seamon v. Upham*, 536 F. Supp. 931, 939 (E.D. Tex.), *vacated*, 456 U.S. 37 (1982).

[10] *Wesch v. Hunt*, 785 F. Supp. 1491, 1497-1498 (S.D. Ala.), *aff'd mem. sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *aff'd mem. sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

[11] *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 633-634 (E.D. Wis. 1982).

[12] *Connor v. Finch*, 431 U.S. 407, 419-420 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975).

[13] *See Abrams v. Johnson*, 521 U.S. 74, 99-101 (1997).

[14] *Connor v. Finch*, 431 U.S. at 422-426.

[15] *Abrams*, 521 U.S. at 90.

[16] *Wis. State AFL-CIO*, 543 F. Supp. at 634-635 (contiguity); *Carstens*, 543 F. Supp. at 88-89 (county lines).

[17] *See, e.g.*, *Minn. State Senate v. Beens*, 406 U.S. 187, 198-200 (1972) (district court improperly ignored state statute establishing number of legislative districts); *see also White v. Weiser*, 412 U.S. 783, 795-796 (1973) (court-ordered plan rejected on ground that although it complied with applicable federal law, it unnecessarily disregarded other state interests).

[18] *S.C. State Conference of Branches of NAACP v. Riley*, 533 F. Supp. 1178, 1181 (D. S.C.), *aff'd mem. sub nom. Stevenson v. S.C. State Conference of Branches of NAACP*, 459 U.S. 1025 (1982); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff'd mem.*, *Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

[19] *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 933 (W.D. Mo.), *aff'd mem. sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Burton*, 793 F. Supp. at 1341.

[20] *Burton*, 793 F. Supp. at 1356; *Arizonans*, 828 F. Supp. at 688.

[21] *Arizonans*, 828 F. Supp. at 688; *Johnson v. Miller*, 922 F. Supp. 1556, 1562 (S.D. Ga.), *aff'd*, 515 U.S. 900 (1995).

[22] *LaComb v. Growe*, 541 F. Supp. 145, 148 (D. Minn.), *aff'd mem. sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982). *See also Johnson*, 922 F. Supp. at 1565.

[23] *See, e.g.*, *Carstens*, 543 F. Supp. at 82.

[24] *Seamon*, 536 F. Supp. at 939-940.

[25] *Wise v. Lipscomb*, 437 U.S. 535, 540-541 (1978); *Chapman*, 420 U.S. at 26-27.

[26] *Carstens*, 543 F. Supp. at 78-79; *Vera v. Bush*, 980 F. Supp. 251, 252-253 (S.D. Tex. 1997).

[27] *Farnum*, 561 F. Supp. at 92-93.

[28] *Growe v. Emison*, 507 U.S. 25, 35-36 (1993).

[29] *Id*. at 36-37.

[30] *Id*.

[31] *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam). A redistricting plan adopted by a state court probably must be precleared. *See Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982).

[32] 452 U.S. 130, 153 (1981).

[33] *Lopez v. Monterey Cnty.*, 525 U.S. 266, 287 (1999).

[34] *See, e.g.*, *White*, 412 U.S. at 793-794; *Minn. State Senate*, 406 U.S. at 200.

[35] *Mahan v. Howell*, 410 U.S. 315, 332-333 (1973); *Jones v. City of Lubbock*, 727 F.2d 364, 386-387 (5th Cir.), *reh'g denied*, 730 F.2d 233 (5th Cir. 1984) (per curiam).

[36] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

[37] *League of United Latin Am. Citizens v. Perry*, No. 2:03-CV-354, slip op. (E.D. Tex. Aug. 4, 2006).

[38] *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. 2001).

[39] *Balderas v. State*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002).