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# DEMOCRACY DELAYED: THE HIGH COURT DISTORTS VOTING RIGHTS PRINCIPLES TO THWART PARTIALLY THE TEXAS REPUBLICAN GERRYMANDER

Gary D. Allison\*

*[P]olitical gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena . . . because our role is limited and not because we see gerrymandering as other than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.*

Judges Patrick E. Higginbotham, John Hanna, Jr., and T. John Ward<sup>1</sup>

## I. INTRODUCTION

Implementing a new congressional districting plan is a politically and legally daunting task for any state required to do it.<sup>2</sup> The degree of difficulty a state will encounter can be significantly increased by such demographic and structural factors as the number of members to the U.S. House of Representatives apportioned to the state,<sup>3</sup>

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1. *Balderas v. Tex.*, 2001 U.S. Dist. LEXIS 25740 at \*\*19–20 (E.D. Tex. Nov. 14, 2001) (per curiam) (footnote omitted), *aff'd*, 536 U.S. 919 (2002).

2. The Reapportionment Act of 1929 set total membership to the U.S. House of Representatives at 435 members. Pub. L. No. 71-13, § 22(a), 46 Stat. 26 (1929) (codified as amended at 2 U.S.C. § 2a(a) (2000)). The number of members has not changed since. See *U.S. House of Representatives*, [http://en.wikipedia.org/wiki/United\\_states\\_house\\_of\\_representatives](http://en.wikipedia.org/wiki/United_states_house_of_representatives) (accessed Sept. 12, 2006). Each state receives a share of the 435-member House in accordance with its relative share of the U.S. population as determined by the latest decennial census. U.S. Const. art. I, § 2, cl. 3, as amended by U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a); 13 U.S.C. § 141(a)–(b) (2000).

No matter how few residents it has, each state is guaranteed at least one U.S. House member. U.S. Const. art. I, § 2, cl. 3. As a result of the 2000 decennial census, seven states—Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming—were allotted only one member of the House of Representatives. The Green Papers, *2000 Census: Apportionment of Representatives and Electors*, <http://www.thegreenpapers.com/Census00/HouseAndElectors.html> (last updated June 20, 2002) [hereinafter Green Papers, *Census*]. In such states, there is no need for a congressional districting plan because their sole U.S. House member is elected statewide. States allotted more than one member of the U.S. House of Representatives must, except under very rare and unusual circumstances, design a congressional district for each of their House members. 2 U.S.C. §§ 2a(c)(5), 2c; *Branch v. Smith*, 538 U.S. 254, 273–75 (2003) (plurality opinion).

3. Creating a congressional districting plan may not be too difficult a task for the twenty-plus states with

whether the state is gaining or losing House members,<sup>4</sup> the number and diversity communities of interest—racial, cultural, political, and economic—residing within the state,<sup>5</sup> and whether the state is experiencing significant population shifts.<sup>6</sup>

Extreme partisanship is yet another complicating factor. It can prevent the state legislature and the governor from being able to produce a congressional districting plan, thereby throwing that task to the judiciary.<sup>7</sup> It can also lead to the adoption of an extreme partisan gerrymander, the legality of which will inevitably be challenged by the disadvantaged party's members and endangered incumbents.<sup>8</sup>

In the wake of the 2000 Census, Texas faced all of the districting complications described above. A high-population, high-growth state, Texas was apportioned thirty-

four or less House members: Alaska (1), Arkansas (4), Delaware (1), Hawaii (2), Idaho (2), Kansas (4), Maine (2), Mississippi (4), Montana (1), Nebraska (3), Nevada (3), New Hampshire (2), New Mexico (3), North Dakota (1), Rhode Island (2), South Dakota (1), Utah (3), Vermont (1), West Virginia (3), and Wyoming (1). Review Green Papers, *Census*, *supra* note 2, for the number of members per state. On the other hand, the thirteen states with ten or more House members—California (53), Florida (25), Georgia (13), Illinois (19), Massachusetts (10), Michigan (15), New Jersey (13), New York (29), North Carolina (13), Ohio (18), Pennsylvania (19), Texas (32), and Virginia (11)—have many more officeholders, office seekers, and communities of interest to accommodate than do the smaller states. Review *id*

4. As a result of the 2000 Census, ten states lost House members—Connecticut (1), Illinois (1), Indiana (1), Michigan (1), Mississippi (1), New York (2), Ohio (1), Oklahoma (1), Pennsylvania (2), and Wisconsin (1)—and eight states gained House members—Arizona (2), California (1), Colorado (1), Florida (2), Georgia (2), Nevada (1), North Carolina (1), and Texas (2). *Id*.

In states that lose House members, at least one district is eliminated and all the rest must have their boundaries redrawn. If all incumbent House members want to run for re-election, at least two of them will have to run against each other.

States that gain House members must also redraw all of their district boundaries. However, they get to add at least one district so that all incumbent House members can be provided their own districts if there is a will to do so.

5. In a recent paper published in the Proceedings of the National Academy of Sciences, Benjamin Forest succinctly described the districting complexities caused by diversity among communities of interest. First, he notes that “a federal system acknowledges that different regions have different political interests.” Benjamin Forest, *The Changing Demographic, Legal, and Technological Contexts of Political Representation*, 102 PNAS 15331, 15333 (Oct. 25, 2005) (available at <http://www.pnas.org/cgi/reprint/102/43/15331>). Then he asserts that “[i]t is a short logical step to argue that different communities (whether or not these are regional) have distinct interests and values that deserve representation in elected assemblies.” *Id*. In this country, communities of interest have formed around race, ethnicity, and immigrant families, which leads Forest to claim that as a result “conflicts over political representation have become increasingly complex as the U.S. population has become increasing [sic] diverse.” *Id*.

6. The task of providing representation to diverse communities of interest has become more difficult as “[i]mmigration and internal migration have led to an increasingly heterogeneous population and increasingly complex residential patterns.” *Id*

7. For example, the failure of the Texas legislature and governor to produce a congressional redistricting plan resulted in a three-judge federal district court drafting the congressional districting plan used in the 2002 elections. *Session v. Perry*, 298 F. Supp. 451, 457–58 (E.D. Tex. 2004); *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*\*9–11.

8. “The word *gerrymander* describes a distinctly . . . American practice, that of redrawing district lines to achieve partisan (or other) advantage.” Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 3 (Cambridge U. Press 2002). Political gerrymander is “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.” *Vieth v. Jubelirer*, 541 U.S. 267, 271 n. 1 (2004) (quoting *Black's Law Dictionary* 696 (Bryan A. Garner ed., 7th ed., West 1999)). *Vieth* provides a good example of a case in which extreme partisanship produced a congressional districting plan so weighted in favor of one party that members of the losing party challenged it as an unconstitutional political gerrymander because “the districts [it] created . . . were ‘meandering and irregular,’ and ‘ignored all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage.’” *Id*. at 272–73 (citation to internal quote omitted) (emphasis added).

two members of the United States House of Representatives as a result of the 2000 Census.<sup>9</sup> This represented a gain of two House members.<sup>10</sup> Texas is increasingly a racially and ethnically diverse state.<sup>11</sup> Much of the population that enabled Texas to gain two new U.S. House members was attributable to population growth in Dallas and Harris Counties.<sup>12</sup> As Texas attempted to produce a new congressional districting plan in the midst of this complexity, it did so in a highly partisan atmosphere created by past political gerrymandering by the Democratic Party and the desire of the newly dominant Republican Party to get even.<sup>13</sup> As a consequence, Texas produced a highly partisan congressional districting plan, the legality and constitutionality of which was challenged in *League of United Latin American Citizens v. Perry (LULAC)*,<sup>14</sup> the main subject of this article.

Texas' congressional redistricting efforts were not conducted in a legal vacuum. The 1960s saw the rise of movements seeking to obtain representative fairness for individuals and communities of interest. Judicial and legislative responses to these movements established a complicated body of federal constitutional and statutory law that makes it much more difficult for states to implement new congressional districting plans without encountering time-consuming and expensive political and legal conflicts.

How Texas Republicans designed Texas' post-2000 congressional districting plan to exploit their political opportunities and meet their legal challenges, and the legal reactions to the resulting congressional districting plan, is the subject of this article. Accordingly, in the sections that follow, this article:

1. provides the legal framework that governed congressional districting plans at the time Texas began developing its congressional districting plan after the 2000 Census (Section II);
2. describes how the Texas legislature designed its 2003 congressional districting plan to meet its legal challenges and exploit its political opportunities (Section III);
3. catalogues the political effects of its new congressional districting plan (Section IV);
4. describes, and provides an overview of the judicial disposition of, the legal challenges to the Texas 2003 congressional districting plan (Section V); and
5. offers critical analyses of how the U.S. Supreme Court resolved the major issues raised in *LULAC*'s vote dilution claims (Section VI) by Latino voters

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9. *Green Paper Census*, *supra* n. 2.

10. *Id.*

11. The 2000 Census revealed that Texas' population of 20,851,820 people was racially and ethnically divided as follows: 11.5% African-American, 31.9% Latino, and 56.6% Anglo. Internal Mem., Career Attorneys, U.S. Dept. Just. Civil Rights Div., Voting Rights Sec., *Section 5 Recommendation Memorandum 1* (Dec. 12, 2003) [hereinafter *VRA Section Memo*] (copy on file with author). With respect to Texans of voting age, 10.9% are African-American, 28.6% are Latino, and 60.5% are Anglo. Although Texas' overall population increased by over 10% from 1990 to 2000, the Latino population percentage increased, the African-American population percentage remained the same, and the Anglo population percentage declined. *Id.*

12. *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*\*13-14.

13. *See Session*, 298 F. Supp. 2d at 457-58.

14. 126 S. Ct. 2594, 2606-07 (2006).

(Section VI.A), African-American voters (Section VI.B), and by voters and disgruntled supporters of the Democratic Party (Section VI.C).

## II. THE LEGAL FRAMEWORK GOVERNING CONGRESSIONAL DISTRICTING PLANS

### A. *The One-Person, One-Vote Rule*

In the early 1960s, a movement emerged seeking redress from urban/rural representational imbalances that produced large differences in population among legislative districts.<sup>15</sup> Proponents of this movement filed lawsuits alleging that these differences in population among legislative districts debased the votes of persons residing in the high population districts by giving their votes less weight than the votes of persons in smaller legislative districts.<sup>16</sup> Responding to these lawsuits, in the 1962 case of *Baker v. Carr*,<sup>17</sup> the U.S. Supreme Court held that these vote debasement allegations presented justiciable claims under the Equal Protection Clause of the Fourteenth Amendment.<sup>18</sup> Two years later, in *Wesberry v. Saunders*,<sup>19</sup> the Court held that the Constitution's article I, section 2 command that members of the U.S. House of Representatives be elected "by the people of the several states" requires that all votes in elections for House members be given equal weight.<sup>20</sup>

Congressional districting plans have been subjected to a very strict equal population requirement ever since 1964.<sup>21</sup> This one-person, one-vote mandate has made it very difficult, if not impossible, for drafters of congressional districting plans to ensure that residents of political subdivisions or members of communities of interest (COI)—voters with enough interests in common that they tend to vote the same way on issues and for candidates<sup>22</sup>—will be placed in a single congressional district.<sup>23</sup>

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15. For example, as result of rural to urban migration, by 1960 "the largest district in Tennessee had more than 44 times the population of the smallest district, and in California the ratio of the largest to smallest district was 449 to 1." Bernard Grofman, *Criteria for Districting. A Social Science Perspective*, 33 UCLA L. Rev. 77, 80 (1985); see also Jeremy Buchman, *Drawing Lines in the Quicksand. Courts, Legislatures, & Redistricting* 9–16 (Peter Lang 2003).

16. *Wesberry v. Sanders*, 376 U.S. 1, 3 (1964); *Baker v. Carr*, 369 U.S. 186, 187–88 (1962)

17. 369 U.S. 186.

18. *Id.* at 237.

19. 376 U.S. 1.

20. *Id.* at 7–18. The Court came to this conclusion after noting that electing House members as a group through statewide elections was a widespread practice during the first fifty years of our nation's existence under the Constitution and that during such elections it would have been deemed irregular if the votes of persons from one part of the state were given two to three times more weight than the votes of persons living elsewhere. *Id.* at 8. Thus, the Court asserted its belief that the framers of the Constitution did not intend "to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants." *Id.*

21. For example, in *Karcher v. Daggett*, the Court affirmed a lower court's holding that New Jersey's congressional districting plan was unconstitutional even though the population variance among the districts was less than one percent. 462 U.S. 725, 727 (1983).

22. See generally Forest, *supra* n. 5. However, the concept of community of interest has not been well-developed or defined with any great specificity. See Bruce E. Cain, Karin Mac Donald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform since Baker v. Carr*, in *Political Lines: Competition, Partisanship, and Congressional Redistricting* 6, 18–19 (Thomas E. Mann & Bruce E. Cain eds., Brookings Instn. Press 2005). Nevertheless, the definition posed here received at least implicit recognition by Justice O'Connor in her concurrence in *Davis v. Bandemer*, 478 U.S. 109 (1986). There, she complained that "[i]f members of major political parties are protected by the Equal Protection Clause from dilution of their voting

### B. *The Vote-Dilution Problem*

The vote debasement involved in the one-person, one-vote cases concerned the weight given to each person's vote. However, vote dilution can also refer to the power of a person's vote to influence the outcome of elections.<sup>24</sup> With respect to legislative officials, the decision as to whether they should be elected by districts—and, if so, how the districts should be drawn—can dramatically affect the ability of COIs to elect their candidates of choice.<sup>25</sup> Through gerrymandering, persons controlling the design of legislative districts can significantly diminish the electoral effectiveness of a disfavored COI by:

- cracking—splitting concentrated populations of a COI among several districts so that the COI does not have enough voting power in any one of them to elect its candidate of choice;<sup>26</sup>
- packing—lumping together most members of the disfavored COI in as few districts as possible so that the COI will waste votes by overwhelmingly electing its candidates of choice in only a few districts;<sup>27</sup> and
- stacking—eliminating legislative districts and electing legislative officials at-large so that a disfavored COI, which had enough concentrated population to win elections in one or more districts, is submerged into a larger electorate in which it is a minority with little hope of electing its candidates of choice.<sup>28</sup>

Individual members of COIs that are victimized by such gerrymandering believe they have been denied an equal opportunity to cast an effective vote or be represented by persons responsive to their needs and desires.<sup>29</sup> The one-person, one-vote rule did not

strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Id.* at 147.

23. For example, in *Kirkpatrick v. Preisler*, the United States Supreme Court found that Missouri's congressional redistricting plan was unconstitutional because its relatively small population variances could have been avoided and were not justified as necessary to accomplish other valid state goals. 394 U.S. 526, 530–36 (1969). The Court specifically rejected the justification that Missouri was trying to keep various communities of interest within single congressional districts so as not to dilute their "effective representation in Congress." *Id.* at 533. It did so because

to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people "Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."

*Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 579–80 (1964)). For similar reasons, the Court also refused to accept as justification Missouri's desire to "avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." *Id.* at 533–34.

24. See Buchman, *supra* n. 15, at 17–19.

25. See *Thornburg v. Gingles*, 478 U.S. 30, 47–48 & n. 13 (1986).

26. See *Bandemer*, 478 U.S. at 116, 117 & n. 6.

27. See *Cox & Katz*, *supra* n. 8, at 33.

28. See Nathaniel Persily, *Forty Years in the Political Thicket: Judicial Review of the Redistrict Process since Reynolds v. Sims*, in *Party Lines: Competition, Partisanship, and Congressional Redistricting* 67, 87 (Thomas E. Mann & Bruce E. Cain eds., Brookings Instn. Press 2005).

29. See *Ga. v. Ashcroft*, 539 U.S. 461, 479–85 (2003); *Bandemer*, 478 U.S. at 124.

protect COIs from this sort of unfairness.<sup>30</sup> As a consequence, as will be outlined below, legislative and judicial responses to persons who felt they had been victimized by gerrymandering have created a very complex legal matrix that can easily ensnare designers of legislative districts into divisive political and judicial controversies.

### C. *Voting Rights Act Solutions to Dilutions*

Pressure from the Civil Rights Movement of the 1960s caused Congress and President Lyndon B. Johnson to produce the Voting Rights Act of 1965 (VRA).<sup>31</sup> The VRA provides certain protected minorities<sup>32</sup> with powerful tools for combating districting which dilutes their voting power.

#### 1. VRA § 5's Prohibition of Retrogressive Dilution

VRA § 5 applies to nine states in their entirety (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia),<sup>33</sup> selected counties in five states (California, Florida, New York, North Carolina, and South Dakota),<sup>34</sup> and selected townships in two states (Michigan and New Hampshire).<sup>35</sup> These jurisdictions were selected because as of a certain date they had used various tests and devices that suppressed the vote of protected racial and language minorities.<sup>36</sup> Under VRA § 5,<sup>37</sup> a covered jurisdiction must convince either the U.S. Department of

30. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex. L. Rev. 1643, 1653–59 (1993).

31. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)); see Stephen Tuck, *Making of the Voting Rights Act*, in *The Voting Rights Act: Securing the Ballot* 77, 77–94 (Richard M. Valelly ed., CQ Press 2006).

32. Covered minorities include minority races, persons of color, and certain language minorities. 42 U.S.C. §§ 1971(a) (2000) (“race, color, or previous condition not to affect right to vote”); *id.* at § 1973(a) (no voting qualification based on race or color); *id.* at § 19731(c)(3) (defining language minorities as “persons who are American Indians, Asian Americans, Alaskan Natives or of Spanish heritage”).

33. U.S. Dept. Just., Civil Rights Div., Voting Sec., *Section 5 Covered Jurisdictions: States Covered as a Whole*, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm#statewide](http://www.usdoj.gov/crt/voting/sec_5/covered.htm#statewide) (last accessed Sept. 12, 2006).

34. *Id.* at *Covered Counties in States Not Covered as a Whole*.

35. *Id.* at *Covered Townships in States Not Covered as a Whole*.

36. 42 U.S.C. §§ 1973b, 1973c(a). The discriminatory tests and devices include

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

*Id.* at § 1973b(c). As to language minorities, the discriminatory practices include “any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language.” *Id.* at § 1973b(f)(3); U.S. Dept. Just., Civil Rights Div., Voting Sec., *Section 4 of the Voting Rights Act: The Formula for Coverage under Section 4 of the Voting Rights Act*, [http://www.usdoj.gov/crt/voting/misc/sec\\_4.htm#](http://www.usdoj.gov/crt/voting/misc/sec_4.htm#) (last accessed Sept. 17, 2006). To terminate coverage under VRA’s special provisions, “the jurisdiction must have eliminated those voting procedures and methods of elections that inhibit or dilute equal access to the electoral process.” *Id.* at *Terminating Coverage under the Act’s Special Provisions*.

37. 42 U.S.C.A. § 1973c (West 2006). In relevant part, VRA § 5 states:

Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court:

Justice or the United States District Court for the District of Columbia that any changes it makes “to any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . 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].”<sup>38</sup> The choice of whether to seek preclearance from the U.S. Attorney General or the D.C. District Court has important consequences, for the U.S. Attorney General’s VRA § 5 preclearance decisions are not judicially reviewable,<sup>39</sup> but the D.C. District Court’s VRA § 5 decisions may be appealed.<sup>40</sup>

When presenting new districting plans for VRA § 5 preclearance, covered jurisdictions must demonstrate that their proposed new congressional districting plans will not have the purpose or the effect of causing a retrogression of minority groups’ opportunities to elect the candidates of their choice or to otherwise participate in the political process.<sup>41</sup> As a practical matter, a retrogressive effect on minority voting power

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section [4(a)] . . . based upon determinations made under the first sentence of section [4(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section [4(f)(2)] . . . , and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges . . . and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section [4(f)(2)] . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C.A § 1973c.

38. *Id.* at § 1973c(a); *see id.* at § 1973b(f)(2).

39. *Morris v Gressette*, 432 U.S. 491, 501–07 (1977).

40. *Ashcroft*, 539 U.S. 461, 476–77 (2003).

41. VRA § 5 protects the ability of covered groups to elect the candidates of their choice. VRA § 5(b), (d); 42 U.S.C. § 1973c(b), (d); *see also* U.S. Dept. Just., Civil Rights Div., Voting Sec., *About Section 5 of the*



is determined by comparing the proposed new districting plan to the covered jurisdiction's last legal districting plan (the benchmark) to see how many "minority opportunity districts" each contains—districts in which minority groups have a sufficient percentage of the citizen voting age population needed to elect the candidates of their choice.<sup>42</sup> A jurisdiction's proposed districting plan cannot be deemed retrogressive if it does not contain less minority opportunity districts than did the benchmark.<sup>43</sup> However, a loss of a minority opportunity district in one part of the state cannot be compensated for by the addition of a minority opportunity district in another part of the state.<sup>44</sup>

Districts do not qualify as minority opportunity districts if the minority group that constitutes the majority has not been able consistently to elect its candidates of choice.<sup>45</sup> A minority group's ability to elect its candidates of choice is highly dependent upon the degree to which its members vote cohesively—meaning its members tend to vote for the same candidates<sup>46</sup>—or encounter racial polarization.<sup>47</sup>

In the 2003 case of *Georgia v. Ashcroft*,<sup>48</sup> the U.S. Supreme Court held that states should be given flexibility to implement new districting plans that contain fewer safe minority opportunity districts than did the state's last valid districting plan.<sup>49</sup> This flexibility would give states the chance to unpack safe minority opportunity districts by distributing some of the minority group's eligible voters from safe minority opportunity districts to other districts where, with the addition of new minority voters, the increase in minority voting power *could* be enough—especially if coalitions are formed with other groups—to elect candidates responsive the minority group's needs.<sup>50</sup> The *Ashcroft*

*Voting Rights Act: Introduction to Section 5*, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last accessed Sept. 12, 2006); J. Gerald Herbert, Donald B. Verrilli, Jr., Paul M. Smith & Sam Hirsch, *The Realists' Guide to Redistricting. Avoiding the Legal Pitfalls* 17 (ABA Admin. L. & Reg. Prac. 2000).

However, in *Georgia v. Ashcroft*, the U.S. Supreme Court held that the minority group's ability to elect candidates cannot by itself be "dispositive or exclusive." 539 U.S. at 480. The minority group's ability to participate in the political process beyond electing its candidates of choice is also an important preclearance factor. *Id.* at 482–85. As will be discussed below, recent VRA § 5 amendments may have nullified this holding. To the extent any part of this holding survived the recent VRA § 5 amendments, factors that are important to determining the minority group's ability to participate in the political process include a comparison of the proposed districting plan to the benchmark as to the number of coalition districts and influence districts and the extent to which the minority group has elected candidates of choice in minority opportunity districts who have achieved leadership positions. *Id.* at 481–84. Review text accompanying *infra* note 54 for the definitions of coalition and influence districts.

42. See *VRA Section Memo*, *supra* n. 11, at 65–69.

43. *Ashcroft*, 539 U.S. at 477 (2003); *Beer v. U.S.*, 425 U.S. 130, 140–42 (1976).

44. *Ashcroft*, 539 U.S. at 479.

45. See *VRA Section Memo*, *supra* n. 11, at 26, 27 & nn. 16, 17.

46. *Id.* It is not clear what level of minority voter unity is the threshold for a finding of cohesion. *Id.* at 27.

47. *Ashcroft*, 539 U.S. at 485.

48. 539 U.S. 461.

49. *Id.* at 480–83. In *Ashcroft*, the safe seats discussed were those in which the African-American voting age percentage was sixty percent or above. *Id.* at 470–71.

50. *Id.* at 470–71, 480–83. This rearranging of minority group voting power would reduce the number of safe minority opportunity districts in which the minority group's voting power virtually assures it of being able to elect its candidates of choice. *Id.* at 470–71. However, it would increase in total the number of districts in which the minority group's voting power would be just above the voting age majority level so that its ability to elect its candidates of choice is reasonably sufficient but not assured. *Ashcroft*, 539 U.S. at 480–81. Alternatively, some of the minority group's safe seat voting power could be distributed so as to form coalition districts, districts in which it would have a sufficiently high sub-majority percentage of the voting age population to have reasonably good chances to form coalitions with other groups that would enable it to elect candidates responsive to its needs. *Id.* at 481.

Court also said that regression analysis should include an assessment of new districting plans' effects on influence districts, which are districts where a minority group's voting power is not enough to elect its candidates of choice but is enough to insure that office holders consider its views.<sup>51</sup>

With the flexibility provided by *Ashcroft*, a political party to which a minority group is intensely loyal could, if it controls the districting process, convince the minority group to allow some of its voting members located in safe minority opportunity districts—where it is virtually assured that a member of the minority group will be elected—to be assigned to other districts in order to increase the party's chances of retaining power.<sup>52</sup> A minority group willing to accept this tradeoff reduces its opportunities to have descriptive representation, meaning to be represented by members of the group, in order to increase its chances of having substantive representation, meaning to be represented by office holders who will, regardless of their race, fight for the group's legislative agenda in a legislative body controlled by the party to which the group is loyal.<sup>53</sup>

*Ashcroft* could be read to permit states to trade minority opportunity districts for more coalition districts—districts in which minority voting strength is only sufficient to elect responsive candidates through coalition building—or influence districts, districts in which a minority group's voting strength is insufficient to elect candidates of its choice but could be significant enough to get office holders it did not support to pay some deference to its views.<sup>54</sup> Read this way, *Ashcroft* sanctions the reduction of minority groups' abilities to elect candidates of their choice.<sup>55</sup> Apparently that is how the 109th Congress interpreted *Ashcroft*. On July 27, 2006, VRA § 5 was amended so that it gives new primacy to the ability of minority groups to elect candidates of their choice.<sup>56</sup> Congress enacted this amendment after expressly finding that “[t]he effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decision[ ] . . . in *Georgia v. Ashcroft*, which ha[s] misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.”<sup>57</sup>

At this point, it is unclear whether the VRA § 5 amendments also are intended to overturn the *Ashcroft* Court's holding that new districting plans' effects on minority influence districts must be assessed as a part of VRA § 5 regression analysis. If that is the intent of the amendments, states will have the power to reduce a minority group's voting power in influence districts.

States must also show that their proposed new districting plans do not have a

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51. *Id.* at 482–83.

52. This was exactly what happened in Georgia. African-American Democrats were willing to risk making some state senate seats held by African-American Democrats less safe in order to help the Democratic Party elect enough Democrats, regardless of race, to retain power in the Georgia State Senate. *Id.* at 482–83, 488–90.

53. *Id.* at 481.

54. See *Ashcroft*, 539 U.S. at 487–90; 492–94 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

55. *Id.* at 492–94.

56. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 580–81 (2006) (codified at 42 U.S.C.A. § 1973c(b), (d) (West 2006)).

57. *Id.* at § 2(b)(6).

retrogressive purpose. Factors relevant to the retrogressive purpose inquiry include the plan's retrogressive effect . . . and dilutive impact; . . . the historical background of the . . . decision; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; and the legislative or administrative history, especially . . . contemporary statements by members of the decisionmaking body.<sup>58</sup>

The Justice Department used to deny preclearance to districting plans that it believed would dilute minority group voting power in violation of VRA § 2.<sup>59</sup> In the 1997 case of *Reno v. Bossier Parish School Board (Bossier I)*,<sup>60</sup> the U.S. Supreme Court held that VRA § 2 violations cannot constitute independent reasons for denying preclearance to a districting plan.<sup>61</sup> About three years later, in the 2000 version of *Reno v. Bossier Parish School Board (Bossier II)*,<sup>62</sup> the Court held that VRA § 5 preclearance may not be denied to nonretrogressive districting plans that were adopted for a nonretrogressive discriminatory purpose, a holding that precludes the use of VRA § 2

58. *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 488–89 (1997) (internal quotes omitted) (citing *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)). In *Bossier I*, the Court cited *Pleasant Grove v. U.S.*, 479 U.S. 462 (1987), as a VRA § 5 case in which it had applied “the *Arlington Heights* framework . . . to evaluate purpose.” 520 U.S. at 488–89. In *Pleasant Grove*, the Court rejected *Pleasant Grove*'s asserted justification that economics drove its decision not to annex areas occupied by African-American residents because this justification was developed after the annexation occurred and “did not reflect economic realities in a number of respects.” 479 U.S. at 470.

The U.S. Department of Justice has also developed a number of criteria it uses to evaluate the purpose of a new districting plan. They include some criteria used generally in all VRA § 5 preclearance proceedings, as follows:

- (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.

28 C.F.R. § 51.57 (2006). They also include the following criteria that are specific to evaluations of districting plans:

- (a) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens.
- (b) The extent to which minority voting strength is reduced by the proposed redistricting.
- (c) The extent to which minority concentrations are fragmented among different districts.
- (d) The extent to which minorities are overconcentrated in one or more districts.
- (e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.
- (f) 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.
- (g) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

*Id.* at § 51.59.

59. See *Bossier I*, 520 U.S. at 475–76.

60. 520 U.S. 471.

61. *Id.* at 476–85.

62. 528 U.S. 320 (2000).

violations as proof of such a discriminatory purpose.<sup>63</sup> In doing so, the Court said that the VRA § 5 purpose prohibition applies to instances where a covered jurisdiction tried, but failed, to achieve retrogression of a racial or language minority's voting power.<sup>64</sup>

On July 27, 2006, VRA § 5 was amended by the addition of a new provision designed to overturn *Bossier II*, which states that “the term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.”<sup>65</sup> Congress enacted this amendment after expressly finding that

[t]he effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decision[ ] . . . in *Reno v. Bossier Parish II*, which ha[s] misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.<sup>66</sup>

So, it appears that while proof of VRA § 2 violations will not be a decisive factor in future VRA § 5 preclearance proceedings, evidence of such violations or a purpose to commit them may support a finding that a district plan was created to serve a purpose that should not be approved during a VRA § 5 preclearance proceeding.

## 2. VRA § 2's Prohibition of Vote Dilution

Under VRA § 2,<sup>67</sup>

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group].<sup>68</sup>

VRA § 2 is violated if “based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [racial or language minorities].”<sup>69</sup> Electoral processes violate this VRA § 2 standard if they provide racial and language minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>70</sup> In evaluating a jurisdiction's electoral processes to determine if it violates VRA § 2, “the extent to which members of [racial or language minority groups] have been elected to office in the State or political subdivision . . . may be considered,” but VRA § 2 does not give racial and language minority groups a right to elect their “members . . . in numbers equal to their proportion in the population.”<sup>71</sup>

When a state's districting plan is challenged on grounds that it violates VRA § 2, the challengers need only show that the state's proposed districting plan has *the effect of*

63. *Id.* at 328–41.

64. *Id.* at 331–32.

65. Pub. L. No. 109-246 at § 5(3), 120 Stat. at 580–81.

66. *Id.* at § 2(b)(6).

67. 42 U.S.C. § 1973.

68. 42 U.S.C. § 1973(a); *see id.* at § 1973b(f)(2).

69. *Id.* at § 1973(b); *see id.* at § 1973b(f)(2).

70. *Id.* at § 1973(b).

71. 42 U.S.C. § 1973(b).

diluting the voting power of a racial or language minority group so that it is denied an equal opportunity to participate in the political process and to elect its candidates of choice.<sup>72</sup> In the 1980 case of *City of Mobile v. Bolden*,<sup>73</sup> the U.S. Supreme Court resolved a Fifteenth Amendment claim against a districting plan in a manner that had the effect of requiring claimants bringing VRA § 2 claims against a state districting plan to prove that it had *the purpose as well as the effect* of diluting a racial/language minority's voting power.<sup>74</sup> Given claimants' past difficulty in proving a discriminatory purpose in vote dilution cases,<sup>75</sup> Congress amended VRA § 2 so that persons bringing claims under it can prevail by only showing that the offending law had the effect of diluting the vote of a protected minority group.<sup>76</sup> These amendments added the proviso that VRA § 2 does not provide racial and language minorities with the right to elect their "members . . . in numbers equal to their proportion in the population."<sup>77</sup>

The court determines whether the requisite effect has been shown by comparing the state's proposed districting plan to other possibly legal districting proposals—rather than to an existing benchmark plan—to determine if a racial or language minority group should have been provided with more minority opportunity districts.<sup>78</sup> To make this determination, it must be possible for the racial/language minority group to elect their candidates of choice in more districts than those provided by the state's proposed districting plan.<sup>79</sup> It must also be shown that the state's proposed districting plan will produce a racial/ethnic prejudicial effect: bloc voting by the racial/language majority group against candidates preferred by racial/language minority groups that will consistently prevent a racial/language minority group from electing its candidates of choice in districts where it does not constitute a majority.<sup>80</sup> Finally, the court will assess other factors to determine whether under the totality of the circumstances a racial/language minority must be provided more minority opportunity districts than those provided it by the state's proposed districting plan in order to give it an equal opportunity to elect its candidates of choice.<sup>81</sup>

In the 1986 case of *Thornburg v. Gingles*,<sup>82</sup> the U.S. Supreme Court developed a threshold test for VRA § 2 vote dilution cases that consisted of the following

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72. *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

73. 446 U.S. 55 (1980).

74. *Id.* at 60–65. According to the Court, VRA § 2 was enacted as a means of enforcing § 1 of the Fifteenth Amendment. *Id.* at 60–61. The Court went on to reaffirm that under its past precedents claimants could not prevail on a Fifteenth Amendment claim without showing that a state abridged a racial minority group's right to vote by taking action that was motivated by a racially discriminatory purpose. *Id.* at 63–65. This holding meant that claimants could not prevail in VRA § 2 case unless they could establish the requisite discriminatory purpose. *Id.* at 60–65; see also Colin D. Moore, *Extensions of the Voting Rights Act*, in *The Voting Rights Act: Securing the Ballot* 95, 105–08 (Richard M. Valelly ed., CQ Press 2006).

75. See *Bolden*, 446 U.S. at 63–65, 67–74 (discussing how the appellees failed to prove the requisite purpose and how claimants in other similar cases had also failed to do so).

76. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982); see Moore, *supra* n. 74.

77. 42 U.S.C. § 1973(b).

78. *Ashcroft*, 539 U.S. at 478–79; *De Grandy*, 512 U.S. at 1012–13; *Gingles*, 478 U.S. at 46–51.

79. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993); *Gingles*, 478 U.S. at 50–51 & n. 17.

80. *Id.* at 51 & n. 15.

81. *De Grandy*, 512 U.S. at 1011–21.

82. 478 U.S. 30.

requirements:

First, the minority group must . . . demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;<sup>83</sup>

Second, the minority group must . . . show that it is politically cohesive,<sup>84</sup> [and]

Third, the minority group must . . . demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.<sup>85</sup>

Together, the first and second requirements demonstrate the capacity of a racial or language minority group to elect its candidates of choice.<sup>86</sup> Together, the second and third requirements establish that the state's districting plan dilutes a racial/language group's voting power by "submerging it in a larger white voting population."<sup>87</sup>

A claimant cannot establish that a districting plan violates VRA § 2 by meeting all of the threshold requirements.<sup>88</sup> Under the totality of circumstances requirement, a number of other factors must be considered including:

[T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;[<sup>89</sup>] the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which minorities have been elected to public office in the jurisdiction; . . . evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group[;] and . . . the [tenuousness] of the contested practice or structure.<sup>90</sup>

83. *Id.* at 50 & n. 17. *Gingles* was concerned with whether a jurisdiction's decision to elect legislators from multimember districts (MMDs) unlawfully diluted the voting power of a racial minority. *Id.* at 34–35, 46 & nn. 11, 12. However, the Court subsequently held, in the 1993 case of *Grove v. Emison*, that these threshold requirements also must be met when it is alleged that a jurisdiction designed single-member districts (SMDs) in a manner that unlawfully dilutes a racial minority group's voting power. 507 U.S. 25, 40–41 (1993). Where SMDs are involved, the first *Gingles* requirement is modified to require that the minority group be sufficiently large and geographically compact to populate more minority opportunity districts than those provided by the state's proposed districting plan. *De Grandy*, 512 U.S. at 1008.

84. *Gingles*, 478 U.S. at 51.

85. *Id.*

86. *Grove*, 507 U.S. at 40; *see also* Herbert et al., *supra* n. 41, at 23–24.

87. *Grove*, 507 U.S. at 40.

88. *De Grandy*, 512 U.S. at 1010–13 & n. 10.

89. Bullet (or single shot) voting is relevant only in the context of MMDs when each voter is allowed as many votes as there are legislative officials to elect from the MMD. For example, an MMD may be established in which three legislators will be elected. Accordingly, each voter is allowed to cast three votes. A voter engages in bullet voting if he or she casts only one vote for a single preferred candidate. This strategy can help a minority group elect a candidate of its choice in MMDs because it may only find one candidate acceptable. By voting only for that candidate the group deprives other less acceptable candidates of its members' votes. *See Gingles*, 478 U.S. at 38 n. 5.

90. *De Grandy*, 512 U.S. at 1010 n. 9 (quoting *Gingles*, 478 U.S. at 44–45).

In addition, in the 1994 case of *Johnson v. De Grandy*,<sup>91</sup> the U.S. Supreme Court held that proportionality—defined as the comparison of the percentage of voting districts in which a racial/language minority group constitutes a voting majority to the racial/language minority group's percentage of the jurisdiction's total population<sup>92</sup>—must be assessed.<sup>93</sup> The basis of this holding was the Court's finding that proportionality may be a useful indicator of whether a districting plan has accorded a racial/language minority group an equal opportunity to participate in the political process and elect its candidates of choice despite its not providing the racial/language minority group the maximum number of minority opportunity districts that could be formed under the *Gingles* requirements.<sup>94</sup> Indeed, the Court demonstrated that exclusive reliance on the *Gingles* requirements could result in a racial/language minority group receiving political power much greater than its numerical strength.<sup>95</sup>

The *Gingles* requirements, the totality of circumstances factors, and the *De Grandy* proportionality assessment requirement seem to provide courts with a definite analytical structure by which to assess VRA § 2 vote dilution claims. In reality, however, there is a fair amount of uncertainty as to how they are to be applied.

The first *Gingles* requirement necessitates an assessment of the minority group's size and compactness. But, at the time Texas was designing its new congressional districting plan, the U.S. Supreme Court had not definitively decided how compactness should be determined,<sup>96</sup> what population base to use—just people, voting age people, citizen voting age people<sup>97</sup>—and what percentage level of that population base constitutes a legally significant majority (a bare fifty percent, some supermajority, some effective electoral percentage that is less than fifty percent).<sup>98</sup> Nor had the Court ruled on whether VRA § 2 dilution could include a reduction in a racial/language minority group's share of the voting population in a district in which it had enough power to influence candidates and officeholders but not enough to elect its candidates of choice.<sup>99</sup>

The second and third *Gingles* requirements necessitate determinations as to whether a racial/language minority group is politically cohesive and whether the racial/language majority group engages in sufficient bloc voting against the racial/language minority group's preferred candidates. There were no definitive holdings as to how to make these determinations when Texas began designing its congressional districting plan.

The use of secret ballots means that evidence of how various racial/language minority and majority groups vote must be estimated by the use of highly contested

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91. 512 U.S. 997.

92. *Id.* at 1014 n. 11.

93. *Id.* at 1000, 1013–17.

94. *Id.*

95. *De Grandy*, 512 U.S. at 1016–17 & n. 13.

96. Herbert et al., *supra* n. 41, at 31–33.

97. *Id.* at 26–28.

98. *Id.* at 26, 28–31. A relevant population share of less than fifty percent could provide a racial/language minority group with an *effective electoral majority* in districts where its political cohesiveness is much greater than that of the racially polarized majority so that with the help of some small amount of white cross-over votes the minority group's preferred candidate will usually win. *Id.* at 29.

99. *Id.* at 30–31.

statistical techniques that create a battle of the experts.<sup>100</sup> There had been inconsistency among federal courts as to whether the political cohesiveness of racial/language minority groups is to be assessed exclusively by estimated voting patterns for particular candidates, and, if so, how much voting cohesiveness is required.<sup>101</sup> There was considerable disagreement as to whether the race of candidates should be a factor in determining what candidates are preferred by politically cohesive racial/language minority groups, with some courts refusing to consider the results of elections involving only white candidates.<sup>102</sup> Nor was there agreement as to what level of majority bloc voting is required or whether the reasons why the majority group bloc voted against the minority group's preferred candidates should be examined to determine if this bloc voting was the result of racial/ethnic hostility.<sup>103</sup> There also had been no agreement as to how many years of elections to examine and whether elections for offices other than the one in question should be considered.<sup>104</sup>

The *De Grandy* proportionality requirement was also a source of uncertainty. The precise holding in *De Grandy* was "no violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population."<sup>105</sup> Yet, in the next sentence, the Court stated that "such proportionality is not dispositive in a challenge to single-member districting, [but] . . . is relevant . . . when determining whether members of a minority group have [equal political and electoral opportunity]."<sup>106</sup>

Moreover, the *De Grandy* Court refused to make proportionality a "safe harbor" defense that would always insulate state districting plans from VRA § 2 challenge.<sup>107</sup> It rejected this safe harbor approach because (1) proportionality may not be an accurate measure of a minority group's ability to elect its preferred candidates in states using methods other than districting to negate minority voting power;<sup>108</sup> (2) it could lead to

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100. Herbert et al., *supra* n. 41, at 33–35.

101. *Id.* at 35–37.

102. *Id.* at 37–39.

103. *Id.* at 41–44. Racially polarized party identification based on party policy differences is one potentially non-race-based reason why white voters might bloc vote against the preferred candidates of minority groups. In the South, a large percentage of white voters are loyal Republican voters and an overwhelmingly large percentage of minority group members are loyal Democratic voters. See David A. Bositis, *Impact of the 'Core' Voting Rights Act on Voting and Officeholding*, in *The Voting Rights Act: Securing the Ballot* 113, 116–19 (Richard M. Valelly ed., CQ Press 2006).

104. Herbert et al., *supra* n. 41, at 39–41. With respect to what offices to consider, the issue is whether the votes within a legislative district for a candidate running statewide are relevant to how various groups will vote for candidates running to represent the legislative district. *Id.* at 39–40.

105. *De Grandy*, 512 U.S. at 1000.

106. *Id.*

107. *Id.* at 1017–21.

108. *Id.* at 1018–19. In this regard, the Court took note of a variety of vote suppressing techniques that have been used against minority groups, including "ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, . . . the white primary[,] . . . at-large elections, run-off requirements, anti-single shot devices, gerrymandering, the impeachment of officeholders, the annexation or deannexation of territory, and the creation or elimination of elective offices." *Id.* at 1018.

In more recent times, a variety of more sophisticated techniques have been used by Republicans to depress minority Democrats, including "moving polling places in black precincts after each election, including primary elections; stationing state police cars near black polling places; . . . locating polling places in venues



countenancing blatant discrimination against minority voters in one part of a jurisdiction or district that was counterbalanced by favorable treatment elsewhere;<sup>109</sup> (3) it might lead to states simply designing districting plans to guarantee proportionality to minority groups even if they did not need it to have equal political and electoral opportunity;<sup>110</sup> and (4) it could encourage the perpetuation of a second-best race-conscious politics that would delay the time when virtually every district would enable minority groups to have equal political opportunity to form effective elective coalitions with other groups based on policy and not race.<sup>111</sup>

Finally, the *De Grandy* Court failed to set guidelines as to whether proportionality is to be determined on a statewide basis or with respect to some smaller area of the state.<sup>112</sup> The *De Grandy* parties had essentially agreed that vote dilution in Dade County was the issue, so the Court confined the proportionality inquiry to the districts and minority populations located in Dade County.<sup>113</sup> It refused to set a rule as to how to determine the scope of the proportionality inquiry when the parties disagreed as to the proportionality “frame of reference.”<sup>114</sup>

*De Grandy* was decided the same day as *Holder v. Hall*,<sup>115</sup> in which Justice Thomas, joined by Justice Scalia, wrote a concurring opinion in which he declared that the U.S. Supreme Court had erred in interpreting VRA § 2 to cover “potentially dilutive electoral mechanisms.”<sup>116</sup> He did so because he believed that the Court’s interpretation permitting VRA § 2 was “at odds with the terms of the statute”;<sup>117</sup> had proven to be

where some African-Americans are nervous about venturing[;] . . . giving black polling stations inadequate supplies so they run out of ballots in the event of a large turnout of blacks[;] and giving [black polling stations] an inadequate number of voting machines (or defective voting machines) so that black voters will have to wait in long lines before they can cast their ballots.” *Bositis, supra* n. 103, at 120.

Another effective tactic is the so-called ballot security program, wherein letters are sent only to minority voters warning them that they may be criminally prosecuted if they vote and there is anything missing or inaccurate on their voter registration statements. *Id.* Sometimes such programs involve challenging the votes of any person who was sent such a letter and the letter was returned to the sender. *Id.*

Laws disenfranchising felons have had a huge disparate impact on African-American voting power. *Id.* at 120–21. In 2004, thousands of Florida voters, many of them African-American, who had never been convicted of a felony, were erroneously purged from the voter rolls by the state’s campaign to keep convicted felons from voting. *Volusia, Polk Block Hundreds of Voters*, Orlando Sentinel B5 (Oct. 9, 2004).

Most recently, some states and Congress have attempted to enact laws requiring that every voter produce a special voter-id card, a requirement that many believe will have a disparate impact on the voting rights of low-income and minority persons. See Eunice Moscoso, *Voter I.D. Fight Lands in D.C.; Democrats on Capitol Hill Blast House Passage of Bill, That, like Georgia’s, Requires Photo*, Atlanta J. Const. A1 (Sept. 21, 2006). Recently, voter identification programs in Georgia and Missouri were declared unconstitutional. Carlos Campos, *Voter I.D. Law Loses Another Round; A Fulton Judge Rules the Measure Violates the State Constitution. The Attorney General Plans to Appeal*, Atlanta J. Const. A1 (Sept. 20, 2006); Editorial, *A Right, Not a Privilege*, St. Louis Post-Dispatch B8 (Sept. 18, 2006).

109. *De Grandy*, 512 U.S. at 1019.

110. *Id.* at 1019–20.

111. *Id.* at 1020.

112. *Id.* at 1021–22.

113. *Id.*

114. *De Grandy*, 512 U.S. at 1022.

115. 512 U.S. 874 (1994).

116. *Id.* at 892 (Thomas & Scalia, JJ., concurring).

117. *Id.* at 892; see generally *id.* at 914–36. Much of this discussion involves Justice Thomas parsing the wording of VRA § 2 to demonstrate that by any accepted statutory interpretation techniques the terms “voting qualification or prerequisite to voting or standard, practice, or procedure” cannot be extended to cover vote dilution mechanisms. *Id.* at 914–930. Justices Thomas and Scalia would extend those terms only to activities

unworkable, immersing judges in philosophical questions they are ill-equipped to resolve, especially with respect to “establish[ing] a benchmark concept of an ‘undiluted’ vote” other than proportionality;<sup>118</sup> and had led to federal courts “segregate[ing] voters into racially designated districts to ensure minority electoral success,” a practice he called the “racial ‘balkanization’ of the Nation.”<sup>119</sup>

#### D. *Equal Protection and Fifteenth Amendment Challenges to Racial Gerrymanders*

Gerrymandering congressional district lines in ways that dilute the voting power of any racial group or segregate voters by race could be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment.<sup>120</sup> Laws violate the Equal Protection Clause if their purpose and effect are to treat people differently on account of race/ethnicity.<sup>121</sup> Laws violate the Fifteenth Amendment if

that get in the way of a voter’s access to the ballot and the right to have that ballot counted. *Holder*, 512 U.S. at 914–15, 917–30. Notable also is Justice Thomas’s insistence that VRA § 2 protects only the voting rights of individuals and, as a consequence, does not concern vote dilution, which affects group voting rights. *Id.* at 918. Moreover, he reads the command of VRA § 2(b)—that minority groups should not be guaranteed proportionate representation—to foreclose extending the statute to vote dilution because vote dilution inexorably looks to proportionality as a means of determining whether a group has had its votes diluted. *Id.* at 927–28 & n. 26.

118. *Id.* at 892; *see id.* at 895–903, 936–44. Thus, judges are called upon to determine whether minority groups are better off when legislators are elected at-large or in MMDs, where their voting share can be used to have influence with all the officeholders elected from a given area, or when the same territory is divided into SMDs, where the minority group’s vote may have decisive influence in a few districts and no influence in others. *Holder*, 512 U.S. at 896–99. To the extent that VRA § 2 jurisprudence results in minority groups being provided minority opportunity districts as a remedy to any vote dilution they have suffered, judges have essentially made a philosophical choice that effective representation can only mean being represented by a person “who will mirror [your] views.” *Id.* at 900–01.

Most importantly, Justice Thomas believes that the search for providing minority groups with fair representation has led judges to make the philosophical choice of proportionate representation as the benchmark of fairness, a choice he believes is “not . . . required by any principle of law.” *Id.* at 902–03. In fact, he takes great pains to catalogue how the Court has inevitably turned to proportionality as the benchmark of vote dilution, despite VRA § 2’s rejection of it, because that is the only workable standard by which vote dilution can be measured. *Id.* at 936–44.

119. *Id.* at 892, *see id.* at 903–12. Justice Thomas decries what he believes is the underlying premise of VRA § 2 vote dilution claims: the assumption that racial groups have racially correlated political identities. *Holder*, 512 U.S. at 903–04. Then, he attacks the methodology by which this assumption is put into practice: equating minority group cohesion with how large a percentage of a minority group votes for the same candidates without searching for possible non-race-based reasons for such similar voting patterns. *Id.* Justice Thomas finds it especially repugnant that by necessity the underlying philosophy of racial political identity has led to courts designing safe districts for minority candidates, a practice he believes has racially segregated our politics and caused representatives to believe that they represent race, not ideas and values. *Id.* at 905–08. Finally, he warns that radical changes to our political system may be mandated by judges who would, in the name of guaranteeing race-based representation without segregated districts, ban districting and require the adoption of voting devices such as cumulative voting and transferable votes. *Id.* at 908–12 & nn. 16, 17.

120. The Equal Protection Clause states: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, § 1. The Fifteenth Amendment states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” U.S. Const. amend XV, § 1. With respect to vote dilution cases, review *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that purpose and effect of a MMD was to dilute the voting power of a racial group); *United Jewish Orgs. of Williamsburgh v. Carey (UJO)*, 430 U.S. 144 (1976) (holding that neither the purpose or the effect of drawing certain SMDs was to dilute the voting power of a racial majority). With respect to racial segregation cases, review *Hunt v. Shaw (Shaw II)*, 517 U.S. 899, 905–06 (1996) (holding that purpose and effect of bizarrely drawn district was to segregate voters by race); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (holding that racially segregating voters was neither the purpose nor the effect of the designs of certain SMDs).

121. *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 642 (1993).

their purpose and effect are to discriminate against people on the basis of race/ethnicity with respect to their ability to vote.<sup>122</sup> With respect to voting laws that allegedly discriminate on the basis of race/ethnicity, claims under both the Equal Protection Clause and the Fifteenth Amendment are so conceptually similar that they have been treated in virtually the same manner by the U.S. Supreme Court.<sup>123</sup>

Challengers of an allegedly unconstitutionally discriminatory law can establish the requisite discriminatory purpose by showing that the law in question facially classifies persons by race or ethnicity.<sup>124</sup> Alternatively, if the law in question is facially neutral, challengers can establish the requisite discriminatory purpose by showing that its drafters intended for it to produce a disparate impact on a particular racial/ethnic group<sup>125</sup> or that the design and impact of the law cannot be explained on grounds other than the desire to treat people differently on account of race/ethnicity.<sup>126</sup> Once it has been shown that a law was enacted with the purpose of treating persons differently on account of race/ethnicity, the law will be declared unconstitutional unless its proponents can show that it is narrowly tailored to serve a compelling government interest.<sup>127</sup>

Congressional districting laws are racially neutral on their face because they “classif[y] tracts of land, precincts, or census blocks.”<sup>128</sup> However, a court will deem a congressional district plan to have been drafted pursuant to a racial/ethnic purpose if the plan’s opponents can show that race/ethnicity was the predominant factor in how one or more districts were drawn.<sup>129</sup>

Meeting the predominant factor test can be difficult. Courts must presume, until shown otherwise, that legislatures acted in good faith in drafting a districting plan.<sup>130</sup> Legislators are always conscious of race when they draw district lines, but this awareness alone is not sufficient to show that race is the dominant factor in a district’s design:<sup>131</sup> “[W]hen members of a racial group live . . . in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect . . . [the legislature’s desire] to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivision[s].”<sup>132</sup> It may also reflect the legislature’s respect for “communities defined by actual shared interests.”<sup>133</sup>

Less innocently, legislatures may assign members of racial/ethnic groups to districts in order to further a political interest, such as to create a safe seat for a particular

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122. *Bolden*, 446 U.S. at 61–65.

123. *See Shaw I*, 509 U.S. at 644–46; *Bolden*, 446 U.S. at 61–74. Accordingly, even though the cases cited below in support of assertions as to the various elements of cases involving claims of voting discrimination are mostly Equal Protection cases, their principles should work equally well for Fifteenth Amendment purposes.

124. *Bolden*, 446 U.S. at 61–74.

125. *Washington v. Davis*, 426 U.S. 229, 239–45 (1976).

126. *Village of Arlington Heights*, 429 U.S. at 266–68.

127. *Shaw I*, 509 U.S. at 643.

128. *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 547 (1999).

129. *Shaw II*, 517 U.S. at 905–06; *Miller v. Johnson*, 515 U.S. 900, 912–16 (1995).

130. *Miller*, 515 U.S. at 916.

131. *Shaw I*, 509 U.S. at 646.

132. *Id.*

133. *Miller*, 515 U.S. at 916.

party.<sup>134</sup> In the 2001 case of *Easley v. Cromartie (Cromartie II)*,<sup>135</sup> the U.S. Supreme Court held that where race/ethnicity “correlates highly with political affiliation,” a legislature may assign members of racial groups to particular districts when to do so will produce a desired political effect that could not be achieved “in alternative ways that are comparably consistent with traditional districting principles . . . [and] would have brought about significantly greater racial balance.”<sup>136</sup> Such effects may include:

1. past political discrimination, when the continuing effects denied African-Americans an equal opportunity to participate in the political process and elect the candidates of their choice;<sup>137</sup>
2. bloc voting on racial lines;<sup>138</sup>
3. county officeholders’ lack of responsiveness to the needs of the African-American community;<sup>139</sup>
4. past socio-economic discrimination, the effects of which continued to make it difficult for African-Americans to participate in politics;<sup>140</sup> and
5. attributes of the at-large election system that especially disadvantaged African-Americans<sup>141</sup> and supported the inference that it was adopted to perpetuate the political disadvantages imposed on African-Americans by now illegal discriminatory practices.<sup>142</sup>

134. *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 239 (2001); *Cromartie I*, 526 U.S. at 549–51.

135. 532 U.S. 234.

136. *Id.* at 258. In *Cromartie II*, the U.S. Supreme Court dealt with assertions that North Carolina’s notorious District 12 was unconstitutional for the fourth time. *Id.* at 237–40. (District 12 had previously been scrutinized in *Cromartie I*, 526 U.S. at 543; *Shaw II*, 517 U.S. at 901–03; and *Shaw I*, 509 U.S. at 635–39). District 12 had been somewhat redesigned, and its African-American population had been reduced to forty-seven percent, but the district still featured an odd snakelike shape and split many counties and towns. *Cromartie II*, 532 U.S. at 240. Nevertheless, the Court upheld its constitutionality, finding that politics, not race, was its predominant design factor. *Id.* at 243–57. The key findings supporting this outcome included the facts that in North Carolina, African-American Democrats voted most reliably for Democratic candidates while white Democrats often voted for Republicans, *id.* at 245, and that plausible alternatives would have either forced two incumbents to run against one another, *id.* at 248, or transferred out of District 12—and into reliable Republican districts—some of the state’s most reliable African-American Democratic voters. *Id.* at 250.

137. Evidence of this discrimination included now illegal voter suppression techniques such as literacy tests, poll taxes, and white primaries that resulted in African-Americans constituting a minority of registered voters despite being the majority of the population; the fact that no African-American had ever been elected as a county commissioner; and discrimination that prevented African-Americans from being members of the County Executive Committee of the Democratic Party, serving as the county’s chief registrar, serving as grand jurors, being hired as county employees, and being appointed to county boards and committees. *Rogers*, 458 U.S. at 623–25.

138. *Id.* at 623.

139. Evidence of this discrimination included lack of justice at the county court house; few, if any, appointments to county committees and boards; discrimination in providing infrastructure such as adequate county roads; segregation of schools and the grand jury; and the leadership of county commissioners in the formation of an all-white private school. *Id.* at 625–26.

140. The socio-economic effects included low income, low educational attainment, poor quality education, lower pay for jobs, and substandard housing. *Id.* at 626. African-Americans had also, and continued to be, victims of segregated education. *Id.* at 624–25.

141. The large size of the county made it difficult for African-Americans to vote and to run for office; the lack of residency requirements let all the county commissioners be elected from the same area of the county; and the requirement that candidates run for specific seats prevented African-Americans from coalescing around a single candidate. *Rogers*, 458 U.S. at 627.

142. *Id.* at 625–26.

Besides the factors singled out in *Rogers*, the purpose factors used to show that a districting plan has as its purpose producing a retrogressive vote dilution in violation of VRA § 5 should also be useful.<sup>143</sup>

Racial/language minority groups have no need or motivation to file vote dilution claims under the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment because they can win vote dilution claims under VRA § 2 without showing a discriminatory purpose.<sup>144</sup> In contrast, racial/language majority groups have no choice; they must bring their vote dilution claims under the Equal Protection Clause and the Fifteenth Amendment. To win such claims, they not only must prove the requisite discriminatory purpose, but they also face a special problem in proving that the districting plan actually diluted their voting power.

The vote dilution effects problem faced by racial majorities is well-illustrated by the plurality opinion of the 1976 case of *United Jewish Organizations of Williamsburgh v. Carey (UJO)*.<sup>145</sup> In *UJO*, a Hasidic Jewish community that formerly was included in one New York Assembly district and one New York Senate district was divided up so that it now was located in two Assembly districts and two Senate districts.<sup>146</sup> Although it was true that this COI had its voting power divided up, it was treated for purposes of its voter dilution claim as a part of the white racial majority.<sup>147</sup> Under the challenged districting plan, the percentage of white majority districts (seventy percent) in the relevant area exceeded the percentage of whites (sixty-five percent) who lived in that area.<sup>148</sup> As a consequence, the *UJO* plurality found that the white majority group had not been “fenc[ed] out . . . from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.”<sup>149</sup>

Even though the districting plan increased the likelihood that persons of color would be elected within the specific districts in which the Hasidic Jewish community resided, the plurality found that “the individual voter . . . has no constitutional complaint merely because his candidate has lost . . . and his district is represented by a person for whom he did not vote.”<sup>150</sup> Moreover, after decrying the fact that racially polarized voting often occurs, the plurality opined that “there is no authority for the proposition that the candidates who are . . . racially unacceptable [to] the majority, and [their supporters] . . . , have had their Fourteenth and Fifteenth Amendment rights infringed.”<sup>151</sup>

Perhaps painfully cognizant of the problems racial majorities face when bringing

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143. Review *supra* note 58 and accompanying text.

144. *Supra* n. 76; see Buchman, *supra* n. 15, at 46–50.

145. 430 U.S. 144.

146. *Id.* at 152.

147. The lower courts held that the Hasidic Jewish community had no constitutional right to be treated as a special COI for purposes of its claims, and the issue was not renewed on appeal to the U.S. Supreme Court. *Id.* at 153–54.

148. *Id.* at 154, 166.

149. *Id.* at 165.

150. *UJO*, 430 U.S. at 166. After all, as the Court observed, “[s]ome candidate, along with his supporters, always loses.” *Id.*

151. *Id.* at 167.

vote dilution cases, in the 1990s white claimants, seeking to challenge the creation of majority-minority districts, eschewed filing vote dilution claims in favor of claims alleging that the offending districts violated the Equal Protection Clause because the districts were purposively designed to segregate voters by race.<sup>152</sup> In the 1993 case of *Shaw v. Reno (Shaw I)*,<sup>153</sup> the U.S. Supreme Court embraced these allegations as proper claims under the Fourteenth Amendment.<sup>154</sup>

In the context of voter segregation claims, the U.S. Supreme Court has held that claimants satisfy the predominant factor purpose test by proving that congressional districting laws are designed primarily to create majority-minority districts in satisfaction of VRA requirements.<sup>155</sup> The Court has also held that claimants may meet the predominant factor test by showing that a congressional districting law creates majority-minority districts that either are so bizarre in shape that they can not be explained on grounds other than that they were designed to segregate voters by race<sup>156</sup> or “concentrate[] a dispersed minority population into a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.”<sup>157</sup>

Once challengers demonstrate that a congressional districting law has the purpose and the effect of diluting the voting power of a racial group or segregating voters by race, the state may have great difficulty proving that the racially/ethnically gerrymandered districts were narrowly tailored to meet a compelling government interest. Remedying the effects of past or present racial/ethnic discrimination is a compelling government interest, but a state cannot successfully establish that a racially/ethnically gerrymandered district is necessary to remediate past or present racial/ethnic discrimination unless it can precisely identify the discrimination and show that it “had a ‘strong basis in evidence’ to conclude that remedial action was necessary.”<sup>158</sup> Nor can a state successfully offer the justification that the racially/ethnically gerrymandered district is designed to meet VRA

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152. *Bush v. Vera*, 517 U.S. 952, 956–58 (1996); *Shaw II*, 517 U.S. at 901; *Miller*, 515 U.S. at 903; *Shaw I*, 509 U.S. at 641–42.

153. 509 U.S. 630.

154. *Id.* at 641–42; see also *Vera*, 517 U.S. at 956–57; *Shaw II*, 517 U.S. at 901–02, 904–06; *Miller*, 515 U.S. at 903–05.

155. *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 917–20.

156. North Carolina’s notorious District 12 was at issue in both *Shaw I* and *Shaw II*. In *Shaw I*, it was described as follows

It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas “until it gobbles in enough enclaves of black neighborhoods.” Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to “trade” districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them.

*Shaw I*, 509 U.S. at 635–36 (internal citation omitted). The *Shaw I* Court accepted as a valid Equal Protection claim worthy of consideration the challengers’ contention that North Carolina’s “redistricting legislation . . . [wa]s so bizarre on its face that it is ‘unexplainable on grounds other than race.’” *Id.* at 644, 658. The *Shaw II* Court sustained the district court’s findings that race predominantly governed the design of North Carolina’s congressional districting legislation in part because of District 12’s shape was so bizarre. *Shaw II*, 517 U.S. at 902–03, 905–06.

157. *Shaw I*, 509 U.S. at 647.

158. *Shaw II*, 517 U.S. at 909–10.

requirements unless it is absolutely necessary to avoid retrogression in violation of VRA § 5<sup>159</sup> or to avoid vote dilution in violation of VRA § 2.<sup>160</sup>

*E. Equal Protection and Fifteenth Amendment Challenges to Partisan Gerrymanders*

Vote dilution is the sole object of partisan gerrymanders.<sup>161</sup> It is achieved by a dominant party in control of the districting process enacting a districting plan designed to maximize the number of districts in which its candidates are likely to win and to minimize the number of districts in which candidates of opposition parties are likely to win.<sup>162</sup> The gerrymander produces the desired partisan advantage by (1) “displacing the incumbents of the other party from their established constituents”<sup>163</sup> and (2) manipulating the location of blocs of voters with predictable party loyalties so that the dominant party’s victories are efficient and the opposition parties’ victories, if any, are wasteful.<sup>164</sup> Needless to say, members of parties victimized by partisan gerrymanders believe they have been unconstitutionally denied an equal opportunity to elect candidates of their choice.<sup>165</sup>

As Texas began designing its new congressional districting plan, it would have been well aware that federal courts had not been kind to persons seeking relief from partisan gerrymanders. In the 1986 case of *Davis v. Bandemer*,<sup>166</sup> the U.S. Supreme Court held that partisan gerrymander vote dilution claims raised under the Equal Protection Clause were justiciable.<sup>167</sup> This holding was premised mainly on the Court’s prior willingness to adjudicate whether vote dilution caused by racial gerrymanders violated the Equal Protection Clause<sup>168</sup> and the Court’s belief that partisan claimants are

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159. In *Shaw II*, the Court found that the U.S. Justice Department’s demand that North Carolina create two African-American majority congressional districts was not necessary to avoid retrogression in violation of VRA § 5. North Carolina’s previous plan would have increased African-American voting power by creating North Carolina’s first African-American majority congressional district and there was not sufficient evidence to prove that race accounted for North Carolina’s unwillingness to create a second African-American majority congressional district. *Id.* at 912–13. Similarly, in *Miller* the Court found that a state does not have a compelling government interest in complying with a Justice Department VRA § 5 preclearance mandate that it create a majority-minority district if creation of that district is not required to meet VRA § 5 standards. *Miller*, 515 U.S. at 922. Accordingly, the *Miller* Court found that Georgia should not have created a third African-American majority congressional district in response to a Justice Department preclearance mandate when it had already “increased the number of majority [African-American] districts from 1 out of 10 (10%) to 2 out of 11 (18.18%).” *Id.* at 923–27.

160. In *Shaw II*, the Court found that a bizarre-shaped, non-compact, African-American majority congressional district could not have remedied a VRA § 2 vote dilution violation because it did not “contain[ ] a ‘geographically compact’ population of any race.” *Shaw II*, 517 U.S. at 916. Moreover, the Court rejected the assertion that if a vote dilution violation occurs anywhere in a state, it may be cured by the creation of a majority-minority district anywhere in the state. *Id.* at 916–17. Such an outcome, said the Court, would lead to individuals who had suffered the violation not receiving a remedy while other individuals who had not suffered a violation receiving an underserved boon. *Id.* “[T]he . . . right to an undiluted vote . . . belongs to . . . [the] individual members [of a minority group],” rather than “to the minority as a group.” *Id.* at 917.

161. *Supra* n. 8.

162. Issacharoff, *supra* n. 30, at 1661–62.

163. *Id.* at 1662. Opposition incumbents displaced from “their established constituents” lose the advantages of “name recognition, past delivery of constituent services, and prior social investment in the district.” *Id.*

164. *Id.*

165. *Bandemer*, 478 U.S. at 113–15.

166. 478 U.S. 109.

167. *Id.* at 118–27.

168. *Id.* at 124–25 (referencing *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S.

harmed constitutionally by partisan gerrymanders and racial gerrymanders in similar, if not identical, ways; they have been denied an equal opportunity to elect representatives of their choice.<sup>169</sup> Thus, the Court refused to find any significant difference between partisan groups and racial groups that would justify finding partisan gerrymanders nonjusticiable.<sup>170</sup>

Nevertheless, in the 1986 partisan gerrymander case, the Court rejected the partisan gerrymander claims. In a plurality opinion, four Justices found that the claims did not establish the requisite discriminatory effects on partisan voting power.<sup>171</sup> Three other Justices rejected the claim by contending that partisan gerrymander claims should not be justiciable.<sup>172</sup>

The plurality Justices rejected proportionality—the requirement that elections result in each party electing a percentage of the total legislative delegation proportionate to the statewide vote each received<sup>173</sup>—as the test for whether a partisan gerrymander has produced an unconstitutional effect on a party’s voting power.<sup>174</sup> Instead, they fashioned their own effects test: “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”<sup>175</sup> Unfortunately, they offered only a few clues as to how this test should be applied, including

1. the observation that political influence means the ability to get winning candidates from the opposition party to respond to their interests,<sup>176</sup>
2. the mandate that proof must be offered of “continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance

124 (1971)).

169. *Id.*

170. *Id.* On this issue, Justice O’Connor, joined by Chief Justice Burger and Justice Rehnquist, filed a concurrence in which she vigorously disagreed with the Court. Justice O’Connor felt that the Constitution granted more protection to racial minority groups, given their special status under the Equal Protection Clause and their historic vulnerability to being excluded from the political process. *Bandemer*, 478 U.S. at 151–52 (Connor, J., Burger, C.J. & Rehnquist, J., concurring). By comparison, non-minority members of the nation’s major political parties “[c]learly . . . cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups.” *Id.* at 152.

171. *Id.* at 127, 129–43 (plurality).

172. *Id.* at 144–61 (Connor, J., Burger, C.J. & Rehnquist, J., concurring).

173. *Id.* at 129–30 (plurality).

174. *Bandemer*, 478 U.S. at 129–34. The plurality’s rejection of proportionality as the basis for determining if dilution has occurred began with its observation that in an electoral system featuring geographically distinct districts and mandating the election of the plurality winners, just a slight statewide preference for a particular party will produce an “overwhelming majority” for it. *Id.* at 130. Thus, the plurality noted, the U.S. Supreme Court is not “prepared to hold that district based elections decided by plurality vote are unconstitutional . . . simply because the supporters of the losing candidates have no legislative seats assigned to them.” *Id.* (quoting *Whitcomb*, 403 U.S. at 160). The plurality also documented that in racial gerrymander cases it has demanded more than just requiring the victimized group to show a lack of proportional representation. *Id.* at 131 & n. 12. Specifically, it has required evidence of “historical patterns of exclusion from the political processes” and “the lack of responsiveness by those elected to the concerns of the relevant groups.” *Id.* at 131 n. 12, 132. Finally, the plurality asserts that “the power to influence the political process is not limited to winning elections” because it is presumed that persons will be adequately represented by, and have an equal opportunity to influence, officeholders they did not support in elections. *Bandemer*, 478 U.S. at 132.

175. *Id.*

176. *Id.* at 131–33.



- to influence the political process,”<sup>177</sup> and
3. the insistence that the proof must include the results, actual or projected, of more than one or two elections.<sup>178</sup>

In the years prior to Texas designing its congressional districting plan, lower courts inevitably used this degradation test to judge the constitutionality of allegedly unconstitutional partisan gerrymanders.<sup>179</sup> Not surprisingly, no claimant ever prevailed “despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results.”<sup>180</sup>

#### F. *The Legal Bottom-Line*

Given the legal framework described above for regulating the design of congressional districts, Republicans in the Texas legislature faced several challenges in coming up with a districting plan that would meet their political goals and survive legal attack. First, they would have to design districts with equal populations. Second, because Texas is a jurisdiction subject to VRA § 5, to receive preclearance they would have to take care that their new plan did not reflect the purpose or produce the effect of diluting the voting power of racial/language minority groups from what they had achieved under Texas’ last valid congressional districting plan. Third, they would have to make sure that their new plan provided all minority groups covered by VRA § 2 with majority-minority districts commensurate with their current cohesive voting power as limited by whatever proportionality rule might be imposed.<sup>181</sup> Fourth, they would have to take care not to do more for minority groups than what is required by VRA §§ 2 and 5 lest they provoke a white voter to charge them with segregating voters by race in violation of the Equal Protection Clause. However, if they took care of these four things, given the inability of anyone to prevail on a partisan gerrymander claim, they could pretty much do what they pleased to disadvantage Democrats.

### III. THE CREATION OF THE TEXAS REPUBLICAN GERRYMANDER

*LULAC* arose from the intense partisan rancor that surrounded the development of a Texas congressional redistricting plan after the 2000 Census of the United States. In 2003, the Republican-controlled Texas legislature replaced a lawful congressional districting plan (Plan 1151C), drafted by a federal district court in 2001,<sup>182</sup> with a congressional redistricting plan (Plan 1374C) designed to elect many more Republican congressmen.<sup>183</sup>

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177. *Id.* at 133.

178. *Id.* at 135–36, 139–41 & n. 17.

179. *Vieth*, 541 U.S. at 267, 279–80.

180. *Id.* at 279–81 & n. 6.

181. Given the principles expressed in Justice Thomas’ *Holder* dissent, as Texas undertook to design its new congressional districting plan, it could anticipate having two votes automatically on its side if a VRA § 2 vote dilution claim against its districting plan reached the U.S. Supreme Court while Justices Thomas and Scalia were still there. Review *supra* notes 115 to 119 and accompanying text.

182. *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*\*29–34.

183. See *LULAC*, 126 S. Ct. at 2606 (plurality); *id.* at 2628–31 (Stevens & Breyer, JJ., concurring in part,

The antecedents of this rancor go back over a decade. In response to the 1990 Census of the United States, the Texas legislature, then controlled by Democrats, produced a redistricting plan many felt was a product of blatant, if not unconstitutional, partisan gerrymandering.<sup>184</sup> Notwithstanding this exercise of political power, at a time when Democrats controlled nineteen of twenty-seven congressional seats,<sup>185</sup> the Democratic Party's dominance of Texas politics was coming to an end. In 1990, the Republicans garnered forty-seven percent of the statewide vote as compared to the Democrats' fifty-one percent share.<sup>186</sup> Nevertheless, in 2000, a year in which the Republicans won fifty-nine percent of the statewide vote, the Democrats won seventeen of Texas' thirty congressional seats in large part because the congressional districting plan of the early 1990s was still in place.<sup>187</sup>

As a result of the 2000 Census of the United States, Texas gained two more

dissenting in part).

184. Michael Barone & Richard E. Cohen, *The Almanac of American Politics 2004*, at 1510 (Nat'l. J. Group 2004); Michael Barone & Richard E. Cohen, *The Almanac of American Politics 2002*, at 1448 (Nat'l. J. Group, Inc. 2002). This redistricting plan was challenged as an unconstitutional partisan gerrymander, but the challenge was rejected twice by three-judge panels of the United States District Court for the Western District of Texas. In the first case, dealing with whether the challengers were entitled to preliminary relief that would alter the gerrymander before the 1992 primary elections, the court found that the plaintiffs failed to provide evidence sufficient to prove that they had been the victim of an unconstitutional gerrymander *Terrazas v. Slagle (Terrazas I)*, 789 F. Supp. 828, 834–35, 839 (W.D. Tex. 1992). The court came to this outcome despite finding that “the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States.” *Id.* at 834. It did so because it found that the legislature’s motivation for creating this weirdly designed district “was to enhance Black voters’ ability to elect a candidate of their choice.” *Id.* at 834–35.

After the 1992 elections, the three-judge court sustained motions for summary judgment on the merits of the gerrymander claim as to the 1991 congressional districting plan. *Terrazas v. Slagle (Terrazas II)*, 821 F. Supp. 1162, 1165–66, 1172–75 (W.D. Tex. 1993). The court found that the plaintiffs failed to demonstrate that the 1991 congressional districting plan would degrade Texas Republicans’ influence on the political process as a whole as they were required to do under the U.S. Supreme Court plurality opinion in *Bandemer*. *Id.* at 1172–75 & n. 12. Specifically, the court found that Republicans had been elected governor twice over the preceding fifteen years, governors can veto congressional redistricting legislation, and Republicans had enough members in the Texas House of Representatives to sustain a Republican governor’s veto. *Id.* at 1174. So, the court concluded that Texas Republicans could “effectively influence legislative outcomes.” *Id.* at 1175 (quoting *Ill. Legis. Redistricting Comm. v. LaPaille*, 782 F. Supp. 1272, 1276 (N.D. Ill. 1992)).

Yet another group of plaintiffs attacked the constitutionality of the Texas 1991 congressional district plan by alleging that several of the districts were drawn predominantly along racial lines in violation of the Fourteenth Amendment’s Equal Protection guarantees. *Vera v. Richards (Vera Dist. I)*, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994), *aff’d sub nom. Bush v. Vera*, 517 U.S. 952 (1996). On August 17, 1994, the three-judge federal district court held that Congressional Districts 18, 29 and 30 “[we]re the product[s] of unconstitutional racial gerrymandering and . . . [we]re not narrowly tailored to further . . . compliance with the Voting Rights Act.” *Id.* at 1344. Nevertheless, on September 2, 1994, bowing to the looming 1994 general elections, the court ordered that the 1994 elections proceed under the 1991 congressional districting plan it had just declared to be unconstitutional. *Id.* at 1351. On June 13, 1996, the U.S. Supreme Court upheld the *Vera Dist. I* court’s declaration that Congressional Districts 18, 29, and 30 were unconstitutional. *Vera*, 517 U.S. at 957. However, the 1996 elections were approaching and the State of Texas refused to produce a new redistricting plan in 1996. *Vera v. Bush (Vera Dist. II)*, 933 F. Supp. 1341, 1346 (S.D. Tex. 1996). The *Vera Dist. II* court, therefore, drew up its own redistricting plan, imposed it on Texas for the 1996 congressional elections, ordered Texas to follow an adjusted congressional election calendar, and ordered Texas to produce its own new redistricting plan by June 30, 1997. *Id.* at 1342, 1352–53. Ultimately, the court imposed its redistricting plan on Texas for the 1998 elections after Texas failed to provide a replacement by June 30, 1997, as the court had ordered in *Vera Dist. II*. *Vera v. Bush*, 980 F. Supp. 251, 253–54 (S.D. Tex. 1997).

185. *LULAC*, 126 S. Ct. at 2605 (plurality).

186. *Id.*

187. *See id.* at 2606.

congressional seats for a total of thirty-two.<sup>188</sup> Legislative attempts to come up with a new Texas congressional districting plan in response to the 2000 Census stalemated as a result of the 2000 elections producing a Texas legislature with Republicans controlling the Texas Senate and Democrats controlling the Texas House.<sup>189</sup> The governor, a Republican, refused to call a special session for purposes of ending this stalemate,<sup>190</sup> and a plan devised by a Texas state district court was vacated by the Texas Supreme Court.<sup>191</sup> Ultimately, a federal district court intervened to draft a lawful Texas congressional district plan,<sup>192</sup> Plan 1151C.<sup>193</sup>

Whether Plan 1151C perpetuated a bias in favor of Democrats is disputed.<sup>194</sup> What is not disputed is that in 2002 Republicans won only fifteen of Texas' thirty-two

188. *Id.*

189. *Id.*

190. *LULAC*, 126 S. Ct. at 2628 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

191. *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. 2001).

192. *Balderas*, 2001 U.S. Dist. LEXIS 25740. The *Balderas* court's rejection of Latino group challenges was sustained on appeal. *LULAC*, 126 S. Ct. at 2629 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

193. *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*29.

194. Two of the three judges who had drafted Plan 1151C in *Balderas*, United States Court of Appeals Judge Patrick E. Higginbotham and United States District Court Judge T. John Ward, sat on the three-judge court that gave final federal district court approval to Plan 1374C in *Henderson v. Perry*. 399 F. Supp. 2d 756 (E.D. Tex. 2005), *aff'd sub nom LULAC*, 126 S. Ct. 2594; *see LULAC*, 126 S. Ct. at 2606 (plurality). Writing for the *Henderson* majority, but not for Judge Ward, Judge Higginbotham stated that "[t]he practical effect of [implementing Plan 1151C] was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." *Henderson*, 399 F. Supp. 2d at 768. He attributed this partisan bias to the *Balderas* court's inability to come up with a standard of fairness to guide its congressional districting and its resulting decision to draft Plan 1151C using only neutral districting principles. *Id.* Thus, Plan 1151C emerged as a result of the *Balderas* court "placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and splitting of voting precincts, . . . undoing transparent offsetting movements of the same number of residents between districts[,] . . . and conform[ing] it to one-person, one-vote." *Id.* In a plurality portion of his *LULAC* opinion, Justice Kennedy embraced Judge Higginbotham's belief that Plan 1151C was biased in favor of the Democratic Party. *LULAC*, 126 S. Ct. at 2606.

In its per curiam opinion, the *Balderas* court claimed to have started with a blank map in designing Plan 1151C. *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*13. It then drew in existing majority minority districts protected by VRA. *Id.* Next, it drew in the two new districts by locating them in the areas of the state with the greatest population growth, locations that were in part affected by the boundaries of VRA-protected majority-minority districts. *Id.* at \*\*13-14. The court drew the rest of the map by respecting county and city lines as much as possible without violating the one-person, one-vote mandate and yet "eschew[ing] an effort to treat old lines as an independent locator." *Id.* at \*\*15-16. "[N]o incumbent was paired against another incumbent" and the court took care not to do anything to affect detrimentally the election prospects of six incumbents—three Democrats and three Republicans—who held important or unique leadership positions in Congress. *Id.* at \*17. Finally, the *Balderas* court, in assessing its handiwork for partisan bias, "found that the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state" with some allowance made to factor in the Democratic bias "due to the preservation of protected majority-minority districts, all of which contain a high percentage of Democratic voters." *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*18. Indeed, writing for the majority of the first three-judge district court to consider the constitutionality and legality of Plan 1374C, Judge Higginbotham said of Plan 1151C that twenty of its thirty-two districts "offer[ed] a Republican advantage." *Session*, 298 F. Supp. 2d at 471. Focusing on this version of how Plan 1151C was created, Justice Stevens concluded in his *LULAC* opinion that Plan 1151C was neither biased in favor of Democrats nor unfair to Republicans. *LULAC*, 126 S. Ct. at 2628-29 & n. 1 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

Perhaps most tellingly with respect to bias is the fact that neither the State of Texas, nor either major political party, legally challenged Plan 1151C. *Id.* at 2629. The *Balderas* court rejected several VRA challenges, including assertions that Plan 1151C violated VRA §§ 2 and 5. *Balderas*, 2001 U.S. Dist. LEXIS 25740 at \*\*20-28. Plan 1151C was challenged on appeal by Latino groups, but not by Texas, the Democratic Party, or the Republican Party. *LULAC*, 126 S. Ct. at 2629 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

congressional seats, an outcome that was bitterly disappointing to them in light of their fifty-nine percent share of the statewide vote in 2000.<sup>195</sup> This outcome was attributed either to Plan 1151C being biased in favor of Democrats<sup>196</sup> or to unanticipated cross-over voting by Republicans in support of six Anglo-Democratic incumbents running in districts tilted in favor of Republicans.<sup>197</sup>

Texas Republicans did have one consolation in 2002; with possibly illegal fundraising help from Tom Delay, Republican Majority Leader in the United States House of Representatives,<sup>198</sup> they won control of the Texas State House of Representatives and retained control of the Texas State Senate.<sup>199</sup> Egged on by Majority Leader Delay, the Republicans in the Texas legislature began immediately to enact a new congressional districting plan to replace Plan 1151C with a plan designed to defeat six Democratic incumbent congressmen.<sup>200</sup> They ultimately achieved this goal, but only

195. See *LULAC*, 126 S. Ct. at 2606 (plurality). Republicans won the two new legislative seats. Appellant's Br. on Merits at 5 (available at 2006 WL 53996). Twenty-eight incumbents were re-elected, and each major party elected one freshman "who[] replaced a retiring member from the same party." *Id.* Seven of the incumbents, six Democrats and one Republican, won in districts that gave pluralities to candidates for statewide offices from the other major party. *Id.* "Fourteen . . . districts voted consistently Republican and 11 voted consistently Democratic." *Id.* at 5-6.

196. *Id.* at 5; *Henderson*, 399 F. Supp. 2d at 768 & n. 52 (majority).

197. *LULAC*, 126 S. Ct. at 2629 & n. 1 (Stevens & Breyer, JJ., concurring in part and dissenting in part); *Session*, 298 F. Supp. 2d at 471 (majority).

198. On September 28, 2005, House Majority Leader Tom DeLay was indicted on a felony charge of participating in a scheme to funnel corporate donations to Republicans running for the Texas State Legislature in violation of Texas campaign finance laws. Philip Shenon & Carl Hulse, *DeLay Is Indicted in Texas Case and Forfeits GOP House Post*, N.Y. Times A1 (Sept. 29, 2005). As a consequence, he was forced to resign temporarily his position as majority leader of the U.S. House of Representatives under a Republican rule that requires members to give up their leadership roles if indicted on a felony charge. *Id.*

The Republican rule that forced DeLay's temporary resignation was put in place in August, 1993, to focus attention on the legal problems of prominent Democratic officeholders. Carl Hulse, *House GOP Acts to Protect Chief*, N.Y. Times A1 (Nov. 18, 2004). However, on November 16, 2004, Congressman Henry Bonilla (R. Tex.), a chief beneficiary of Plan 1374C, see *LULAC*, 126 S. Ct. at 2613 (majority), introduced a proposal to abolish this rule in face of increasing prospects that DeLay would be indicted. Carl Hulse & David E. Rosenbaum, *House Republicans Move to Protect Their Leader from Effects of Possible Indictment*, N.Y. Times A18 (Nov. 17, 2004). He did so to "eliminate the chance for a prosecutor to be able to force Mr. DeLay from his post by obtaining an indictment." *Id.* By a voice vote, House Republicans adopted Bonilla's proposal and eliminated its anti-corruption rule on November 17, 2004. Hulse, *supra*.

"Stung by criticism that they were lowering ethical standards, House Republicans [on the evening of Jan. 3, 2005] reversed [the] rule change that would have allowed a party leader to retain his position even if indicted." Carl Hulse, *House G.O.P. Voids Rule It Adopted Shielding Leader*, N.Y. Times A1 (Jan. 4, 2005) [hereinafter Hulse, *G.O.P. Voids Rule*]. In doing so, they bowed to "fierce criticism from Democrats and watchdogs outside the government, who said the Republican majority was subverting ethics enforcement." *Id.*

However, this step to restore effective ethics enforcement was weakened by the announcement by Congressman David Drier (R. Cal.) that he would introduce a proposal requiring the dismissal of any ethics charge if a majority of the House Ethics Committee, which is evenly divided between Republican and Democrats, failed to vote for an investigation. *Id.* On January 4, 2005, the Republican-dominated U.S. House of Representatives voted 220 to 195 to adopt Drier's proposal. Carl Hulse, *After Retreat, G.O.P. Changes House Ethics Rules*, N.Y. Times A1 (Jan. 5, 2005). In response, Democrats on the Ethics Committee refused to allow the committee to do its work. Carl Hulse, *House Overturns New Ethics Rule as G.O.P. Relents*, N.Y. Times A1 (Apr. 28, 2005) [hereinafter Hulse, *House Overturns*]. As a consequence, to get the House Ethics Committee functioning again, on April 27, 2005, the Republican-led House voted 406 to 20 to restore the previous rule that ethics investigations would proceed in the event there was deadlock within the House Ethics Committee. *Id.*

199. *LULAC*, 126 S. Ct. at 2606 (plurality).

200. Robert T. Garrett, *Senate Signs Off On Map; Six Months and Three Special Sessions Later, Plan Sits on Perry's Desk*, Dallas Morning News A1 (Oct. 13, 2003); Wayne Slater & George Kuempel, *Texas Redistricting Challenge Goes to Court Today: Poll Respondents Split on Special Sessions, Opposed to Remap Fight*, Dallas

after waging a time-consuming, expensive, and bitter fight featuring:

1. Democratic House members thwarting the plan in regular session by leaving the state so the requisite quorum could not be met;<sup>201</sup>
2. Senate Democrats thwarting the first special session by denying the Republicans the two-thirds vote they needed to bring the plan up for a vote under a long-standing senate rule designed to protect the rights of the minority party;<sup>202</sup>
3. Democratic Senators thwarting the second special session by leaving the state so the requisite quorum could not be met after the lieutenant governor, a Republican, set aside the Senate's rule requiring two-thirds support to bring a measure to the floor;<sup>203</sup>
4. The legislature enacting Plan 1374C in the third special session after one Democratic senator returned to Texas<sup>204</sup> and, at the urging of Congressman DeLay, after it substituted Plan 1374C for other plans many in the legislature

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Morning News A4 (Dec. 11, 2003).

201. Fifty-five Democratic State House members fled to Ardmore, Oklahoma, on the evening of May 11, 2003, in order to prevent the Texas House of Representatives from achieving the quorum needed to enact the Republicans' new congressional redistricting plan. *Texas Democrats Return as Disputed Bill Dies*, N.Y. Times A12 (May 17, 2003). Desperate Republicans tried to get the Texas Rangers and the United States Department of Homeland Security to help them track down the rebel Democrats. *Id.* "After the lawmakers brought the House to a standstill by failing to show up on May 12, state troopers went to their homes, to offices where members of their families worked and even to the neonatal unit of a Galveston hospital, where Representative Craig Eiland's newborn twins were under care." *Texas Search for Democrats Is Ruled Illegal*, N.Y. Times A7 (July 12, 2003). The Federal Aviation Administration helped track down the private plane of Democratic State Representative James E. Laney and reported its whereabouts to a member of Majority Leader Tom Delay's staff. *Id.*

202. See *LULAC*, 126 S. Ct. at 2630 (Stevens & Breyer, JJ., concurring in part and dissenting in part). "[I]n use since the 1950s[. . .], the rule requiring] that . . . two-thirds of the senators must agree to debate a bill before it can be heard . . . [is] credited . . . with forcing compromise and providing muscle to minority points of view, which for decades included the Republican agenda." Christy Hoppe & Robert T. Garrett, *Democrat Returns to Capitol; Whitmire Says He Wants to Save Senate Rule, Deal with G.O.P., Redistricting*, Dallas Morning News A3 (Sept. 6, 2003). Governor Perry, a Republican, "favor[ed] ending the rule [because] it has outlived its usefulness." *Id.* In particular, Governor Perry believed the two-thirds rule would enable the minority Democrats to block major Republican initiatives "such as revamping the tax system to fund public schools." *Id.*

203. See *LULAC*, 126 S. Ct. at 2630 (Stevens & Breyer, JJ., concurring in part and dissenting in part). On July 28, 2003, eleven Democratic Texas State Senators fled Texas in private jets destined for Albuquerque, New Mexico. Gromer Jeffers, Jr. & Wayne Slater, *Democrats Bolt Again—to NM; Senators Try to Halt Redistricting in New Session*, Dallas Morning News A1 (July 29, 2003). They did so after the lieutenant governor, a Republican, again said he would suspend the rule requiring two-thirds of the Senate to agree to debate a bill before it can be brought to the floor. *Id.*

204. See *LULAC*, 126 S. Ct. at 2630 (Stevens & Breyer, JJ., concurring in part and dissenting in part). The governor signed the redistricting plan into law on October 13, 2003, after Democratic Senator John Whitmire broke the unity of the Democrats' walkout by returning to Austin. Pete Solver, *Governor Signs Redistricting Bill; Dispute over Whether It Hurts Minority Power Will Go to Court Next*, Dallas Morning News A5 (Oct 14, 2003) (available in LEXIS, NEWS library). During the walkout, Senate Republicans imposed fines totaling \$57,000 per person on the absent Democratic senators. In the aftermath of Senator John Whitmire's return, the Senate removed the fines and other penalties, including the loss of parking places, but placed the recalcitrant Democrats on a probation that would leave them subject to fines if they missed more than seventy-two hours of Senate sessions without just cause over the next six months. Terrance Stutz, *Democrats Angry over 'Probation'; Republicans Lift Fines, Other Penalties against Senators Who Left State*, Dallas Morning News A1 (Sept. 19, 2003).

- felt were less likely than Plan 1374C to face serious VRA challenges;<sup>205</sup> and
5. United States Attorney General John Ashcroft giving Plan 1374C VRA § 5 preclearance despite the unanimous opinion of career attorneys in the Voting Rights Section of the United States Department of Justice that Plan 1374C violated VRA § 5.<sup>206</sup>

#### IV. THE EFFECTS OF THE TEXAS REPUBLICAN GERRYMANDER

Plan 1374C significantly altered Texas' congressional district map. Eight million Texans were moved from one district to another.<sup>207</sup> More counties are split under Plan 1374C than were split under Plan 1151C.<sup>208</sup> Many Plan 1374C districts are less compact than their Plan 1151C counterparts.<sup>209</sup>

The balance of power among Latino, African-American, and Anglo voters was also altered by Plan 1374C. As did Plan 1151C, Plan 1374C has eleven majority-minority districts as defined by general and voting age populations.<sup>210</sup> Plan 1374C's majority-minority districts are comprised of eight districts where Latinos constitute a majority of the general and voting age populations and three districts where Latinos and

205. See *LULAC*, 126 S. Ct. at 2630 (Stevens & Breyer, JJ., concurring in part and dissenting in part); *VRA Section Memo*, *supra* n. 11, at 13. In Part IV of his opinion, Justice Stevens cited to the *VRA Section Memo*, characterizing it as a "unanimous report . . . by staff attorneys in the Voting Section of the Department of Justice." *LULAC*, 126 S. Ct. at 2644 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

206. See *id.* at 2644; *VRA Section Memo*, *supra* n. 11; Dan Eggen, *Gonzales Defends Approval of Texas Redistricting by Justice*, Wash. Post A4 (Dec. 3, 2005) [hereinafter Eggen, *Gonzales Defends*]; Dan Eggen, *Justice Staff Saw Texas Districting as Illegal, Voting Right Finding on Map Pushed by DeLay Was Overruled*, Wash. Post A1 (Dec. 2, 2005) [hereinafter Eggen, *Staff Overruled*]; Dan Eggen, *Democrats Won't Get Justice Memo; Texans Say Document Could Embarrass G.O.P.*, Wash. Post A23 (Jan. 22, 2004) [hereinafter Eggen, *Justice Memo*]. The Justice Department sought to keep the contents of the *VRA Section Memo* secret, *id.*, but someone gave it to the *Washington Post*, which promptly disclosed its contents. Eggen, *Staff Overruled*, *supra*, see *LULAC*, 126 S. Ct. at 2644–45 (Stevens & Breyer, JJ., concurring in part and dissenting in part). Critics of the Justice Department's approval of the Texas redistricting plan asserted that the *VRA Section Memo* demonstrated that the Bush Administration had politicized the Justice Department. Eggen, *Gonzales Defends*, *supra*.

207. See *LULAC*, 126 S. Ct. at 2630 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

208. See *id.* Twenty-three counties were split under Plan 1151C as compared to the twenty-eight counties that are split by Plan 1374C. Rpt. of Ronald Keith Gaddie (Nov. 21, 2003), in *LULAC* Jt. App. I. 173, 176–178 (Jan. 10, 2006) [hereinafter Gaddie Rpt.] (available at 2006 WL 64437).

209. See *LULAC*, 126 S. Ct. at 2630–31 (Stevens & Breyer, JJ., concurring in part and dissenting in part). Generally, two standard measures of compactness are used to evaluate legislative districts: (1) "the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and [(2)] the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district." *Id.* at 2631 n. 2.

Using the perimeter-to-area score, Ronald Gaddie, an expert witness, found that five Plan 1374C districts are more compact than their Plan 1151C counterparts, twenty-six Plan 1374C districts are less compact than their 1151C counterparts, and one Plan 1374C district is equally compact with its Plan 1151C counterpart. Gaddie Rpt., tbl. 1, *supra* n. 208, at 198–99. Plan 1374C's mean and median perimeter-to-area scores are 6.416 and 6.550 respectively, which are significantly higher than Plan 1151C's mean and median perimeter scores of 5.065 and 4.650. *Id.* at 199.

Using the smallest circle score, Gaddie found that eight Plan 1374C districts are more compact than their Plan 1151C counterparts, twenty-two Plan 1374C districts are less compact than their Plan 1151C counterparts, and two Plan 1374C districts are equally compact to their Plan 1151C counterparts. Gaddie Rpt., tbl. 2., *supra* n. 208, at 200–01. Plan 1374C's mean and median smallest circle scores are 3.516 and 3.100 respectively, which were significantly higher than Plan 1151C's mean and median perimeter scores of 2.750 and 2.600. *Id.* at 201.

210. *VRA Section Memo*, *supra* n. 11, at 2–3.

African-Americans combine to constitute a majority of the general and voting age populations.<sup>211</sup> By comparison, Latinos constituted a majority of the general and voting age populations in seven Plan 1151C districts, and Latinos and African-Americans combined to constitute a majority of the general and voting age populations in four Plan 1151C districts.<sup>212</sup> Most importantly, as defined by the more politically significant citizen voting age population (CVAP), Plan 1374C has only seven majority-minority districts (six Latino and one African-American),<sup>213</sup> while Plan 1151C had nine majority-minority districts (six Latino and three Latino/African-American).<sup>214</sup>

Several Plan 1151C districts in which Latinos comprised a significant percentage of the population were altered by Plan 1374C. These alterations reduced the voting power of Latinos who had lived in 1151C Districts 9, 10, 15, 23, and 24 and who live in Plan 1374C's version of Districts 2, 14, 15, 22, 23, and 26.<sup>215</sup> Conversely, Plan 1374C nominally, if not substantively, increased the voting power of Latinos who live in the new District 29<sup>216</sup> and created a new District 25 with a high Latino population put

211. *Id.* at 3.

212. *Id.* at 2.

213. *Id.* at 3.

214. *Id.* at 2.

215. In Plan 1151C's District 9, Latino voting strength was not very strong—9.7% of the voting age population with 8.5% of registered voters Spanish surname registered voters (SSRV)—but this voting strength combined with African-American residents—21.3% of the citizenship voting age population (CVAP)—so that minority residents constituted 31% of the CVAP. *VRA Section Memo, supra* n. 11, at 22. Plan 1374C cracked Plan 1151C's District 9, with much of that district going to Plan 1374C's District 2 and the rest in smaller segments to Plan 1374C Districts 14 and 22. *Id.* At the time it was formed, Plan 1374C's District 2 had a Latino CVAP of 8.1%, a SSRV of 6.7%, and a Latino/African-American combined CVAP of 27.3%. *Id.* at 22–23. Worse yet, minority voters shifted to 1374C Districts 14 and 22 were to be represented by two Anglo-Republican Congressmen, Ron Paul and Tom DeLay, who were not noted for their sensitivity to the concerns of minority voters. *Id.* at 23.

Plan 1374C virtually eliminated Plan 1151C's District 10 by dividing it up among “several adjacent districts.” *Id.* Prior to its demise, Plan 1151C's District 10 had a Latino CVAP of 21.9%, a SSRV of 17.9%, an African-American CVAP of 11.7%, a combined Latino/African-American voting age population of 39.2%, and a combined Latino/African-American CVAP of 33.3%. *VRA Section Memo, supra* n. 11, at 23.

Under Plan 1374C, District 15's Latino CVAP falls from 69.3% to 58.5%, and its SSRV falls from 68.2% to 56.7%. *Id.* at 10. A large number of Plan 1151C's District 15 high turnout Latino voters are shifted to other districts and replaced with low turnout Latino voters and high turnout Anglo voters. *Id.* at 47.

To protect a Latino Republican incumbent, Henry Bonilla, whose support among Latino voters was declining precipitously, Plan 1374C shifted from Plan 1151C's District 23 to a new District 28 an area in which about 94,000 Latinos resided and added a new area containing about an equal number of Anglo Republicans. *LULAC*, 126 S. Ct. at 2613 (majority). As a consequence, in District 23 the Latino share of the voting age population declined from 63% to 50.9%, the Latino share of the CVAP fell from 57.4% to 45.8%, and the SSRV decreased from 55.3% to 44.0%. *VRA Section Memo, supra* n. 11, at 9, 41, 42.

Plan 1151C's District 24 had a significant minority population, with a Latino CVAP of 20.8%, a SSRV of 16%, an African-American CVAP of 25.7%, a combined Latino/African-American VAP of 54.6%, and a combined Latino/African-American CVAP of 46.3%. *Id.* at 7, 33. Plan 1374C splintered Plan 1151C's District 24 “into six different districts.” *Id.* at 7. Of these districts, Plan 1374C's District “26 has the highest minority population . . . , with [a Latino/African-American voting age population] of 27.4 percent and [a Latino/African-American] . . . [C]VAP of 23.5 percent.” *Id.* at 33.

216. The new District 29 has a Latino CVAP of 46.9% and a SSRV of 45.9%. By comparison, Plan 1151C's District 29 had a Latino CVAP of 42.8% and a SSRV of 39.8%. *Id.* at 55. Despite these enhanced Latino population numbers, regression analysis showed that the old District 29 performed better in terms of providing Latinos with an opportunity to elect the candidates of their choice than did the new District 29. *VRA Section Memo, supra* n. 11, at 55. One explanation for this anomaly was that the new District 29 received an area containing many high-income, high turnout Anglos. *Id.* It also has a significantly lower African-American CVAP, falling to 13.8% from the old District 29's 20.4%. *Id.* at 8.

together by joining two distant and distinct Latino communities.<sup>217</sup>

Plan 1374C also reduced the voting strength of African-Americans who had lived in Plan 1151C's Districts 9, 10, and 24 and who live in Plan 1374C's Districts 2, 14, 22 and 26.<sup>218</sup> In addition, many African-American residents of Plan 1151C's District 25, a district with relatively strong African-American voting strength, were shifted to Plan 1374C's District 9, which made District 9 somewhat stronger in African-American voting strength than was Plan 1151C's District 25.<sup>219</sup>

The most politically significant effects of Plan 1374C were the re-election disadvantages it imposed on ten Anglo-Democratic incumbents, including Max Sandlin (Plan 1151C District 1); Jim Turner (Plan 1151C District 2); Ralph Hall (Plan 1151C District 4); Nick Lampson (Plan 1151C District 9); Lloyd Doggett (Plan 1151C District 10); Chet Edwards (Plan 1151C District 11); Charles Stenholm (Plan 1151C District 17); Martin Frost (Plan 1151C District 24); Chris Bell (Plan 1151C District 25); and Gene Green (Plan 1151C District 29).<sup>220</sup> Seven of these congressmen—Turner, Lampson, Edwards, Stenholm, Frost, Bell, and Green—were slated to be moved into new districts that included very few of their former constituents.<sup>221</sup> The three congressmen who were not slated to be moved—Sandlin, Hall, and Doggett—had their districts significantly reconfigured to put them at a competitive disadvantage.<sup>222</sup> Worse yet, six of these Anglo-Democrats—Turner, Lampson, Stenholm, Frost, Bell, and Green—were slated to run in new districts against other current members of Congress.<sup>223</sup>

217. Intended as compensation to Latinos for the reduction of their voting power in District 23, the new District 25 was inserted between District 23 and the two districts to the east of District 23. *LULAC*, 126 S. Ct. at 2613 (majority). "District 25 is a long, narrow strip that winds its way from McAllen and the Mexican border towns in the south to Austin, in the center of the State and 300 miles away." *Id.* Between McAllen and Austin lie seven full counties, "but 77% of [District 25's] population resides in the split counties at the northern and southern ends," with half of the 77% living in Hidalgo County at the southern end and half living in Travis County at the northern end. *Id.* Latinos comprise 55% of District 25's CVAP and reside largely in equal measure in Hidalgo and Travis Counties. *Id.* This means District 25 contains two large Latino areas at opposite ends of the district which "have divergent 'needs' and 'interests' . . . owing to 'differences in socio-economic status, education, employment, health, and other characteristics.'" *Id.* (citation omitted).

218. Review *supra* note 215 for discussions about Plan 1151C's Districts 9, 10 and 24

219. Plan 1151C's District 25 had an African-American VAP of 22.0%, an African-American CVAP of 26.1%, a Latino CVAP of 18.6%, a SSRV of 13.6%, and a combined African-American/Latino CVAP of 44.3%. *VRA Section Memo, supra* n. 11, at 7, 36. By comparison, Plan 1374C's District 9 has an African-American VAP of 36.5%, an African-American CVAP of 46.9%, a Latino CVAP of 16.9%, a SSRV of 13.7%, and a combined African-American/Latino CVAP of 63.0%. *Id.* at 8, 36.

220. Rpt. of John R. Alford (Nov. 14, 2003) in *LULAC* Jt. App. I, 13, 42–45 (Jan. 10, 2006) [hereinafter Alford Rpt.] (available at 2006 WL 64437).

221. The traveling Democrats, their old districts, their new districts, and the percent of their old constituents that moved with them included Congressmen Jim Turner (District 2 to District 6, 4.4% old constituency); Nick Lampson (District 9 to District 2, less than 50% old constituency); Chet Edwards (District 11 to District 17, 35.2% old constituency); Charles Stenholm (District 17 to District 19, 30.9% old constituency); Martin Frost (District 24 to District 6, 21.6% old constituency); Chris Bell (District 25 to District 7, 18.8% old constituency); and Gene Green (District 29 to District 2, 1.1% old constituency). *Id.* at 42–44.

222. Congressman Max Sandlin's District 1 retained only 40.1% of his old constituency, and its Republican registration increased five points. *Id.* at 42. Congressman Ralph Hall's District 4 lost 33.9% of his old constituency. *Id.* at 44. Congressman Lloyd Doggett's District 10 was so dismantled that it was virtually a new district that retained only its old number. *Id.*

223. Congressmen Nick Lampson and Gene Green were paired together in District 2, which had a Republican index of 60.6. Alford Rpt., *supra* n. 220, at 44. Congressmen Jim Turner and Martin Frost were paired together in District 6 (Republican index 64.1), the home district of Republican incumbent Joe Barton, who retained 66.4% of his old constituency. *Id.* at 43. Chris Bell was slated to run in District 7 (Republican



The electoral burdens imposed by Plan 1374C on the Texas Anglo-Democratic Ten took a heavy toll. Six of these ten Anglo-Democratic incumbents—Sandlin, Lampson, Stenholm, Turner, Frost and Bell—did not return to Congress,<sup>224</sup> and one—Hall—returned after switching parties to run as a Republican.<sup>225</sup> Three of the burdened Democrats—Green, Doggett, and Edwards—won re-election as Democrats, with two—Green and Doggett—running in districts other than the ones to which they were assigned.<sup>226</sup> When the dust cleared, Plan 1374C had helped the Republicans gain six Texas congressional seats so that the Texas congressional delegation had twenty-one Republicans and eleven Democrats.<sup>227</sup>

## V. DISPOSITION OF LEGAL CHALLENGES TO THE TEXAS REPUBLICAN GERRYMANDER

### A. Federal District Court's Initial Disposition of All Claims against Plan 1374C in Session

On December 19, 2003, the Justice Department gave its VRA § 5 preclearance blessing to Plan 1374C.<sup>228</sup> Eighteen days later, in *Session v. Perry*,<sup>229</sup> a three-judge federal district court for the Eastern District of Texas upheld Plan 1374C by rejecting assertions that:

1. It is unconstitutional for states to revise mid-decade their congressional

index of 70.2), the home district of Republican incumbent John Culberson, who retained 51.8% of his old constituency. *Id.* Congressman Stenholm was forced to run in District 19 (Republican index of 69.0), the home district of Randy Neugebauer, who retained 57.5% of his old constituency. *Id.*

224. Congressmen Max Sandlin (District 1), Nick Lampson (District 2), and Charles Stenholm (District 19) lost to Republicans in the general election after choosing to run in the districts assigned to them by Plan 1374C. Robert T. Garrett, *Congressional Delegation Tips toward G.O.P.*, Dallas Morning News A22 (Nov. 3, 2004). Neither Congressman Jim Turner nor Congressman Martin Frost chose to run in Republican incumbent Joe Barton's District 6, where they were originally slated, for Jim Turner chose to retire and Martin Frost chose to run in District 32, where he lost in the general election. *Id.*; *Dallas-Fort Worth Area*, Dallas Morning News A23 (Nov. 4, 2004). Joe Barton easily won re-election. *See U.S. House*, Dallas Morning News A22 (Nov. 3, 2004).

Congressman Chris Bell, a freshman, chose to run in District 9 rather than in District 7, where he had been slated. *See Doggett Lives to Run Another Day Despite Redrawn District; Colleague Rodriguez in Tight Race, Bell Loses in Houston*, Dallas Morning News B6 (Mar. 10, 2004). There, he lost the primary election to an African-American Democrat who ultimately won the general election. Gebe Martinez, *Texas' Newest Congressmen Stampede into D.C.: G.O.P. Contingent Has Unmatched Numbers and Clout*, Houston Chronicle A4 (Nov. 14, 2004). In part, Congressman Bell's defeat was attributable to District 9 being altered to give African-American candidates a better chance to win. *Id.*; *supra* n. 219.

225. Garrett, *supra* n. 224.

226. Congressman Gene Green won running out of District 29 instead of District 2. *U.S. House*, Dallas Morning News A23 (Nov. 4, 2004); Alford Rpt., *supra* n. 220, at 42. Congressman Lloyd Doggett won running out of District 25 instead of District 10. *U.S. House, supra*; Alford Rpt., *supra* n. 220, at 44. Congressman Chet Edwards won in District 17, *U.S. House, supra*, where he had been assigned, Alford Rpt., *supra* n. 220, at 44, despite District 17 being heavily Republican (Republican index of 64.0), *id.*, and the home district of President George W. Bush. Garrett, *supra* n. 224.

227. *Id.*

228. *Session*, 298 F. Supp. 2d at 457.

229. 298 F. Supp. 2d 451, *vacated for reconsideration in light of Vieth*, 541 U.S. 267, *sub noms G.I. Forum v. Perry*, 126 S. Ct. 829 (2005) (mem.), *Jackson v. Perry*, 126 S. Ct. 827 (2005) (mem.), *Travis Co. v. Perry*, 126 S. Ct. 827 (2005) (mem.), *Henderson v. Perry*, 543 U.S. 941 (2004), *adhered to on remand, Henderson*, 399 F. Supp. 2d 756, *aff'd, LULAC*, 126 S. Ct. 2594.

- districts;<sup>230</sup>
2. Plan 1374C in its entirety discriminates against African-Americans and Latinos in violation of the Equal Protection Clause of the Fourteenth Amendment;<sup>231</sup>
  3. Plan 1374C constitutes an illegal partisan gerrymander;<sup>232</sup>
  4. Plan 1374C violated VRA § 2 by altering Plan 1151C's Districts 1, 2, 4, 9, 10, 11, 17, and especially 24 in ways that diluted African-American voting power in certain parts of Central and East Texas;<sup>233</sup>
  5. Plan 1374C diluted Latino voting power in South and West Texas, in violation of VRA § 2 because it provided only six Latino opportunity districts when in fact it was possible to draw seven Latino opportunity districts;<sup>234</sup>
  6. Plan 1374C violated VRA § 2 by altering Plan 1151C's Districts 15, 23, 27, and 28 and creating a new district 25 that included two distant and disparate Latino communities, in ways that diluted Latino voting power in South and West Texas;<sup>235</sup>
  7. Texas violated the Equal Protection Clause of the Fourteenth Amendment by making ethnicity the predominant factor in drawing congressional district lines in South and West Texas;<sup>236</sup> and
  8. Plan 1374C violated VRA § 2 by altering Plan 1151C's Districts 18 and 30 in ways that diluted African-American voting strength and possibly endangering the political futures of two African-American congresswomen.<sup>237</sup>

*B. Federal District Court's Disposition of the Political Gerrymander Claims in Henderson*

About four months after *Session* was decided, the U.S. Supreme Court decided *Vieth v. Jubelirer*,<sup>238</sup> a case in which plaintiffs challenged a Pennsylvania congressional redistricting plan, created in 2001—2002 by a Republican-controlled state government, on grounds that it was an unconstitutional political gerrymander.<sup>239</sup> The Justices produced five different opinions, none of which commanded a majority of the Court.<sup>240</sup>

230. *Session*, 298 F. Supp. 2d at 457–69.

231. *Id.* at 457, 469–73.

232. *Id.* at 457, 474–75.

233. *Id.* at 457, 478–86. The *Session* court rejected VRA § 2 claims with respect to Plan 1151C's District 24, *id.* at 481–85, then it rejected VRA § 2 claims directed toward Plan 1151C's Districts 1, 2, 4, 9, 10, 11, and 17. *Session*, 298 F. Supp. 2d at 485–86.

234. *Id.* at 457, 491–96.

235. *Id.* at 457, 496–505.

236. *Id.* at 457, 505–13.

237. *Id.* at 513–15.

238. 541 U.S. 267.

239. *Id.* at 271–73 (plurality).

240. The main opinion announcing the judgment of the Court and asserting that political gerrymanders presented non-justiciable political questions was written by Justice Scalia, who was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas. *See id.* at 271–306. Justice Kennedy provided the deciding vote for affirming the lower court's dismissal of the political gerrymander claim, but he did so out of a belief that there were presently no workable standards for judging "the burden a gerrymander imposes on representational rights," *id.* at 317 (Kennedy, J., concurring), and, therefore, refused to join the plurality's contention that political gerrymander cases inevitably present non-justiciable political questions. *See id.* at 306–17. Four Justices—Stevens, Souter, Ginsburg, and Breyer—dissented, producing among them three

A five Justice decisional majority affirmed the lower court's dismissal of the plaintiffs' claims,<sup>241</sup> with four justices asserting that political gerrymanders present non-justiciable political questions<sup>242</sup> and one justice finding that judicially manageable standards for

different opinions, each of which expressed the belief that political gerrymanders present justiciable issues, offered standards for judging the constitutionality of alleged political gerrymanders, asserted that the offered standards were judicially manageable, and contended that valid claims had been presented which should be addressed by the trial court upon remand. See *Vieth*, 541 U.S. at 317–42 (Stevens, J., dissenting); *id.* at 343–55 (Souter & Ginsburg, JJ., dissenting); *id.* at 355–68 (Bryer, J., dissenting).

241. *Id.* at 271–306 (plurality); *id.* at 306–17 (Kennedy, J., concurring).

242. *Vieth*, 541 U.S. at 271–306 (plurality). Justice Scalia asserted that there are “no judicially discernable and manageable standards for adjudicating political gerrymandering claims.” *Id.* at 281. He then launched into analyses of various standards that had been proposed in *Bandemer*, by the *Vieth* appellants, and by the *Vieth* dissenters. *Id.* at 281–84 (rejecting the *Bandemer* plurality standards), 284–90 (rejecting the *Vieth* appellants' proposed standards), 290–91 (rejecting standards proposed in J. Powell's *Bandemer* opinion), 292–95 (rejecting standards proposed in J. Steven's *Vieth* dissent), 295–98 (rejecting standards proposed in J. Souter's *Vieth* dissent, which was joined by J. Ginsburg), 299–301 (rejecting standards proposed in J. Breyer's *Vieth* dissent). Justice Scalia pronounced the *Bandemer* plurality standards to be unworkable mainly because lower courts and commentators said that they did not provide much guidance. *Id.* at 282–84.

The *Vieth* appellants proposed requiring claimants to demonstrate that a districting plan was designed with the predominant intent of disadvantaging a political party, *id.* at 284, involved systematic packing and cracking of the disadvantaged party's voters, *Vieth*, 541 U.S. at 286 & n. 7 (plurality), and would, under the totality of the circumstances, thwart the party's ability to win a majority of the seats with a majority of the vote. *Id.* at 286–87. Justice Scalia found the intent test to be unmanageable because it is not unlawful for partisan concerns to be taken into account when drawing district lines, and there is no way to weigh how many districts must have been drawn that subverted traditional district goals—compactness, contiguousness, protecting incumbents, respecting political subdivision boundaries, and respecting the cohesiveness of communities of interest—in order to have produced a partisan advantage to demonstrate that partisan advantage was the predominant intent. *Id.* at 285–86. He also feared that this test was an invitation to litigate. *Id.* at 286.

Next, Justice Scalia observed that parties can rarely know who their voters are because a person's political identity is not as permanent as his or her racial identity and can shift from election to election. It is, therefore, not possible to “assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.” *Id.* at 287. Justice Scalia rejected guaranteeing a political party the right to translate a majority of the votes into a majority of the seats because such a guarantee would establish proportionality as a fairness standard, something the Constitution does not require. *Vieth*, 541 U.S. at 287–88 (plurality). Moreover, he demonstrated that determining which party is a state's majority party is often impossible because it is rare that a single party wins all of the statewide elections. *Id.* at 288 (noting that in Pennsylvania's 2000 elections the Democrats won the presidential vote and the auditor general's election while the Republicans won a U.S. Senate seat, the attorney general's election, and the state treasurer's election). Finally, he asserted that when legislative seats are tied to multiple geographic districts, each with its own unique characteristics, there can be no direct correlation with a party's statewide vote and the number of legislative seats it wins. *Id.* at 288–90.

Justice Scalia rejected Justice Powell's proposal in *Bandemer* that districting plans be invalidated if “district boundaries had been drawn solely for partisan ends to the exclusion of ‘all other neutral factors relevant to fairness of redistricting’” by essentially reducing this standard to a search for fairness. *Id.* at 290–291. He then noted that fairness could be achieved despite “non-contiguous districts, . . . districts that straddle political subdivisions, and . . . a party's not winning the number of seats that mirrors the proportion of its vote.” *Id.* at 291.

Justice Stevens proposed a variant of Justice Powell's proposed standard by modifying the racial gerrymander standard adopted in *Shaw I*. *Vieth*, 541 U.S. at 339 & n. 33 (Stevens, J., dissenting). Thus, he would invalidate legislative districts for which “no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength.” *Id.* at 339. Justice Scalia rejected this proposed standard primarily because it either presumes that partisanship cannot legally be considered during districting or requires the court to determine something it cannot determine—how much partisanship is too much. *Id.* at 292–93 (plurality). Justice Scalia also objected to applying a racial-gerrymandering approach that invoked strict scrutiny to a type of case that can only invoke rational basis scrutiny, for there is nothing in the Constitution that demands the application of strict scrutiny to partisan gerrymanders. *Id.* at 293–95.

Justice Souter, joined by Justice Ginsburg, proposed a complicated five part test:

- (1) that [the plaintiff] is a member of a “cohesive political group”; (2) “that the district of his

judging the fairness of alleged political gerrymanders had yet to be discovered but holding out hope that they might emerge in the future.<sup>243</sup> The four dissenting Justices produced three different opinions expressing their views that the plaintiffs had presented at least one valid claim for relief which should be heard by the trial court and offering their own distinct versions of judicially manageable standards for judging the fairness of alleged political gerrymanders.<sup>244</sup> Given that five Justices agreed that judicially manageable standards for judging the fairness of alleged political gerrymanders had not yet been formulated,<sup>245</sup> it was surprising when, on October 18, 2004, the Court remanded *Session* back to the three-judge federal district court for the Eastern District of Texas for reconsideration in light of its *Vieth* opinions.<sup>246</sup>

On remand, in *Henderson v. Perry*,<sup>247</sup> the three-judge federal district court read the U.S. Supreme Court's remand order as a suggestion that workable standards for judging the fairness of redistricting plans alleged to be unconstitutional partisan gerrymanders could possibly emerge from the constitutional challenges to Plan 1374C.<sup>248</sup> Opponents of Plan 1374C offered, and the *Henderson* court rejected, two broadly stated standards: (1) that redistricting plans serve no rational or legitimate purpose if they are developed solely for the purpose of enabling a political party to gain electoral advantage over its opponents,<sup>249</sup> and (2) that redistricting plans created voluntarily rather than under the compulsion of law must strictly conform to the one-person, one-vote principal through the use of data that are more accurate than the latest decennial census data.<sup>250</sup> Thus, the *Henderson* court held that opponents of Plan 1374C failed to demonstrate that Plan 1374C is an unconstitutional political gerrymander.<sup>251</sup>

residence . . . paid little or no heed" to traditional districting principles; (3) that there were "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group"; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group."

*Id.* at 295–96 (quoting *Vieth*, 541 U.S. at 347–50 (Souter & Ginsburg, JJ., dissenting)). Justice Scalia found this test to be unworkable because it deploys a series of factors to answer a question judges cannot answer: "[h]ow much political motivation and effect is too much?" *Id.* at 297 (plurality). Moreover, Justice Scalia asserted that Justice Souter's test was only designed to detect "extremity of unfairness" with respect to vote dilution, *id.*, which rests ultimately for a search for fairness—"the same flabby goal that deprived Justice Powell's test of all determinacy." *Id.* at 298.

Justice Breyer approaches political gerrymanders from a statewide perspective and would invalidate a districting plan as an unconstitutional political gerrymander only if it was designed through "the *unjustified* use of political factors to entrench a minority in power." *Id.* at 299 (emphasis in original). Justice Scalia found that all of the explanations Justice Breyer provided for how this test would work suffer from the "difficulties of assessing partisan strength statewide and of ascertaining whether an entire statewide plan is motivated by political or neutral justifications." *Vieth*, 541 U.S. at 300 (plurality).

243. *Id.* at 306–17 (Kennedy, J., concurring).

244. *Id.* at 317–42 (Stevens, J., dissenting); *id.* at 343–55 (Souter & Ginsburg, JJ., dissenting); *id.* at 355–68 (Breyer, J., dissenting).

245. *Supra* nn. 242, 243.

246. 543 U.S. 941; Charles Lane, *Justices Order New Look at Tex. Redistricting Case; GOP-Crafted Plan Stays in Effect for This Election*, Wash. Post A21 (Oct. 19, 2004).

247. 399 F. Supp. 2d 756.

248. *Id.* at 762.

249. *Id.* at 758, 762–73.

250. *Id.* at 758–59, 773–77.

251. *Id.* at 758, 773, 777.

C. *The Supreme Court's Disposition of All Claims Against Plan 1374C in LULAC*

Given the U.S. Supreme Court's remand mandate to reconsider *Session* in light of *Vieth*,<sup>252</sup> the *Henderson* court refused to review its holdings in *Session* that none of Plan 1374C's districts impermissibly violated minority voters' rights under VRA § 2 and the Equal Protection Clause of the Fourteenth Amendment.<sup>253</sup> However, in *LULAC*, the U.S. Supreme Court reviewed the holdings of both the *Session* court and the *Henderson* court.<sup>254</sup>

About a month before the U.S. Supreme Court handed down its *LULAC* decision, Chief Justice Roberts gave a speech at Georgetown University in which he expressed the hope that he and his colleagues would achieve greater consensus by deciding cases on the narrowest possible grounds.<sup>255</sup> He insisted that achieving consensus in this manner would strengthen the rule of law, for by doing so the Court would provide "greater coherence and agreement about what the law is."<sup>256</sup> Unfortunately, the manner in which the Court decided *LULAC* did not conform to the model of judicial coherence Chief Justice Roberts had outlined in his Georgetown speech, for the Court produced six separate opinions that demonstrated its lack of consensus on many issues.<sup>257</sup>

1. Disposition of Latino Vote Dilution Claims

On appeal to the U.S. Supreme Court, the appellants raised several issues relevant to whether Plan 1374C diluted the voting power of Latino communities. G.I. Forum reasserted its claims that Plan 1374C diluted Latino voting power in violation of the Equal Protection Clause and VRA § 2 by reducing Latino voting power in Plan 1151C's District 23<sup>258</sup> and that Plan 1374C did not cure this violation by creating District 25 as a Latino majority district.<sup>259</sup> G.I. Forum also appealed the *Session* court's holding that Texas cannot or need not create seven Latino opportunity districts in South and West Texas.<sup>260</sup>

The League of United Latin American Citizens (LULAC) again cited Plan 1374C's reduction of Latino voting power in Plan 1151C's Latino influence district

252. See *Henderson*, 399 F. Supp. 2d at 758.

253. *Id.* at 777–78.

254. The Court consolidated several appeals after the *Henderson* decision and accepted them for argument on December 12, 2005. *G.I. Forum*, 126 S. Ct. 829; *Jackson*, 126 S. Ct. 827; *Travis Co.*, 126 S. Ct. 827. In *LULAC*, the Court reviewed the *Henderson* court's political gerrymander holding and the *Session* court's disposition of claims that Plan 1374C established districts in ways that violated VRA § 2 and used race and politics in drawing specific districts that violated the First Amendment and Equal Protection Clause. *LULAC*, 126 S. Ct. at 2604–05.

255. E. J. Dionne, Jr., *The Chief Justice Sets a Standard*, Wash. Post A17 (June 20, 2006).

256. *Id.*

257. Justice Kennedy wrote the principal opinion. *LULAC*, 126 S. Ct. at 2604–26. Chief Justice Roberts and Justices Stevens, Scalia, Souter, and Breyer each wrote an opinion which in part concurred with and in part dissented from Justice Kennedy's opinion. *Id.* at 2626–47 (Stevens & Breyer, JJ., concurring in part and dissenting in part), 2647–51 (Souter & Ginsburg, JJ., concurring in part and dissenting in part), 2651–52 (Breyer, J., concurring in part and dissenting in part), 2652–63 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part), and 2663–69 (Scalia & Thomas, JJ., concurring in part and dissenting in part).

258. App. Br. of G.I. Forum, 2005 U.S. Briefs 439 at 27–35 (Jan. 10, 2006) (also available at 2006 WL 63583).

259. *Id.* at 36–38.

260. *Id.* at 38–49.

(District 23) and reduction of minority voting power in Plan 1151C's minority coalition districts (Districts 1, 2, 4, 9, 10, 11, and 17) as proof that Plan 1374C constitutes an unconstitutional partisan gerrymander.<sup>261</sup> LULAC also reasserted its claim that Plan 1374C diluted Latino voting power in violation of the Equal Protection Clause and VRA § 2 by reducing Latino voting power in Plan 1151C's District 23 and reducing minority voting power in Plan 1151C's coalition districts, Districts 10, 17, and 24.<sup>262</sup>

In rendering its judgment on the merits of the Latino dilution claims, the U.S. Supreme Court focused almost exclusively on whether Plan 1374C's reduction in Latino voting power in Plan 1151C's District 23 diluted Latino voting power in violation of VRA § 2 despite the creation of Plan 1374C's District 25 as a Latino CVAP majority district.<sup>263</sup> A bare majority of the Court held that Plan 1374C had indeed violated VRA § 2 by diluting the voting power of Latinos who had lived in Plan 1151C's District 23.<sup>264</sup> It did so after finding that:

1. Plan 1151C's District 23 qualified as an effective Latino opportunity district;<sup>265</sup>
2. Plan 1374C's District 23 was not an effective Latino opportunity district;<sup>266</sup>
3. Plan 1374C's District 25 did not qualify as a Latino opportunity district because it failed to meet VRA § 2's compactness requirement by incorporating two distant and disparate Latino communities;<sup>267</sup>
4. the *De Grandy* proportionality factor should have been assessed for the entire state because the appellants claimed that Latinos' statewide voting power had been diluted and the selection of only seven districts in South and West Texas as the proportionality frame of reference would have been an arbitrary way to assess whether Texas' political processes are "equally open to participation";<sup>268</sup> and
5. even though Plan 1374C might be deemed to have achieved a "rough proportionality" between the percent of congressional districts that were Latino opportunity districts and Latino's percent of the statewide CVAP,<sup>269</sup> a remedy should be provided for the cracking of Plan 1151C's District 23 because Plan 1374C unjustifiably denied Latinos their opportunity to defeat a congressman who had been unresponsive to their needs.<sup>270</sup>

In light of these holdings, the Court declined to rule on Latino Equal Protection claims because it believed its resolution of the VRA § 2 claims necessitates the

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261. App. Br. of LULAC, 2005 U.S. Briefs 204 at 24–26 (Jan. 10, 2006) (also available at 2006 WL 53996).

262. *Id.* at 26–36.

263. *LULAC*, 126 S. Ct. at 2612–23 (majority); *id.* at 2652–63 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

264. *Id.* at 2612–23.

265. *Id.* at 2615–16, 2623.

266. *Id.* at 2616.

267. *LULAC*, 126 S. Ct. at 2616–19.

268. *Id.* at 2619–21.

269. *Id.* at 2621.

270. *Id.* at 2621–23.

redrawing of Districts 23 and 25.<sup>271</sup> Accordingly, these claims will not be discussed further.<sup>272</sup> However, the Court's resolution of the Latino VRA § 2 claims will be discussed below in greater detail because it may have provided needed clarity about what constitutes an effective minority opportunity district,<sup>273</sup> how compactness should be assessed in VRA § 2 cases,<sup>274</sup> and how the Court should determine what geographic area is relevant for judging whether a redistricting plan has provided a minority voting group with "rough proportionality."<sup>275</sup>

Unfortunately, the *LULAC* majority affirmed the *Session* court's rejection of the G.I. Forum's case for the creation of seven Latino opportunity districts with a cursory statement that "the court's resolution of the conflicting evidence was not clearly erroneous."<sup>276</sup> However, the *Session* court did more than just weigh the evidence to resolve this issue; it rendered legal judgments that an alternative plan cannot prevail, despite offering more minority opportunity districts than the state's plan, if its minority opportunity districts are less compact or riskier for minority-preferred candidates than the minority opportunity districts created in the state's plan.<sup>277</sup> By not addressing these issues, the Court failed to provide guidance as to whether it is appropriate to assess an alternative plan's ability to meet the *Gingles* prongs by comparing the characteristics of its putative minority opportunity districts with those offered by the state.

Moreover, the Court was bitterly divided on how to resolve the Latino VRA § 2 claims. As will be discussed in greater detail below, Chief Justice Roberts wrote a scathing dissent, joined by Justice Alito,<sup>278</sup> in which he raised very plausible arguments against the Court's electoral effectiveness, compactness, and proportionality holdings.<sup>279</sup> In addition, through Justice Scalia's cryptic dissenting opinion, he and Justice Thomas

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271. *Id.* at 2623.

272. Justice Scalia did address and reject the Latino Equal Protection claims that the cracking of Plan 1151C's District 23 was a violation of VRA § 2 and was not cured by the creation of Plan 1374C's District 25 as a Latino majority district. *Id.* at 2664–68 (Scalia & Thomas, JJ., Roberts, C.J. & Alito, J., concurring in part and dissenting in part). He rejected the claims as to Plan 1151C's District 23 because he found that the legislature's predominant purpose in cracking Plan 1151C's District 23 was to protect Congressman Henry Bonilla in a manner that also facilitated increasing Republican congressional victories. *LULAC*, 126 S. Ct. at 2664–68. In doing so, he relied on *Cromartie I*'s holding that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the state were *conscious* of that fact." *Id.* at 2665 (emphasis in original) (quoting *Cromartie I*, 526 U.S. at 551). Justice Scalia held that the Texas legislature was justified in creating Plan 1374C's District 25 as a Latino opportunity district because it had a reasonable belief that this action was necessary to achieve VRA § 5 preclearance of Plan 1374C. *LULAC*, 126 S. Ct. at 2666–68.

273. *See id.* at 2614–19 (majority).

274. *See id.* at 2616–19.

275. In *De Grandy*, the Court held that plaintiffs from a minority group may not be able to prevail in a VRA § 2 case if within a relevant area the percentage of districts in which the minority group has achieved voting majorities is roughly proportional to the minority group's percentage of the voting age population. 512 U.S. at 1000. *LULAC* presented an interesting issue of whether the relevant area for this proportionality analysis of Latino VRA § 2 claims was statewide or limited to South and West Texas. *LULAC*, 126 S. Ct. at 2620–21 (majority).

276. *Id.* at 2616.

277. *Session*, 298 F Supp. 2d at 491–92 & n. 125 (compactness issue); *id.* at 494–96 & n. 136 (electoral effectiveness issue).

278. *LULAC*, 126 S. Ct. at 2652–63 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

279. *Id.* at 2655–57, 2659–61 (compactness); *id.* at 2658, 2661 (proportionality); *id.* at 2661–62 (electoral effectiveness issue).

continued their “just say no” policy toward VRA § 2 dilution claims by invoking Justice Thomas’ passionate rejection of such claims in his concurring opinion in *Holder*.<sup>280</sup>

## 2. Disposition of African-American Vote Dilution Claims

On appeal to the U.S. Supreme Court, the appellants raised several issues relevant to whether Plan 1374C diluted the voting power of African-American communities. Appellant Eddie Jackson appealed the *Session* court’s holdings that (1) VRA § 2 did not require Texas to preserve Plan 1151C’s District 24 as a coalition district and (2) Plan 1151C’s District 24 was not an effective African-American opportunity district.<sup>281</sup> Appellant Jackson especially challenged the *Session* court’s invocation of a rule established by the United States Court of Appeals for the Fifth Circuit that a district could not be an effective minority opportunity district unless the minority group’s CVAP was greater than fifty percent.<sup>282</sup>

LULAC cited the reduction of minority voting power in certain African-American influence districts (Plan 1151C’s Districts 1, 2, 4, and 9) as proof that Plan 1374C was an unconstitutional partisan gerrymander.<sup>283</sup> It also appealed the *Session* court’s rejection of its claims that reduction of minority voting power in Plan 1151C’s District 24 and certain Plan 1151C’s minority influence districts (Districts 1 and 9) diluted African-American voting power in violation of VRA § 2 and the Equal Protection Clause.<sup>284</sup> LULAC especially appealed the *Session* court’s apparent holding that a Fifth Circuit precedent requires VRA § 2 plaintiffs to prove that white bloc voting against minority-preferred candidates is motivated by race rather than partisanship.<sup>285</sup>

From the foregoing discussion, it is apparent that the appeals concerning whether Plan 1374C diluted African-American voting power in violation of VRA § 2 raised three important broad issues: (1) whether VRA § 2 protects minority coalition districts; (2) whether it protects minority influence districts; and (3) whether a minority district can qualify as a minority group if it is so racially diverse that no ethnic/racial minority group has a majority of the CVAP.

Unfortunately, as will be discussed in greater detail below, neither these broad issues—nor the more specific issues concerning the Fifth Circuit’s fifty-percent-plus rule and requirement to prove that white bloc voting is not the product of partisanship—were decided in a manner that provides useful guidance on how they should be resolved. The

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280. *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part). Review discussion of Justice Thomas’ *Holder* opinion at text accompanying notes 115 to 119.

281. App. Br. of Eddie Jackson, 2005 U.S. Briefs 276 at 32–39 (Jan. 10, 2006) (coalition district issue) (also available at 2006 WL 62062); *id.* at 39–43 (effectiveness issue).

282. *Id.* The *Session* court invoked two Fifth Circuit cases that required minority groups to be at least fifty percent of the adult citizen population to meet the first *Gingles* prong—*Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999); *Perez v. Pasadena Ind. Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999). *Session*, 289 F. Supp. 2d at 483–84.

283. App. Br. of LULAC, *supra* n. 261, at 24–26.

284. *Id.* at 26–34.

285. *Id.* at 28–30. On this point, the *Session* court, after finding that African-Americans and Latinos did not vote cohesively in primary elections, *Session*, 298 F. Supp. 2d at 478, then cited *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993), for the proposition that “even assuming that Blacks and Hispanics vote cohesively, Plaintiffs have failed to meet their burden to disprove partisanship as the driving force behind the bloc voting.” *Session*, 298 F. Supp. 2d at 478 n. 88.



African-American VRA § 2 claims were given in-depth analysis in only two of the six *LULAC* opinions, neither of which constituted a majority opinion<sup>286</sup> and Fifth Circuit rules were not discussed in either of those opinions.<sup>287</sup>

Justice Kennedy wrote a plurality opinion, joined by Chief Justice Roberts and Justice Alito, in which he focused exclusively on VRA § 2 claims concerning Plan 1151C's District 24. With respect to those claims, Justice Kennedy:

1. did not address the coalition district issue directly because he accepted the *Session* court's finding that African-Americans and Latinos did not vote cohesively in Plan 1151C's District 24 primary elections;<sup>288</sup>
2. asserted that Plan 1151C's District 24 could not qualify as an African-American opportunity district because the ability of African-Americans to control the Democratic Party primary elections in Plan 1151C's District 24 was untested in absence of an African-American candidate challenging Congressman Martin Frost, a long-time Anglo-Democrat incumbent;<sup>289</sup> and
3. VRA § 2 does not require states to create or preserve minority influence districts.<sup>290</sup>

In reply, Justice Souter, joined by Justice Ginsburg, wrote a dissenting opinion that:

1. rejected out of hand that minority groups must be at least fifty percent of a district's CVAP to prevail in a VRA § 2 case because such a rule would preclude providing minorities with VRA § 2 protection for coalition districts given recognition and protection under VRA § 5;<sup>291</sup>
2. proposed that minority groups seeking to defend a coalition district be allowed to satisfy the first *Gingles* prong by showing they constitute a voting majority in the primary elections of the district's dominant party;<sup>292</sup> and

286. On this issue, Justice Kennedy wrote a plurality opinion, joined only by Chief Justice Roberts and Justice Alito. *LULAC*, 126 S. Ct. at 2624–26. Justice Souter, joined by Justice Ginsburg, wrote an opinion dissenting from the *LULAC* plurality. *Id.* at 2647–51. Justices Scalia and Thomas summarily rejected all VRA § 2 claims on grounds that VRA § 2 does not cover claims of vote dilution. Review *supra* note 280 and accompanying text. Although Justice Stevens was sympathetic to Justice Souter's dissenting opinion on this issue, Justice Stevens did not join that opinion and did not offer an opinion on his own because he found that “cracking . . . [Plan 1151C's] District 24 created an unconstitutional gerrymander.” *LULAC*, 126 S. Ct. at 2645 n. 16 (Stevens, J., dissenting). Similarly, Justice Breyer neither joined any of the other opinions on this issue, nor rendered one of his own, because he found that Plan 1374C was a political gerrymander that “in its entirety violates the Equal Protection Clause.” *Id.* at 2652 (Breyer, J., concurring in part and dissenting in part).

287. The white bloc voting rule was not discussed in either opinion. See *id.* at 2624–26 (plurality); *id.* at 2647–51 (Souter & Ginsburg, JJ., concurring in part and dissenting in part). Justice Kennedy's opinion ducked the fifty-percent rule by resolving the *Gingles* first prong issues on other grounds, *id.* at 2624–25 (plurality), while Justice Souter decried the fifty-percent rule and the fact that the Court had not resolved it. *LULAC*, 126 S. Ct. at 2647–49, 2651 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).

288. *Id.* at 2624 (plurality).

289. *Id.* at 2624–25.

290. *Id.* at 2625–26.

291. *Id.* at 2647–48 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).

292. *LULAC*, 126 S. Ct. at 2648–50.

3. decried the plurality and the *Session* court's focus on the race of Congressman Frost in their determinations that African-Americans did not have effective control over the outcomes of Democratic Party primaries in Plan 1151C's District 24.<sup>293</sup>

Accordingly, Justice Souter would have remanded this part of the case back to the federal district for a resolution of the African-American vote dilution claims with respect to Plan 1151C's District 24, unsullied by the fifty-percent-plus rule or the focus on Congressman Frost's race.<sup>294</sup>

### 3. Disposition of the Partisan Gerrymander Claims

Any expectations that *LULAC* would produce a majority view about how courts should determine whether a redistricting plan as a whole is an unconstitutional partisan gerrymander were thoroughly dashed. The five Justices who in *Vieth* found partisan gerrymander cases to be justiciable did so again in *LULAC*.<sup>295</sup> However, a careful reading of all six *LULAC* opinions reveals that seven Justices agreed that after *LULAC* there was still no majority support for any standards by which to judge the constitutionality of partisan gerrymanders, for the standards offered by the *LULAC* appellants failed to secure majority support.<sup>296</sup>

293. *Id.* at 2650–51.

294. *Id.* at 2651.

295. *Supra* n. 240; *LULAC*, 126 S. Ct. at 2607 (majority). Justices Scalia and Thomas continued to express their view that all such claims are non-justiciable. *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part). Chief Justice Roberts, adhering to his notion that cases should be decided on the narrowest possible grounds, refused to say whether he thought that partisan gerrymander cases were justiciable because the justiciability issue had not been argued in *LULAC*. *Id.* at 2652 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

296. After noting that in *Vieth* a majority of the Court had not yet agreed on standards by which to judge the constitutionality of partisan gerrymanders, *id.* at 2607 (majority), Justice Kennedy went on to reject the standards offered by the *LULAC* appellants. *Id.* at 2607–12. However, some of this portion of Justice Kennedy's opinion was not joined by any other Justice, *id.* at 2607–08 (discussing basic principles for dealing with redistricting cases), *id.* at 2609–11 (rejecting the appellants' arguments that mid-decade redistricting undertaken for purely partisan purposes is unconstitutional), and only Justices Souter and Ginsburg joined any aspect of it. *LULAC*, 126 S. Ct. at 2611–12 (rejecting appellants' arguments that voluntary mid-decade redistricting plans must be held to strict one-person, one-vote standards that preclude the use of beginning-of-decade Census data).

In Part II of his opinion, joined only by Justice Breyer, Justice Stevens supported the appellants' sole purpose argument. *Id.* at 2631–35 (Stevens & Breyer, JJ., concurring in part and dissenting in part). In Part III, which was not joined by any other Justice, Justice Stevens argued that Plan 1374C produced unconstitutional effects that could be identified through judicially manageable standards. *Id.* at 2635–41.

Writing separately for himself and Justice Ginsburg, Justice Souter concluded that "here as in *Vieth* we have no majority for any single criterion of impermissible gerrymander (and none for a conclusion that Plan 1374C is unconstitutional across the board)." *Id.* at 2647 (Souter & Ginsburg, JJ., concurring in part and dissenting in part). As a consequence, he "treat[ed] the broad issue of gerrymander much as the subject of an improvident grant of certiorari." *Id.*

Although he joined Part II of Justice Stevens' opinion, Justice Breyer wrote separately, and for only himself, that Plan 1374C is unconstitutional in its entirety because it "entrenches the Republican Party." *LULAC*, 126 S. Ct. at 2652 (Breyer, J., concurring in part and dissenting in part). He did so because he found that the "plan . . . overwhelmingly relies upon the unjustified use of purely partisan line-drawing considerations and . . . will likely have seriously harmful electoral consequences." *Id.*

Chief Justice Roberts, joined by Justice Alito, agreed "that appellants have not provided 'a reliable standard for identifying unconstitutional political gerrymanders.'" *Id.* at 2652 (Roberts, C.J. & Alito, J.,

In appealing the *Henderson* court's rejection of their partisan gerrymander claims, appellants Eddie Jackson and LULAC asserted that Plan 1374C was an unconstitutional partisan gerrymander because it was the product of voluntary mid-decade redistricting undertaken solely for partisan purposes.<sup>297</sup> These appellants, joined by appellant Travis County, also asserted that voluntary mid-decade redistricting plans violate the one-person, one-vote principle if the plans rely on decennial census data rather than data reflecting a state's current population.<sup>298</sup> Explicit in these claims is the underlying premise that *Bandemer's* and *Vieth's* command—that plaintiffs prove undue partisan vote dilution by some nebulous measure of an undiluted vote—can be avoided because the mere decision to undertake mid-decade redistricting for partisan gain is unconstitutional irrespective of any negative effects the resulting partisan gerrymander may impose on the subordinated political party.<sup>299</sup>

Given that seven Justices agreed that the *LULAC* appellants had failed to provide acceptable standards for judging the constitutionality of partisan gerrymanders, one might have expected to Court to have produced a majority rationale for why the arguments offered by the *LULAC* appellants were deficient. But, only Justices Kennedy and Stevens wrote opinions that offered a detailed consideration of the appellants' proposed standards,<sup>300</sup> and they wrote in opposition to one another.

As will be analyzed in greater detail below, Justice Kennedy rejected the appellants' mid-decade/sole partisan purpose argument because of his beliefs that:

1. Plan 1374C's design was not totally dictated by the desire of Republicans to gain partisan advantage;<sup>301</sup>
2. The Constitution does not preclude mid-decade redistricting and that the possibility of being able to engage in mid-decade redistricting could induce

concurring in part and dissenting in part). Nevertheless, he did not join Justice Kennedy's rationale on this matter, preferring instead to join the Court's disposition "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.*

Justice Scalia, joined by Justice Thomas, praised "Justice Kennedy's discussion of appellants' political gerrymandering claims" because it "ably demonstrates that, yet again, no party or judge has put forth a judicially discernable standard by which to evaluate them." *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part). However, he refused to join Justice Kennedy's opinion on this matter because it "concludes that the appellants have failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of." *LULAC*, 126 S. Ct. at 2663. To Justice Scalia, this approach "perpetuates a cause of action with no discernable content." *Id.* Accordingly, he and Justice Thomas would have "dismissed appellants' claims as nonjusticiable." *Id.*

297. App. Br. of Eddie Jackson, *supra* n. 281, at 17–29; App. Br. of LULAC, *supra* n. 261, at 21–26.

298. App. Br. of Eddie Jackson, *supra* n. 281, at 30–31; App. Br. of LULAC, *supra* n. 261, at 15–21; App. Br. of Travis Co., 2005 U.S. Briefs 254 at 14–30 (Jan. 10, 2006) (also available at 2006 WL 63958).

299. Thus, Appellant Eddie Jackson asserted that:

Appellants' current claim alleviates the justiciability concerns expressed in *Vieth*, because it does not ask a court to determine how much bias is too much.

Indeed, the opinions in *Vieth* strongly support the conclusion that a redistricting plan undertaken solely to achieve partisan advantage, and serving no other purpose, necessarily violates the Constitution. . . . A mere desire to lessen the power of one group of citizens because of their disfavored political beliefs is not a legitimate basis for exercising governmental power.

App. Br. of Appellant Eddie Jackson, *supra* n. 281, at 17.

300. *Supra* n. 296.

301. *LULAC*, 126 S. Ct. at 2609–10 (Kennedy, J., concurring).

more cooperation among the competing political parties in coming up with fair and legal redistricting plans immediately after each decennial census,<sup>302</sup>

3. Plan 1374C was fairer than previous Texas congressional districting plans because it gave the dominate Republican Party a percentage of Texas' congressional seats that was roughly proportional to the Republican's percentage of the statewide vote in the 2004 general election;<sup>303</sup>
4. The constitutionality of alleged partisan gerrymanders must be determined on the basis of its effects on the members of the subordinated political party, and therefore partisan gerrymanders cannot be deemed unconstitutional simply because their designers had a bad motive and used unfair redistricting processes;<sup>304</sup> and
5. The plaintiffs failed to provide a standard by which to determine the level of partisan bias that should not be tolerated by the Constitution.<sup>305</sup>

Justice Kennedy, joined by Justices Souter and Ginsburg, also rejected the appellants' mid-decade/one-person, one-vote argument because he believed it was just another way of saying that redistricting plans voluntarily undertaken mid-decade for partisan advantage should be declared unconstitutional per se.<sup>306</sup>

In reply, Justice Stevens, joined by Justice Breyer, argued that:

1. It was immaterial that some of Plan 1374C's lines were drawn for permissible reasons because the relevant inquiry was whether Texas' decision to undertake mid-decade redistricting was unconstitutional;<sup>307</sup>
2. There was plenty of evidence to support the conclusion that Texas' sole purpose for undertaking a mid-decade redistricting was to secure a partisan advantage for the Republican Party;<sup>308</sup> and
3. A decision to redistrict mid-decade solely to achieve a partisan advantage is unconstitutional because it serves no legitimate government purpose and, therefore, violates the Fourteenth Amendment's prohibitions against invidious discrimination and the "bare desire to harm . . . politically disfavored group[s]" and the First Amendment's prohibition [against] government retaliating against persons on account of "their political affiliation."<sup>309</sup>

In Part III of his opinion, joined by no other Justice, Justice Stevens argued that Plan 1374C unconstitutionally burdens on the representational rights of Texas Democrats because it is designed to (1) produce asymmetrical election results that will insulate

302. *Id.* at 2610–11.

303. *Id.* at 2610.

304. *Id.* at 2610–11.

305. *Id.*

306. *LULAC*, 126 S. Ct. at 2611–12 (plurality)

307. *Id.* at 2631–32 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

308. This evidence included "(1) testimony from legislators; (2) . . . procedural irregularities . . . ; (3) Plan 1374C's significant departures from . . . neutral districting criteria . . . ; (4) the plan's excessive deviations from prior districts, which interfere with the development of strong relationships between Members of Congress and their constituents; and (5) the plan's failure to comply with the Voting Rights Act." *Id.* at 2632–33.

309. *Id.* at 2633–35.

Republicans from changes in the electorate's attitudes;<sup>310</sup> and (2) provide Republican members of Congress with such safe seats that they need not take into consideration the needs and desires of their Democratic constituents.<sup>311</sup>

## VI. ANALYSIS OF *LULAC*'S VOTE DILUTION CLAIMS

The inability of the Texas legislature to agree on a congressional redistricting plan prior to the 2002 elections, and the subsequent development of Plan 1151C by the *Balderas* Court, produced two fortuitous consequences. First, as the last valid congressional districting plan in force prior to the development of Plan 1374C, Plan 1151C was the benchmark for purposes of VRA § 5 preclearance analysis by the U.S. Department of Justice.<sup>312</sup> Having been drafted to be Texas' post-2000 decennial congressional districting plan, it could, but need not, have served as the possible valid alternative plan for purposes of meeting the requirements of VRA § 2 vote dilution analysis. As a consequence, the VRA § 5 preclearance denial memo by the career attorneys of the U.S. Department of Justice's Voting Rights Section provides analysis useful for analyzing the *LULAC* Court's disposition of the VRA § 2 vote dilution claims.

The second fortuitous circumstance is that at the time Texas drafted Plan 1374C, there was not in place a valid legislatively created post-2000 decennial congressional districting plan. As will be discussed below, this fact may have been pivotal to the Justices who refused to find that mid-decade redistricting is legal per se.<sup>313</sup>

### A. *The Latino Vote Dilution Claims*

In VRA § 2 vote dilution cases, the state is entitled to implement its districting plan if it provides specific minority groups with the maximum feasible number of minority opportunity districts consistent with the proportionality limits imposed by *De Grandy*.<sup>314</sup> So, in *LULAC*, Texas was entitled to prevail against the VRA § 2 Latino vote dilution claims if it was correct in asserting that Plan 1374C provided as many Latino opportunity districts as could have been physically and legally created in Texas after the 2000 Census.

Assuming for purposes of this immediate discussion that the *Session* court was correct in finding that seven valid Latino opportunity districts could not have been created in Texas after the 2000 Census, given the posture of the *LULAC* case when it

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310 *Id.* at 2635–38. Electoral asymmetry is the phenomenon of one party getting better election results than another from the same share of the vote. *LULAC*, 126 S. Ct. at 2637 (Stevens & Breyer, JJ., concurring in part and dissenting in part). In *Session*, there was testimony introduced that Plan 1374C would produce severe asymmetry so that “if each party receive[d] half the statewide vote, . . . the Republicans would win 62.5% (20) of the congressional seats, whereas the Democrats would win 37.5% (12) of those seats.” *Id.* at 2638.

311 *Id.* at 2639–40.

312 *VRA Section Memo*, *supra* n. 11, at 2.

313. In this regard, Parts II.C and II.D of Justice Kennedy's opinion is essentially a rejection of the idea that mid-decade redistricting is invalid per se. *LULAC*, 126 S. Ct. at 2609–11, 2611–12 (plurality). He wrote for himself in Part II.C., *id.* at 2604, but Justices Souter and Ginsburg joined Part II.D. *Id.* In his opinion, Justice Stevens praised the *Henderson* court's holding that “the Constitution does not prohibit a state legislature from redrawing congressional districts in the middle of a census cycle.” *Id.* at 2631 (citing *Henderson*, 399 F. Supp. 2d at 766) (Stevens & Breyer, JJ., concurring in part and dissenting in part).

314. Review *supra* notes 78, 79, 81, and 91 to 95 and accompanying text.

reached the U.S. Supreme Court, Texas would have been entitled to prevail against the VRA § 2 Latino vote dilution claims if either Plan 1374C's District 25 was a qualified Latino opportunity district or the appellants failed to demonstrate that an alternative valid districting plan could provide six Latino opportunity districts.<sup>315</sup> Appellants pointed to Plan 1151C as a valid alternative plan that would provide Latinos with six opportunity districts,<sup>316</sup> but whether Plan 1151C's District 23 was an effective Latino opportunity district was hotly contested because Latinos had been unable to defeat Republican Congressman Henry Bonilla despite voting overwhelmingly and cohesively against him for years.<sup>317</sup>

There should have been no doubt that Plan 1151C's District 23 met the second *Gingles* prong because District 23 Latinos voted cohesively.<sup>318</sup> Moreover, Latinos encountered white bloc voting in District 23 sufficient to satisfy the third *Gingles* prong.<sup>319</sup> As a part of a districting plan already deemed to be valid, District 23 presumably met the compactness requirement of *Gingles*' first prong.<sup>320</sup> In addition, Latinos constituted more than a majority of District 23's CVAP,<sup>321</sup> meaning the District 23 Latino community literally met the *Gingles* first prong requirement that it be sufficiently large to constitute a majority.<sup>322</sup>

Nevertheless, the *Session* court held that Plan 1151C's District 23 was not an effective Latino opportunity district because District 23 Latinos had never been able to elect their candidate of choice for Congress.<sup>323</sup> Other federal courts have not used this effective majority approach, preferring instead to find that minority groups meet the *Gingles* first prong majority if they constitute a numeric majority of the relevant voting population.<sup>324</sup> This divergence of approaches presented the *LULAC* Court with a policy choice as to how to determine whether a minority group is sufficiently large to meet the *Gingles* first prong majority requirement.

The *LULAC* majority all but adopted the numeric approach in its rationale for finding Plan 1151C's District 23 to be a Latino opportunity district. After noting "it may

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315. Review *supra* notes 259 to 263 and accompanying text describing the scope of the issues raised by appellants that were relevant to the VRA § 2 Latino vote dilution claims.

316. App. Br. of Eddie Jackson, *supra* n. 281, at 49.

317. In fact, the *Session* court explicitly held that Plan 1151C's District 23 was not a Latino opportunity district because the plaintiffs' own expert testified that in District 23 the Latino preferred candidate won only five of eight "racially contested elections from 1994 to 2002." *Session*, 298 F. Supp. 2d at 496–97.

318. Latino voters in Plan 1151C's District 23 had been voting so cohesively that only Latino candidates won in the congressional primaries held since 1990. *VRA Section Memo, supra* n. 11, at 44.

319. Representative Bonilla's share of the Latino vote has declined precipitously from 1996, when he received 24.9% of the Latino vote, to 2002, when he received 3.5% of the Latino vote. *Id.* at 41. Only bloc voting by whites has saved him from defeat. *See id.* at 42 & n. 35, 44.

320. Review *Session*, 298 F. Supp. 2d at 506–08, where the *Session* court takes note of compactness measures for Districts 15, 23, 25, 27, and 28 for both Plans 1151C and 1374C. These scores show that Plan 1151C's compactness scores are better than several districts the *Session* court found acceptably compact. *Id.*

321. Latinos in Plan 1151C's District 23 constituted 57.5% of the CVAP, with a SSRV of 55.3%. *Session*, 298 F. Supp. at 496.

322. *Gingles*, 478 U.S. at 50 & n. 17.

323. *Session*, 298 F. Supp. 2d at 496–97.

324. *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1051–52 (D. Md. 1994). Review Herbert et al., *supra* n. 41, at 28–31.

be possible for a citizen voting-age majority to lack real opportunity,”<sup>325</sup> the Court went on to cite a number of factors it believed signified that District 23 provided Latinos with a legitimate chance to elect congressional candidates of their choice. These factors included Latino-preferred statewide candidates winning a majority of District 23’s vote in thirteen of fifteen 2002 races, the demonstrable “rise in Latino voting power in each successive election,” and the near defeat of Congressman Bonilla in 2002.<sup>326</sup> Moreover, in conducting its VRA § 2 totality of the circumstances analysis, the *LULAC* Court chided the *Session* court for “referr[ing] only to how effective District 23 ‘had been,’ not to how it would operate today.”<sup>327</sup> In sum, although Latinos had been unable to win District 23’s congressional elections, the Court still found District 23 to be a Latino opportunity district since VRA § 2 only guarantees an equal opportunity to win, not victories.<sup>328</sup>

The *LULAC* majority’s pragmatic approach to determining that Plan 1151C’s District 23 was an effective Latino opportunity district provides needed clarity with a touch of flexibility. It extends a presumption of effectiveness to districts in which a minority group constitutes a majority of the CVAP, but it requires some additional indicia that this majority CVAP status will continue so that the possibility of the minority group becoming an effective political force is preserved. Thus, it might still be possible for a state to argue that a district is not an effective minority opportunity district—despite it being home to a minority group constituting a majority of its CVAP—if emerging population shifts indicate that the minority group may not be the majority of the district’s CVAP in the not-so-distant future. At the same time, this pragmatic approach honors the fact that any group constituting a majority of a district’s CVAP can win any election in which it realizes its potential voting power by registering its citizen voting age members and getting them to the polls.

So, that is why the Court’s summary dismissal of the appellants’ assertion that seven Latino opportunity districts should be created is so puzzling. Latinos comprised the majority of the CVAP in each of the appellants’ demonstration Latino opportunity districts.<sup>329</sup> Election effectiveness evidence showed that each of the appellants’ demonstration Latino opportunity districts performed as well or better than Plan 1151C’s District 23.<sup>330</sup> It therefore appears that the appellants’ seven demonstration Latino opportunity districts met the *LULAC* majority’s pragmatic equal opportunity effectiveness test. Not only did the *Session* court not use this test, it also did not appear to have fully considered the evidence concerning the election effectiveness of the appellants’ demonstration districts.<sup>331</sup>

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325. *LULAC*, 126 S. Ct. at 2615 (majority).

326. *Id.*

327. *Id.* at 2623.

328. *Id.* at 2615.

329. In descending CVAP percentage order, the appellants’ proposed Latino opportunity districts and their CVAP percentages were District 16 (67.7), District 15 (63.2), District 27 (59.9), District 25 (58.4), District 20 (57.9), District 23 (56.9), and District 28 (50.3). *Session*, 298 F. Supp. 2d at 496 n. 136.

330. Evidence showed that the Latino preferred candidates won eight of eight elections in the appellants’ proposed Districts 15, 16, 20, 25, 27, and 28, and five of eight elections in proposed District 23. *Session*, 298 F. Supp. 2d at 522–23 (Ward, J., dissenting).

331. In rejecting the appellants’ plea for seven Latino opportunity districts, the *Session* court focused

In addition, the *Session* court also held that some of the appellant's proposed districts failed to meet the *Gingles* first prong compactness requirement because they were less compact and more strangely shaped than comparable Plan 1374C districts.<sup>332</sup> But, four of the appellants' proposed districts had better compactness scores than their 1374C counterparts.<sup>333</sup> If the *Session* court had been consistent in the use of its comparative compactness technique, then it would have produced a circular result that invalidated several of Plan 1374C's districts.

More importantly, in the context of VRA § 2 challenges to single-member districts, the issue is whether more minority opportunity districts than those provided by a state's proposed districting plan can and should be created.<sup>334</sup> It would seem logical that this issue should be determined by the Court examining the plaintiffs' demonstration districts against some objective criteria relevant to what constitutes a valid minority opportunity district in the same manner the *LULAC* majority examined Plan 1151C's District 23.<sup>335</sup> After all, the appellants' demonstration districts were proffered only for the purposes of showing the feasibility of creating seven Latino opportunity districts.<sup>336</sup> If the state had been ordered to develop a districting plan that contains seven Latino opportunity districts, it would not have been required to adopt the designs of the appellants' demonstration districts.<sup>337</sup>

As noted previously, the *Session* court held that Texas should not have to provide seven Latino opportunity districts even if the appellants' demonstration districts met all the *Gingles* prongs because Latinos had already received more than a "rough proportionate" share of opportunity districts as measured by their voting strength in South and West Texas.<sup>338</sup> This could not have been a factual determination accepted by the *LULAC* majority because, as discussed below, it rejected the *Session* court's use of South and West Texas as the relevant area for assessing proportionality.<sup>339</sup>

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obsessively on the relatively low majority Latino CVAP percentages in two of the appellants' demonstration districts. *See id.* at 494–96 (majority). The court also inexplicably failed to acknowledge and consider election analysis demonstrating how well the appellants' demonstration districts would perform for Latino-preferred candidates. *Id.*; *id.* at 522–23 (Ward, J., dissenting); App. Br. of G.I. Forum, *supra* n. 258, at 44–46.

332. *Session*, 298 F. Supp. 2d at 491–92 & n. 125.

333. The appellant's proposed districts 15, 20, and 25 had better perimeter-to-area and smallest circle scores than their Plan 1374C counterparts, while proposed District 27 had a better perimeter-to-area and an equal smallest circle score as compared to Plan 1374C's District 27. *Id.* It is true that Plan 1374C's Districts 23 and 28 had significantly better compactness scores than the appellants' proposed Districts 23 and 28, but the appellants proposed Districts 15 and 25 had significantly better compactness scores than Plan 1374C's Districts 15 and 25. *Id.*

334. *De Grandy*, 512 U.S. at 1012–13.

335. In *Vera*, the U.S. Supreme Court resolved an Equal Protection challenge to a majority-minority district on the basis of whether that district qualified to be a minority opportunity district under the requirements of VRA § 2. 517 U.S. at 976–81 (plurality). In that context, the *Vera* plurality asserted that "[a] § 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.'" *Id.* at 977. This assertion supports the common sense notion that a proffered minority opportunity district either is or is not reasonably compact in-and-of-itself irrespective of the compactness or lack thereof of any other district.

336. *See Clark v. Calhoun Co.*, 21 F.3d 92, 95 (5th Cir. 1994).

337. *Id.*

338. *Session*, 298 F. Supp. 2d at 492–94.

339. *LULAC*, 126 S. Ct. at 2620–21 (majority).



Given the inappropriate manner in which the *Session* court factually assessed proportionality and the effectiveness and compactness of the appellants' demonstration districts, the *LULAC* Court should have vacated the *Session* court's denial of the appellants' demand for seven Latino opportunity districts and sent the issue back for the district court to conduct another assessment using the proper VRA § 2 analytical frames. By doing so, the Court could have reinforced its pragmatic equal opportunity approach for assessing the effectiveness of proposed minority opportunity districts and made it clear that such districts are to be judged for compactness on their own merits rather than by whether they are more aesthetically pleasing than the districts drawn up by the state's districting plan. At a minimum, if the factual record had convinced the Court that seven Latino opportunity districts could not have been created, it should have offered its own factual analysis and conclusions using the proper VRA § 2 analytical frames in order to provide lower courts with guidance as to how such assessments should be made.

Having rejected the appellants' demand for seven Latino opportunity districts and pronounced Plan 1151C's District 23 to be a legitimate opportunity district, it was incumbent on the Court to determine whether six Latino opportunity districts were required under the totality of the circumstances to prevent Latino vote dilution in violation of VRA § 2. There was no doubt that Latinos had been the victims of a number of past discriminatory practices that still affected their ability to participate effectively in the political process.<sup>340</sup> As a consequence, the totality of the circumstances issue turned on how the Court conducted proportionality calculations to estimate how many Latino opportunity districts were needed to reflect Latino voting power in the relevant area,<sup>341</sup> "remedy the effects of past and present discrimination against Mexican-Americans, and bring the community into the full stream of political life."<sup>342</sup>

Chief Justice Roberts, joined by Justice Alito, reinforced the plausible argument made by the *Session* court in support its selection of South and West Texas as the relevant proportionality area.<sup>343</sup> He, and the *Session* court, argued quite logically that only those areas in which it is possible to form valid minority opportunity districts should be considered for purposes of performing proportionality calculations, and it was undeniable that valid Latino opportunity districts could be formed only in South and West Texas.<sup>344</sup>

Latinos comprised fifty-eight percent of the CVAP in South and West Texas, and only seven Congressional districts could be located there that met the one-person, one-vote requirement.<sup>345</sup> Thus, if South and West Texas was selected as the relevant area for proportionality calculations, the Latino community would have been accorded perfect

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340 The discriminatory practices cited by the *LULAC* Court included "the poll tax, an all-white primary system, and restrictive voter registration time period." *LULAC*, 126 S. Ct. at 2622 (citing *Vera Dist. I*, 861 F. Supp. at 1317).

341. *LULAC*, 126 S. Ct. at 2621–22 (majority).

342. *Id.* at 2622 (citing to *White v. Regester*, 412 U.S. 755, 769 (1973)).

343. *Id.* at 2661–63 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

344. *Id.* at 2661–62; *id.* at 2620 (majority) (accepting the contention that Latino opportunity districts could be formed only in South and West Texas but finding that fact to be irrelevant to proper proportionality analysis).

345. *LULAC*, 126 S. Ct. at 2662 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

proportionality if Texas had only provided four Latino opportunity districts.<sup>346</sup> At minimum, both Plan 1151C and Plan 1374C provided five Latino opportunity districts, so Chief Justice Roberts concluded that Latinos had achieved all the proportionality to which they were entitled even if Plan 1151C's District 23 and Plan 1374C's District 25 were found not to be valid Latino opportunity districts.<sup>347</sup>

The *LULAC* Court's response to the *Session* court and the Chief Justice on the proportionality issue may be more satisfying as an exercise of fairness than as an exercise in logic. With respect to the proportionality area of relevance issue, the Court makes how a plaintiff pleads a case a determinative but not sufficient factor by distinguishing *LULAC* from *De Grandy* on the basis that *LULAC* plaintiffs alleged a statewide vote dilution while the *De Grandy* plaintiffs alleged a county-wide dilution.<sup>348</sup> By doing so, the Court provides future vote dilution plaintiffs with the incentive to allege statewide vote dilution even when the potential vote dilution in question is more localized.<sup>349</sup>

In *LULAC* itself, the relevant potential vote dilution was localized in Plan 1151C's District 23, a fact the Court recognized by acknowledging that its VRA § 2 analysis had concentrated on whether Plan 1374C had unlawfully diluted the vote of Latinos who resided in District 23.<sup>350</sup> As the Court began its proportionality inquiry, it had already determined that District 23 was a valid opportunity district but that Plan 1374C's district 25 was not.<sup>351</sup> This meant that Plan 1374C offered only five Latino opportunity districts, while Plan 1151C demonstrated that six valid Latino districts could be drawn. As a consequence, the Court also characterized the nature of its proportionality inquiry as being "whether the absence of that additional district constitutes impermissible vote dilution"<sup>352</sup> and asserted that "this inquiry requires an 'intensely local appraisal' of the challenged district."<sup>353</sup>

It is obvious, however, that the Court engaged in the "intensely local appraisal of the challenged district" before it had conducted its proportionality calculation, for its proportionality calculation had nothing to do with the characteristics or facts on the ground in Plan 1151C's District 23. Instead, it consisted of (1) picking the relevant area in which to gauge Latino voting power, (2) determining the Latino percentage of the CVAP in that area, (3) calculating the percentage of Texas' congressional districts that were valid Latino opportunity districts, and (4) comparing the two percentages to see if there was a rough proportionality.<sup>354</sup>

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346. Because Latinos comprised fifty-eight percent of the CVAP in South and West Texas, multiplying that CVAP by seven, the proposed number of seven Latino districts, results in four districts ( $58\% \times 7$  districts = 4.06 districts).

347. *LULAC*, 126 S. Ct. at 2662 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part). At this point in his opinion, Chief Justice Roberts had already concluded that Plan 1151C's District 23 was probably not a valid Latino opportunity district. *Id.* at 2657–58.

348. *Id.* at 2620 (majority).

349. *Id.* at 2662 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

350. *Id.* at 2620–21 (majority).

351. *LULAC*, 126 S. Ct. at 2619.

352. *Id.* at 2621.

353. *Id.* (citing *Gingles*, 478 U.S. at 79).

354. *Id.* at 2621.

The Court intensely appraised the past history and current circumstances affecting the opportunities of Latinos residing in Plan 1151C's District 23 to participate in the political process.<sup>355</sup> From this appraisal, as noted above, the Court concluded that Latinos in District 23 had been victimized in the past by discriminatory electoral practices and were still suffering electoral ill-effects from them.<sup>356</sup>

Most significantly, the Court noted that Plan 1151C's District 23 boundaries had been changed to remove a large number of politically active Latinos from the district just as the Latino community was on the cusp of defeating a congressman, Henry Bonilla, who had not been responsive to its needs.<sup>357</sup> This action, said the Court, "made fruitless the Latinos' mobilization efforts . . . [and] acted against those Latinos who were becoming most politically active."<sup>358</sup> These effects on Latinos in District 23 certainly smacked of Texas' past schemes to exclude Latinos from the political process.<sup>359</sup> Accordingly, the Court would not accept incumbent protection as a valid excuse, especially because this form of incumbent protection involved shedding voters to protect an incumbent from voters whose interests he had not furthered, instead of packing into a district voters whose interests the incumbent had furthered so these voters could continue to support him and hold him accountable.<sup>360</sup>

One could conclude from the results of the Court's "intense local appraisal" of the conditions within Plan 1151C's District 23 that Plan 1374C had unfairly diluted the votes of Latinos residing there. Indeed, the Court stated that it needed to perform this appraisal because "the right to an undiluted vote does not belong to the 'minority group as a group' but rather to 'its individual members.'"<sup>361</sup> It also proclaimed that the appraisal was needed because "a [s]tate may not trade off the rights of some members of a racial group against the rights of other members of that group."<sup>362</sup> But, at this point in the Court's opinion, this proclamation was superfluous because the Court had already held that Plan 1374C's District 25 was not a valid Latino opportunity district and, therefore, could not remedy a potential VRA § 2 violation in District 23.<sup>363</sup>

So, what is the logical connection between an "intense local appraisal" of a district in which a putative VRA § 2 has occurred and a determination of what area of reference is appropriate for conducting a proportionality calculation? A candid assessment of the Court's answer to this question leads to the conclusion that a court should take care so that its selection of the area of proportionality reference will not prevent it from undoing any patent unfairness it discovers during the "intense local appraisal."

The Court virtually admitted as much when it opined that "[t]he role of

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355. *Id.* at 2621–23.

356. *Supra* n. 340.

357. *LULAC*, 126 S. Ct. at 2621–23 (majority).

358. *Id.* at 2622.

359. Thus, redrawing the boundaries of District 23 to benefit Congressman Bonilla was presumptively unlawful because it did not, as valid redistricting does, "thwart the historical tendency to exclude Hispanics." *De Grandy*, 512 U.S. at 1014.

360. *LULAC*, 126 S. Ct. at 2622–23 (majority).

361. *Id.* at 2620 (quoting *Shaw II*, 517 U.S. at 917).

362. *Id.* (citing to *De Grandy*, 512 U.S. at 1019).

363. *Id.* at 2616–19.

proportionality is not to displace this local appraisal or to allow the State to trade off the rights of some against the rights of others.”<sup>364</sup> After allowing this bit of candor to appear in its opinion, the Court then dissembled shamelessly by contending that selecting the entire state as the area of proportionality reference would allow a determination of how “the electoral opportunities of Latinos across the State can bear on whether the lack of electoral opportunity for Latinos in District 23 is a consequence of Plan 1374C’s redrawing of lines.”<sup>365</sup> A mathematical calculation can shed no light on that determination, and, in any event, the Court’s “intense local appraisal” had already produced the conclusion that Plan 1374C had altered the lines of District 23 to benefit Congressman Bonilla at the expense of District 23 Latino voters.<sup>366</sup> And so the Court selected the entire state of Texas as its area of proportionality reference. By doing so, the product of its proportionality calculation made its decision to require Texas to create six Latino opportunity districts seem a lot more justified than it might appear to be if South and West Texas had been selected instead.

The Court noted that five Latino opportunity districts is about sixteen percent of Texas’ thirty-two seat congressional delegation and the Latino share of the statewide CVAP was twenty-two percent.<sup>367</sup> One could argue as to whether sixteen percent as compared to twenty-two percent shows that five Latino opportunity districts achieve the “rough proportionality” of congressional representation to Latino voting power to which the Latino community is entitled.<sup>368</sup> However, if South and West Texas had been the area of proportionality reference, then Latino proportionality would have been seventy-one percent as compared to the Latino’s fifty-eight percent share of the area’s CVAP.<sup>369</sup> That calculation suggests that five Latino opportunity districts would give Latinos much greater congressional representation than their voting power warrants.<sup>370</sup>

So, it is understandable why the Court would prefer to justify requiring Texas to provide six Latino opportunity districts in light of the statewide proportionality calculation than to try to do it in the face of the much more unfavorable regional proportionality calculation. Yet, even after producing the more favorable proportionality numbers, the Court ignored them and cryptically announced that its “intensely local appraisal” had convinced it that Plan 1374C had diluted the votes of Latinos in Plan 1151C’s District 23 in violation of VRA § 2.<sup>371</sup> With this final bit of candor, the Court’s illogical logic behind selecting all of Texas as its proportionality area of reference came full circle.

Lost in this proportionality saga is the underlying philosophical question: how

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364. *Id.* at 2621.

365. *LULAC*, 126 S. Ct. at 2621 (majority).

366. Review *supra* notes 357 to 360 and accompanying text.

367. *LULAC*, 126 S. Ct. at 2621 (majority).

368. See *De Grandy*, 512 U.S. at 1000, 1013–14.

369. *LULAC*, 126 S. Ct. at 2662 (Roberts, C.J. & Alitio, J., concurring in part and dissenting in part). Given that the Court had essentially already decided that Texas should create six Latino districts, the Court would have presented a more accurate picture if it had used six districts in its proportionality requirement. If it had, the Latino statewide proportionality figures would have been 18.75%, not 22%, and the regional proportionality figures would have been 86%, not 58%.

370. *Id.*

371. *Id.* at 2621 (majority).

much representation should one group receive even when it continues to suffer from racial/ethnic discrimination? A comprehensive discussion of possible answers to this question is beyond the scope of this article. But, it is important to remember that in *De Grandy* the Court held that minority groups are entitled to as many minority opportunity districts as needed to provide them an “equal measure of political and electoral opportunity.”<sup>372</sup> The *De Grandy* Court indicated that proportionality calculations can help the Court assess whether a districting plan has accorded a minority group the requisite equal opportunity by showing how nearly the minority group’s share of a representative body matches its voting power.<sup>373</sup> It did not, however, set the cut-off number at the level necessary to achieve perfect proportionality.

Instead, the Court recognized that in some cases equal opportunity can be provided with a smaller number of minority opportunity districts,<sup>374</sup> while in other cases continuing discrimination or persistently strong negative effects of past discrimination would warrant requiring a jurisdiction to create a greater number of minority opportunity districts.<sup>375</sup> Further, the Court observed that perfect proportionality could be produced by a jurisdiction blatantly discriminating against some members of a minority group in some areas but balancing the proportionality calculations by creating an equalizing number of minority opportunity districts for members of the minority group living in other areas.<sup>376</sup> This pattern of discrimination, said the Court, would warrant ordering the offending jurisdiction to create more minority opportunity districts than those needed to achieve absolute proportionality between a minority group’s share of representation and its share of voting power.<sup>377</sup>

Still, the *De Grandy* Court indicated that there should be an upper limit to the number of minority opportunity districts a jurisdiction should be required to create for any one minority group no matter how “prejudiced a society might be.”<sup>378</sup> It used a hypothetical to illustrate its point that “[o]ne may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast,” such as would occur if a districting plan gave a minority group “effective political power 75 percent above its numerical strength.”<sup>379</sup>

The past discrimination inflicted upon Latinos in Plan 1151C’s District 23, as well as Plan 1374C’s blatant removal of a large percentage of Latinos from District 23 to prevent them from finally defeating Henry Bonilla, seem to constitute the type of

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372 *De Grandy*, 512 U.S. at 1013–14.

373. *Id.* at 1014–17.

374. *Id.* at 1019–20.

375. *Id.* at 1018–19.

376. *Id.* at 1019.

377 *De Grandy*, 512 U.S. at 1020.

378. *Id.* at 1016–17.

379. The hypothetical jurisdiction assumed in *De Grandy* had 1,000 voters, 400 of which belonged to a minority group, and 10 legislative districts. *Id.* at 1016. Under these circumstances, districting could assign at least fifty-one members of the minority group to seven different districts, an outcome that could lead to the minority group being assured of electing its candidate of choice in seven of the ten districts. *Id.* Should that occur, the minority group would secure seventy percent of the jurisdiction’s representation with forty percent of the jurisdiction’s voting power. *Id.* at 1016–17 & n. 13. This would give the minority group “effective political power 75 percent above its numerical strength,” a result the Court said should not be allowed no matter how much discrimination the minority group was experiencing. *Id.* at 1017 & n. 13.

circumstances the *De Grandy* Court said would justify ordering a jurisdiction to create more than a proportional number of minority opportunity districts. For purposes of providing clarity as to how proportionality calculations are to be performed, and as to what their relative influence on a Court's VRA § 2 vote dilution totality of circumstances assessment should be, it would have been best if the *LULAC* Court had

1. embraced the more logical method of performing proportionality calculations endorsed by Chief Justice Roberts;
2. performed only the regional proportionality calculations even though they would indicate that six Latino opportunity districts would provide Latinos with more congressional representation than their voting power might warrant;
3. presented forcefully, without any connection to the proportionality calculations, the discrimination inflicted on Latinos in Plan 1151C's District 23; and
4. weighed straightforwardly the magnitude of discrimination inflicted on Latinos in District 23 against the relatively high proportionality balance between Latinos' representation (eighty-six percent) and voting power (fifty-eight percent) to decide whether requiring Texas to create six Latino opportunity districts would be an appropriate remedy for ameliorating inexcusable discrimination or provide Latinos with an unjustified political feast.<sup>380</sup>

A decision that Texas must create six Latino opportunity districts does not necessarily remedy a dilution of Latino voting power in Plan 1151C's District 23. In *Shaw II*, the U.S. Supreme Court articulated a paradox in the way VRA § 2 provides protection against vote dilution that could have prevented some Latinos living in District 23 from receiving a meaningful remedy.

*Shaw II* involved a presumptive VRA § 2 vote dilution violation in one area of North Carolina which allegedly deprived African-Americans living there of one African-American opportunity district.<sup>381</sup> North Carolina attempted to create a legitimate African-American opportunity district in an area of North Carolina that was remote to the area in which the VRA § 2 violation occurred.<sup>382</sup> Voters who had been placed in the putative remedial district brought a *Shaw I* Equal Protection racial gerrymander claim alleging that the remedial district was drawn predominantly along racial lines in violation of the Equal Protection Clause.<sup>383</sup> North Carolina defended its districting plan on grounds that the remedial district was needed to remedy the VRA § 2 vote dilution.<sup>384</sup>

The *Shaw II* Court found that North Carolina's putative remedial district could not provide a remedy for the alleged VRA § 2 vote dilution violation in part because the remedial district did not contain a minority group that was geographically compact and,

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380. With respect to the political feast limit, the proportionality calculations would give Latinos effective political power forty-eight percent above their numerical strength  $((86\% - 58\%) / 58\% = 48\%)$ .

381. *Shaw II*, 517 U.S. at 902, 911, 914–17.

382. *Id.*

383. *Id.* at 902–04.

384. *Id.* at 911.

therefore, did not qualify as a valid African-American opportunity district.<sup>385</sup> The Court also held that a VRA § 2 violation in a specific area cannot be remedied by creation of a remedial district in some other area.<sup>386</sup> This holding was premised on the principle that “the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority . . . group[‘s] . . . individual members” rather than to the “minority as a group.”<sup>387</sup> However, in a footnote, the Court paradoxically asserted that VRA § 2 vote dilution plaintiffs do not necessarily have the right to be placed in a minority opportunity district even if they prove the violation because “[s]tates retain broad discretion in drawing districts to comply with the mandate of § 2.”<sup>388</sup>

How the VRA § 2 paradox affects actual cases is most easily seen in cases where it is alleged that within a broad but discrete area it is possible for the state to create more minority opportunity districts than it did. For example, in *De Grandy* the plaintiffs alleged that the State of Florida should have created eleven Latino opportunity State House districts in Dade County—in which eighteen House districts were located—instead of the nine created by the state’s districting plan.<sup>389</sup> If the Court had agreed with the plaintiffs on this issue, Florida would have been required to create two more Latino opportunity districts and would have had the discretion to determine their boundaries. It is probable that some of the Latino plaintiffs would still find themselves in one of the seven districts that were not minority opportunity districts after the State complied with its duty to create eleven Latino opportunity districts. These unlucky plaintiffs would have no cognizable claim that they should be placed in a minority opportunity district.

The disagreement between the *LULAC* Court and Chief Justice Roberts as to how to resolve the VRA § 2 Latino vote dilution claims can best be understood as a clash over whether the circumstances presented by the Latino vote dilution claims most resemble those in *Shaw II* or those in *De Grandy*. Following the *Shaw II* model, the *LULAC* Court focused on whether Plan 1374C’s District 25 was a valid Latino opportunity district that could remedy a VRA § 2 Latino vote dilution violation in Plan 1151C’s District 23.<sup>390</sup> In contrast, Chief Justice Roberts not only defended the validity of District 25 as a Latino opportunity district,<sup>391</sup> he also essentially characterized the case as one that resembled *De Grandy* because Texas had the duty and the discretion to determine the boundaries of six Latino opportunity districts in a seven district area.<sup>392</sup>

Each of the clashing perspectives had a common determinative issue: whether Plan 1374C’s District 25 was a valid Latino opportunity district. If it was not, then Plan 1374C would be unlawful under both the *Shaw II* model and the *De Grandy* model. Plan 1374C would be unlawful under the *Shaw II* model because its failure to qualify as a Latino opportunity model would render it unqualified to serve as a district that remedied a VRA § 2 vote dilution violation in Plan 1151C’s District 23. Plan 1374C would also

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385 *Id.* at 916.

386. *Shaw II*, 517 U.S. at 917.

387 *Id.*

388. *Id.* at 917 n. 9.

389 *De Grandy*, 512 U.S. at 1002, 1014.

390. *LULAC*, 126 S. Ct. at 2616–19, 2623 (majority).

391. *Id.* at 2655–58, 2660–63 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

392. *Id.* at 2654–55, 2658–60, 2662–63.

be unlawful under the *De Grandy* model because it would create only five Latino opportunity districts instead of the six the Court said Texas must create.

If, however, Plan 1374C's District 25 was a valid Latino opportunity district, Plan 1374C would be lawful under the *De Grandy* model, but the *Shaw II* model would not be an equally appropriate analytical frame of reference. The *LULAC* Court stated that the Latino plaintiffs had alleged a statewide vote dilution.<sup>393</sup> It appears that the Latino plaintiffs' fallback position was that Plan 1374C diluted Latino power in South and West Texas by not creating seven Latino opportunity districts in that area.<sup>394</sup> As detailed above, the *LULAC* Court not only decided that seven valid Latino opportunity districts could not be created,<sup>395</sup> it also ruled that Plan 1151C's District 23 was a valid Latino opportunity district.<sup>396</sup> This meant that Plan 1151C demonstrated that six valid opportunity districts could be created in Texas.<sup>397</sup> Ultimately, the *LULAC* Court held that under the totality of the circumstances Texas needed to create six Latino opportunity districts in order to prevent diluting Latino voting power in violation of VRA § 2.<sup>398</sup>

At this point, the posture of the case would be like that in *De Grandy*; Texas' VRA § 2 obligations would be viewed as the duty to create six Latino opportunity districts within the thirty-two district State of Texas or, alternatively, to create six Latino opportunity districts within the seven district area of South and West Texas.<sup>399</sup> Texas would have successfully complied with its VRA § 2 obligations if Plan 1374C's District 25 was a valid Latino opportunity district, and the Latinos left behind in the now cracked Plan 1151C's District 23 would not have had a meritorious claim to have been included in a Latino opportunity district.<sup>400</sup>

Unfortunately, the *LULAC* Court did not use the *De Grandy* model in its assessment of how the Latino vote dilution claims should have been decided if Plan 1374C's District 25 was a valid Latino opportunity district. Instead, it invoked the *Shaw II* model by reframing the case as one in which the state denied persons living in one area of their VRA § 2 right to be included in a minority opportunity district and then sought to compensate for this denial by creating a minority opportunity district in another part of the state.<sup>401</sup>

Having created this zero-sum view of the case, the *LULAC* Court opined that it would be lawful for a state to create a minority opportunity district in one area to compensate for not doing so in another area "only when the [minority] group in each area had a [VRA] § 2 right and both could not be accommodated."<sup>402</sup> Applying this *Shaw II* frame to the case at hand, the Court acknowledged that if Plan 1374C's District 25 had been a valid Latino opportunity district—and that Texas was obligated by VRA §

393. *Id.* at 2620 (majority).

394. App. Br. of G.I. Forum, *supra* n. 258, at 12–13, 23–24.

395. *LULAC*, 126 S. Ct. at 2615–16 (majority).

396. *Id.*

397. *Id.* at 2619.

398. *Id.* at 2619–23.

399. *De Grandy*, 512 U.S. at 1002, 1014.

400. *See Shaw II*, 517 U.S. at 917 n. 9.

401. *LULAC*, 126 S. Ct. at 2616 (majority).

402. *Id.*



2 to create only six Latino opportunity districts—then Texas could not have been faulted for including Latinos residing in District 25 in a Latino opportunity district but not doing the same for many of the Latinos who had lived in Plan 1151C's District 23.<sup>403</sup> In other words, a VRA § 2 violation would still exist: it would just be deemed to be an injury without a remedy.

Although it appears that the *LULAC* Court could have reached the same resolution of the Latino vote dilution claims the same way using either the *De Grandy* model or the *Shaw II* model in deciding whether Plan 1374C's District 25 was a valid Latino opportunity district, it was doctrinally unhelpful for the *LULAC* Court to have adopted the *Shaw II* model. The *LULAC* Latino vote dilution claims did not involve the possibility of creating Latino opportunity districts in two distinct and remote areas of Texas.<sup>404</sup> If that possibility had existed, then the Court would have been required to assess separately how many Latino opportunity districts should have been created in each area.<sup>405</sup> Texas would not have been allowed to create in one area more Latino opportunity districts than the number needed to avoid a VRA § 2 vote dilution violation in order to compensate for not creating in the second area the number of Latino opportunity districts that were required to avoid diluting the Latino voting power there in violation of VRA § 2.<sup>406</sup> Instead, the *LULAC* vote dilution claims involved one distinct area of Texas in which it was possible to create seven equally populated congressional districts and necessary to make six of them Latino opportunity districts in order to avoid diluting Latino voting power in violation of VRA § 2.<sup>407</sup> As a result of Plan 1151C being imposed on Texas by the *Banderas* Court, six VRA § 2 mandated Latino opportunity districts had already been put in place.<sup>408</sup>

Assuming Texas had the right to substitute another districting plan for Plan 1151C, under the *LULAC* Court's *Shaw II* vision of the case, Texas would unlawfully dilute some Latinos' voting power if the districting plan it adopted did not faithfully recreate Plan 1151C's Latino opportunity districts. The unlawful dilution would be the result of Texas moving some Latinos from a Latino opportunity district into the one district that was not a Latino opportunity district.<sup>409</sup> Texas would not have to remedy this violation if its new districting plan actually created six valid Latino opportunity districts, but Texas' actions would be regarded as deliberate action that debased some Texans' voting rights in order to enhance the voting rights of others.<sup>410</sup> This is a decidedly negative,

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403 *Id.*

404. As noted previously, the Latino vote dilution claims raised the issues of how many Latino opportunity districts could be created in South and West Texas and what should be the boundaries of those districts. Review *supra* notes 394 to 395 and accompanying text.

405 See *Shaw II*, 517 U.S. at 916–18.

406. For example, the Court might have concluded that, to avoid diluting Latino voting power in violation of VRA § 2, Texas had to create eight Latino opportunity districts—six in one area and two in the other. Then, it would not have been permissible under *Shaw II* for Texas to create seven Latino opportunity districts in the first area and only one in the second. *Id.* at 916–17. Texas would have diluted the voting power of some Latinos in the second area in violation of VRA § 2 and provided enhanced voting power to some Latinos in the first area even though it had no VRA § 2 duty to do so. See *id.*

407 *LULAC*, 126 S. Ct. at 2616, 2619–23 (majority); *Session*, 298 F. Supp. 2d at 487.

408. *Id.*

409. *Shaw II*, 517 U.S. at 916–17.

410. *LULAC*, 126 S. Ct. at 2616 (majority).

doctrinally unsound, and unnecessary way to assess what normally happens every time a state implements a new districting plan,<sup>411</sup> and it all could have been avoided if the *LULAC* Court had analyzed the Latino vote dilution claims through the filter of the *De Grandy* model.

In any event, the *LULAC* Court's holding that Plan 1374C's District 25 was not a valid Latino opportunity district resulted from another exercise in doctrinally questionable logic based on the *Shaw II* model. The remedial district found deficient in *Shaw II* had a highly irregular shape caused by the state's attempt to create an African-American majority minority district.<sup>412</sup> It was also geographically separated from the area in which North Carolina had allegedly diluted African-American voting power in violation of VRA § 2.<sup>413</sup> As a consequence, the *Shaw II* Court found that the remedial district was not a valid African-American opportunity district because its African-American communities were not geographically compact enough to meet the compactness requirement of *Gingles*' first prong.<sup>414</sup> Accordingly, the *Shaw II* Court held that the remedial district could not be used to compensate for the illegal vote dilution because of its failure to qualify as a valid African-American opportunity district and its remoteness from the area in which the vote dilution occurred.<sup>415</sup>

In contrast, District 25 was long in distance, fairly regular in shape, and located reasonably near Plan 1151C's District 23, where Texas had allegedly diluted Latino voting power in violation of VRA § 2.<sup>416</sup> Both districts were located in the midst of the only area in Texas where valid Latino opportunity districts could be formed.<sup>417</sup> Most significantly, District 25 fused together two large Latino communities which were located at opposite ends of the district from each other and "ha[d] divergent 'needs and interests' owing to 'differences in socio-economic status, education, employment, health, and other characteristics.'"<sup>418</sup> Despite their differences, according to regression analysis studies, District 25's Latino communities voted cohesively and effectively so that their common statewide candidates of choice would have won a majority of the vote in District 25 in five of six primaries and all fifteen statewide general elections.<sup>419</sup> But, anecdotal evidence indicated that these two Latino communities might not support the

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411. Chief Justice Roberts provided a clear picture of what normally happens during redistricting "[w]hen the question is where a fixed number of majority-minority districts should be located." *Id.* at 2658 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part). He observed that

it is always possible to look at one area of minority population . . . and see a 'violation' of § 2 . . . . For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.

*Id.* at 2658–59.

412. *Shaw II*, 517 U.S. at 902–03.

413. *Id.* at 917–18.

414. *Id.* at 916.

415. *Id.* at 916–17.

416. *Session*, 298 F. Supp. 2d at 496, 498–99.

417. *Id.* at 498.

418. *LULAC*, 126 S. Ct. at 2613 (quoting *Session*, 298 F. Supp. 2d at 502, 512).

419. *Session*, 298 F. Supp. 2d at 500; *VRA Section Memo*, *supra* n. 11, at 51–52.

same candidate for Congress in the 2004 Democratic Party primary election.<sup>420</sup>

Even though there are some differences between District 25 and the putative remedial district at issue in *Shaw II*, the *LULAC* Court nevertheless held that District 25's Latino communities were not geographically compact enough to qualify District 25 as a legitimate Latino opportunity district.<sup>421</sup> The *LULAC* Court supported this holding by citing the large geographical distance between District 25's two large and nearly equally sized Latino communities and the demographic differences between the two communities.<sup>422</sup>

The Court emphasized that its holding was based on both the distance and demographic factors,<sup>423</sup> but its real concern was that the demographic differences could cause District 25's two Latino communities to support different congressional candidates so that one or both would not be able to elect a preferred congressional candidate.<sup>424</sup> This concern was based on the Court's conclusion that the demographic differences between the District 25's Latino communities were significant enough to make them distinct and different COIs despite their common ethnicity.<sup>425</sup> The concept of the COI concerns political identity in that people who share common interests will, if those interests are strong enough, vote together for candidates who support their interests and seek help from legislative representatives in pursuing these interests.<sup>426</sup> So, if it is true that District 25's Latino communities are divided into two non-ethnic COIs, they might exert political identities based more on their COI differences than their ethnicity in a manner that would cause them to support different candidates during primary elections. The ability of racial/ethnic communities to coalesce politically so they can elect specific candidates is precisely what must be shown to meet the cohesiveness requirement of *Gingles*' second prong.<sup>427</sup>

In contrast, the primary concern of *Gingles*' first prong—minority community size and compactness requirements—is whether a minority group's population is sufficiently large and concentrated in a given area so that it can constitute a voting majority in a legislative district the boundaries of which do not do excessive violence to traditional districting principles.<sup>428</sup> But, for VRA § 2 purposes, compactness is also concerned with COIs because a district's compactness is judged in part by how well its boundaries respect traditional districting principles, including maintaining COIs.<sup>429</sup>

Historically, members of COIs tended to cluster within compact areas.<sup>430</sup>

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420. *Id.* at 52–55. As the 2004 elections drew near, the Austin-area Latinos seemed poised to support Congressman Lloyd Doggett, an Anglo-Democrat who had been their representative in Plan 1151C's District 10 for some time and had served their interests well, *id.* at 52–53, while the Hildago Latinos near the Mexican border seemed likely to support different candidates from their area. *Id.* at 53 n. 45.

421. *LULAC*, 126 S. Ct. at 2619 (majority).

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 2618–19, 2623.

426. See *Gingles*, 478 U.S. at 64–67; Buchman, *supra* n. 15, at 204.

427. *Emison*, 507 U.S. at 40–42; *Gingles*, 478 U.S. at 50, 56.

428. *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997); *Vera*, 517 U.S. at 977–81; *Emison*, 507 U.S. at 40; *Gingles*, 478 U.S. at 50–51 & n. 17.

429. *Abrams*, 521 U.S. at 92.

430. Buchman, *supra* n. 15, at 204.

Obviously, if an area in which a COI's members clustered was divided among two or more legislative districts, whatever voting power that COI possessed by virtue of the size of its membership would be reduced.<sup>431</sup> As a consequence, compactness became linked to the protection of COIs because requiring legislative districts to be reasonably compact implies in part that they will maintain the political integrity of COIs by keeping them within a single district.<sup>432</sup> To the extent that District 25's Rio Grande and Central Texas Latinos had strong non-ethnic-based interests in common with other Latinos within their respective regions, they each were a part of distinct non-ethnic-based COIs from which they were separated by District 25. If those were indeed the facts on the ground in South and Central Texas, then District 25 did not maintain COI integrity in violation of one aspect of the traditional concept of compactness.

However, non-race/ethnic based COIs do not have a constitutional right to have their voting power maintained,<sup>433</sup> for the one-person/one-vote requirement, growing populations, the multiplicity of COIs, and the limited number of legislative districts make it impossible to do so.<sup>434</sup> And, the U.S. Supreme Court has not insisted on rigid adherence to the traditional notions of compactness, permitting the states some latitude in setting district boundaries when pursuing legitimate political objectives<sup>435</sup> or attempting to provide a minority group with an equal opportunity to participate in the political process as required by VRA § 2.<sup>436</sup>

The one-person, one-vote requirement has combined with geography and demography to make compliance with traditional concepts of compactness extraordinarily difficult in South and West Texas.<sup>437</sup> In fact, the *Session* court took note of expert testimony that "Texas ha[d] not valued compactness during the period in which Texas has engaged in districting."<sup>438</sup> As a result, the *Session* court found that the combination of geography, demography, and the one-person/one-vote requirement imposes certain limits on drawing districts in South and West Texas and those limits

431. *United Jewish Orgs. of Williamsburgh, Inc v. Wilson*, 510 F.2d 512, 520 (2d Cir. 1975).

432. See Buchman, *supra* n. 15, at 197, 204.

433. *Wilson*, 510 F.2d at 520-21.

434. *Id.* at 521. In *Wilson*, the Second Circuit Court of Appeals noted that "[t]here are from 20 to 60 clearly-defined communities in Kings County, but only 8.6 senate districts and 21.4 assembly districts. To preserve community political integrity and comply with . . . [the one-person, one-vote requirement] would therefore be impossible." *Id.*; see also Buchman, *supra* n. 15, at 197-98.

435. *Cromartie II*, 532 U.S. at 243-46, 258. In *Cromartie II*, North Carolina created a bizarre district with a large African-American voting population just short of a majority and successfully defended it on the basis that its boundaries reflected the political desire to create a safe Democratic seat. Review *supra* note 136. The Court held that

where racial identity correlates highly with political affiliation, the party attacking the . . . boundaries [of a majority-minority district] must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles . . . [and will also] br[ing] about significantly greater racial balance.

*Cromartie II*, 532 U.S. at 258.

436. *Vera*, 517 U.S. at 977-81. In *Vera*, the Court said states possessed the flexibility to draw district boundaries in accordance with their own traditional districting principles to meet VRA § 2 requirements that were not the most compact possible districts as long as they did not significantly depart from traditional districting practices as evidenced by a bizarre shape or extreme non-compactness. *Id.*

437. *Session*, 298 F. Supp. 2d 486-88, 507-08.

438. *Id.* at 507 n. 196.

were reflected in very similar ways in both Plan 1151C and Plan 1374C.<sup>439</sup> The Court further found that under these circumstances Plan 1374C's strip Districts, 15, 25, and 28, neither evidenced a purpose to extend district boundaries "north in a determined search for Hispanics" not "provide[d] circumstantial evidence of forbidden racial gerrymandering."<sup>440</sup>

The foregoing discussion of compactness demonstrates that it is essentially a spatial concept. As such, compactness traditionally provided a means of protecting COIs whose members were clustered in identifiable and limited territories. More recently, it has been used to help determine whether minority opportunity districts can be formed because of the existence of large minority groups whose members are located in clustered rather than dispersed patterns. It has also provided a means of evaluating districts for purposes of determining whether their boundaries are so irregular that they constitute circumstantial evidence of racial gerrymandering.

So, spatiality generally, and the recognized functions of compactness as a spatial concept specifically, bear little relationship to the assertion of political identity beyond defining the area in which individuals must assert their political power to elect legislative officers. What little relationship compactness has to the assertion of political identity has been diminished because compactness's usefulness as a device for helping COIs assert their political power effectively has declined and the U.S. Supreme Court has not insisted on rigid adherence to traditional compactness.

Compactness is, therefore, only tangentially related to the *LULAC* Court's main concern about whether District 25 would enable the Latino communities it incorporated to have an equal opportunity to elect their preferred candidates for Congress. If this were not true, then the Court would have found Plan 1151C's District 23 to be as equally non-compact as Plan 1374C's District 25 because their spatial characteristics are virtually identical—long in distance and Latino communities that are widely separated geographically.<sup>441</sup> Instead, the Court took care to note that the Latinos in District 23 shared a common set of non-ethnic-related interests and needs that enabled them to form a united non-ethnic-based COI.<sup>442</sup>

Distinguishing Plan 1151C's District 23 from Plan 1374C's District 25 on the basis of COI identity gave Chief Justice Roberts a good counterargument based on election

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439. The *Session* court noted that

[t]he district that begins just east of El Paso County must be large and must run east from far West Texas, stretching deeply into Central and South Texas. The districts that begin in far South Texas must run north in "strip" fashion into Central Texas. The district that begins in the southern tip of Texas and travels up the coast must also proceed north.

*Session*, 298 F. Supp. 2d at 488. Thus, "[b]oth [plans] have a district in the far western corner of the State." *Id.* at 487. In both plans, the district next to the east runs hundreds of miles to the east. *Id.* Next come "districts that begin in the relatively narrow and relatively densely populated southern part of Texas, which includes the Rio Grande Valley." *Id.* These districts "must extend north to gather enough population to satisfy equality among the districts." *Id.* Plan 1151C has two of these "'strip' districts[, while] . . . Plan 1374C has three." *Session*, 298 F. Supp. 2d at 487. Finally, each plan has a district that begins "in the southeastern corner of the State [which] . . . begin[s] in the Rio Grande Valley and proceed[s] north to include enough people to satisfy equipopulosity." *Id.* at 488.

440. *Id.* at 508.

441. See *LULAC*, 126 S. Ct. at 2657 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

442. *Id.* at 2619 (majority).

analysis. He contended accurately that regression analysis of several elections demonstrated that District 25 was more effective in supporting Latino preferred candidates than District 23.<sup>443</sup>

Clinging to its compactness analysis, the *LULAC* Court gave Chief Justice Roberts a doctrinally and functionally illogical reply: a “finding of effectiveness cannot substitute for . . . a finding on compactness, . . . because [under this] approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of the racial group, added together, could control election outcomes.”<sup>444</sup> This answer is doctrinally illogical because at its core it is dismissive of the central objective of creating minority opportunity districts: giving minority groups an equal opportunity to elect its candidates of choice.<sup>445</sup> It is functionally illogical because the Court’s compactness concern was based on the premise that Latino communities cannot join together to elect a common set of preferred candidates if they are divided into distinct COIs, and therefore any district that joined together such Latino communities was not compact.<sup>446</sup> That being the case, a district in which Latino communities effectively join together to elect a common set of preferred candidates must be compact at least in respect to how the Court used that term.

Given the relative irrelevance of compactness to the assertion of political identity, and the strong correlation between effective assertion of political power and cohesiveness, the *LULAC* Court could have promoted more doctrinal coherence if it had decided the status of District 25 by undertaking an explicit cohesiveness analysis. If it had done so, it would not have had to distort the concept of compactness.

Cohesiveness analysis would also have let the Court answer Chief Justice Roberts’ effectiveness argument more effectively. Generally, cohesiveness is determined by analyzing how members of minority groups vote in elections to see if most of them vote for the same candidate in numbers that give them a chance to elect their preferred candidates.<sup>447</sup> Enabling minority groups to elect their preferred candidates for Congress is the sole purpose of creating minority opportunity congressional districts. As a consequence, evidence of how members of a minority group votes for statewide offices is at best only a secondary indicator of the minority group’s cohesiveness.<sup>448</sup>

Plan 1374C’s District 25 was newly formed, so its Latino communities had not previously voted in the same congressional district. As a consequence, no data were available showing that District 25’s Latino communities would vote cohesively in a congressional election.<sup>449</sup> In contrast, Plan 1151C’s District 23’s Latino communities had voted very cohesively in congressional primary and general elections for many years.<sup>450</sup> In the absence of congressional election data, it was appropriate for anecdotal testimony to be received about whether District 25’s Latino communities would vote

443. *Id.* at 2653, 2656, 2658 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

444. *Id.* at 2617–18 (majority).

445. *See Gingles*, 478 U.S. at 47–51.

446. *LULAC*, 126 S. Ct. at 2618–19 (majority).

447. *Gingles*, 478 U.S. at 56–57; *see* Herbert et al., *supra* n. 41, at 35–36.

448. *See id.* at 39–40.

449. All the regression analysis data presented to the *Session* court involved statewide elections. *Session*, 298 F. Supp. 2d at 500.

450. *VRA Section Memo*, *supra* n. 11, at 41–44.

cohesively,<sup>451</sup> and that testimony raised the specter that they would not do so in the Democratic Party primary election due to their COI differences.<sup>452</sup> There would be a great likelihood that a court might, on cohesiveness grounds, strip District 25 of its Latino opportunity status if District 25's Latino communities failed to support the same congressional candidate in congressional primaries.<sup>453</sup> That possibility was the Court's best justification for invalidating District 25 as a Latino opportunity district and the reason that it should have done so using cohesiveness analysis.

One would have expected that the *LULAC* Court, having declared Plan 1374C's District 25 ineligible to be a Latino opportunity district, would have then declared Plan 1374C unlawful on grounds that it failed to provide the six Latino opportunity districts needed to prevent Texas from diluting Latino voting power in South and West Texas in violation of VRA § 2. Instead, the Court held that Plan 1374C unlawfully diluted Latino voting power in Plan 1151C's District 23.<sup>454</sup> Accordingly, it remanded the case back to the district court with the expectation that it would "remedy the violation in District 23" and that the remedy would involve modifying District 25.<sup>455</sup>

It is clear from the way the Court framed the remand that it did not intend that the district court have flexibility to redraw the districts in South and West Texas in any manner that might exclude any of the Latinos who had lived in Plan 1151C's District 23 from the opportunity to live in a Latino opportunity district.<sup>456</sup> Given the Court's strong expressions of dismay that District 23 was broken up just as its Latino residents were poised to defeat Congressman Bonilla,<sup>457</sup> it would not be unreasonable to believe that the Court wanted District 23 returned to its Plan 1151C boundaries so that Congressman Bonilla would be held accountable to his once and future Latino constituents.

In its opinion accompanying its remedial order of August 4, 2006, the district court reunited the Latino community that had resided in District 23 by moving all of them into a new District 28, a Latino opportunity district.<sup>458</sup> District 23 was restored to its previous status as a Latino opportunity district by adding Latino voters from the southern portion of Bexar County.<sup>459</sup> In this manner, the district court remedied all the effects of the VRA § 2 violation in District 23 by providing a Latino opportunity district to every Latino living within the boundaries of Plan 1151C's District 23 and insuring that Congressman Bonilla will be held accountable to a Latino CVAP majority in the 2006 congressional elections.<sup>460</sup>

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451. See *Sanchez v. Bond*, 875 F.2d 1488, 1493–96 (10th Cir. 1989).

452. *LULAC*, 126 S. Ct. at 2618–19 (majority); *Session*, 298 F. Supp. 2d at 502–03; see *VRA Section Memo*, *supra* n. 11, at 52–55.

453. *Romero v. City of Pomona*, 883 F.2d 1418, 1426–27 (9th Cir. 1989).

454. *LULAC*, 126 S. Ct. at 2623, 2626 (majority).

455. *Id.* at 2623.

456. In fact, the Court made this inflexibility quite clear when it affirmed Chief Justice Roberts' complaint that it had taken away the flexibility due the district court under VRA § 2. *Id.* at 2623.

457. *Id.* at 2621–23.

458. *League of United Latin Am. Citizens v. Perry*, No. 2:03-CV-354, slip op. at 3, 6 (E.D. Tex. Aug. 4, 2006).

459. *Id.* at 3, 4, 6.

460. In the reconfigured District 23, Latinos have a 57.4% share of the district's CVAP. *Perry*, slip op. at 6.

*B. The African-American Vote Dilution Claims*

Appellants Jackson and LULAC faced a daunting challenge in trying to prevent Plan 1374C from breaking apart significant clusters of voting minorities in Plan 1151C's Districts 1, 2, 4, 9, and 24. African-Americans and Latinos did not constitute separately or collectively a majority of the CVAP in any of these districts.<sup>461</sup> But, the appellants had a strong incentive in trying to protect these districts from being broken up because each was represented by an Anglo-Democrat who enjoyed great minority support because he had done a good job attending to interests and needs of their minority constituents.<sup>462</sup> District 24 became the major legal battleground with respect to the African-American vote dilution claims,<sup>463</sup> but the other districts' status as minority influence districts was also defended.<sup>464</sup>

African-Americans and Latinos constituted respectively 27.5 percent and 20.8 percent of Plan 1151C's District 24 CVAP.<sup>465</sup> Obviously, African-Americans did not constitute a majority of District 24's eligible voting population, but they did constitute a strong majority of District 24 voters who participated in Democratic Party primaries, they tended to vote cohesively, and the candidates they supported in the primaries tended to get a majority of District 24's vote in both the Democratic Party primary elections and general elections.<sup>466</sup>

African-American electoral success in Plan 1151C's District 24 Democratic primaries and general elections could be explained in three ways that would arguably qualify District 24's African-American voting community for VRA § 2 protection from vote dilution. First, it could be argued that District 24 is a minority coalition opportunity district because the combined African-American/Latino voting power was sufficient to control the outcomes of District 24's Democratic Party primaries and the minority-preferred Democratic nominees attracted enough white votes to win a majority of the general election vote.<sup>467</sup> Second, it could be argued that District 24 is an African-American opportunity district because African-Americans controlled District 24's Democratic Party primary elections by themselves and the African-American preferred Democratic nominees attracted enough of the Latino and white vote to win a majority of

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461. The combined minority CVAPs for these districts were District 1 (19.1%), District 2 (19.1%), District 4 (15.6%), District 9 (31.0%), and District 24 (46.4%). *Session*, 298 F. Supp. 2d at 482, 486.

462. The respective Anglo-incumbents were Max Sandlin (District 1), Jim Turner (District 2), Ralph Hall (District 4), Nick Lampson (District 9), and Martin Frost (District 24). Review *supra* note 220 and accompanying text. The career voting section officers of the U.S. Department of Justice who conducted the VRA § 5 review for Plan 1374C said that minority support for Congressmen Sandlin, Turner, and Hall was "overwhelming." *VRA Section Memo*, *supra* n. 11, at 61. Congressman Lampson had received 100% African-American support in recent elections, *id.* at 59 n. 52, 61, and had been the African-American preferred candidate in a 1996 five-way race which included an African-American candidate. *Id.* at 60. He also "ha[d] received high marks from minority organizations." *Id.* at 61. Similarly, Congressman Martin Frost received "exceptionally high marks" on the "'scorecards' of minority groups" and minority leaders had stated to the Justice Department that "he [wa]s their preferred candidate." *Id.* at 35.

463. App. Brief of Eddie Jackson, *supra* n. 281, at 32-33 & n. 26, 43; App. Br. of LULAC, *supra* n. 261, at 32 & n. 35, 33 & n. 36.

464. *Id.* at 25.

465. Review *supra* note 215.

466. *VRA Section Memo*, *supra* n. 11, at 33.

467. App. Br. of Eddie Jackson, *supra* n. 281, at 32-33 & n. 26, 43; App. Br. of LULAC, *supra* n. 261, at 32 & n. 35, 33 & n. 36.



the general election vote.<sup>468</sup> Third, it could be argued that at minimum District 24 was an African-American influence district because African-American support was crucial to the success of Democratic candidates in District 24, and in *Ashcroft* the U.S. Supreme Court had encouraged the creation of minority influence districts by offering a measure of VRA § 5 non-regression protection.<sup>469</sup>

There is disagreement among the United States Court of Appeals Circuits as to whether VRA § 2 protects minority coalitions comprised of protected minority groups which could not by themselves constitute an effective majority in a single-member district. One view holds that coalitions among minority groups protected by VRA § 2 should be able to win vote dilution claims as long as the coalition partners are collectively large and compact enough to form an effective voting majority in a single member district, vote cohesively for the same candidates, and face white majority bloc voting.<sup>470</sup> The other view holds that allowing minority coalitions to seek collective vote dilution protection is incompatible with the language, history, and policy concerns of VRA § 2.<sup>471</sup>

468. App. Br. of Eddie Jackson, *supra* n. 281, at 40–42.

469. App. Br. of LULAC, *supra* n. 261, at 32 & n. 35, 33 & n. 36.

470. The Fifth Circuit case of *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), is a representative example of cases in which such claims have been allowed. *Id.* at 1244. Holding that nothing in VRA § 2 precluded defining the protected minority group as a combination of two jurisdictionally protected classes who historically had been victims of similar discriminatory voting practices, *id.*, the *Campos* court held that such coalitions could pursue vote dilution claims successfully as long as they met all of the *Gingles* prongs and other VRA § 2 requirements. *Id.* at 1244 (effective majority and compactness requirements); *id.* at 1244–48 (cohesiveness requirement); *Campos*, 840 F.2d at 1248–49 (white bloc voting requirement); *id.* at 1249–50 (totality of circumstances requirements).

471. The Sixth Circuit's opinion in the case of *Nixon v. Kent Co.*, 76 F.3d 1381 (6th Cir. 1996), is representative of this view. The *Nixon* court first held that by its terms VRA § 2 protects each jurisdictional minority group only singularly because its language references a class rather than classes. In this regard, the *Nixon* court notes that VRA § 2(b) refers to "members of a class of citizens," "its members," and "a protected class" in describing who is protected, what they are protected from, a special circumstance that should be considered, and a disclaimer that VRA § 2 is intended to enable a protected class to elect its members to public office in numbers proportionate to their share of the population. 42 U.S.C. § 1973(b); *Nixon*, 76 F.3d at 1386–87.

Next, the *Nixon* court found that there was no legislative history supporting extending VRA § 2 to minority coalitions. *Id.* at 1387. The court then rejected the logic of *Campos* on grounds that it answered the wrong question—does VRA § 2 forbid extending vote dilution protection to minority group coalitions?—because the right question is, does VRA § 2 expressly provide minority group coalitions with vote dilution protection? *Id.* at 1387. After acknowledging that Congress had greatly expanded the coverage of VRA § 2 by amendments in 1975 and 1982, the court held that these expansions could not be interpreted as a blanket authority for courts to expand VRA § 2 coverage beyond the exact extensions provided by Congress, for these extensions were provided with very precise statutory language and also contained a new proportionate representation limitation. *Id.* at 1389–90.

Most importantly, the *Nixon* court expressed a number of reasons why extending VRA § 2 vote dilution protection to minority group coalitions would be incompatible with the broad policies that are served by VRA. First, it cautioned that while Congress had certainly found that African-Americans and certain language minorities had suffered from discriminatory voting practices, the discrimination it had found was somewhat different for each protected class, and Congress made no findings to indicate that these classes had suffered common collective discrimination. *Id.* at 1391. Second, the Court worried that extending vote dilution protection to minority group coalitions could lead to district designers lumping together minority groups so that none could achieve by itself an effective majority in any district, thereby possibly making it impossible for any group to advance its interests fully. *Nixon*, 76 F.3d at 1391. Third, the court asserted that courts would face difficult philosophical questions as to whether minority groups could best assert their equal opportunities to secure effective representation for their interests by forming coalition opportunity districts rather than opportunity districts for each separate protected class. *Id.* Fourth, and most significantly, the court insisted that all such coalitions would be put together on the basis of socio-economic-philosophical cohesion rather than

The *LULAC* plurality was spared from having to resolve this disagreement by its finding that Plan 1151C's District 24 African-American and Latino communities did not form an effective minority coalition because they did not vote cohesively for the same primary candidate in the 2002 United States Senate Democratic Primary.<sup>472</sup> As a consequence, the *LULAC* plurality rightfully affirmed the *Session* court's holding that the District 24's African-American and Latino coalition failed *Gingles*' second prong, the cohesiveness requirement.<sup>473</sup>

The *LULAC* plurality did not, as did the *Session* court, reject out-of-hand the appellants' theory that Plan 1151C's District 24 was an African-American opportunity district. For purposes of discussion, the *LULAC* plurality assumed that a minority group with less than fifty percent of a district's CVAP could elect its preferred candidates with help from some limited percentage of voters of other races,<sup>474</sup> an assumption rejected as a matter of law by the *Session* court.<sup>475</sup> It then proceeded to analyze the merits of the appellants' assertion that African-Americans had the voting power to elect their candidates of choice because they controlled District 24 Democratic Party primaries and Democratic nominees inevitably won a majority or plurality of District 24's votes in general elections.<sup>476</sup>

Both the *Session* court and the *LULAC* plurality found that Plan 1151C's District 24 was itself the product of a political gerrymander that Texas Democrats implemented during Texas' post-1990 Census redistricting.<sup>477</sup> Moreover, they both credited testimony that charged Congressman Martin Frost, District 24's incumbent congressman, with not only engineering the 1991 gerrymander but also splitting a minority community in order to make District 24 election-friendly to Anglo-Democrats.<sup>478</sup> These findings greatly influenced the way both the *Session* court and the *LULAC* plurality resolved the issue of whether African-Americans controlled the outcomes of Democratic Party primaries in District 24.

By any objective measure, African-Americans determined which Democratic candidates received the most votes in Plan 1151C's District 24 Democratic Party

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racial/ethnic identity and, therefore, should be treated the same as any other political coalition instead of being given the special protections of VRA § 2. *Id.* at 1391-92.

472. Anglo voters participating in this primary did not vote cohesively as a racial group, providing thirty-nine percent of their votes to the African-American candidate, dividing up thirty-three percent of their votes among the Anglo candidates, and giving the Latino candidate twenty-eight percent of their votes. In contrast, participating African-American voters provided the African-American candidate with ninety-nine percent of their votes and divided the remaining one percent among the Anglo candidates. Participating Latino voters provided the Latino candidate with ninety percent of their votes and divided the remaining ten percent of their votes among the Anglo candidates. Rpt. of Allen J. Lichtman (Nov. 14, 2003), in *LULAC* Jt App. I, 56, 94 tbl. 6 (Jan. 10, 2006) (available at 2006 WL 64437). So, African-American voters cohesively supported the African-American candidate, Latino voters cohesively supported the Latino candidate, but the two putative coalition partners voted totally cross-purposes to one another.

473. *LULAC*, 126 S. Ct. at 2624 (plurality); *Session*, 298 F. Supp. 2d at 478 & n. 88, 484.

474. *LULAC*, 126 S. Ct. at 2624 (plurality).

475. The *Session* court felt bound by *Valdespino*, 168 F.3d 848, in which the U.S. Court of Appeals for the Fifth Circuit firmly established a bright line fifty-percent-plus CVAP standard for meeting the majority requirement of *Gingles*' first prong. *Session*, 298 F. Supp. 2d at 478, 482-83; *Valdespino*, 168 F.3d at 852-53.

476. *LULAC*, 126 S. Ct. at 2624-25 (plurality).

477. *Id.* at 2625-26; *Session*, 298 F. Supp. 2d at 482.

478. *LULAC*, 126 S. Ct. at 2625-26 (plurality); *Session*, 298 F. Supp. 2d at 482.

primaries. Expert analysis of the District 24 results in statewide Democratic Party primaries and run-off elections that were held from 1996 through 2002, and involved both African-American and Anglo candidates, showed that African-Americans on average constituted sixty-four percent of the primary vote and fifty-nine percent of the run-off election vote.<sup>479</sup> The 2002 U.S. Senate race best illustrated African-American power voting power in District 24, for Ron Kirk, an African-American candidate who received ninety-nine percent of the African-American primary vote,<sup>480</sup> won sixty percent of District 24's primary vote and seventy-five percent of District 24's run-off election vote.<sup>481</sup> During these same election years, statewide Democratic candidates inevitably won most of the District 24 vote in general elections. Democrats averaged 55.3 percent of the two-party general election vote in District 24.<sup>482</sup> In the 2002 U.S. Senate general election, Ron Kirk won sixty percent of the District 24 general election.<sup>483</sup>

On the basis of these election results, experts for both the appellants and the state agreed that African-Americans controlled the outcomes of Plan 1151C's District 24 primary election vote and that their candidates of choice won most, if not all, of District 24's general election vote.<sup>484</sup> The career U.S. Justice Department officers who conducted the VRA § 5 preclearance review of Plan 1374C came to the same conclusions and characterized District 24 as a "'safe' minority ability district."<sup>485</sup>

By the same token, objective evidence demonstrated that Congressman Martin Frost was the African-American preferred candidate in Plan 1151C's District 24 congressional elections. Minority leaders stated that Congressman Frost was their preferred candidate.<sup>486</sup> In the only election in which he faced a minority opponent, the 2002 general election, Congressman Frost received one hundred percent of the African-American vote,<sup>487</sup> which represented 52.6 percent of his total vote,<sup>488</sup> and won sixty-six percent to thirty-four percent despite getting only forty-one percent of the white vote.<sup>489</sup> His top ranking among all Texas congressman on the 2001—2002 NAACP scorecards is indicative of how much African-Americans believed Congressman Frost had done a

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479. The elections analyzed were U.S. Senate races in 1996 and 2002, the Texas Attorney General race in 1998, and the Presidential race in 2000. Rpt. of Allen J. Lichtman, *supra* n. 472, at 99 & tbl. 8. For the Democratic primaries, the District 24 African-American shares of the vote by year were 66% (1996), 53% (1998), 72% (2000), and 63% (2002). *Id.* The African-American mean share for the latest two years was 68%. *Id.* For the Democratic run-off elections, the District 24 African-American shares of the vote by year were 51% (1996), n/a (1998), 55% (2000), and 70% (2002). *Id.* The African-American mean share for the latest two years was 63%. *Id.* at 100.

480. Rpt. of Allen J. Lichtman, *supra* n. 472, at 94 tbl. 6.

481. *Id.* at 100.

482. The Democratic candidate's aggregate share of the two-party general election vote in District 24 was 55.4% (1996), 53.6% (1998), 54.0% (2000), and 58.1% (2002). *Id.* at 100 tbl. 9. Their aggregate mean share of the vote over the last two election years was 56.1%. *Id.*

483. *Id.* at 102.

484. Rpt. of Allen J. Lichtman, *supra* n. 472, at 101–02; Depo. Keith Gaddie 31:23 to 33:24 (Nov. 22, 2003), in *LULAC* Jt. App. I. 217, 217–19 (Jan. 10, 2006) (available at 2006 WL 64437).

485. *VRA Section Memo*, *supra* n. 11, at 33–35.

486. *Id.* at 35.

487. Rpt. of Allen J. Lichtman, *supra* n. 472, at 97 tbl. 7.

488. *VRA Section Memo*, *supra* n. 11, at 34.

489. Rpt. of Allen J. Lichtman, *supra* n. 472, at 97 tbl. 7.

good job representing them and their interests.<sup>490</sup> In addition, Congressman Frost had not faced a primary election since the beginning of his incumbency.<sup>491</sup>

This strong support for the appellants' VRA § 2 vote dilution claims was for all practical purposes ignored by the *Session* court. The court found the fact that no African-American candidate had ever challenged Congressman Frost in a Democratic Party primary to be fatally inconsistent with the assertion that Plan 1151C's District 24 was an African-American opportunity district.<sup>492</sup> A possible explanation for this phenomenon is that Congressman Frost was the overwhelmingly preferred candidate of District 24's African-American community because it valued how well he had represented it and the community understood the advantages of having a representative with seniority.<sup>493</sup> The court believed, however, that the real explanation was, as Congresswoman Eddie Bernice Johnson testified, that Congressman Frost had designed District 24 to be an Anglo-Democratic district as a part of the Democrats' 1991 gerrymander.<sup>494</sup>

Moreover, the *Session* court held that there was no accurate measure of true Anglo voting strength in Plan 1151C's District 24 as a result of there being no primaries pitting Congressman Frost against African-American candidates.<sup>495</sup> African-Americans had dominated District 24's Democratic Party primaries in part because most white and Latino voters had voted in the Republican primary or did not vote at all.<sup>496</sup> The court hypothesized that many of these white voters would vote in any Democratic Party primary in which an African-American candidate ran for Congress in District 24 in order to defeat the African-American community's preferred candidate through determined white bloc voting.<sup>497</sup> Treating this hypothesis as an inevitable occurrence, in the face of

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490. Congressman Frost achieved a 94% NAACP score for 2001–2002. *Id.* at 107–08 & tbl. 11. By comparison, in descending order the mean score for various categories of Texas congressmen were 91.5% for African-American Democrats, 88.8% for Latino Democrats, 74.5% for Anglo Democrats, 24.8% for Anglo Republicans, and 22.0% for Latino Republicans. *Id.*

491. *Session*, 298 F. Supp. 2d at 484.

492. *Id.*

493. On this point, Ron Kirk, an African-American, former two-term mayor of Dallas, testified that Congressman Frost probably had not been challenged because of how highly regarded he was in the African-American community. Tr. Transcr., 10:1 to 10:24 (Dec. 12, 2003), in *LULAC* Jt. App. I. 236, 240–41 (Jan. 10, 2006) (available at 2006 WL 64437). This view was echoed by Roy Brooks, precinct administrator for the Tarrant County Commissioners Precinct No. 1, who also testified that the African-American community understood the advantages of seniority. Tr. Transcr., 42:9 to 43:8 (Dec. 12, 2003), in *LULAC* Jt. App. I., *supra*, at 242–43. State Senator Royce West testified that he and perhaps two or three other minority persons could possibly defeat Martin Frost in a Democratic primary, Tr. Transcr., 125:23 to 127:2 (Dec. 17, 2003), in *LULAC* Jt. App. I., *supra*, at 255–56, but no one had chosen to run because “he has taken care of our political interests in Washington. And as such, we’re politically empowered, and we’re effective as a result of his advocacy and representation of us.” Tr. Transcr., 127:3 to 127:12 (Dec. 17, 2003), in *LULAC* Jt. App. I., *supra*, at 256–57.

494. *Session*, 298 F. Supp. 2d at 482, 484. Congresswoman Johnson, an African-American, had been quite angry with Congressman Frost for sometime before she testified, for she blamed Congressman Frost and other Anglo-Democratic congressmen for it taking over twenty years to get an African-American opportunity district in the Dallas area, Tr. Transcr., 155:14 to 156:14 (Dec. 16, 2003), in *LULAC* Jt. App. I. 262, 263–64 (Jan. 10, 2006) (available at 2006 WL 64437), and she accused Congressman Frost of double-crossing her during the redistricting dispute of 1996 by deceptively substituting his map for hers at a critical time after he had agreed not to do so. Tr. Transcr., 168:20 to 170:12 (Dec. 16, 2003), in *LULAC* Jt. App. I., *supra*, at 265–66.

495. *Session*, 298 F. Supp. 2d at 484.

496. *Id.*

497. *Id.*

substantial evidence to the contrary, the *Session* court concluded that “Anglo Democrats control this district.”<sup>498</sup>

The *Session* court also went out of its way to debunk evidence that African-Americans in Plan 1151C’s District 24 voted cohesively. It attributed the very high support that District 24 African-American voters had given the popular former mayor of Dallas in the 2002 U.S. Senate race to a “friends and neighbors” effect.<sup>499</sup> Then, it noted what it believed was a significant difference between Dallas County (sixty-six percent) and Tarrant County (seventy-six percent) in the support African-Americans had given a respected African-American judge in the 1998 Attorney General’s election.<sup>500</sup> Finally, and most significantly, the court noted that the African-American candidate in the 2002 Court of Criminal Appeals election received only forty percent of the African-American vote in District 24.<sup>501</sup>

With little acknowledgment, and no analysis, of the evidence tending to support the appellants’ VRA § 2 vote dilution claims, the *LULAC* plurality adopted summarily the *Session* court’s findings and conclusions.<sup>502</sup> In doing so, it interpreted these findings in slight, but legally significant, ways.

First, the *LULAC* plurality virtually held that an Anglo incumbent cannot be deemed a minority group’s preferred candidate in absence of having defeated a member of the minority group in a primary election by receiving significant support of the minority group’s voting members.<sup>503</sup> In this regard, it opined that the fact that Plan 1151C’s District 24 African-American voters preferred Congressman Frost to his Republican opponents did not make Congressman Frost their preferred candidate.<sup>504</sup>

Second, the *LULAC* plurality apparently misconstrued the cohesiveness analysis of the appellants’ expert witness by interpreting this analysis as a measure of whether the preferred candidates of Plan 1151C’s District 24 African-American voters won or lost when it fact it merely showed what percentage of the vote each candidate received from District 24’s African-American voters.<sup>505</sup> As a consequence, the *LULAC* plurality held that District 24 could not be an African-American opportunity district because the appellants failed to show that District 24 African-American voters had the voting strength to elect their candidates of choice or that Congressman Frost was their candidate of choice.<sup>506</sup>

In dissenting from this portion of the *LULAC* plurality, Justice Souter, joined by Justice Ginsburg, basically accused the plurality of substituting speculation for the appellants’ factual demonstration that African-Americans had the voting power necessary to elect their candidates of choice and that Congressman Frost was their

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498. *Id.*

499. *Id.*

500. *Session*, 298 F. Supp. 2d at 484–85.

501. *Id.* at 485.

502. *LULAC*, 126 S. Ct. at 2624–25 (plurality).

503. *Id.*

504. *Id.* at 2625.

505. *Id.*; Rpt. of Allen J. Lichtman, *supra* n. 472, at 75–76, 92–96

506. *LULAC*, 126 S. Ct. at 2625 (plurality).

candidate of choice for Congress in Plan 1151C's District 24.<sup>507</sup> Given the strength of the evidence introduced in this case in support of the appellants' theories of vote dilution, it is hard to disagree with him.

But, both the *Session* court and the *LULAC* plurality focused on one *hard fact*: Plan 1151C's District 24 was the product of a political gerrymander designed by and for Congressman Martin Frost at the possible expense of Dallas-area minority communities. All of the factual inferences they made to support finding that District 24 African-Americans did not control the outcomes of Democratic Party primaries—and that Congressman Martin Frost could not be considered the preferred candidate of District 24's African-American community—are logical byproducts of that hard fact.

When the circumstances of Plan 1151C's District 24 are viewed in this light, it is not hard to conclude that the Democrats' past manipulation of District 24 on behalf of Martin Frost is just as repugnant as the Republicans' attempted manipulation of Plan 1151C's District 23 on behalf of Henry Bonilla. Accordingly, the *LULAC* plurality declared that "[t]here is no reason . . . why the old district [24] has any special claim to fairness . . . [because it] was formed for partisan reasons."<sup>508</sup> Even more pointedly, the *Session* court stated bluntly that the "[p]laintiffs' understandable efforts to . . . locat[e] some duty under § 2 not to redraw the district is a transparent effort to use race as a shield from a partisan gerrymander when the district itself was a child of identical efforts to gerrymander."<sup>509</sup> And so both the *Session* court and the *LULAC* plurality have, by example, given courts permission to use even the most remotely logical inferences that can be drawn from the fact that a district has been manipulated racially for partisan advantage to justify taking away that advantage from the beneficiary party and officeholders.

Unfortunately some of the inferences made by the *Session* court and the *LULAC* plurality can be interpreted to mean that a person cannot be the preferred candidate of a minority group unless he or she is a member of that minority group or has, with heavy support from that minority group, defeated one of its members in a primary election. That would be an unfortunate outcome, for carried to its logical end this interpretation would force minority groups always to choose descriptive representation over substantive representation.<sup>510</sup> It would, however, be a very good outcome for Republicans because at this point in American politics African-Americans and Latinos identify strongly with the Democratic Party.<sup>511</sup> A rule that all but strips minorities of their VRA § 2 protection if they vote cohesively for white candidates would make a lot

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507. *Id.* at 2650–51 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).

508. *LULAC*, 126 S. Ct. at 2626 (plurality).

509. *Session*, 298 F. Supp. 2d at 481.

510. It was to prevent this inflexibility that the Court in *Ashcroft* extolled the virtues of allowing a state to create less safe minority opportunity districts in order to create more winnable but riskier districts, coalition districts, and influence districts. *Ashcroft*, 539 U.S. at 480–82.

511. In a 2004 poll, it was found that sixty-five percent of African-Americans identify with the Democratic Party and only six percent of African-Americans identify with the Republican Party. Pew Research Center for the People & the Press, *Democrats Gain Edge in Party Identification—Party Identification Trend by Demographic Groups*, <http://people-press.org/commentary/display.php3?AnalysisID=95> (July 26, 2004). The same poll showed that forty percent of Latinos identify with the Democratic Party as compared to the twenty percent of Latinos who identify with the Republican Party. *Id.*

of strong Democratic districts fair game for gerrymandering. As a consequence, minorities would have to insist on having their voting strength packed into a few districts so they can be all but guaranteed of the ability to elect minority candidates if they are going to have their interests and needs safely and adequately represented.<sup>512</sup>

The “white persons usually can’t be minority preferred candidates” interpretation of VRA § 2 also lends itself to the view that vote dilution plaintiffs must prove that a minority group’s support for a particular candidate is based on racial identity instead of socio-economic-philosophical interests.<sup>513</sup> This is an outcome Justice Brennan sought to prevent in *Gingles*, for he feared that it would lead to a revival of the rule that VRA § 2 vote dilution plaintiffs must prove that vote dilution was the product of a racially discriminatory purpose.<sup>514</sup> Should that happen, it would make it all but impossible for protected minorities to win VRA § 2 vote dilution cases because a person’s race or minority status often correlates with unique socio-economic conditions that dictate the interests and needs that an individual wants furthered by candidates and officeholders.<sup>515</sup>

*Ashcroft* mandated that during preclearance retrogression proceedings state redistricting plans must be examined to determine whether they add or subtract “influence districts”—where minority voters may not be able to elect a candidate of choice but can play a substantial . . . role in the electoral process.”<sup>516</sup> Further, the *Ashcroft* Court indicated that states may choose to give up safe minority opportunity seats in order to add more influence districts so that minority groups can “achieve greater overall representation . . . by increasing the number of representatives sympathetic to the interests of minority voters.”<sup>517</sup> Beyond possibly increasing the legislative influence of minority groups, the *Ashcroft* Court believed that permitting states to substitute coalition

512. Testimony in *Ashcroft* showed that African-American legislators favored unpacking some safe African-American opportunity districts in order to spread reliable Democratic voters to districts where they could help elect Anglo Democrats as a part of a strategy to win the number of seats needed to keep the Democratic Party, and therefore senior African-American legislative leaders, in control of the Georgia legislature. *Ashcroft*, 539 U.S. at 469–71. This strategy cannot work if districts in which a protected minority constitutes a majority of the CVAP can be stripped of their minority opportunity status if the minority community votes cohesively to elect a white person. See also *Session*, 298 F. Supp. 2d at 483–84 n. 114, quoting a Texas expert witness’ complaint about influence districts that is relevant to this issue:

[Y]ou’re on a slippery slope to essentially saying, “Well, if it’s a Democratic district, you can’t redraw it.” And, intellectually, that to me is troubling because it sets up a circumstance where one party has its constituency protected under the Voting Rights Act and . . . , the other party doesn’t have any protections at all.

513. In *Gingles*, Justice White disagreed with Justice Brennan’s plurality view that for VRA § 2 vote dilution purposes, “there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates.” *Gingles*, 478 U.S. at 83 (White, J., concurring). To illustrate his concern, he hypothesized an election in a multi-member district that elects eight members in which a Republican slate of six Anglo and two African-American candidates defeated a Democratic slate of six Anglo and two African-American candidates despite the opposition of eighty percent of the African-American voters. *Id.* He contended it would be “interest group politics rather than a rule hedging against racial discrimination” if the outcome of such an election were to be deemed a VRA § 2 violation. *Id.* Writing for herself, Chief Justice Burger, and Justices Powell and Rehnquist, Justice O’Connor concurred in the *Gingles* judgment but agreed with Justice White’s view that the race of the candidate should matter. *Id.* at 101 (O’Connor, J., Burger, C.J. & Powell & Rehnquist, JJ., concurring).

514. *Gingles*, 478 U.S. at 62–63.

515. *Id.* at 64–67.

516. *Ashcroft*, 539 U.S. at 482.

517. *Id.* at 483.

and influence districts for minority opportunity districts would “encourage the transition to a society where race no longer matters.”<sup>518</sup>

Plan 1151C’s District 24 may not have qualified as an African-American opportunity district, but it certainly qualified as an African-American influence district. Its African-American community had enough voting power to provide substantial, if not decisive, help to Democratic candidates in their primary elections.<sup>519</sup> With help from other groups, its cohesive voting for Democrats was a significant general election factor.<sup>520</sup> In recognition of its voting power and significant electoral support, Congressman Frost promoted well the interests of his African-American constituents.<sup>521</sup> Plan 1374C proposed to spread District 24’s African-American voting power among several safe Republican districts, thereby simultaneously jeopardizing Congressman Frost’s re-election and putting District 24’s African-American voters into districts where they would have no influence.<sup>522</sup>

Prior to *LULAC*, the theory of influence dilution had been recognized in some lower federal courts. In *Armour v. Ohio*,<sup>523</sup> Ohio had altered the boundaries of two legislative districts in a manner that reduced the voting power of an African-American community which was too small to constitute a majority in any district.<sup>524</sup> Nevertheless, the *Armour* court found that the boundary change diluted African-American voting power so much that the representatives of the African-American community were not responsive to its needs.<sup>525</sup> It also found that if the boundary change was reversed, the African-American community would have enough voting power to get Democratic Party candidates to respond to their interests and to help elect these responsive Democrats with a lot of help from white Democrats.<sup>526</sup>

Recognition of influence districts was not beneficial to African-Americans in *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter (McWherter II)*.<sup>527</sup> Originally, the court had required Tennessee to create another African-American opportunity district,<sup>528</sup> but that order was vacated by the U.S. Supreme Court and remanded for reconsideration in light of *De Grandy*.<sup>529</sup> On remand, the *McWherter II* court decided not to require Tennessee to create another African-American opportunity district, even though one could be created within *De Grandy*’s proportionality requirements, because Tennessee had created a few influence districts.<sup>530</sup> In reaching

518. *Id.* at 490.

519. Review *supra* notes 480 to 82 and accompanying text.

520. Review *supra* notes 483 to 489 and accompanying text.

521. Review *supra* notes 490 and 493 and accompanying text.

522. Alford Rpt., *supra* n. 220, at 42–44; *VRA Section Memo*, *supra* n. 11, at 33–35.

523. 775 F. Supp. 1044 (N.D. Ohio 1991).

524. *Id.* at 1046.

525. *Id.* at 1058.

526. *Id.* at 1059–60.

527. 877 F. Supp. 1096 (W.D. Tenn. 1995), *summarily aff’d sub nom. Millsaps v. Langsdon*, 510 U.S. 1160 (1994).

528. *Rural West Tenn. African-American Affairs Council, Inc. v. McWherter (McWherter I)*, 836 F. Supp. 453 (W.D. Tenn. 1993).

529. *McWherter v. Rural West Tenn. African-American Affairs Council, Inc.*, 512 U.S. 1248 (1994).

530. *McWherter II*, 877 F. Supp. at 1098, 1106–07.



this decision, the *McWhorter II* court documented extensively how minority groups can gain meaningful support for their interests by giving up safe minority opportunity districts for more influence districts.<sup>531</sup>

Despite their many merits, prior to *LULAC* most courts had held that VRA § 2 neither requires the creation of influence districts nor protects them from being dismantled during redistricting.<sup>532</sup> They feared that to do so would lead to a proliferation of marginal vote dilution claims that would, if accepted, produce proportionate representation.<sup>533</sup> Most importantly, these courts felt that the concept of influence was unbounded and relative to the circumstances of every election where, at its ultimate, one vote could have a profound influence.<sup>534</sup>

So, it should not have been surprising that both the *Session* court and the *LULAC* Court held that VRA § 2 neither requires states to create influence districts nor protects influence districts from being dismantled during redistricting. The *Session* court rejected influence districts on grounds that they “support[ ] persons joined, not by race, but by common view.”<sup>535</sup> It also read *Ashcroft* as giving states the flexibility to choose what kind of equal political opportunity to give protected minority groups by freeing them to substitute less secure minority opportunity districts, coalition districts, and influence districts for safe minority opportunity districts.<sup>536</sup> To protect this flexibility, the *Session* court held that VRA § 2 may not be used to force states to create influence districts “in the absence of an obligation to create a majority-minority district.”<sup>537</sup> In affirming this outcome, the *LULAC* Court cryptically insisted that race would be infused into every redistricting if VRA § 2 “were interpreted to protect” “the ability to influence the outcome between some candidates.”<sup>538</sup> The *LULAC* plurality also found that it cannot be deemed a violation of VRA § 2 for the state to fail to create influence districts even though the presence of influence districts is an important factor in determining in VRA § 5 preclearance proceedings whether a change in districting has denied or abridged the right to vote.<sup>539</sup>

The *LULAC* holding on influence districts leaves open one major question: will a state’s decision to trade safe minority opportunity districts for influence districts—as Tennessee did in *McWhorter*—be immune from VRA § 2 vote dilution claims by minority groups intent on getting all of the safe opportunity districts that are legally possible for them to receive? If not, then it is hard to see how the impetus provided by *Ashcroft* toward creating more competitive districts and hastening the day when race will not be such a major political factor can be maintained. Moreover, if the integrity of minority influence districts cannot be maintained from one districting year to the next, then minority groups will have a continuing incentive to maintain segregated housing

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531. *Id.* at 1005–06.

532. *Dillard v Baldwin Co. Commrs.*, 376 F.3d 1260, 1267–68 (11th Cir. 2004).

533. *Id.* at 1268.

534. *Id.* at 1269.

535. *Session*, 298 F. Supp. 2d at 484.

536. *Id.* at 478–81.

537. *Id.* at 481.

538. *LULAC*, 126 S. Ct. at 2625 (plurality).

539. *Id.* at 2625–26.

patterns in order to remain qualified as large, compact, and cohesive voting blocs which are eligible to be assigned to a minority opportunity district.

### C. *The Partisan Gerrymander Vote Dilution Claims*

If ever a case presented an ideal set of circumstances for developing a winning partisan gerrymander theory, it was *LULAC*. Republicans at all levels of government relentlessly bent rules to impose a partisan gerrymander on Texas' congressional delegation.<sup>540</sup> This left no doubt that Texas' sole motivation for undertaking a mid-decade congressional redistricting was to produce an outsized electoral advantage for Republicans.<sup>541</sup> That is why the appellants had reason to hope that their artful process-based Equal Protection theory would relieve them of the necessity to prove by standards that did not exist or were impossible to meet that they had suffered ill-effects from undue partisan vote dilution.<sup>542</sup>

Unfortunately, Justice Kennedy insisted on judging the purpose of Plan 1374C not by the legislature's motivation in drawing it but by whether every line of it was dictated by partisanship.<sup>543</sup> This is an impossibly deferential standard that drastically understates the degree of partisan bias in Plan 1374C, a bias exposed by credible asymmetry evidence introduced at trial that demonstrated how with the same statewide vote totals Republicans would dramatically win many more congressional seats.<sup>544</sup> Even accounting for the fact that the partisan gerrymander claims were judged under the rational basis test, the degree of deference is shocking when compared to Chief Justice Rehnquist's approach in *Shaw II*, wherein he acknowledged the obvious: that "[r]ace was the criterion that . . . could not be compromised" even though the state's design of a

540. To achieve its partisan goals, the Republican governor refused to provide the leadership necessary to get a bipartisan redistricting plan in 2001, thereby leaving the task to the *Balderas* court. *LULAC*, 126 S. Ct. at 2628 (Stevens & Breyer, JJ., concurring in part and dissenting in part). Although Republicans did not do as well as they had expected to under the *Balderas* court's redistricting plan, *id.* at 2629, they did gain a majority in the Texas legislature, *id.*, putting in motion events that resulted in Plan 1374C. Then, Tom DeLay engineered a possibly illegal funding scheme to help the Republicans take over both houses of the Texas legislature in the 2002 elections Philip Shenon & Carl Hulse, *supra* n. 198. After Congressman DeLay was indicted, the Republican-controlled U.S. House of Representatives altered long-standing ethics rules in a vain attempt to insulate Tom DeLay from the obligation to resign his leadership post. Hulse, *House Overturns*, *supra* n. 198; Hulse, *G.O.P. Voids Rule*, *supra* n. 198.

When a long-time Texas Senate rule, which was designed to protect Senators in the minority, was used by Democrats to block the Republican's gerrymander, the Republicans simply did away with it. Jeffers & Slater, *supra* n. 203. After elimination of this annoying rule, the Republicans enacted their partisan gerrymander and then benefited from the U.S. Attorney General's office intervening to overturn a recommendation by career officers in the U.S. Department of Justice Voting Rights Section that Texas' partisan gerrymander not be cleared because it imposed retrogression. Eggen, *Gonzales Defends*, *supra* n. 206; Eggen, *Staff Overruled*, *supra* n. 206; Eggen, *Justice Memo*, *supra* n. 206.

541. This was the finding of the *Session* court when it rejected the appellants' racial discrimination claims because "[t]here [wa]s little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." *Session*, 298 F. Supp. 2d at 470.

542. See App. Br. of Eddie Jackson, *supra* n. 281, at 17.

543. *LULAC*, 126 S. Ct. at 2609–10 (Kennedy, J., concurring).

544. According to the state's own expert, Plan 1374C would enable Republicans to win twenty of thirty-two seats with only forty-nine percent of the vote. *LULAC*, 126 S. Ct. at 2637 (Stevens & Breyer, JJ., concurring in part and dissenting in part). In fact, Plan 1374C enabled Republicans to win twenty-two seats out of thirty-two with fifty-eight percent of the vote, a total they would have won even if they only got fifty-two percent of the total vote. *Id.* at 2636–37.

challenged district bore unmistakable signs of meeting other criteria such as “respecting communities of interest and protecting Democratic incumbents.”<sup>545</sup>

The appellants’ claims also rose and fell on whether it was impermissible for Texas to engage in a mid-decade redistricting. Mid-decade redistricting could not, in-and-of-itself, be considered questionable given the case law that presumes that legislatures have the right to replace court-drawn maps if they so choose.<sup>546</sup> More fundamentally, if legislatures could not redistrict mid-decade, the party out-of-power would have an incentive to block redistricting right after the Census in order to get the map drawn by a court, which presumably would be less partisan, while legislatures dominated by one party would have the incentive to impose a onerous gerrymander since the opposition party would not be able to undo it later in the decade.

What is most troublesome about Justice Kennedy’s opinion is that he is offering one at all, other than to finally throw in the towel and admit that partisan gerrymanders present non-justiciable issues. Surely Justice Scalia is correct that it is more than a little odd to complain that the appellants failed to state a claim when no one on the Court knows how anyone could state a partisan gerrymander claim because agreed-to standards defining the claim do not exist.<sup>547</sup> More to the point, political parties are merely large communities of interest with no real geometric boundaries by which to judge their compactness or philosophical boundaries to distinguish them from any other political interest group.

Justice O’Connor’s concurrence in *Bandemer* certainly sounded an apt warning. In allowing political parties to pursue freely vote dilution cases, the Court must treat every other COI the same way.<sup>548</sup> She was also correct in pointing out that political parties have no special claim to be protected from one another, for unlike racial and language minorities,

members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process.<sup>549</sup>

Along these lines, she offered the view that gerrymanders are somewhat self-limiting because to maximize its gains the dominant party must weaken its voting strength in its safe seats, thereby incurring greater risk of large losses should a shift occur in the mood of the electorate.<sup>550</sup> Indeed, this article was completed about one month before the 2006 elections when the outcome was not known but the projections were for the Democratic Party to reclaim one or both houses of Congress despite being out of power in both houses for most of a decade.<sup>551</sup> *LULAC* itself is a product of one party rising above a

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545. *Shaw II*, 517 U.S. at 907 (majority).

546. *LULAC*, 126 S. Ct. at 2608–09 (Kennedy, J., concurring).

547. *LULAC*, 126 S. Ct. at 2663; *supra* n. 296.

548. *Bandemer*, 478 U.S. at 147 (O’Connor, J., Burger, C.J. & Rehnquist, J., concurring).

549. *Id.* at 152.

550. *Id.*

551. In fact, the Democrats won control of both the U.S. House of Representatives and the U.S. Senate. Zachary A. Goldfarb, *How Many Wins Make Up a Wave? Political Scientists Debate the Scope of Democrats’*

very burdensome gerrymander to impose another on its opposition.

## VII. CONCLUSION

The big story about *LULAC* was supposed to be how the Court finally came to grips with the issue of partisan gerrymanders. Unfortunately, the Court fragmented and that just did not happen. Nevertheless, the Court in the Latino VRA § 2 vote dilution case significantly altered its previous vote dilution principles to create a means of thwarting partisan gerrymanders that also perpetrate racial or ethnic inequality.

Similarly, the *LULAC* plurality twisted vote dilution principles in the African-American vote dilution case in order to help those who were victimized by Texas' last most famous gerrymander bring down its designer. The distortions in this case, however, threaten to do real damage, for they "elevate[ ] race to an 'all or nothing' proposition in redistricting: African-Americans and Latinos who cannot be combined into majority-black or majority-Latino districts become legally irrelevant, and the State is then free to . . . render them politically irrelevant as well."<sup>552</sup>

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*Victory*, Wash. Post A19 (Nov. 13, 2006). The Democrats picked up six Senate seats and, as of November 13, 2006, twenty-nine House seats. *Id.* Later, as a result of a special election in Texas, the Democrats would win one more House seat, in Texas Congressional District 23, for a total of thirty. Office of Texas Secretary of State, *Race Summary Report: Special Runoff Election U.S. Representative District 23*, <http://elections.sos.state.tx.us/elchist.exe> (Dec. 12, 2006) [hereinafter *Special Runoff Election*].

Political scientists differed over whether this outcome signified an extraordinary Democratic victory or just a normal outcome in the sixth year of the administration of President from another party. See Goldfarb, *supra*. The Democrats' thirty-seat pickup was about average for this point in an administration of a President from another party, *id.*, but the landslide proponents contended that it was an extraordinary achievement because the Democrats had to overcome a lot of gerrymanders designed to create safe Republican seats. *Id.*

Even in Texas, the Democrats picked up two House seats (in Districts 22 and 23) despite Plan 1374C being substantially in place. Nick Lampson, a former Congressman who lost in 2004 largely because of Plan 1374C, review text accompanying notes 220 to 227, won in House District 22. Office of Texas Secretary of State, *Race Summary Report: 2006 General Election*, <http://elections.sos.state.tx.us/elchist.exe> (Nov. 7, 2006). District 22 was vacant because of the scandal-induced resignation of Congressman Tom DeLay. Gary Martin, *Congress; By and Large G.O.P. Lawmakers Hold Their Texas Ground*, San Antonio Express-News A13 (Nov. 8, 2006).

Ciro Rodriguez, another former Congressman, defeated Republican incumbent Henry Bonilla in a special run-off election in House District 23. Greg Jefferson, *Ciro in a Landslide*, San Antonio Express-News 1A (Dec. 13, 2006); *Special Runoff Election*, *supra*. Congressman Bonilla had received special protection under Plan 1374C, review text accompanying notes 357 to 360, but this special protection was undone after District 23 had been revised to meet the U.S. Supreme Court's mandate in *LULAC*. Review text accompanying notes 263 to 270, 361 to 363, and 454 to 460.

552. App. Br. of Appellant Eddie Jackson, *supra* n. 282, at \*39.

