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## *LULAC v. Perry: The Frumious Gerry-Mander, Rampant*



*The Gerry-Mander*, BOSTON GAZETTE (Mar. 26, 1812).

William Goldman's *The Princess Bride* is a rollicking comedy fantasy adventure romance novel: a fictitious fairy tale distillation of the "good parts" of a fictional satirical political history of a fictional country. Both the book and the film adaptation have become classics—perhaps because they contain, as the narrator promises, "Fencing. Fighting. Torture. Poison. True love. Hate. Revenge. Giants. Hunters. Bad men. Good men. Beauitfulest ladies. Snakes. Spiders. Beasts of all natures and descriptions. Pain. Death. Brave men. Coward men. Strongest men.

Chases. Escapes. Lies. Truths. Passion. Miracles.”<sup>1</sup> *The Princess Bride* is the tale with everything.

Had Goldman been drawn to the law of democracy, he might well have savored the raw material of *LULAC v. Perry*. In this field, *LULAC* is the case with everything. Absconding officials. Abuses of power. Ethical malfeasance. Alleged theft. Midnight legislation. Partisan bloodletting. Political revenge. Entitled incumbents. Procedural hijinks. Marginalized minorities. Willie Nelson. Misdirection. Whistleblowing. Primaries. Coalitions. Polarization. Retrogression. Preclearance. Discrimination. Redistricting. Re-redistricting. Race. Party. Power. Voice.

Professors who are feeling unkind contemplate giving the fact pattern of *LULAC* as a final exam. The case is one part democratic theory, one part institutional turf war, one part action-adventure.

Once upon a time . . .

## I. Political Context

The story of *LULAC*—finally decided in 2006—really begins in 1990. Texas was well into the political transition affecting much of the South, transforming from a firmly Democratic stronghold to a region of increasingly robust Republican support. The Texan population was also growing, faster than the country as a whole, spurred largely by the substantial Latino growth rate.<sup>2</sup> Before 1990, Texas had had 27 congressional representatives; the 1990 census brought three additional seats. The growth and the new seats meant that the whole district map had to be redrawn to make sure that the population in each district was about the same, as the Constitution requires.

The Democratic leadership in the state legislature, with a Democratic governor, controlled the 1991 redistricting. And the resulting map—described as the “shrewdest gerrymander of the 1990s,”<sup>3</sup> with Representative Martin Frost often denoted as primary author—not only preserved the Democrats’ representational strength, but yielded gains from the three new seats. In 1990, with 53% of Texans voting Democratic, on average, for statewide office,<sup>4</sup> 19 Democrats and 8 Republicans were elected to the Texas congressional delegation.<sup>5</sup> In 1992, with 42% of

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<sup>1</sup> WILLIAM GOLDMAN, THE PRINCESS BRIDE 10 (1973).

<sup>2</sup> The decennial increase in Texas’s Hispanic population in 1990 was 45%, compared to a 12% increase for the non-Hispanic population. See Campbell Gibson & Kay Jung, Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States 76 tbl. 58, Working Paper No. 56 (2002), <http://perma.cc/XZ3L-DJKC>.

<sup>3</sup> MICHAEL BARONE ET AL., ALMANAC OF AMERICAN POLITICS 2002, at 1448 (2001).

<sup>4</sup> These averages reflect the median value of the two-party election results for the nine statewide races in 1990. 1992–93 Texas Almanac and State Industrial Guide 426–27, <http://perma.cc/FVN2-CC66>.

<sup>5</sup> *Id.* at 452–53.

Texans voting Democratic for statewide state office,<sup>6</sup> 21 Democrats and 9 Republicans were elected to the congressional delegation.<sup>7</sup> One seat previously held by a Democrat—District 23 in the southwest—was won by Republican Henry Bonilla. The three new seats—a neighboring district that was majority-Latino, a Houston-area district that was majority-Latino, and a Dallas-area district that was majority African-American—were all won by Democrats.

The resulting map, based largely on the configuration of the new seats, was challenged as an unwarranted racial gerrymander, unsupported by the requirements of the Voting Rights Act or any other compelling interest. In 1996, the Supreme Court agreed with the challengers and struck down the map.<sup>8</sup> Governor George W. Bush declined to call a special legislative session, and so the trial court, on remand, drew a remedial plan that summer.<sup>9</sup> In 1996, with 45% of Texans voting Democratic, on average, for statewide office,<sup>10</sup> 17 Democrats and 13 Republicans were elected to the congressional delegation.<sup>11</sup>

The 2000 census once again revealed disproportionate population growth in Texas (again driven by the Latino population), and Texas was apportioned an additional two congressional seats, for a total of 32 seats.<sup>12</sup> The Republican-controlled Senate and the Democrat-controlled House could not agree on a congressional plan, and with impending elections in malapportioned districts, intransigence was shunted to a judicial arena. Republicans filed (and amended) a series of suits in

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<sup>6</sup> This number reflects the two-party election results for the lone statewide race for state office in 1992—the Office of the Railroad Commissioner. The only other statewide race in 1992 was the U.S. Presidential race, with underlying partisan leanings substantially complicated by the sizable vote for Independent candidate Ross Perot. 1994–95 Texas Almanac and State Industrial Guide 409, <http://perma.cc/K88V-FLSK>.

<sup>7</sup> Of course, it is difficult to determine from election results alone the degree to which partisan motivations may have been responsible for the congressional plan, or the degree to which results from one election may linger. Many criteria for the drawing of district boundaries—including criteria often considered to have little inherent partisan valence—will often result in maps that elect a legislative delegation not reflecting the political composition of the state, due to political demography, partisan waves, or candidate effects.

<sup>8</sup> *Bush v. Vera*, 517 U.S. 952, 979–83 (1996) (plurality opinion); *id.* at 999–1003 (Thomas, J., concurring in the judgment).

<sup>9</sup> *Vera v. Bush*, 933 F. Supp. 1341, 1346–47, 1352 (S.D. Tex. 1996) (three-judge court).

<sup>10</sup> These averages reflect the median value of the two-party election results for the three statewide races in 1996: Presidential electors, U.S. Senator, and Railroad Commissioner. 1998–99 Texas Almanac and State Industrial Guide 386, <http://perma.cc/TZQ5-LEKU>.

<sup>11</sup> By the mid-90s, Democratic control of several of these districts may well have been due to “candidate effects,” *see supra* note 7. In 1996, at least four Democratic incumbents won re-election in congressional districts preferring Republican presidential nominee Bob Dole to Democratic candidate Bill Clinton. POLIDATA, Presidential Election, 1996, Districts of the 105th Congress: District Summary, President & Congress 1996, Texas (1997), <http://perma.cc/QR4L-NKPZ>.

<sup>12</sup> The decennial increase in Texas’s Hispanic population in 2000 was 54%, compared to a 12% increase for the non-Hispanic population. *See* U.S. Census Bureau, The Hispanic Population: 2000, at 4 tbl. 2(2001), <https://perma.cc/6QNU-ZLSQ>.

Houston and Democrats did the same in Austin, each telling a state court at various points in the legislative session that it was now the appropriate time for judges to draw legal lines for the elections ahead.<sup>13</sup> File too early and the case would not be ripe; file too late and the case would not be the first valid case filed, ceding jurisdiction to a venue deemed less friendly. Neither trial court yielded to the other; indeed, each scheduled trial to begin on the same day: September 10, 2001.

The Texas Supreme Court—a body chosen in partisan elections, composed at the time of seven Republicans—eventually resolved the forum-shopping in favor of the first case filed after the close of the regular legislative session.<sup>14</sup> The Austin court sought by Democrats would have first crack at drawing a map.

It did not stick. Parallel litigation had been proceeding in federal court, but since redistricting is an enterprise laden with state policy, federal courts must defer to state proceedings if there is a reasonable prospect that state proceedings will produce a timely map.<sup>15</sup> The federal court in Texas had given the state courts until mid-October to produce a plan. The state courts just ran out of time. In late September of 2001, the Austin state court held a trial; it promulgated a plan on October 3 and asked for comment by October 9. On the morning of October 10, the court said that it was considering modifications in light of the comments it had received; the court requested reactions by noon, and released a final map later the same day—substantially changed from the draft of the week before, with changes “based in part, if not in whole, on political considerations, including incumbent protection.”<sup>16</sup>

A speedy appeal to the Texas Supreme Court followed. That court acknowledged that the trial proceedings were rapid, but found that they were—mostly—appropriately so. The substantial changes of the final day, however, crossed the line of too much haste for the due course of law.<sup>17</sup>

With the state court’s map thus invalidated, quite late in the cycle, a federal court took over. It made modest adjustments to the pre-existing map of the 90s, to equalize the population in each district.<sup>18</sup> Latino groups were livid: despite the substantial Latino population growth driving the two new congressional districts, the new map yielded no new district controlled by Latino voters. But the resulting map, though not adopting

<sup>13</sup> See *Perry v. Del Rio*, 66 S.W.3d 239, 243–48 (Tex. 2001).

<sup>14</sup> *Id.* at 256.

<sup>15</sup> *Grove v. Emison*, 507 U.S. 25, 33–37 (1993).

<sup>16</sup> *Perry v. Del Rio*, 67 S.W.3d 85, 88 (Tex. 2001); *id.* at 95 (Owen, J., concurring). See also *id.* at 97 (Rodriguez, J., concurring) (“The changes asked for by [Democratic] Speaker Laney and ultimately adopted by the trial court . . . , while not couched in terms of incumbent protection, are not so distinct from incumbent protection as to escape suspicion.”).

<sup>17</sup> *Id.* at 94–95.

<sup>18</sup> *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 36403750 (E.D. Tex. Nov. 14, 2001) (three-judge court).

the preferred map of Democratic litigants, preserved much of the Democrats' earlier plan, leaving architect Martin Frost hailing a "major victory."<sup>19</sup>

Nationwide, 2002 was a post-9/11 Republican political wave year: so much so that Republicans increased their control of the U.S. House, which is quite rare for the President's party in a midterm election.<sup>20</sup> In Texas, only 43% of Texans voted Democratic, on average, for statewide office.<sup>21</sup> But the federal court's map, following much of the map of the 90s, produced a congressional delegation of 17 Democrats and 15 Republicans.

## II. The Re-Redistricting

Just as the 2001 Texas legislature deadlocked on a congressional plan, it also deadlocked on a plan for the state legislature. State law sometimes provides a backup plan for such a scenario; the Texas constitution, for example, gives a commission of five elected officials the responsibility to draw state legislative lines, if the legislature itself cannot come to an agreement.<sup>22</sup> And so this commission—four Republicans and one Democrat—drew the districts for the state Senate and drew districts that formed the basis for the state House map.<sup>23</sup> One federal judge, while finding the map to be lawful, specifically wrote "to express [his] shock at the drawing of districts by the [commission]. The dominant political party treated all members of the opposing party as if they were 'enemies of the State' instead of respected state leaders. . . ."<sup>24</sup> The commission's map was deployed for state legislative races in 2002 . . . and the same electoral wave mentioned above delivered Republicans

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<sup>19</sup> See R.G. Ratcliffe, *New U.S. House Map Saves All Seats; 2 Added Districts Tilt Toward GOP*, HOUSTON CHRON. (Nov. 15, 2001).

<sup>20</sup> The last time that the President's party gained congressional seats in a midterm race was 1998, in the wake of the Clinton impeachment; the last time before that was 1934. Gerhard Peters, *Seats in Congress Gained/Lost by the President's Party in Mid-Term Elections*, THE AMERICAN PRESIDENCY PROJECT, <http://perma.cc/KW2T-N3UV>.

<sup>21</sup> These averages reflect the median value of the two-party election results for the eight statewide races in 2002. 2004–05 Texas Almanac and State Industrial Guide 399, <http://perma.cc/K24C-8D8H>.

<sup>22</sup> TEX. CONST. art. III, § 28. The Commission consists of the Lieutenant Governor, the Speaker of the state House, the state Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office. *Id.* In 2001, only the Speaker of the House was a Democrat. 2000–01 Texas Almanac and State Industrial Guide 420, <http://perma.cc/TGE7-HSKY>.

<sup>23</sup> *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 34104836 (E.D. Tex. Nov. 28, 2001) (three-judge court) (state Senate); *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001) (three-judge court) (state House). Based on the impact of portions of the plan on the Latino population, the Department of Justice refused to approve the state House map under the Voting Rights Act, *see infra* text accompanying notes 84–88. A federal court modified the politician commission's plan, but only to address the DOJ's objections; much of the political impact remained. *Balderas*, 2001 WL 34104833, at \*2–4.

<sup>24</sup> *Id.*, 2001 WL 34104834, at \*1 (E.D. Tex. Nov. 30, 2001) (separate statement of Hannah, C.J.).

unilateral control of the Governor's mansion, the state Senate, and the state House.<sup>25</sup>

With pressure from native son and U.S. House Majority Leader Tom DeLay, the legislature, now under unified Republican control, returned in 2003 eager to redraw the congressional map. The then-existing map was presumptively legally valid,<sup>26</sup> but state law provided no express bar to a legislative decision to revisit the lines once again.<sup>27</sup> And for many, the congressional status quo was politically suboptimal. Congressional votes on Medicare, Head Start, and school vouchers had recently been decided by one vote, and President Bush's tax cuts ultimately passed by just three.<sup>28</sup> The Republican congressional leadership was hungry for an added margin of party-line security. And it was particularly eager to target Anglo Democratic incumbents.<sup>29</sup>

Negotiations were long and intense, and full of cloak-and-dagger intrigue. At one point in early April, a map supposedly drawn by DeLay was allegedly stolen from a committee room by Democratic staff; with police proceedings under way, one of the alleged conspirators thereafter decided to stay at Texas hotels only under the name "John Lennon."<sup>30</sup> The atmosphere intensified further as April turned to May: the legislative calendar set May 16, 2003, as the operative deadline for the session.<sup>31</sup> A plan produced at midnight on May 6 was passed out of committee in the state House that same morning; the executive director of Tom DeLay's PAC was quoted as acknowledging, with respect to the map he helped draw, "Our goal is to elect more Republicans."<sup>32</sup>

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<sup>25</sup> In 2001, the state House consisted of 78 Democrats and 72 Republicans; in 2003, Republican victories meant that the state House consisted of 62 Democrats and 88 Republicans.

<sup>26</sup> *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 36403750 (E.D. Tex. Nov. 14, 2001) (three-judge court).

<sup>27</sup> Justin Levitt & Michael McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258 & n.51 (2007); Tex. Op. Att'y Gen. No. GA-0063 (RQ-0017-GA) (Apr. 23, 2003), 2003 WL 1954255, <https://perma.cc/T3CT-B2UL>.

<sup>28</sup> STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY 2* (2007).

<sup>29</sup> *Id.* at 4, 98, 123.

<sup>30</sup> See Peggy Fikac, *Missing Map in Redistricting Flap*, SAN ANTONIO EXPRESS-NEWS (Apr. 24, 2003); Sam Dealey, *Frost Staffer Implicated in 'Theft' of Map*, THE HILL (Apr. 30, 2003), <https://perma.cc/69X3-39PX>; Interview with J. Gerald Hebert (July 10, 2015). State police, who never filed formal charges, said after reviewing security camera footage that there was "no evidence to show that a crime had been committed." In a further twist, there was even a lawsuit filed by the Texas Department of Public Safety against the Attorney General to prevent release of the tape—a hot political commodity—in order to maintain confidentiality of the camera location. Claire Osborn, *DPS Sues Abbott Over Capitol Videotape*, AUSTIN AMERICAN-STATESMAN (Sept. 25, 2003).

<sup>31</sup> Due to procedural restrictions, see *infra* text accompanying note 51, passage through the state Senate was less certain than passage through the House; May 16 was the last day for the House to consider House bills. Tex. Legis., 78th Legis., Reg. Sess., Deadlines for Action Under House and Senate Rules, May/June 2003, <http://perma.cc/FP5W-NEHR>.

<sup>32</sup> BICKERSTAFF, *supra* note 28, at 132; R.G. Ratcliffe & Karen Masterson, *Committee OKs Redistricting Map*, HOUSTON CHRON. (May 8, 2003), <http://perma.cc/MSZ7-NFXQ>.

### A. First Flight

With passage seemingly inevitable, 53 Democratic members of the 150-member state House were persuaded to deprive their colleagues of a quorum, and thereby shut the legislature down.<sup>33</sup> The proposed map cut right through the heart of Laredo, a heavily Latino border town; the House leadership had previously refused to hold hearings anywhere in the region because, in the words of the committee chair, “There are only two people I know of on the committee that speak Spanish. The rest of us would have a very difficult time if we were out in an area—other than Austin or other English-speaking areas—to be able to have committee hearings or to be able to converse with people that did not speak English.”<sup>34</sup> That dismissive attitude may help to explain why Richard Raymond, a representative from Laredo, was one of the leaders of the quorum break. “He didn’t ask, ‘OK, everybody who’d be willing to make a quorum break, raise your hand.’ He asked, ‘If there’s a quorum break, how many of you would refuse to join us?’ He knew what he was doing.”<sup>35</sup>

On the evening of Mother’s Day, May 11, most of the Democrats met in secret and boarded two buses out of the state.<sup>36</sup> As a member of the delegation recounted, “If you know how difficult it is to get 52 Democrats to do anything—much less get on a bus and do something that sounds a little outrageous—you have to realize that they were very thoughtful about it.”<sup>37</sup>

Racial and ethnic politics, which had been quite contentious in strategy sessions up to that point, were apparently reflected even in the bus logistics. One of the buses was filled predominantly with white Democrats over 40, largely from more rural districts: the “WD-40s,” as they called themselves, after the popular lubricant.<sup>38</sup> African-American and Latino incumbents were on the other bus. “Supposedly, on [one] bus, it was very quiet, people were reading, doing a little work. On the other bus, people were hooting and hollering.”<sup>39</sup> One of the buses showed the movie *Catch Me If You Can*.<sup>40</sup>

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<sup>33</sup> TEX. CONST. art. III, § 10.

<sup>34</sup> Dave Mann, *Capitol Notebook*, TEX. OBSERVER (June 20, 2003), <http://www.texasobserver.org/1379-capitol-notebook-pears-and-swine/>.

<sup>35</sup> Interview with Matt Angle, Chief of Staff for U.S. Representative Martin Frost (Aug. 6, 2015).

<sup>36</sup> BICKERSTAFF, *supra* note 28, at 141–42.

<sup>37</sup> GERRYMANDERING (Green Film Co. 2010) (interview with Representative Jim Dunnham, 28:19–28:37).

<sup>38</sup> The moniker led not only to a raft of predictable punchlines—one article opened with the lead: “Talk about slippery politicians”—but also to a minor trademark dispute. See Connie Mabin, *Democrats Chided for Use of WD-40 Name*, CORPUS CHRISTI CALLER-TIMES (May 27, 2003).

<sup>39</sup> Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015).

<sup>40</sup> BICKERSTAFF, *supra* note 28, at 143.

The buses aimed for the Oklahoma state line, about five hours away. As one of the organizers of the excursion recalled, “If we had told them that they were going to Oklahoma, they wouldn’t have gotten on the bus. So we told them they were going to Lake Charles,” the self-proclaimed “Festival Capital of Louisiana,” thirty miles from the Gulf, and home to four prominent casinos. And what if the legislators noticed that they were driving north, not south and east? “We told the bus driver, ‘If you stop before we get there, you don’t get paid. So if anyone comes up and asks any questions, don’t stop.’”<sup>41</sup>

The next morning, Republican legislators arrived at the Capitol to find their Democratic colleagues gone, and no quorum for business. They were not amused. The House sergeant-at-arms asked the Texas Department of Public Safety to arrest the legislators on the lam, branded the “Killer Ds,” and the Texas Rangers began a statewide search.<sup>42</sup> At least one state officer enlisted the help of an FBI agent.<sup>43</sup>

U.S. House Majority Leader Tom DeLay joined the fray as well. His staff asked the FAA to track the plane of the immediate past speaker of the Texas House, Pete Laney—a federal request for intervention into a state law enforcement matter for which DeLay was formally admonished by the U.S. House Ethics Committee.<sup>44</sup>

The plane was indeed tracked. And it was found in Ardmore, Oklahoma, where the Democrats were discovered hiding out at a Holiday Inn, two to a room, under assumed names.<sup>45</sup> A law student apparently reviewed the episode in a paper, beginning: “Historically, there are many

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<sup>41</sup> Interview with J. Gerald Hebert (July 10, 2015).

<sup>42</sup> Scott Gold, *Outgunned, Texas Democrats Vamoose*, L.A. TIMES (May 13, 2003), <http://perma.cc/YUB8-7MCN>; Order of Speaker Tom Craddick, May 12, 2003, <https://perma.cc/A5U9-A9P6>; Letter from Rod Welsh, Tex. H.R. Sergeant-at-Arms, to Col. Tommy Davis, Dir. Tex. Dep’t of Public Safety, May 12, 2003, <https://perma.cc/A5U9-A9P6>.

The arrest request was issued not under the authority of a violation of the criminal law, but under the authority of a provision of the Texas House rules, authorizing the sergeant-at-arms or his designee to send for and arrest all absentees “for whom no sufficient excuse is made” in the event of an absence of a quorum, to “secure[ ] and retain[ ]” the attendance of those missing. *See id.*; Rules of the House, 78th Leg., Reg. Sess., 2003, at 68 (Rule 5, § 8), <http://perma.cc/VWY5-GUHE>. The legality of the use of Department of Public Safety officers to secure a legislative quorum was contested, but never resolved. *See* Final Judgment, Burnam v. Davis, No. GN-301665, 2003 WL 25301368 (Tex. Dist. Ct. Aug. 4, 2003), *vacated in relevant part on procedural grounds sub nom.* Davis v. Burnam, 137 S.W.3d 325, 334–35 (Tex. Ct. App. 2004).

<sup>43</sup> U.S. Dep’t of Justice, Off. of the Inspector General, An Investigation of the Department of Justice’s Actions in Connection with the Search for Absent Texas Legislators, Aug. 12, 2003, <https://perma.cc/JD3G-DRTV>.

<sup>44</sup> BICKERSTAFF, *supra* note 28, at 294, 296; Letter from Kenneth Mead, Inspector General, U.S. Dep’t of Transportation, to Sen. Joseph Lieberman, July 11, 2003, <https://perma.cc/T5NE-TTHB>; H.R. Rep. No. 108–806, at 67 app. III, <https://perma.cc/5KL2-WGPQ>.

<sup>45</sup> BICKERSTAFF, *supra* note 28, at 143; Michael King, *The House Adjourns to Oklahoma*, AUSTIN CHRON. (May 16, 2003), <http://perma.cc/JBU5-4BVR>.

reasons why middle-aged men might sneak into a motel late at night. Until now, redistricting has not been one of them.”<sup>46</sup>

Why Ardmore? Representative Jim Dunnam explained, “Ardmore was a place where nobody was going to be accused of going there for joy. Not to say anything bad about Ardmore, but they don’t have a casino there, and they don’t have a lot of bars there; they didn’t have the distractions that people might claim, you know, ‘Why are you there?’ ”<sup>47</sup> And Oklahoma had a Democratic governor, who reportedly “suggested it might take him six months to process extradition papers” if Texas made a formal request for assistance in reclaiming the officials.<sup>48</sup>

Once the Democrats’ hideout was discovered, the “Texas state police did go to Ardmore, and ‘invited’ them to come back to Austin. At that point, Oklahoma state police are summoned; they determine that Texas state police are out of their jurisdiction. That was the end of the first day, where the Democrats finally realized, ‘S\*\*\*, we may have actually pulled this off.’ ”<sup>49</sup>

The Democrats stayed in Ardmore for the week, returning only after the deadline for the session had passed.<sup>50</sup>

### B. Second Flight

In July, Governor Rick Perry put redistricting back on the table by calling a month-long special session. This time, a plan passed the state House, after a series of rancorous hearings around the state. But it stalled in the Senate due to a procedural tradition. There were 19 Republicans and 12 Democrats in the Senate, but a longstanding Texas legislative procedure effectively required two-thirds support to move bills forward. Technically, a “blocker bill”—a bill not intended for passage—would routinely be placed at the top of the Senate calendar, and any bill seeking to jump that blocker bill in the queue would have to gain two-thirds support to suspend the regular calendar order of consideration.<sup>51</sup> What this meant was that redrawing the congressional district lines would need bipartisan consent. Such consent was not forthcoming.

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<sup>46</sup> GERRYMANDING, *supra* note 37 (interview with Prof. Sam Issacharoff, 32:03–32:14).

<sup>47</sup> *Id.* (interview with State Representative Jim Dunnam, 29:31–29:48).

<sup>48</sup> Terrie Gonzalez, *Killer Ds Found in Oklahoma*, CHEROKEEAN/HERALD, May 14, 2003, at 1, 12, <http://perma.cc/3Q97-GNRX>.

<sup>49</sup> GERRYMANDING, *supra* note 37 (interview with Guillermo Garcia, reporter for the San Antonio Express-News, 30:04–30:23).

<sup>50</sup> They did have fortification along the way. As the manager of the Ardmore Holiday Inn explained, “I know Willie Nelson, he sent a case of Jack Daniels, I believe, a case of it. Then there were also other liquors arrived as presents and gifts . . . but I remember the one, from Willie Nelson, because it was a case. We went, ‘Okay, well, I guess we’re going to have some social time.’ ” *Id.* (interview with Phrely Branstetter, manager of the Ardmore Holiday Inn, 31:08–31:29).

<sup>51</sup> Legis. Reference Library of Texas, The Two-Thirds Rule, <http://perma.cc/7X88-YAJL>.

On July 18, 2003, Lieutenant Governor David Dewhurst mentioned that he would abide by the two-thirds rule for the present session. But if a second special session were necessary, he vowed to put redistricting at the top of the calendar, first—making a two-thirds supermajority unnecessary to consider the bill.<sup>52</sup> July wound down, with no plan in sight. And as the first special session came to a close, the Senate leadership reportedly devised a backup plan. They would adjourn early, timed so that the governor could immediately call a second special session, without a moment’s delay; the Senate doors would be locked, redistricting would be placed first on the agenda, and the Senate would proceed to pass its desired bill by a simple majority.<sup>53</sup>

But on July 28, when the first special session was indeed adjourned early and the second gaveled to order, eleven Democratic Senators were nowhere to be found. They had been tipped off, and sprinted to the airport, boarding planes headed out of the state to deny the Republican leadership a quorum, just as their state House colleagues had done two months before. Most of the fleeing Senators first learned of their destination after the flights were airborne.<sup>54</sup>

That destination was Albuquerque, New Mexico. “The reason we went to New Mexico is that one of the Senators had a heart condition, and wanted to be close to a first-class medical facility. And, of course, it had a Democratic governor who would kick the Rangers out if they came after us.”<sup>55</sup>

The House members remained out of state for just a few days in May. But for the Senators to avoid a quorum in the special session, they needed to stay in Albuquerque for more than a month. One of the organizers of this episode reflected, “If you’d have asked me if you can get eleven members of the Texas Senate to stay anywhere together for six weeks—I don’t care if it’s South Beach or the Riviera—I’d have said ‘hell no.’”<sup>56</sup>

August passed with eleven Democratic Senators still firmly ensconced out of state.

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<sup>52</sup> Robert T. Garrett & Gromer Jeffers Jr., *Remap Would Divide Frost’s District*, DALLAS MORNING NEWS (July 18, 2003).

<sup>53</sup> BICKERSTAFF, *supra* note 28, at 192.

<sup>54</sup> *Id.* at 193.

<sup>55</sup> Interview with J. Gerald Hebert (July 10, 2015).

<sup>56</sup> Interview with Matt Angle, Chief of Staff for U.S. Representative Martin Frost (Aug. 6, 2015).

The legislators' flight was so striking—both in its rarity<sup>57</sup> and in its audacity<sup>58</sup>—that it is easy to lose a serious dispute in the lurid details of the journey. Many observers—and not merely the Republican legislators left waiting in Austin—believe that the run for the border amounted to a substantial ethical lapse. This view emphasizes that legislators have the responsibility to legislate: an obligation that remains even for legislators who foresee an impending loss, along party lines or otherwise. A legislature composed of rotating coalitions of members who abandon the institution to prevent each impending disfavored vote would quickly cease to be a legislature at all. And if the impending redistricting is viewed purely in personal terms, there is little to redeem a legislator's incapacitation of the institutional body solely to protect his or her seat in that institution.

That said, Representative Jim Dunnam, one of the organizers of the first foray into Ardmore, refuses to yield the ethical high ground. "It had to do with more of a fundamental defense of democracy," he has said.<sup>59</sup> Even for those who see a distinction between U.S. Senate filibusters and the Texan walkout—or for those who believe that filibusters involve similar ethical lapses<sup>60</sup>—Dunnam's particular claim need not be mere posturing. As described elsewhere in this volume in considerably more detail,<sup>61</sup> Supreme Court Justices have unanimously concluded that in

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<sup>57</sup> The departure was rare, but not unprecedented, even in Texas. In 1991, 42 representatives denied a quorum for an hour over prekindergarten budget funding, and in 1979, twelve Senators hid to deny a quorum and kill a controversial bill alleged to favor a presidential bid by former Texas Governor John Connally. *See R.G. Ratcliffe & Polly Ross Hughes, AWOL Democrats Hole Up in Oklahoma Motel; Saralee Tiede, A Texas Saga: "Killer Bees" Still on Loose*, WASH. POST (May 22, 1979), <http://perma.cc/84NT-UW9X>. Some time earlier, Abraham Lincoln had apparently engaged in self-defenestration in a failed effort to break the quorum of the Illinois state legislature. DAVID HERBERT DONALD, LINCOLN 77 (1995); *see also* Karl Kurtz, *Legislative Walkouts Are Nothing New*, THE THICKET, Feb. 18, 2011, <http://perma.cc/M28F-K6AE>.

<sup>58</sup> This was not merely a partisan battle. "In Texas, all power derives from the Speaker. The speaker names all committees, names all chairs, approves all expenditures, all budgets, determines whether or not your bill lives or dies. When you challenge that person, you risk your career." Interview with Matt Angle, Chief of Staff for U.S. Representative Martin Frost (Aug. 6, 2015). Had the fleeing delegation not reached critical mass, individualized retribution would likely have been swift and severe.

<sup>59</sup> GERRYMANDERING, *supra* note 37 (interview with Representative Jim Dunnam, 28:38–28:39). Others in the missing delegation shared his assessment. *See, e.g.*, Armando Villafranca, *Walkout Lauded by Democrats, Blasted by GOP*, HOUSTON CHRON. (May 13, 2003), <http://perma.cc/YL43-52UH>.

<sup>60</sup> Changes to Senate rules in 1975 made it possible for Senators threatening a filibuster to force a supermajority vote on particular pieces of legislation without actually bringing other work of the Senate to a halt. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 200–06 (1997). The speaking filibusters of the past involved more personal strain and public scrutiny than the filibusters of the present, but also posed more of an obstruction to other Senate business; it is not immediately evident which, if either, is more consistent with a U.S. Senator's oath to "faithfully discharge the duties of the office." U.S. Senate, Oath of Office, <http://perma.cc/J5HF-9JYB>.

<sup>61</sup> For more on the Court's treatment of claims of partisan gerrymandering, *see* Professor Lisa Marshall Manheim's chapter on *Vieth v. Jubelirer* in this volume.

redistricting, “an excessive injection of politics is unlawful.”<sup>62</sup> At the same time, the Justices vigorously disagree about how to determine how much (or what kind) is too much, and whether courts are fit to tackle that problem in the first instance. At the moment, the uneasy truce leaves courts only theoretically available to adjudicate disputes over partisanship in redistricting. This means that there are at least some circumstances in which a legislature pursuing redistricting could engage in what the judiciary has deemed a federal constitutional violation, without the prospect of federal judicial relief.

Each Texas legislator swears an oath that he or she “will faithfully execute the duties of the office of [legislator] of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State.”<sup>63</sup> It is no trivial matter to determine when, if ever, it is appropriate to violate the first portion of this oath in order to fulfill the second, particularly when there is no practical available recourse to a dispute resolution body operating even ostensibly beyond the political process. It may be that a subsequent election campaign serves as the only check on a legislator’s determination that he or she must disempower the legislature entirely in order to prevent it from acting unconstitutionally. Of the 63 legislators who left Austin, 53 were re-elected in their next race.<sup>64</sup>

Back in 2003, the Senators were weighing the electoral and other costs of their time in Albuquerque. Among other impacts of the self-imposed exile, one Senator apparently “went weeks without seeing his newborn daughter.”<sup>65</sup> And it was becoming difficult to justify the personal strain of a month of non-vacation on the road as public attention waned, particularly with Republicans’ superior access to the capitol press corps

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<sup>62</sup> Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (plurality opinion); *see also id.* at 312 (Kennedy, J., concurring in the judgment); *id.* at 317–18, 324–26 (Stevens, J., dissenting); *id.* at 343–46 (Souter, J., dissenting); *id.* at 360–61 (Breyer, J., dissenting).

<sup>63</sup> TEX. CONST. art. XVI, § 1.

<sup>64</sup> Of the remaining ten legislators, five were defeated in primary elections, two were defeated in the general election, and three opted not to run for re-election. Information sourced from Legislative Reference Library of Texas, <http://perma.cc/YL6V-Y3R4>; Office of Sec'y of State, Race Summary Report: 2004 Democratic Primary Election, <http://perma.cc/4VCD-SW3Q>; Office of Sec'y of State, Race Summary Report: 2004 General Election, <http://perma.cc/39PL-FGL8>; Office of Sec'y of State, Race Summary Report: 2006 Democratic Party Primary Election, <http://perma.cc/FY76-42GD>.

It is not clear whether the flight was actually an issue for voters in any of these contests. The incumbents, at least, predicted limited, if any, repercussions. Angela K. Brown, *House Democrats Say Revolt Won't Hurt Re-Election Bids*, PLAINVIEW HERALD (May 17, 2003), <http://perma.cc/HWE7-ETMU>. Indeed, political ramifications may have been more pronounced for Democrats who did *not* leave Austin. Glenn Lewis, a Democratic state Representative from Ft. Worth, did not join his colleagues in Ardmore—and was, in the next election, defeated in a primary challenge by a former staffer for Martin Frost. Gromer Jeffers Jr., *Redistricting Has Helped Define State Rep. Marc Veasey's Career*, DALLAS MORNING NEWS (May 18, 2012), <http://perma.cc/4Y2K-CW7C>. Marc Veasey, the former staffer who won the seat, was also the lead plaintiff in the 2014 challenge to Texas’s voter ID law.

<sup>65</sup> BICKERSTAFF, *supra* note 28, at 199.

back home. Shirt ironing contests between state legislators in self-imposed exile do not command interest for long.<sup>66</sup>

In September, just over a month after the bolt for New Mexico, Democratic Senator John Whitmire, the longest-serving member of the Senate, declared that he had had enough, and returned to Texas. His presence would be sufficient to meet the quorum requirement. And so it was that a third special session was called on September 15, 2003.

By this point, the Democrats had exhausted their options; final negotiation over the map was almost exclusively an internal Republican battle. Two Republican state legislators from West Texas—the Speaker of the House and the chair of a key Senate committee—became embroiled in a fight over congressional districts in the area; each helped to pass a separate map in his own chamber.<sup>67</sup> Each of these maps was relatively moderate, compared to the plan that the national party leadership sought. And Washington, it seemed, just lost patience. The executive director of Tom DeLay's PAC had told his boss that “We must stress [to the senators] that a map that returns [longtime Democrats Martin] Frost, [Chet] Edwards, and [Lloyd] Doggett is unacceptable and not worth all of the time invested into this project.”<sup>68</sup> Stress was henceforth applied. By October 13, Governor Perry had signed a new redistricting bill into law. “It was unlike either of the plans passed earlier by the House and Senate.”<sup>69</sup>

### C. The New Map

The new congressional map was as controversial as its gestation process. “There is little question but that the single-minded purpose of the Texas Legislature in enacting [the map] was to gain partisan advantage,” said a federal court.<sup>70</sup> Indeed, the court noted that “[f]ormer [Republican] Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was ‘the entire motivation.’ He explained that he [was] leaving the Senate before the expiration of his term in large part out of disappointment at its partisan turn.”<sup>71</sup>

The partisan consequences of the plan were unmistakable. Recall that in 1992, with 42% of Texans voting Democratic for statewide state

<sup>66</sup> See Harold Cook, *Breaking the Quorum for Fun and Profit*, Letters from Texas, Feb. 20, 2011, <http://perma.cc/WZB7-3YTX>; Rachel Graves, *Exiled Texas 11’ Senators Draw Supporters, Well-Wishers to Albuquerque, N.M.*, HOUSTON CHRON. (Aug. 24, 2003).

<sup>67</sup> BICKERSTAFF, *supra* note 28, at 237–41.

<sup>68</sup> *Id.* at 245.

<sup>69</sup> *Id.* at 254.

<sup>70</sup> Session v. Perry, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004) (three-judge court), vacated for further consideration in light of new precedent *sub nom.* Henderson v. Perry, 543 U.S. 941 (2004).

<sup>71</sup> *Id.* at 472–73.

office, 21 Democrats and 9 Republicans were elected to the congressional delegation. Ten years later, 43% of Texans voted Democratic, on average, for statewide office; 17 Democrats and 15 Republicans were elected to Congress, though that included six incumbent Democrats from districts substantially preferring Republican (and Texas Governor) George W. Bush to Democrat Al Gore in the 2000 presidential race.<sup>72</sup> By 2004, with the implementation of the new map, the partisan transformation was remarkable. With 42% of Texans once again voting Democratic for statewide state office,<sup>73</sup> 11 Democrats and 21 Republicans were elected to the congressional delegation.<sup>74</sup>

The consequences spread beyond overall partisan composition of the delegation. The redistricting plan allegedly targeted the ten Anglo Democratic incumbents—and particularly the Anglo Democrats winning re-election in “Bush territory”—with particular force. In the eyes of these Democrats’ legal counsel, “[t]he whole enterprise was to get rid of all of the white Democrats in the state, and they pretty much did.”<sup>75</sup> Six Anglo Democrats retired or were defeated in 2004; among them, they had 78 years of seniority and included the Chief Deputy Whip and the Ranking Member of the House Rules Committee. Another member, with 24 years of experience as a Democratic incumbent, switched party affiliation. The Dallas-area district represented by Representative Martin Frost, the architect of the 1991 redistricting, was splintered into pieces of five new districts; one of the Republican members responsible for the final map allegedly noted that all of his Republican colleagues on the legislative conference committee “wanted to try to make [sure] that . . . Martin Frost could not get re-elected.”<sup>76</sup>

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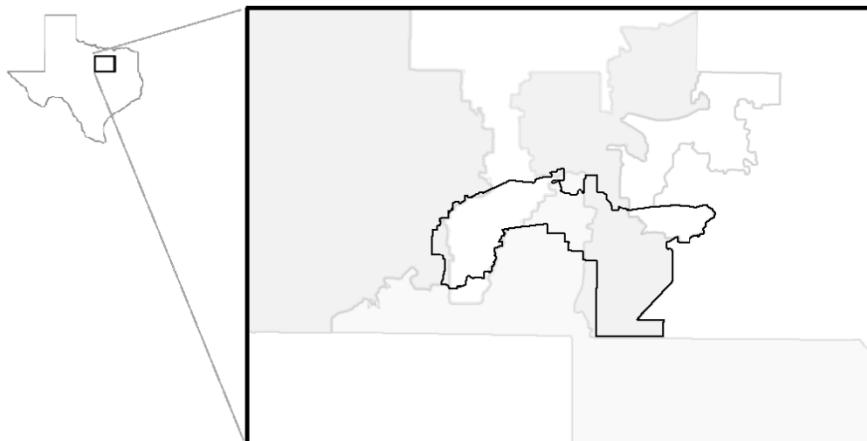
<sup>72</sup> POLIDATA, Presidential Election, 2000, Districts of the 108th Congress: District Summary, President 2000, Congress 2002, Texas (2003), <http://perma.cc/BUH4-YH8R>.

<sup>73</sup> This number reflects the two-party election results for the lone statewide race for state office in 2004—the Office of the Railroad Commissioner. The only other statewide race in 2004 was the U.S. Presidential race, with underlying partisan leanings complicated by the sizable vote for former Texas Governor George W. Bush. Office of the Sec'y of State, Race Summary Report: 2004 General Election, 11/2/2004, <http://perma.cc/PWN7-ZR8C>.

<sup>74</sup> This includes Ralph Hall, an incumbent Democrat who changed partisan affiliation to Republican in the 2004 election.

<sup>75</sup> Interview with Paul Smith, Chair, Appellate and Supreme Court Practice, Jenner & Block (July 10, 2015).

<sup>76</sup> BICKERSTAFF, *supra* note 28, at 249.



**District 24.** The central dark boundary indicates District 24 before redistricting; the other lines indicate the new districts in the area, after redistricting.

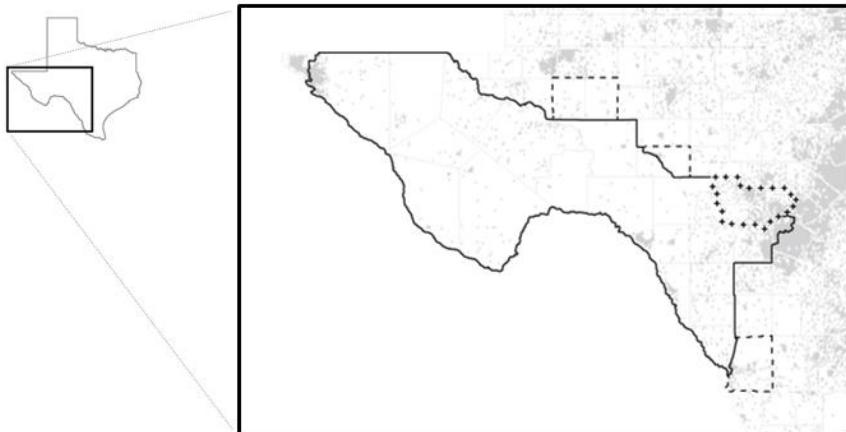
The dismembering of District 24—the district represented by Frost—had racial overtones as well. District 24 was allegedly controlled by the Dallas African-American community, although this claim was vigorously contested (including by the African-American congresswoman from a neighboring district, Representative Eddie Bernice Johnson). The district's citizen voting-age population was 49.8% Anglo, 25.7% African-American, and 20.8% Latino.<sup>77</sup> But a majority of the Democratic primary voters had been African-American, and in that district, control of the Democratic primary had meant control of the general election.<sup>78</sup>

For Latino advocates, the affront was broader. Many felt that the state's partisan haggling had been waged on their backs and at their expense, engendering little love for the institutional positions of either party. Latino outrage was focused on the south and west of the State. Before the 2003 re-redistricting, District 23 sprawled from the eastern suburbs of El Paso to the western suburbs of San Antonio, and south to the Rio Grande, across more than twenty-two counties and five hundred miles of sparsely populated mountains and plains. Latinos made up 57.5% of the district's citizen voting-age population, and they were increasingly upset with incumbent Republican Henry Bonilla; "Bonilla's support among Latinos had dropped with each successive election since

<sup>77</sup> One advocate has described the relatively even split as a "Neapolitan ice cream district." Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015).

<sup>78</sup> League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 443–44 (2006) (plurality opinion). The opposing view noted that Frost had had no challengers in the Democratic primary, and claimed that Anglo Democrats therefore did not bother to turn out in large numbers. If Frost had drawn a primary challenge, per this theory, Anglo Democrats would have turned out in greater strength, and African-Americans would not have maintained "control" of the primary results. See *Session v. Perry*, 298 F. Supp. 2d 451, 484–85 (2004) (three-judge court), *vacated for further consideration in light of new precedent sub nom. Henderson v. Perry*, 543 U.S. 941 (2004).

1996[, and in] 2002, Bonilla captured only 8% of the Latino vote.”<sup>79</sup> About 88% of non-Latinos voted for him, which was enough to squeak out a win in 2002, but with Latino participation growing (and a presidential electorate), it looked like Bonilla might not prevail in the election to come.



**District 23. The gray dots represent population in 2000. The areas bounded by dashes were cut from District 23 in the redistricting; the area bounded by plus signs was added to District 23 in redistricting.**

(Data from Population Density for Block Groups in Texas, 2000, produced by the Texas State Data Center using shapefiles supplied by ESRI.)

State legislators changed District 23 “specifically because they worried that Latinos would vote Bonilla out of office.”<sup>80</sup> The new District 23 still sprawled across the southwest, but the legislature carved out half of the population center of border town Laredo, at the southeast corner of the district, sending 100,000 people—largely Latinos—out of the district. And to equalize the overall population, the legislature replaced these voters with mostly Anglo Republicans 200 miles away, in the San Antonio suburbs to the northeast. The new district *looked* like it retained a Latino majority, with a voting-age Latino total just over 50%. But the Latino electorate dropped to 46% when accounting for citizenship.<sup>81</sup> And performance tests showed that in the new plan, “the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district.”<sup>82</sup>

<sup>79</sup> *LULAC*, 548 U.S. at 423–24 (majority opinion).

<sup>80</sup> *Id.* at 428.

<sup>81</sup> *Id.* at 424.

<sup>82</sup> *Id.* at 427.

Of the 55 African-American and Latino state legislators, 53 voted against the plan.<sup>83</sup>

### III. Legal Challenges

The political resistance of the summer of 2003 led immediately to legal resistance in the fall. The plan's first legal hurdle was the preclearance requirement of the Voting Rights Act.

#### A. *Preclearance*

The preclearance regime was often known as "Section 5" of the Voting Rights Act, though in reality it spanned several statutory sections. Jurisdictions of particular concern—"covered jurisdictions"—could not enforce any election-related change before receiving approval from the federal government. In the 2001 redistricting cycle, this special requirement applied primarily to a set of jurisdictions in the South and Southeast: jurisdictions where particularly virulent racial discrimination in the 1960s and 1970s had broad antidemocratic impact, and which had failed in the intervening years to demonstrate a record of minority engagement sufficiently improved to be released from coverage.<sup>84</sup> In 2013, the Supreme Court would strike down the coverage formula as insufficiently attuned to current conditions.<sup>85</sup> But in 2003, Texas was still firmly subject to the preclearance requirement.

Successful preclearance of an election-related change required approval by either a three-judge federal trial court in Washington, D.C., or by the U.S. Department of Justice.<sup>86</sup> Administrative preclearance through the Department of Justice was designed as a far speedier (and far less expensive) path, and as a result, the vast majority of jurisdictions submitted changes through the DOJ rather than through the court. Though jurisdictions receiving a DOJ objection to preclearance could always seek a second opinion in court, a DOJ decision to grant preclearance was not reviewable under the statute.

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<sup>83</sup> Section 5 Recommendation Memorandum: December 12, 2003 ["Preclearance Memorandum"], at 3, 5, available at <http://perma.cc/EZ5P-2Q5J>.

<sup>84</sup> 52 U.S.C. § 10303.

<sup>85</sup> *Shelby County v. Holder*, 133 S. Ct. 2612, 2630–31 (2013). Technically, the Court struck the reauthorization of the coverage formula for preclearance, which was renewed in 2006 to cover the same jurisdictions that had been covered previously. Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. García Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577 (2006), amended by Pub. L. No. 110–258, 122 Stat. 2428 (2008). The reauthorization bill that the Court deemed insufficiently attuned to current conditions was signed into law exactly one month from the date of the decision in this very Texas case, determining that the Texas legislature's action, "[taking] away the Latinos' opportunity because Latinos were about to exercise it[,] . . . bears the mark of intentional discrimination." *LULAC*, 548 U.S. at 440. For more critique of *Shelby County*, see Justin Levitt, *Section 5 As Simulacrum*, 123 YALE L.J. ONLINE 151 (2013); Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG, June 25, 2013; see also the chapter on *Shelby County* by Professor Ellen Katz in this volume.

<sup>86</sup> 52 U.S.C. § 10304.

At the time, the preclearance decision essentially rested on a jurisdiction's ability to show that its proposed electoral change would not have the effect of denying or abridging the right to vote on account of race or language minority status. This standard, known as "retrogression," meant that a change could be precleared only if it did not leave a community of minority voters worse off with respect to their "effective exercise of the electoral franchise" than they had been under the prior policy.<sup>87</sup> In June 2003 (after one group of Texas legislators had fled for Oklahoma but before the second group fled for New Mexico), the Supreme Court declared that this standard was intensely contextual, and subject to a wide variety of nuanced judgments about political efficacy. For example, the Court allowed covered jurisdictions to trade minority voters' control of a few districts for minority influence over, but not control of, a larger area—as long as the change could plausibly, in the totality of the circumstances, be interpreted as something other than a step backward.<sup>88</sup> And preclearance was warranted for any change preserving the status quo or offering an improvement, no matter how minor.

Just eight days after its new map was signed into law, Texas submitted the map to the Voting Section of the Civil Rights Division of the Department of Justice for preclearance review.<sup>89</sup> Over the few years prior, as the politically appointed "front office" of the new Administration began to exercise more control, the Voting Section had become the site of substantial conflict between career civil service staff and political appointees.<sup>90</sup> The Texas redistricting proceeding was no exception.

The law was precleared by the Department of Justice on December 19, 2003.<sup>91</sup> While objections to preclearance are accompanied by some explanation of the rationale for the decision, letters indicating that a particular change has been successfully precleared are invariably short, declarative recitals that the Attorney General does not intend to object to

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<sup>87</sup> Beer v. United States, 425 U.S. 130, 141 (1976). Technically, another prong of the statute denied preclearance to jurisdictions that *attempted* to retrogress; this provision had independent power only when a jurisdiction attempted to retrogress but failed to do so, or when the intent to retrogress was easier to prove than retrogression itself. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 332 (2000). These circumstances were, in practice, quite limited. When Congress reauthorized the preclearance regime in 2006, it clarified that the statute authorized objections to preclearance for *any* intent to discriminate against racial or language minorities, and not merely the intent to retrogress. See 52 U.S.C. § 10304(c).

<sup>88</sup> Georgia v. Ashcroft, 539 U.S. 461, 481–84 (2003). Congress responded to this decision, just as it responded to the statutory construction described *supra* note 87. In the 2006 reauthorization, Congress clarified that any change diminishing the ability on account of race or language minority status of a community to elect their preferred candidates of choice would amount to an unlawful retrogression. 52 U.S.C. § 10304(b).

<sup>89</sup> Preclearance Memorandum, *supra* note 83, at 3, 5.

<sup>90</sup> U.S. Dep't of Justice, Office of the Inspector General, A Review of the Operations of the Voting Section of the Civil Rights Division (2013), <https://perma.cc/97F4-KFPP>; U.S. Dep't of Justice, Office of the Inspector General & Office of Professional Responsibility, An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division (2008), <https://perma.cc/FEQ3-35U8>.

<sup>91</sup> Letter from Sheldon T. Bradshaw, Principal Deputy Ass't Att'y Gen., U.S. Dep't of Justice, to Geoffrey S. Connor, Tex. Sec'y of State, Dec. 19, 2003, <http://perma.cc/Y97X-BWVT>.

preclearance and that the law may therefore be enforced. The DOJ's letter informing Texas that its redistricting maps were presumptively legal was one page long, in the standard mold.

We now know that one week earlier, the career civil service staff analyzing the Texas case had vehemently disagreed. On December 12, they submitted a seventy-three-page memo to the political appointees in the "front office," explaining their recommendation to object to preclearance. Most of the time, if such disagreement exists, the world beyond the Voting Section never hears of it. But this preclearance was sufficiently controversial that the career staff memo was later leaked to the press.<sup>92</sup>

Most of the substance of the recommendation in the career civil service staff's memo focused on the apparent disconnect between the composition of the districts and their likely political performance. The staff found that when comparing the 2003 plan to its 2001 benchmark, "the number of districts in which minority voters are a majority of the [voting-age population] remains the same, and there is an increase of one district where minority voters are a majority of the citizen [voting-age population]. However, with regard to minority voters' ability to elect the candidate of their choice—the so-called 'safe' seats—there is a net reduction of two seats."<sup>93</sup> Those two seats were Districts 23 and 24. Nor did the career staff find sufficient compensation in other electoral power structures, even given the flexible approach directed by the Supreme Court.<sup>94</sup> In the eyes of the career staff, minority voters were worse off with respect to their "effective exercise of the electoral franchise" under the new plan.

The decision of the Department, however, was to grant preclearance. And under the statutory scheme, the decision to grant preclearance is not reviewable.

A decision by the Department of Justice to grant preclearance is often interpreted by the lay public as a general stamp of legal approval, but the preclearance decision does *not* serve that purpose. A decision on preclearance in 2003 was effectively a decision about retrogression under Section 5 of the Voting Rights Act, and retrogression alone. It was not, and was not intended to be, a pronouncement on legality under the Constitution, under other federal statutory provisions, or under state law. Indeed, every decision granting preclearance specifically explains that "the failure of the Attorney General to object [to preclearance] does not bar subsequent litigation to enjoin the enforcement of the [submitted] change [under other laws]."<sup>95</sup> The Texas preclearance letter dutifully

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<sup>92</sup> Dan Eggen, *Justice Staff Saw Texas Districting As Illegal*, WASH. POST (Dec. 2, 2005).

<sup>93</sup> Preclearance Memorandum, *supra* note 83, at 31.

<sup>94</sup> *Id.* at 32–33.

<sup>95</sup> 28 C.F.R. § 51.41(b).

included this caveat. And the subsequent litigation was promptly forthcoming.

### B. Everybody Sues

The first federal action did not even wait for preclearance. It was filed by a few local officials, months earlier, on October 12—the day that the legislature passed the plan and the day before the Governor signed it—in an attempt to ask the courts to enjoin further action toward making the pending bill into a law.<sup>96</sup>

It had plenty of company, even before the day was out. Seemingly everyone in Texas sued, or asked to join one of the suits already in progress. African-American individuals. Latino individuals. Anglo individuals. Community groups. Nonprofits. Federal legislators. State legislators. Political parties. Counties. Local officials. Pro se plaintiffs. Judges. Law professors. Bad men. Good men. Beautiful ladies.

In addition to these new cases, the federal court that had drawn the 2001 plan was also the locus of renewed action, as litigants in that case asked the court to prevent any interference with its 2001 order. Seven distinct suits were ultimately consolidated before a special federal trial court consisting of two district court judges and one judge from the U.S. Court of Appeals for the Fifth Circuit.<sup>97</sup> Such courts were once quite common for cases thought to be particularly controversial, but are now authorized by statute for only a few federal claims, focused largely on challenges to campaign finance provisions and statewide redistricting.<sup>98</sup> This court, sitting in Austin, attempted to manage 116 distinct individuals, organizations, and entities who became parties to the action, represented by 39 different law firms or legal institutions. And that did not even begin to count the various non-parties filing briefs as amici curiae to “assist” the court’s analysis.

As the Voting Section debated its preclearance response in December of 2003, the Austin three-judge court conducted a trial. The trial, coincidentally, ended on December 19, the same day that the Department of Justice precleared the new plan.<sup>99</sup> The court heard challenges based on

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<sup>96</sup> Complaint, *Session v. Perry*, No. 2:03-cv-00354 (E.D. Tex. Oct. 12, 2003) (three-judge court).

<sup>97</sup> The three-judge court convened for this case included Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, appointed by President Reagan; Judge T. John Ward of the U.S. District Court for the Eastern District of Texas, appointed by President Clinton; and Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas, appointed by President George H.W. Bush. Judges Higginbotham and Ward had also sat on the three-judge court tasked with drawing the congressional districts when the legislature deadlocked in 2001; Judge John H. Hannah, Jr., appointed by President Clinton, sat on the 2001 panel but not its 2003 incarnation. (Judge Hannah died of an unexpected heart attack just as the 2003 trial was set to begin.)

<sup>98</sup> 28 U.S.C. § 2284; see generally Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. REV. 101 (2008).

<sup>99</sup> In another coincidence, the trial started the day after the Supreme Court heard oral argument in *Vieth v. Jubelirer*, the partisan gerrymandering case described *infra* text

the timing of the redistricting, the partisan intent and impact of the redistricting, the racial and ethnic intent and impact of the redistricting, and a host of other related claims. And it rejected them all, finding for the state of Texas across the board.<sup>100</sup>

Plaintiffs appealed directly to the Supreme Court: this procedure, too, is different from the norm. Usually, trial-level cases are appealed to the federal courts of appeal, which are obligated to render a second opinion; if parties seek further review, the Supreme Court determines which of these cases it will hear and which it will simply ignore. By contrast, cases heard by a three-judge trial court—like the Texas redistricting case—are appealed directly to the Supreme Court, without intermediate appellate review, and without the possibility of ignoring the claim entirely.<sup>101</sup>

The Court, essentially, punted. It had earlier heard another case arising out of the 2000 redistricting cycle: a case called *Vieth v. Jubelirer*, alleging unconstitutional partisan gerrymandering in Pennsylvania's congressional districts. In the fractured *Vieth* decision, a majority decided that the courts would keep the courthouse doors open to hear claims that districts had been drawn with undue partisanship. But no more than two Justices agreed on the appropriate legal standard to adjudicate these claims.<sup>102</sup> This meant that there was still a theoretical possibility that the Court might find a redistricting map to be the unconstitutional product of undue partisanship, but no agreement on how, when, or under what circumstances. When the Texas case arrived at the Supreme Court a few months thereafter, the Court vacated the trial court opinion, and remanded for further consideration in light of *Vieth*.<sup>103</sup>

The trial court considered the matter further, yet left its opinion essentially unchanged. It reviewed only the claims of undue partisanship, and once again rejected the plaintiffs' contentions—not because the map was other than partisan, but because the court could not discern an appropriate constitutional limit for federal courts to adjudicate such claims.<sup>104</sup> The plaintiffs, again, appealed. This time, the Supreme Court took up the case in considerably more detail—and not only did it decide

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accompanying note 102; Paul Smith, one of the principal attorneys for the Texas Democrats, flew to Austin for the trial directly after arguing *Vieth* in the Supreme Court.

<sup>100</sup> *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court), *vacated for further consideration in light of new precedent sub nom. Henderson v. Perry*, 543 U.S. 941 (2004). On most issues, the three-judge court was unanimous. Judge Ward, however, dissented in one respect: he would have found a violation of the Voting Rights Act with respect to the Latino community in District 23, in southwest Texas. *Id.* at 518–22. His opinion reflects much of the analysis with which the Supreme Court ultimately agreed. See *infra* text accompanying notes 156–177.

<sup>101</sup> 28 U.S.C. § 1253.

<sup>102</sup> 541 U.S. 267 (2004). For an in-depth discussion of *Vieth* and its ramifications, see Professor Lisa Marshall Manheim's chapter in this volume.

<sup>103</sup> *Henderson v. Perry*, 543 U.S. 941 (2004).

<sup>104</sup> *Henderson v. Perry*, 399 F. Supp. 2d 756, 773 (E.D. Tex. 2005) (three-judge court).

to hear argument, but it devoted twice the normal amount of oral argument time to hear the case.

### C. Oral Argument

With 116 parties, thirty-nine entities providing legal representation, four consolidated cases, and ten distinct questions presented to the Supreme Court, oral argument involved a substantial negotiation of its own. There were claims revolving around undue partisanship, racial and ethnic vote dilution, the interaction of the two, and more; and there were animated discussions about who would argue what during the hour allotted to the plaintiffs. As one experienced Supreme Court litigator recounted, “It was the classic sort of ugly argument jostling: the worst I’ve seen. There were probably more separate . . . merits briefs than I’ve seen in any other case. There were so many different claims.”<sup>105</sup> Normally, in cases at the Supreme Court, plaintiffs—even groups of plaintiffs who strongly disagree with each other—work out among themselves how argument time should be spent. But the battle here was so intense that different groups of plaintiffs filed competing motions for divided argument, each asking the Supreme Court to divide time differently.<sup>106</sup>

It was clear that Texas would be represented by the state’s then-Solicitor General: Ted Cruz, a man already of several superlatives. Cruz was the first Latino clerk for a Supreme Court Chief Justice, the nation’s youngest state Solicitor General, and Texas’s first Latino in that position; later, in 2012, he would be elected as the junior U.S. Senator from Texas, and in 2015, he would announce a run for the White House.<sup>107</sup> At the time of the Texas redistricting case, Cruz had already argued four cases before the Court.<sup>108</sup> Gregory Garre, arguing for the Office of the U.S. Solicitor General in his thirteenth case before the Court, had clerked for Chief Justice Rehnquist five years before Cruz.<sup>109</sup> Garre used his brief argument time to support the state’s argument that the new map did not violate the Voting Rights Act.

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<sup>105</sup> Interview with Paul Smith, Chair, Appellate and Supreme Court Practice, Jenner & Block (July 10, 2015).

<sup>106</sup> Motion for Divided Argument by the Jackson Appellants, the Travis County Appellants, and the G.I. Forum Appellants, League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399 (2006) (Nos. 05–204, 05–254, 05–276, 05–439), <http://perma.cc/G2GQ-GXFQ>; Appellant LULAC’s Motion for Divided Argument, *id.*, <http://perma.cc/NQ44-F98B>. I am aware of only thirteen other instances since 2000 in which parties on the same side of a case filed competing motions to divide argument, or opposed such a motion from another party on the same side.

<sup>107</sup> Richard Dunham, *A Man of Many Contrasts, Ted Cruz Defies Easy Stereotypes*, HOUSTON CHRON. TEXAS ON THE POTOMAC (Oct. 15, 2012), <http://perma.cc/P3BF-CAMN>; Jeffrey Toobin, *The Absolutist*, NEW YORKER (June 30, 2014), <http://perma.cc/5ZV5-ERSM>; About Senator Cruz, <http://perma.cc/QMP8-BEGT> (visited July 25, 2015).

<sup>108</sup> R. Ted Cruz, OYEZ, <http://perma.cc/3NES-D52L>.

<sup>109</sup> Gregory Garre, OYEZ, <http://perma.cc/FTF5-DKSM>. Garre would later be appointed U.S. Solicitor General.

On the plaintiffs' side, two advocates eventually emerged to argue the case. Paul Smith, of the law firm Jenner & Block, was also a former Supreme Court clerk, and had at that point already argued eleven cases before the Court.<sup>110</sup> He shared a podium with Nina Perales, Regional Counsel for MALDEF. Perales was an accomplished trial lawyer, but had never argued before the Court: indeed, she had never before had an appellate argument of any kind, in either state or federal court.<sup>111</sup> Each attorney would argue different claims, but each presentation would also inevitably inform the Court's reception of the other, particularly given conflicting views of the reasons why Texas drew the lines as it did. Their practice sessions were heated, with a not insubstantial quantum of profanity. As Perales recalls, "It was like being on the Soviet Olympic figure skating team, and being told you had to skate with this guy. . . . [W]e're coming from such different perspectives, and being told that we had to argue the same side of the case was—very challenging."<sup>112</sup>

Smith was granted forty minutes to present arguments concerning partisan gerrymandering and vote dilution in the District 24 Dallas area. He also promised to advance the argument pressed by co-counsel Renea Hicks that the decision to redraw the lines in 2003 using outdated census data from three years earlier violated constitutional provisions requiring districts to be approximately the same size.<sup>113</sup> Perales had twenty minutes—half the time as Smith—to focus on discrimination against Latino voters in the south of the state. But the terrain shifted almost as soon as the argument began: within the first two minutes, Smith found himself fielding questions about south Texas. The question about the census data was shunted entirely to a moment of rebuttal.<sup>114</sup>

Cruz also faced a skeptical bench. Observers—even opponents in the case—credit Cruz with a very effective defense against the political gerrymandering claim. Texas had won in the district court with the argument that the 2003 map was merely a response to the Democrats' own partisan gerrymander of the 1990s, preserved in its essence by the court-drawn map in 2001.<sup>115</sup> And Cruz repeatedly and concisely stressed the same point before the Court, contending that the Republican map merely returned majority control to the Republican party, which was at

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<sup>110</sup> Paul M. Smith, OYEZ, <http://perma.cc/5CQU-SH2Z>.

<sup>111</sup> Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015). MALDEF has a firm tradition of trial lawyers arguing their own appeals.

<sup>112</sup> *Id.* Ms. Perales observed another anomaly with respect to the advocates: the fact that she and Ted Cruz faced off against each other in this particular case. "It was talked about as the biggest Mexican-American civil rights case of the decade . . . but it was argued by a Puerto Rican and a Cuban. There was a Latino on both sides, but [one] thing that's odd about it is that neither of us are Mexican-American." *Id.*

<sup>113</sup> For a more thorough description of these claims, see *infra* Part IV.

<sup>114</sup> Transcript of Oral Argument, League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399 (2006) (Nos. 05–204, 05–254, 05–276, 05–439), <http://perma.cc/9CC7-Y7K5>.

<sup>115</sup> See, e.g., Henderson v. Perry, 399 F. Supp. 2d 756, 767–70 (E.D. Tex. 2005) (three-judge court).

that point consistently commanding a majority in state races. Said one seasoned observer, “I was in the courtroom that day, and Cruz’s performance was one of the most impressive I’ve ever seen.”<sup>116</sup>

#### **IV. The Opinion**

When the Court’s decision arrived, under the name *League of United Latin American Citizens v. Perry*,<sup>117</sup> it turned out that Cruz had reason to call the result both a win and a loss. The Court was as fractured as District 24 had been, comprising voting coalitions that were just as fluid. Six different opinions spanned 132 pages; most of the opinions were able to attract the agreement of fellow Justices only in part. It is, perhaps, telling that even the recitation of the facts failed to command a majority of the Court.<sup>118</sup>

It would take considerably more than 132 pages to present and critique each of the prevailing and losing arguments around each of the issues presented. But there were several narrow points of agreement uniting five Justices—and these are each worth some extra focus.

##### *A. Partisan Gerrymandering*

The first area of agreement concerned the justiciability of partisan gerrymandering claims. Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer confirmed that they would “not revisit” the Court’s decision to allow litigants to keep bringing federal cases alleging that a gerrymander was unconstitutionally unduly partisan.<sup>119</sup> The agreement lasted only five sentences, three of which described the claim and prior holdings. Still, it represented a majority opinion for the Court that had not materialized in *Vieth*. The courthouse doors, at least, remained open.

The locus of agreement then shifted. A federal court had drawn lawful congressional lines in 2001; the plaintiffs here alleged that the legislature’s mid-decade decision to revisit those lines was thoroughly partisan. And a different set of five Justices—Chief Justice Roberts, and Justices Kennedy, Scalia, Thomas, and Alito—found that the plaintiffs’ partisanship theory did not suffice to require federal judicial relief on constitutional grounds.

The Justices disagreed among themselves, however, on the reason to deny relief. The Chief Justice and Justice Alito did not say much beyond asserting that the plaintiffs had not made a compelling case. Justices Scalia and Thomas reiterated their position from *Vieth* that such claims should not be heard by the courts, period.

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<sup>116</sup> Interview with Edward B. Foley, Charles W. Ebersold and Florence Whitcomb Ebersold Chair in Constitutional Law, Ohio State U. (June 5, 2015).

<sup>117</sup> 548 U.S. 399 (2006).

<sup>118</sup> *Id.* at 410–13 (opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.).

<sup>119</sup> *Id.* at 414–15 (majority opinion). See *supra* text accompanying note 102 & note 102.

Justice Kennedy, alone among these five (and over the dissents of the other Justices), engaged the merits of the theories that the plaintiffs suggested. He found nothing constitutionally impermissible in the simple fact of a legislature replacing a court-drawn map with one of its own—particularly given the inherently contested nonjudicial nature of many of the choices to be made in drawing district lines.<sup>120</sup> He seemed to accept that the Texas legislature decided to toss the court map and take up its own redistricting plan “with the sole purpose of achieving a Republican congressional majority,”<sup>121</sup> but rejected the notion that motive alone could demonstrate unconstitutionality. In addition to an unconstitutional motive, he said, plaintiffs would still need to show some sort of unconstitutional effect: a burden on their representational rights exceeding constitutional limits.<sup>122</sup> And in Justice Kennedy’s eyes, that the plaintiffs did not do—particularly since the 2003 plan seemed in part to correct an earlier Democratic gerrymander, bringing the partisan makeup of the congressional delegation more closely in line with statewide party power.<sup>123</sup>

An amicus brief submitted by respected political scientists, in line with some of the expert opinions at trial, suggested such a standard for unconstitutional effect, revolving around partisan symmetry or partisan bias.<sup>124</sup> Partisan bias is a measure of the extent to which redistricting plans favor a particular party consistently over time, such that the party is statistically likely to win more seats with a certain percentage of the vote than its opposing party would.<sup>125</sup> For example, if districts were drawn such that Republicans would be likely to win 58% of a given jurisdiction’s seats with 52% of the votes in that jurisdiction, but Democrats would be likely to win only 54% of the seats with 52% of the votes, the district’s plan would have a partisan bias favoring Republicans.<sup>126</sup> Districts drawn with partisan bias yield an inherent

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<sup>120</sup> *Id.* at 414–16 (opinion of Kennedy, J.).

<sup>121</sup> *Id.* at 417. Justice Kennedy also noted that “partisan aims did not guide every line” that the legislature drew; “the contours of some contested district lines were drawn based on more mundane and local interests.” *Id.* at 417–18. Given the juxtapositions of the two statements, it is not clear whether Justice Kennedy believed that this latter observation meant that the plaintiffs had failed to show that the legislature’s legally relevant motive was the pursuit of partisan advantage.

<sup>122</sup> *Id.* at 418.

<sup>123</sup> *Id.* at 419.

<sup>124</sup> Brief for Amici Curiae Professors Gary King et al., *LULAC* (Nos. 05–204, 05–254, 05–276, 05–439), 2006 WL 53994.

<sup>125</sup> See Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2, 8 (2007); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251–52 (1987). Partisan bias is a (proposed) measure of impact—it does not purport to explain *why* the bias exists. The intent to favor or disfavor a party will usually produce partisan bias. But depending on local political demography, other goals—like the aim to follow county lines, or keep certain communities intact—may produce partisan bias as well.

<sup>126</sup> Partisan bias is often confused with disproportion. Disproportion simply refers to a difference between the composition of the electorate and the composition of a representative body. For example, in a jurisdiction in which 52% of the voters are

structural advantage, allowing one party to gain legislative seats at a certain level of support more easily than its rivals.<sup>127</sup> That said, determining how many seats a particular party “would” win with a certain percentage of jurisdiction-wide votes entails a fair number of counterfactual assumptions. And the ability to measure this kind of structural bias itself yields no answer about levels of bias that would be permissible and those that would be unconstitutional (either on their own or when paired with a showing of partisan intent), or the theory permitting judicial determination of such a boundary line. Justice Kennedy specifically called out the political scientists’ brief, but did so to explain that asymmetry alone, in his mind, was not a sufficient measure of unconstitutional effect to decide the case.<sup>128</sup>

After *LULAC*, the issue of partisan gerrymandering remains—theoretically—justiciable. But in the federal courts, as Professor Gary King memorably put it, partisan gerrymandering has still never been “justished.”<sup>129</sup>

In addition to the basic partisan gerrymandering claim, Justices Souter and Ginsburg briefly joined Justice Kennedy in addressing a related point: the concern about the census data that Smith had promised to mention at argument. In a line of cases from the 1960s that has marked the Court’s boldest foray into adjudicating electoral disputes,<sup>130</sup> the Court has held that the Constitution requires legislative districts to be of

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Democrats, a disproportion would result if greater (or fewer) than 52% of the legislative delegation were Democrats. This sort of deviation from strictly proportional representation is likely in any system that does not set out to distribute representation proportionally by party, and all but inherent in any system that elects representatives from districts that are not perfectly homogenous by party. See Grofman & King, *supra* note 125, at 8–9. In any such system, there will be a political minority in each district—say, 42 Democrats in a 100-voter district leaning Republican—and the seat allocation resulting from an election will only proportionally represent the electorate as a whole if the number of losing voters in each district coincidentally balance each other out.

<sup>127</sup> The lack of partisan bias is known as partisan symmetry.

<sup>128</sup> *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). Several of the dissenting Justices on this point believe that the symmetry test holds more promise as a measure of unconstitutional effect, and with some generous citations, Justice Souter gamely attempted to cobble together statements of five Justices showing that “[i]nterest in exploring this notion is evident.” *Id.* at 483–84 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

<sup>129</sup> See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 204 (2003). Some states have their own state constitutional provisions that prohibit partisan gerrymandering, and some claims under those provisions have successfully struck down district maps or individual districts. See, e.g., *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So.3d 597 (Fla. 2012); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015). Litigants continue (thus far, unsuccessfully) to press claims in federal court alleging unconstitutional partisanship in the redistricting process.

<sup>130</sup> *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968). These cases are generally known under the misnomer of the “one person, one vote” cases; Chief Justice Earl Warren famously called *Baker* “the most important case of [his] tenure on the Court.” EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977). For an in-depth discussion of *Baker* and *Reynolds* and their ramifications, see the chapter on *Reynolds* by Professor Guy-Uriel Charles and Professor Luis Fuentes-Rohwer in this volume.

approximately equal population. Deviations in district size must be justified by a good reason, with larger deviations requiring substantially greater justification. In Texas, when the legislators drew districts in 2003, they used census data from 2000 to draw districts of approximately equal size. Because people are born, move, and die every day, the 2000 census data did not actually reflect real district population in 2003; because the data used in 2003 were obsolete, plaintiffs claimed that the 2003 districts were unequally populated without a good reason. That is, plaintiffs claimed that reliance on old census data to draw mid-decade districts, when the reason to redraw districts mid-decade was partisan gain, would violate the equal population principle.

The Court did not buy it. It embraced the legal fiction that the snapshot taken on April 1 of a decennial census year adequately reflects the population for the duration of the decade, at least for purposes of drawing legal districts. Otherwise, districts would have to be redrawn constantly, undermining any representational stability. Justice Kennedy was loathe to prohibit mid-decade redistricting even for partisan purposes (how else, he asked, could a legislature correct an egregious gerrymander in a decennial year?).<sup>131</sup> And he thought that legislatures redrawing lines mid-decade should be able to rely on the same fiction of durable census data that legislatures use when they redraw lines the year after the census.<sup>132</sup> Without evidence that Texas intentionally used the data lag itself to serve partisan ends, capitalizing specifically on the fact that census data was outdated to achieve a nefarious purpose, the claim was rejected.<sup>133</sup>

### B. Section 2 of the Voting Rights Act: District 24

The second major point of agreement among five Justices concerned claims of vote dilution under the Voting Rights Act. The Chief Justice, and Justices Kennedy, Alito, Scalia, and Thomas all agreed that the dismembering of the district represented by Martin Frost did not violate Section 2 of the Voting Rights Act.<sup>134</sup>

Unlike the preclearance regime discussed above,<sup>135</sup> Section 2 of the Voting Rights Act applies across the country. And unlike the preclearance regime discussed above, Section 2 does not focus solely on the comparison between an old plan and a new plan in deciding whether minorities have

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<sup>131</sup> *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.); *id.* at 422 (opinion of Kennedy, J., joined by Souter and Ginsburg, JJ.).

<sup>132</sup> *Id.* at 421–22.

<sup>133</sup> Though they did not join Justice Kennedy's opinion in this regard, the Chief Justice and Justice Alito stated that the plaintiffs had not succeeded in making a claim that the mid-decade partisan gerrymander was unconstitutional, "without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy." *Id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>134</sup> Justices Scalia and Thomas wrote separately, in an opinion far more sweeping in limiting Section 2 claims. See *infra* text accompanying note 146.

<sup>135</sup> See *supra* text accompanying notes 84–88.

been made worse off. Instead, in redistricting—deep breath—Section 2 prevents the inequitable dilution of minority communities’ voting power where alternative districts might otherwise allow minorities to maintain an effective equitable opportunity to elect candidates of choice, no matter what opportunities had been provided in the past.<sup>136</sup> There’s an awful lot of substance packed into that sentence.

Section 2 first establishes a threshold to identify where district lines might be responsible for depriving a racial or language minority community of the equal opportunity for electoral success.<sup>137</sup> Without this threshold, there is no valid claim. The first part of the threshold is that minority communities must be sufficiently large, sufficiently compact, and sufficiently politically cohesive to have a meaningful chance to win an election in a reasonable hypothetical district. This tests whether members of a minority community could elect their chosen candidates if only the lines were drawn in their favor. (If not, the Court has concluded, then district lines aren’t the primary reason for a minority community’s lack of political power.)

The second part of the threshold is that the remainder of the surrounding electorate must be sufficiently polarized to consistently defeat minority voters in the area. This tests whether the minority community *needs* the lines drawn in their favor. If minority voters coalesce around a particular candidate, but they are also joined by the other voters in the area, the Court has concluded that there is little reason to have special solicitude for the minority voters: their candidates of choice should be elected regardless. It is only when the minority community and the majority electorate have decidedly different preferences that the decision to draw particular district lines becomes pivotal.

The two tests above<sup>138</sup> are only a threshold, to determine if district lines lead to lost opportunity. But not every lost opportunity amounts to a violation of Section 2.

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<sup>136</sup> 52 U.S.C. § 10301. In addition to the lack of reference to the past, Section 2’s focus on an opportunity to elect amounts to another distinction from the section 5 preclearance regime. At least at the time that *LULAC* was decided, the touchstone of section 5 involved a practical evaluation of minority political power, including power that may not lead directly to the ability to *elect* candidates of choice. By contrast, Section 2 expressly hinges on an opportunity to *elect*. See *supra* text accompanying note 88 and note 88.

<sup>137</sup> Collectively, these threshold elements are known as “*Gingles* conditions,” after the case establishing them. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). For a much more detailed description of *Gingles*, see Professor Daniel Tokaji’s chapter in this volume.

<sup>138</sup> The *Gingles* conditions are most often presented, following the Court in *Gingles* itself, as a three-part test. “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Gingles*, 478 U.S. at 50–51. However, dividing the conditions into the two categories in the text, above, may make it easier to understand the functions that the conditions are actually performing.

The Voting Rights Act prohibits the inequitable dilution of political power on the basis of race or language minority status—and it instructs that this dilution is to be tested “in the totality of circumstances.”<sup>139</sup> That is, placing the districts in context, do they amount not just to an absence of equal opportunity, but to an unjust deprivation of equal opportunity? Courts have consistently analyzed this totality through the lens of the “Senate factors”: factors listed in the Senate Judiciary report accompanying the amendment of the Voting Rights Act in 1982.<sup>140</sup> These Senate factors include conditions like a history of official discrimination in voting or in other areas that affect the voting process, or troublesome signs of current discriminatory attitudes. In general, they amount to “danger signs” of an enhanced risk that either intentional discrimination or the legacy of such discrimination is interacting with the way that districts have been drawn to fuel the deprivation of minority opportunity.<sup>141</sup>

In addition to the factors above, courts will also consider one last step in “the totality of circumstances”: the degree to which minority communities have already achieved rough proportionality of electoral power.<sup>142</sup> That is, the final factor in the mix is whether, for example, a minority community comprising 40% of a state’s potential electorate already reliably controls about 40% (or more) of the districts.

The lack of proportionality has not been construed as a reason to *find* liability, particularly if the other factors above do not show the requisite

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<sup>139</sup> 52 U.S.C. § 10301(b).

<sup>140</sup> S. REP. NO. 97–417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205–06; accord *Gingles*, 478 U.S. at 44–45.

<sup>141</sup> Section 2, as we know it, is the product of a conversation between Congress and the Supreme Court. In 1980, the Court construed then-existing text of Section 2 to require proof of *intentional* racial or ethnic discrimination. *Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality opinion). This standard—the same as in a constitutional claim of intentional discrimination—set a demanding evidentiary threshold that is exceedingly difficult to meet in practice. Two years later, Congress amended the text of Section 2; the amendment was specifically designed to let plaintiffs challenge dilutive practices without the same degree of proof needed for a constitutional claim of discriminatory intent. See, e.g., S. REP. NO. 97–417, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205 (“The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of [sic] practice in order to establish a violation.”).

As a consequence, Section 2 as amended has often been referred to as establishing an “effects test” or a “results test.” This shorthand is an unfortunate misnomer, see *United States v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004), because it may imply that Section 2 prohibits practices with merely a disparate impact on minority voters—practices that happen to affect voters of different races or ethnicities disproportionately. Section 2 has not been construed in such a manner. Instead, based largely on the text’s reference to the totality of the circumstances, courts have generally insisted on some sort of tie to intentional discrimination, past or present, or the enhanced risk of such discrimination. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUMIA L. REV. 2143, 2164–67 (2015) (reviewing courts’ varying interpretations of the totality of circumstances, and concluding that though courts may differ in the particulars, all seem to require some sort of tie to intentional discrimination).

<sup>142</sup> *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *Johnson v. De Grandy*, 512 U.S. 997, 1013–15 (1994).

“danger signs.” That is, if there are no other danger signs, the simple fact that 40% of the voters may control only 20% of the districts is not alone a violation of the Voting Rights Act. But the presence of proportionality may be a reason to *deny* liability—to find that, all in all, there is no unlawful dilution. Courts have been reluctant to find that the absence of an incremental minority-controlled district denies minority voters “equal electoral opportunity” when those voters reliably control districts “in substantial proportion to the minority’s share of voting age population.”<sup>143</sup> Imagine that 40% of a state’s voters already reliably control 60% of the districts: it is not particularly intuitive to say that those voters’ opportunities have been “diluted” by the way the lines have been drawn.

If that seems like a lot to consider, it’s because it *is* a lot to consider. Section 2 of the Voting Rights Act is an enormously powerful vehicle for combating political structures that inequitably deny opportunity on the basis of race or ethnicity, but only under certain circumstances. Each of the factors above—the threshold conditions and the danger signs—must be rigorously proven, with demographic, electoral, and historical data and an ample serving of local context.<sup>144</sup> The establishment of a violation “depends upon a searching practical evaluation of the past and present reality,” connected to “an intensely local appraisal of the design and impact of the contested electoral mechanisms.”<sup>145</sup> These cases are intensely fact-specific, and hard to win.

Back in Texas, the case proved too hard to win in the Dallas area, where Martin Frost had been the incumbent. Five Justices did not believe that the “searching practical evaluation” required by Section 2 amounted to a violation with respect to the 2003 gutting of District 24.

Justices Scalia and Thomas threw up their hands at the whole of Section 2 as applied to redistricting. Both had expressed, years earlier, that the Voting Rights Act should be construed to address barriers to the mechanical casting and counting of a ballot, but not to the apportionment of political power contained in a redistricting challenge.<sup>146</sup> They repeated

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<sup>143</sup> *De Grandy*, 512 U.S. at 1013.

<sup>144</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (emphasizing that a State may not “assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

<sup>145</sup> *Gingles*, 478 U.S. at 79 (quoting S. REP. NO. 97-417, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 208).

<sup>146</sup> *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J., concurring in the judgment). Justice Thomas’s concurrence in *Holder* is a lengthy exposition of political theory, and worth a careful read. In many ways, it follows in the tradition of Justice Frankfurter’s intriguing warning about the Court joining the “political thicket” by engaging redistricting claims. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion), overruled by *Baker v. Carr*, 369 U.S. 186 (1962).

But whatever the interest of Justice Thomas’s concurrence as a matter of political theory, it is at best an unusual approach to statutory interpretation. The Court applied the Voting Rights Act to redistricting claims in 1969, *see Allen v. State Board of Elections*, 393 U.S. 544 (1969), and in numerous amendments of the Act since (including amendments

their objection here, claiming that the plaintiffs had failed to prove a violation because Section 2 simply does not apply to redistricting.

Justice Kennedy, in an opinion joined by the Chief Justice and Justice Alito, was less sweeping. His opinion—the controlling opinion for the Court because it was the narrowest in scope—was based more on the local facts than on a new construction of the law. These Justices relied heavily on the trial court’s finding that African-Americans had not proven that they were deprived of an effective opportunity to elect candidates of their choice.<sup>147</sup> Specifically, African-Americans had claimed that their votes were diluted in part because the new plan did not have a district like District 24. The trial court, however, found that African-Americans had not proven that a district like District 24 would give them an effective opportunity to elect candidates of their choice. Indeed, the Justices found that African-Americans had not proven that they ever *had* an effective opportunity to elect candidates of their choice in the old District 24. Martin Frost had represented the district for so long that there had been no opposition in the Democratic primary for the last twenty years. The fact that African-Americans had voted for Frost could have meant that he was their favored candidate.<sup>148</sup> But it also might have meant that African-Americans in the area never had the numbers to put up a viable challenger, and settled for second-best. The trial court decided the latter, and the Supreme Court saw insufficient reason to overturn that finding.<sup>149</sup>

The Court also declined to open Section 2 to claims that a group’s votes had been diluted based on a deprivation of political influence beyond the opportunity to elect candidates. These sorts of “influence districts” describe areas in which a minority community may not be able to control an election outright, but is nevertheless an important factor in the outcome. In District 24, even if African-Americans had not controlled

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explicitly responding to other judicial decisions), Congress never sought to modify the Act’s application to redistricting. Indeed, Congress appeared to embrace the Court’s interpretation. Legislative history confirms that the embrace was not accidental. *See Brief of Historians and Social Scientists as Amici Curiae in Support of Respondents at 15–17*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12–96). Normally, this sort of Congressional activity is treated as an adoption of the precedent that has not been addressed—an expression that the judicial construction of the statute in fact reflects Congressional understanding. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . .”).

<sup>147</sup> *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 444 (2006) (opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.).

<sup>148</sup> The touchstone of assessing whether a candidate is the preferred candidate of a minority community is the measurable preference of *that community*. A candidate’s race is not irrelevant in assessing this: as one court memorably put it, the Voting Rights Act is not satisfied when “[c]andidates favored by blacks can win, but only if the candidates are white.” *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court). On the other hand, a candidate’s race is also not a certain reflection of the community’s preferences. An Anglo candidate may be the preferred candidate of a minority community, and—as in Representative Bonilla’s case, *see supra* text accompanying note 79—a minority candidate may not be the preferred candidate of a minority community.

<sup>149</sup> *LULAC*, 548 U.S. at 444.

the election, they had certainly influenced it to a substantial degree. The plaintiffs claimed that a deprivation of that influence was unlawful.

The Court disagreed. It said that without the ability to control an election outright, such claims were not within the scope of the relevant piece of the statute.<sup>150</sup> “If [S]ection 2 were interpreted to protect this kind of influence,” wrote Justice Kennedy, “it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”<sup>151</sup> Claims limited to the ability to *elect* candidates of choice make Section 2 responsive to minority communities of substantial size, and serve to alert state decisionmakers to the locations of potential liability. The alternative would render each and every redrawing of district lines susceptible to a claim that it abridged a relatively small minority group’s political power from what that group’s power should otherwise have been. And beyond the quantity of claims, the substantive standard raised concerns as well: in an action based on the dilution of influence, it would be quite difficult to determine *what* the hypothetical allocation of power, short of winning an election, “should” have been. For Justice Kennedy, who has recognized the occasional necessity for race-conscious action but betrays discomfort each time the necessity arises,<sup>152</sup> a theory allowing relief under the Voting Rights Act based on influence alone was a theoretical step too far.<sup>153</sup>

### C. Section 2 of the Voting Rights Act: District 23

The third point of agreement among five Justices was also focused on Section 2, but concerned a different coalition of Justices and a different congressional district. Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer in a single opinion for a Court majority, held that the shift to Representative Bonilla’s sprawling district in south Texas *did* violate Section 2 of the Voting Rights Act.

This was the claim raised at the Court by Nina Perales, in her first appellate argument of any kind—and the only claim that plaintiffs would win. At trial, she had explained to the court that litigating this case

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<sup>150</sup> In addition to the theoretical concerns expressed below, the Court also pointed to the statutory text. Section 2 prohibits practices that give racial or language minorities “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b). Justice Kennedy specifically highlighted the focus on “elect[ing]” representatives. He did not explain the role of the statute’s reference to participation in the political process. *LULAC*, 548 U.S. at 445–46 (opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.).

<sup>151</sup> *Id.* at 446.

<sup>152</sup> See, e.g., *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787–93, 796–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>153</sup> Indeed, three years later, the Court determined that in order to be sufficiently large to have a meaningful opportunity to elect a candidate of choice—one of the threshold conditions for bringing a redistricting claim under Section 2 of the Voting Rights Act, *see supra* text accompanying note 137—the relevant minority community had to comprise at least 50% of a reasonably-sized district’s electorate. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

was like driving down I-35 in a very small car with a semi on either side. . . . There's nothing like being in a tiny car squished between two tractor-trailers. You just have to put your foot on the gas and go. The two tractor-trailers were the Republican party and the Democratic party, who were both working for their own purposes, and neither one could even see the small car, which was the interest of the minority voters in all of this.<sup>154</sup>

The Latino plaintiffs felt no more prominent on appeal. Perales recalled:

As we went toward the Supreme Court, all the reporters wanted to cover was Democrat v. Republican. I remember someone asking me, 'What are you doing here at the Supreme Court?' The whole story was about the Republican gerrymander of Tom Delay. Every story, every paper, every blog, had the words Republican, gerrymander, Tom Delay. It was like we were invisible. . . . And it was so typical of the way people continue to think about redistricting, as a bunch of people with Rs on their T-shirts and a bunch of people with Ds on their T-shirts—and they never get the real point of the struggle.<sup>155</sup>

At least in this case, five Justices apparently "got" it. Indeed, given the Court's description, a ruling under the Voting Rights Act seemed to be the product of considerable judicial restraint. The unmistakable tenor of this part of the opinion sounds much like the predicate for a constitutional finding of intentional discrimination. At oral argument, Justice Kennedy had wondered why the state's tactics in south Texas should not be considered "an affront and an insult"<sup>156</sup>—and the opinion reads as if he were both affronted and insulted. "The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo,"<sup>157</sup> the Court's majority wrote. And it continued:

Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. . . . The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-

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<sup>154</sup> Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015); *see also* Transcript of Bench Trial at 10, *Session v. Perry*, No. 2:03-cv-00354, 298 F. Supp. 2d 451 (E.D. Tex. Dec. 11, 2003).

<sup>155</sup> Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015).

<sup>156</sup> Transcript of Oral Argument at 76, *LULAC* (Nos. 05–204, 05–254, 05–276, 05–439), <http://perma.cc/9CC7-Y7K5>.

<sup>157</sup> *LULAC*, 548 U.S. at 440 (majority opinion).

age majority (without a citizen voting age majority) for political reasons.<sup>158</sup>

“In essence,” said the Court, “the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”<sup>159</sup>

Yet despite the strong language above, the Court veered away from a holding under the Equal Protection Clause. Instead, it found for the Latino plaintiffs under the Voting Rights Act. This forbearance might have been the doctrine of constitutional avoidance at work: because Congress can amend statutes in the wake of an unfavorable statutory decision, but only the Court can correct a constitutional holding, the Court generally “will not decide a constitutional question if there is some other ground upon which to dispose of the case.”<sup>160</sup> Or the forbearance might have been based on the Justices’ reluctance to impose the heavy brand of intentional racial or ethnic discrimination on a state.

Or the forbearance might have been based on the fact that proving a constitutional claim on the basis of race or ethnicity in the political arena can be both complicated and messy. Equal protection doctrine would most likely have required the plaintiffs to prove that the Texas legislature drew District 23 “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon” Latinos.<sup>161</sup> This standard can be tricky, and may be best explained by the *Feeney* case that set the standard. *Feeney* involved a Massachusetts civil service preference for veterans, challenged in the 1970s, when 98% of veterans in the state were male.<sup>162</sup> The Court said that it would apply heightened scrutiny if the Massachusetts law were aimed at men (“because of”), but not if it was aimed at veterans, who happened to be almost entirely men (“in spite of”).

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<sup>158</sup> *Id.* at 441.

<sup>159</sup> *Id.* at 440.

<sup>160</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (internal quotation marks and citation omitted); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>161</sup> *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Under a line of cases from the same period, districts drawn intentionally to harm a racial or ethnic minority were struck down if that impermissible motive was merely one of several but-for factors driving the district lines. See *Rogers v. Lodge*, 458 U.S. 613, 616–18 (1982); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). (If the impermissible motive were not a but-for factor—if the districts would have been drawn the same way even without the discriminatory intent—the discrimination would not have “caused” the districts, and the districts would stand. *Vill. of Arlington Heights*, 429 U.S. at 270 n.21.) Later, the Court developed an “analytically distinct” equal protection claim subjecting districts to strict scrutiny even without an intent to harm a racial or ethnic minority, but only if race or ethnicity was the *predominant* explanation for the location of the lines that were drawn, and not merely one of several causal factors. *Miller v. Johnson*, 515 U.S. 900, 911, 916–17 (1995). See also *LULAC*, 548 U.S. at 513–14 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., concurring in the judgment in part and dissenting in part) (articulating the distinction).

<sup>162</sup> *Feeney*, 442 U.S. at 270.

Translated to Texas, a successful equal protection claim would depend on proof that the Texas legislature, at least in part, drew District 23 aiming at Latinos (“because of”), and not that it drew District 23 aiming at a different group, who happened to be Latinos (“in spite of”). To be clear, if the legislature targeted Latinos in the area because they were Latinos, that would be a constitutional violation. And if the legislature targeted Latinos in the area because they were readily identifiable reliable Democrats, but chose to get at Democrats *by targeting Latinos*, that too would be a constitutional violation.<sup>163</sup> But if the legislature targeted Democrats in the area, who just happened to be Latinos, heightened constitutional scrutiny has not been forthcoming.<sup>164</sup> When a racial or ethnic minority community is highly politically cohesive, and there are few Anglo fellow partisans in the area to serve as a comparison, distinguishing a racial motive from a political one can be . . . difficult.<sup>165</sup> Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, credited the trial court’s finding that the motivation for dividing Laredo was politics and not race.<sup>166</sup> The majority ducked.<sup>167</sup>

The majority did not directly confront the intentional discrimination claim because it instead found a violation of the Voting Rights Act, which would supply relief to the same Latino constituency in south Texas. The Court determined that this Latino community was sufficiently large and concentrated to be able to control elections in a reasonable district, if given the opportunity. And it found that voting was highly polarized along ethnic lines—based on demonstrated voting patterns in the area, Latino voters strongly preferred one set of candidates and non-Latino (mostly Anglo) voters strongly preferred a different set, with the Anglo majority able to regularly defeat the Latino community’s preferred

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<sup>163</sup> A decision to target Latinos need not be dependent on racial animus or hatred, and may instead be based on an entirely different, even benign, “ultimate” motive. As Judge Kozinski, of the Ninth Circuit, has explained:

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza v. County of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

<sup>164</sup> And it does not appear to be forthcoming until the Court works through a standard for a justiciable partisan gerrymander. *See supra* Part IV.A.

<sup>165</sup> Cf. Easley v. Cromartie, 532 U.S. 234 (2001) (discussing whether race or politics “predominated” in the drawing of a district plan, as described *supra* note 161).

<sup>166</sup> *LULAC*, 548 U.S. at 514–17 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., concurring in the judgment in part and dissenting in part).

<sup>167</sup> *Id.* at 442 (majority opinion).

candidates if the districts were not specifically designed for Latino electoral opportunity.<sup>168</sup>

Moreover, in a state with Texas's "long, well-documented history of discrimination"<sup>169</sup>—and the present political context<sup>170</sup>—the Court found that the totality of the circumstances favored a finding that the Latino electorate's votes were unduly diluted. And in the final check for rough proportionality,<sup>171</sup> Latinos comprised 22% of the state's citizen voting-age population, but had a reliable opportunity to elect candidates of choice in only five of the 31 other districts—16% of the total, without District 23.<sup>172</sup> The Latino community had not already achieved equal opportunity to elect candidates of choice through other districts in the state. The Latino voters of District 23 were due.

The state countered by claiming that whatever obligation it had in the area around District 23, it had remedied any problem by offering a compensating Latino-majority district elsewhere.<sup>173</sup> Specifically, the 2003 plan created a new District 25, described as a "bacon strip" that stretched from the population center in Austin south to the population center in McAllen, at the Rio Grande and the Mexican border. Within District 25, 55% of the citizen voting-age population was Latino, and voting was just as polarized along ethnic lines there as it was along the southwest border.<sup>174</sup> Texas claimed that if the Voting Rights Act required an incremental district of Latino control, it had provided that district in District 25 instead of District 23.

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<sup>168</sup> *Id.* at 427.

<sup>169</sup> *Id.* at 439 (internal quotation marks omitted).

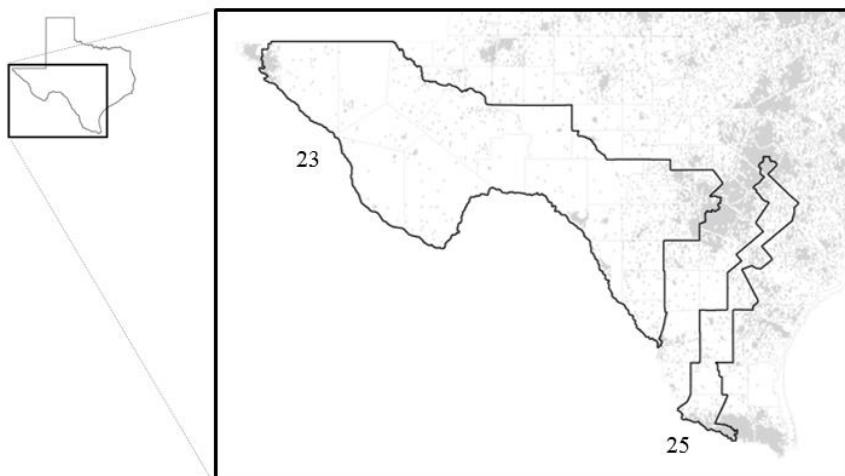
<sup>170</sup> See *supra* text accompanying notes 156–159.

<sup>171</sup> See *supra* text accompanying notes 142–143.

<sup>172</sup> *LULAC*, 548 U.S. at 438. Earlier cases had left an ambiguity about whether the appropriate measure of proportionality—to determine whether a minority group had already achieved an equitable opportunity to elect candidates of choice, even without the additional district claimed—was regional or jurisdiction-wide. See *Johnson v. De Grandy*, 512 U.S. 997, 1014–17, 1021–22 (1994). The *LULAC* Court emphatically clarified that the appropriate reference is the jurisdiction as a whole. If the final proportionality check is designed to test whether a minority community's vote has been diluted in elections for city council, or county commission, or state representative, or Congress, then it makes sense to consider the proportion of elections to the whole governing body that the minority already controls, rather than just a subset. *LULAC*, 548 U.S. at 437–38.

<sup>173</sup> Six of 32 districts would have amounted to 19% of the total delegation—rough proportionality, perhaps, but a lot more rough than seven of the 32 districts, or 22%. One of the litigants did present a plan with seven majority-Latino districts, but the trial court determined that the districts were not reasonably compact.

<sup>174</sup> *LULAC*, 548 U.S. at 493–94, 500–01 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also Session v. Perry*, 298 F. Supp. 2d 451, 492, 503–04 (E.D. Tex. 2004) (three-judge court), vacated for further consideration in light of new precedent *sub nom. Henderson v. Perry*, 543 U.S. 941 (2004).



**Districts 23 and 25, after redistricting. The gray dots represent population in 2000.**

(Data from Population Density for Block Groups in Texas, 2000, produced by the Texas State Data Center using shapefiles supplied by ESRI.)

There is a conflict at the heart of voting rights law that current jurisprudence occasionally acknowledges but more consistently elides. The cases are framed firmly in terms of the rights of individual citizens, and the statutory predicate for liability is premised firmly on an intensely localized political assessment. And yet the cases also inevitably turn on assessments of broader group equity in determining whether a particular local set of voters' rights have been "diluted."<sup>175</sup> It makes no sense to think of one individual's vote as "diluted" without reference to a broader, similarly situated group of which he or she is a part—and without reference to a group of people who are *not* similarly situated that is broader still. This, in turn, requires some theory of what makes the voters in question similarly situated. The notion of rough proportionality mentioned above shows this conflict in high relief: a specific local community of voters may have no claim for relief under Section 2 if sufficient numbers of *other* voters of similar race or ethnicity, elsewhere in the jurisdiction, control their own political destiny.<sup>176</sup> Which means that a jurisdiction may sometimes avoid liability to one group of voters by providing control of a district to racial or ethnic "kin" elsewhere.

In *LULAC*, the Court stressed a caveat to this proposition. It held that a state may "offset" the absence of an opportunity district required by Section 2 by drawing a second district elsewhere, but only if the voters of that alternative "offset" district would have a viable statutory claim as

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<sup>175</sup> See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–67, 1680–85 (2001).

<sup>176</sup> See *id.* at 1689–90.

well.<sup>177</sup> That is, if voters in one area would have a viable Section 2 claim but are denied an appropriate district, a state is not free to justify the deprivation by drawing a district for other voters who would *not* have a viable Section 2 claim of their own.

Texas's new District 25, said the Court, did not respond to a local Section 2 need. It did not cure any local deficiency under the Voting Rights Act, and was therefore no substitute for the absence of a functioning Latino-controlled District 23. District 25 had a majority of Latino voting-age citizens, and voting in and around District 25 was polarized. But the minority population of District 25 was not sufficiently "compact" to justify liability under the Voting Rights Act. Without this compactness, the minority voters in District 25 could not have prevailed on a Voting Rights Act claim—and as a result, the state could not use the district to "offset" a violation elsewhere.

#### *D. "Compactness"*

This notion of "compactness" is one of the most significant facets of *LULAC*. And it requires some unpacking.

Most observers have an intuitive sense of "compactness" when it comes to redistricting. A district is more compact when the parts or people of the district are closer together, and less compact when the parts or people are farther apart.<sup>178</sup> Some also believe that a district gets less compact as it has more contorted boundaries and more tendrils (even if the district is quite small and the people are quite close). But that rough intuition, revolving approximately around a set of more favored and less favored shapes, is about as much consensus as exists about what the term really means. Political scientists have developed more than thirty-six different ways to measure how compact a district is, in local context or removed from local context, including measures that lead to different conclusions about the same district.<sup>179</sup> And when the term appears in statutory or constitutional text, it is usually undefined.<sup>180</sup>

The lack of definition is not new. Like most redistricting concepts, the notion of compactness appears primarily in state law, not federal

<sup>177</sup> *LULAC*, 548 U.S. at 429–30 (majority opinion); see also *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 917 (1996).

<sup>178</sup> Generally, compactness is taken to refer to a district's shape on a map, though some scholars (and at least one state) think about the concept in terms of population dispersion. See, e.g., CAL. CONST. art. XXI, § 2(d)(5) ("[D]istricts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population."). Courts will occasionally refer to certain popular measures of compactness in the course of an opinion—usually without justifying that measure over others, and without too much reliance on the measure as a strict test for legality.

<sup>179</sup> Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 165 (1998).

<sup>180</sup> Thirty-two states have constitutional provisions or statutes requiring that their state legislative districts be compact (only thirteen have similar provisions for congressional districts). In only four of these states do the provisions further define what the term means or how it should be evaluated. See CAL. CONST. art. XXI, § 2(d)(5); COLO. CONST. art. V, § 47; IOWA CODE § 42.4(4); MICH. COMP. L. §§ 3.63(c)(vii); 4.261(j).

law.<sup>181</sup> The first references in state law to district compactness cropped up in the middle of the nineteenth century, requiring that districts be “compact” or “as compact as practicable,” without more;<sup>182</sup> the earliest cases construing these provisions approved the compactness of most every district map as within legislative discretion (or declared the issue nonjusticiable).<sup>183</sup> Perhaps early drafters thought additional definition unnecessary: the building blocks for early districts were usually whole counties (and occasionally towns), most of which were themselves more or less regular in shape.<sup>184</sup> After cases in the 1960s required district populations to be approximately equal, district lines sliced through counties and towns more often, and became more irregular. Yet courts mostly continued to leave the concept undefined, and mostly gave legislative maps the benefit of any doubt.

And so, for about a hundred years, compactness served as a vague, largely hortatory, and rarely enforced guideline for drawing state legislative districts in about half of the country—and for drawing congressional districts in just a handful of states.<sup>185</sup>

Then, in 1986, “compactness” suddenly became quite important nationwide, with direct ramifications for Texans in 2003. In *Thornburg*

<sup>181</sup> From 1901–1929, Congress required congressional districts to be compact, without further explanation. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734; Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13, 14. The requirement then unceremoniously vanished. Wood v. Broom, 287 U.S. 1 (1932).

<sup>182</sup> The earliest such provision of which I am aware is in New York’s 1846 state constitutional provision for designing judicial districts. N.Y. CONST. art. VI, § 4 (1846). The earliest pertaining to state legislative districts seem to come from Wisconsin, WIS. CONST. art. IV, § 4 (1848); the earliest for congressional districts seems to come from Virginia, VA. CONST. art. IV, § 14 (1851). Kentucky’s state constitution in this period is rare in its specificity: when a city merited multiple representatives, state law required that it be divided into contiguous squares, “so as to make the most compact form.” KY. CONST. art. II, § 5 (1850).

<sup>183</sup> See, e.g., *Wise v. Bigger*, 79 Va. 269, 282 (1884); *Fletcher v. Tuttle*, 37 N.E. 683, 689 (Ill. 1894); *Ohio ex rel. Robeson v. Jacobi*, 39 N.E. 317, 318 (Ohio 1894). Wisconsin ex rel. *Lamb v. Cunningham*, 53 N.W. 35, 58 (Wis. 1892), striking a district for lack of compactness, is in this sense a rare exception.

<sup>184</sup> See Altman, *supra* note 179, at 180. Municipal borders frequently became less regular with substantial annexation. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (citing what had by then become Connecticut’s “oddly shaped” town lines).

<sup>185</sup> See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) (“A number of state statutes and constitutions require districts to be compact and contiguous. These standards have been of limited utility because they have not been defined and applied with rigor and precision.”). After the Supreme Court’s equal representation cases in the 1960s, a state’s desire to keep districts compact, in accord with state law, was occasionally offered as a permissible reason to maintain districts with relatively minimal population discrepancies. See *Reynolds v. Sims*, 377 U.S. 533, 578–59 (1964); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); but see *Kirkpatrick v. Preisler*, 394 U.S. 526, 535–36 (1969) (rejecting Missouri’s attempt to defend population variances in congressional districts based solely on compactness for aesthetic appearance). And courts occasionally turned to the idea when called upon to draw districts of their own (as remedies for some other violation), even in states where compactness was not a requirement of state law. See, e.g., *Connor v. Finch*, 431 U.S. 407, 414 (1977) (reviewing the judicial drawing of Mississippi legislative districts).

v. *Gingles*,<sup>186</sup> the Supreme Court interpreted new amendments to the Voting Rights Act for the first time. African-American plaintiffs alleged that North Carolina's multimember districts unlawfully diluted the votes of the African-American community. In these multimember districts, all of the voters of Wake County could cast a vote for each of Wake County's six representatives. If African-Americans constituted a distinct minority of Wake County's voters with common preferences different from those of the rest of the community, they would likely be outvoted for every single seat in every election. The plaintiffs claimed that, given the local political context, smaller districts, each with its own representative, should have been drawn instead. These "single-member" districts would give African-American voters a chance to elect representatives of their own choice.

The Court set up a threshold for making such a claim under Section 2 of the Voting Rights Act: the "*Gingles* conditions," mentioned above.<sup>187</sup> This *Gingles* threshold was designed to test whether the district structure was causing a deprivation on the basis of race.

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.<sup>188</sup>

As a rough test for causation (and also of remedy) based on the language of the statute, most of the *Gingles* threshold is entirely sensible. If the minority group is not sufficiently large, the *district structure* is not creating cognizable difficulties on the basis of race.<sup>189</sup> If the minority group is large but not sufficiently politically cohesive, the district structure is not creating cognizable difficulties *on the basis of race*.<sup>190</sup> And

<sup>186</sup> 478 U.S. 30 (1986). For a much more extensive discussion of *Gingles*, see Professor Daniel Tokaji's chapter in this volume.

<sup>187</sup> See *supra* text accompanying note 137.

<sup>188</sup> *Gingles*, 478 U.S. at 50–51.

<sup>189</sup> Imagine, for example, a minority "community" of just four voters. Given requirements that districts have approximately equal population, with hundreds of thousands of people in a congressional district, no district lines would allow that four-person "community" the ability to elect a candidate of their choice, no matter how the districts were drawn.

<sup>190</sup> No districts would help "the" minority community elect a candidate of their choice, because the minority "community" is not really a unified community at all, and does not agree on a candidate to favor.

At least, that's the theory. The Court did not consider communities that could be seen as externally cohesive and internally non-cohesive. Consider, for example, a localized Latino minority that prefers candidates with distinct immigration policies, but that is otherwise split, say between parties, on other social or fiscal issues. That group might well be politically cohesive when considered in contrast to the local majority population, but could well look internally divided—even if, given the opportunity, they might prioritize the issues of cohesion over the issues of division. If the important facet of the *Gingles* conditions is the purpose served by the test, members of such a group could well be harmed on the basis of race by a district structure that diluted the distinct aspects of their political preferences.

if the minority group is large and cohesive and winning elections most of the time, the district structure is not creating *cognizable difficulties* on the basis of race.

But there is one part of the Court's test that is in this respect a substantial anomaly: the atextual construction of a federal statute to require, before a minority group may contest the dilutive nature of a district structure, that the group be "sufficiently . . . geographically compact" to constitute a majority in a single-member district. What, exactly, does it mean for a population to be "sufficiently" geographically compact to be a majority in a district?<sup>191</sup> It is like saying that a population must be sufficiently tall to be a majority in a district, or have a sufficiently appropriate set of occupations to be a majority in a district. At the time of *Gingles*, North Carolina had no requirement that districts be compact.<sup>192</sup> Neither did many other states. Neither did federal law.<sup>193</sup> North Carolina districts could legally be fat or skinny or spindly, or stretch from one end of the state to the other. Population within the districts could legally do the same. Whatever the Court was imagining as a constraint, it did not come from an existing legal mandate.

This threshold requirement that a population be compact to benefit from Section 2 of the Voting Rights Act makes sense only if it is assumed, as a baseline, that districts will be compact. That is, the *Gingles* compactness requirement appears to import into a statutory provision that does not mention compactness the Justices' own normative preconception about what districts *should* attempt to do.

On this understanding, the *Gingles* compactness requirement is really a normative preconception about what representation should attempt to achieve. Section 2 of the Voting Rights Act corrects "abridgment" or "dilution." Dilution is necessarily an aberration from some normative baseline: you can't know whether something is "diluted" or "abridged" until you know what it should be. And the Court determined that at least for purposes of Section 2, sizable and polarized but noncompact groups of minorities do not meet the relevant

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<sup>191</sup> Note that this is not a requirement under the Voting Rights Act that a potential remedial district be compact, but that a minority *population* be compact to seek relief in the first place. The two are often conflated, but are quite distinct (and respond to distinct concerns).

<sup>192</sup> State law at the time purported to require following county lines; most states did likewise, because states had generally constructed districts of county "building blocks." However, the 1960s cases requiring equal population as a federal constitutional mandate forced states—including North Carolina—to move away from county integrity, at least where malapportioned districts were the consequence. Moreover, North Carolina law permitted districts to be drawn based on decidedly noncompact aggregations of counties. To the extent that state law incorporated a compactness principle, it came only years later. See *Stephenson v. Bartlett*, 562 S.E.2d 377, 397 (N.C. 2002).

<sup>193</sup> The Court has consistently refused to find that compactness is a federal constitutional requirement, to impose on states against their will. *See, e.g., White v. Weiser*, 412 U.S. 783, 796 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

representational norm.<sup>194</sup> The statute speaks only of race or language minority status and equal political opportunity—but the Court has determined that minority voters in noncompact areas have not been deprived of any district that “should” exist and so cannot claim that the extent of their representation has been diluted.<sup>195</sup>

To be clear, there are legitimate reasons why a Justice might prefer to design representation around compact communities.<sup>196</sup> The point is not that the choice is good or bad, but that it represents a judicial choice, not compelled by or inherent in the statute and not dictated by state consensus. The choice was ushered in with no relevant discussion in the case.<sup>197</sup> In the law of democracy, these sorts of un- or underexamined judicial policy choices are everywhere.

The compactness prong of a Section 2 claim is often conflated with a different use of compactness in a related arena. In a controversial set of cases beginning in the late 1980s, the Court determined that the federal Constitution’s Equal Protection Clause requires judicial skepticism when the government intentionally uses race, whether to hurt minorities, help minorities, or neither.<sup>198</sup> In redistricting, based largely on a line of cases following *Shaw v. Reno*, if race or ethnicity is the predominant reason for drawing a particular set of lines, the lines are subject to strict scrutiny.<sup>199</sup>

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<sup>194</sup> It is true that—particularly before the equal population cases—most districts were once relatively compact, on several different measures. See Altman, *supra* note 179, at 181–86. But compactness for purposes of Section 2 is not about a norm in an *empirical* sense—it is not a determination to grant or withhold relief based on what is currently or historically usual. Even when most or all of a state’s existing districts are wildly noncompact—showing that the state has no aversion to noncompact districts when it wishes—a minority community may not bring a Section 2 claim if that community is dispersed. See Gerken, *supra* note 175, at 1707 (noting the anomaly).

<sup>195</sup> Cf. Gerken, *supra* note 175, at 1706–07 (recognizing that the compactness inquiry is not inherent in the nature of a dilution injury).

<sup>196</sup> For example, more compact communities may be in the same media market, and easier for candidates to reach by mass media or door-to-door travel. (In the dismantling of segregated schools, courts were instructed to construct “compact” school districts to facilitate kids’ travel to school. See *Brown v. Bd. of Educ.* (Brown II), 349 U.S. 294, 300 (1955).) Of course, even in 1986, the extent to which geography actually improved campaign contact is not clear, and expanding technologies likely make geography even less relevant to campaign contact today; voters would benefit from the travel benefits of compactness only to the limited extent that polling precincts are designed around legislative districts. Moreover, depending on the layout of local roads or highways, a noncompact district may actually facilitate rather than impede travel. See *Karcher v. Daggett*, 462 U.S. 725, 755 n.20 (1983) (Stevens, J., concurring).

<sup>197</sup> The casual introduction of compactness seems to have its roots in a case from the early 1970s. See *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971) (describing a group’s purported claim to electoral power “if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.”). In *Whitcomb*, no legal holding turned on whether the group was compact or not; after *Gingles*, compactness matters.

<sup>198</sup> See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Johnson v. California*, 543 U.S. 499 (2005); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>199</sup> *Shaw v. Reno*, 509 U.S. 630, 643–44 (1993); *Miller v. Johnson*, 515 U.S. 900, 904–05, 911–16, 920 (1995). This standard is related to—but according to the Court, “analytically

Strict scrutiny is a demanding standard, but not automatically fatal: it requires that government acts be narrowly tailored to achieving a compelling purpose. Though the Supreme Court has never ruled directly on the question, it has strongly suggested (and several Justices have outright stated) that drawing districts predominantly on the basis of race or ethnicity to comply with the Voting Rights Act is constitutionally permissible. Indeed, this very *LULAC* case contained the clearest statement of the notion to date: six Justices expressly wrote that districts drawn on the basis of race in order to achieve compliance with the Voting Rights Act would meet strict scrutiny.<sup>200</sup>

This means that geographical compactness can have two distinct but related roles when it comes to the interaction of Section 2 and the Equal Protection Clause. The fact that a district with a substantial minority population is not compact may be one piece of evidence indicating that the district was drawn predominantly based on race or ethnicity (and therefore subject to strict scrutiny under *Shaw*).<sup>201</sup> The fact that the same district is not compact may also be a piece of evidence indicating that the minority population within the district is not compact, and that the population would therefore have no Section 2 claim.<sup>202</sup> And if the dispersed population would have no Section 2 claim, the government cannot justify the drawing of the district predominantly based on race or ethnicity by claiming that the district was drawn to satisfy Section 2.

Got all that?

Before applying this discussion of compactness, *Gingles*, and the Voting Rights Act to Texas's 2003 redistricting plan, it is worth mentioning one particularly notable feature of a Section 2 requirement that communities be geographically compact. Voters must belong to a racial or language minority community or communities before bringing a claim under Section 2. But the Voting Rights Act vigorously fights racial essentialism: shared racial or ethnic minority status is not enough to prevail on a claim.<sup>203</sup> Minority voters must also demonstrate that they have cohesive political preferences, distinct from the surrounding community. But that too is insufficient.

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distinct" from—equal protection claims based on the intent to harm a racial or ethnic minority, through vote dilution or otherwise. See *Miller*, 515 U.S. at 911; *supra* note 161.

<sup>200</sup> See *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 475 & n.12 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); *id.* at 518–19 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., concurring in the judgment in part and dissenting in part). The other Justices did not disagree—they simply did not find reason to address the issue.

<sup>201</sup> See, e.g., *Shaw*, 509 U.S. at 646–47; *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 905–06 (1996).

<sup>202</sup> See, e.g., *Shaw II*, 517 U.S. at 916–17.

<sup>203</sup> See generally Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. \_\_ (forthcoming 2016) (describing the ways in which the Voting Rights Act combats essentialism).

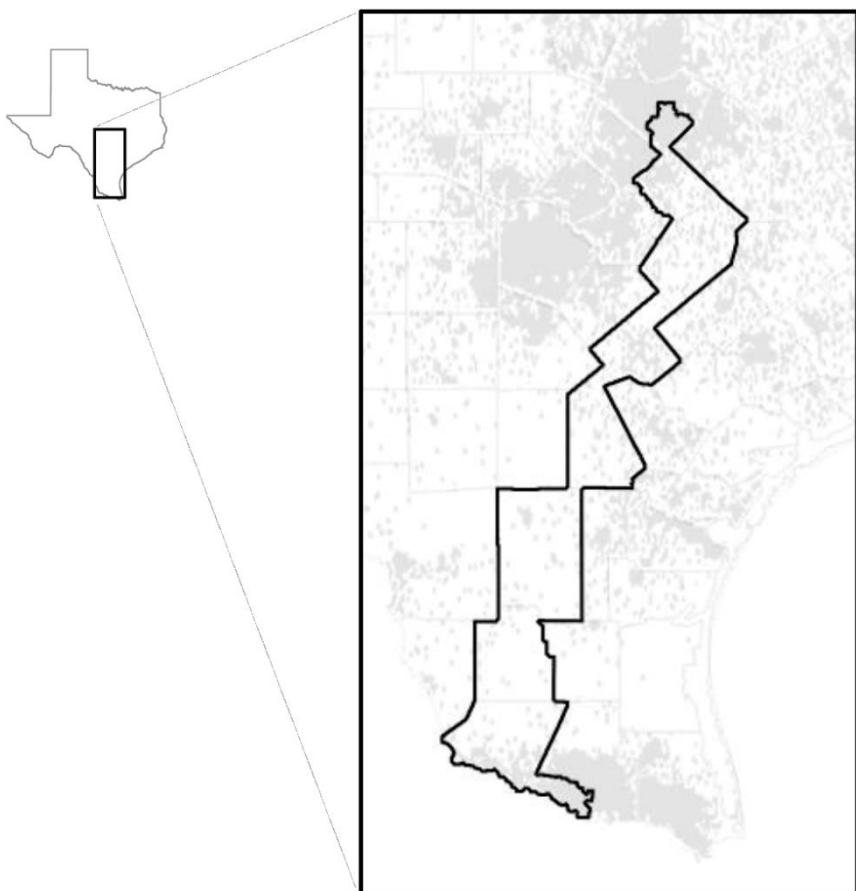
To meet the minimum threshold for a Section 2 claim under *Gingles*, cohesive minority communities with distinct political preferences must also demonstrate that they are geographically compact—that members of the group live relatively close together. Living in proximity is often a fair proxy for having common interests. The compactness requirement is one means to ensure that voters proceeding under the Voting Rights Act have some common interests *beyond* merely race and politics.<sup>204</sup> That is, the compactness requirement is one means to ensure that voters proceeding under the Voting Rights Act have common interests that might form the basis of a relationship with a representative, *beyond* merely race and party.

#### *E. The Return to Texas*

And so we come back to 2006, and the Court’s rare agreement on the treatment of voters in south Texas. Recall that the Court found that Texas had precluded effective Latino opportunity in District 23, where the Latino community *had* a right under the Voting Rights Act. The Court also found that Texas could not compensate for this deprivation by providing Latino opportunity in District 25, where the Latino community did *not* have such a right. The Latino population of District 25 was sufficiently sizable, and sufficiently polarized with respect to the Anglo majority. But according to the Court, it was not sufficiently compact.

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<sup>204</sup> Of course, as a plurality of the Court recognized in another portion of the *Gingles* opinion, particularly where race or ethnicity was the basis for official or societal discrimination, many members of a racial or ethnic group will often have common social and economic characteristics, and common political needs and preferences. *Thornburg v. Gingles*, 478 U.S. 30, 64–65, 66 (1986) (plurality opinion). Imposing a compactness requirement prioritizes a particular geographic basis for real shared interests—and one that may not be reflected in other districts drawn by a state—over all others.



**District 25. The gray dots represent population in 2000.**

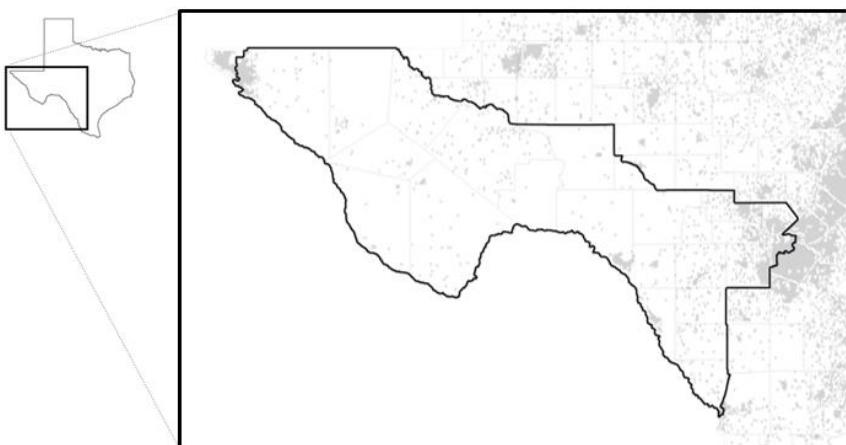
(Data from Population Density for Block Groups in Texas, 2000, produced by the Texas State Data Center using shapefiles supplied by ESRI.)

As in *Gingles*, the Court directed a fair amount of attention to physical, geographic characteristics. In so doing, it considered not the shape of District 25 (which was long, but had relatively smooth contours), but rather the dispersion of the Latino *population* within that district. District 25 paired Latinos in Austin with Latinos in McAllen, hundreds of miles away and separated by vast swaths of largely empty prairie and plain, with some mixed Anglo population in the middle. Even without a consensus mathematical measurement, few would intuit that the Latino populations at the north and south of the district felt comparatively close together.

Then Justice Kennedy, writing for the Court, appeared to add an additional element: what Professor Daniel Ortiz has called “cultural

compactness.”<sup>205</sup> The Court said that there was not only a “300-mile gap between the Latino communities in District 25,” but also “a similarly large gap between the needs and interests of the two groups,” supported by ample evidence at trial.<sup>206</sup> It repeatedly stressed that Latinos in Austin and Latinos in McAllen had little in common—that they were truly “disparate communities of interest,” with “differences in socioeconomic status, education, employment, health, and other characteristics.”<sup>207</sup> And this, in turn, might foster a lack of political cohesion within the Latino population, even if the community as a whole had quite distinct preferences from the surrounding Anglo majority.

The requirement of “cultural compactness” may seem like a new element, quite different from the geographic compactness requirement of *Gingles*. Indeed, Chief Justice Roberts, applying *Gingles* and focused on geography, could not understand why the Latino population in the 500-mile (acceptable) District 23 was any more compact than the Latino population in the 300-mile (unacceptable) District 25.<sup>208</sup>



**District 23. The gray dots represent population in 2000.**

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<sup>205</sup> Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006).

<sup>206</sup> League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399, 432–34 (2006) (majority opinion); Session v. Perry, 298 F. Supp. 2d 451, 502 (E.D. Tex. 2004) (three-judge court).

<sup>207</sup> *LULAC*, 548 U.S. at 432–33. Justice Kennedy also repeatedly stressed the need to avoid essentialist assumptions that the two groups of voters, of the same ethnic background, “think alike, share the same political interests, and will prefer the same candidates at the polls,” *id.* at 433 (internal quotation marks and citations omitted)—even though polarization with respect to the surrounding Anglo community was undisputed (and likely turned on political party). For the majority, compactness is a requirement that groups share political interests beyond ethnicity and party.

<sup>208</sup> *Id.* at 501 (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part). To be fair, in a sentence, the Chief also highlighted the lack of discussion about the degree to which voters in District 23 were culturally distant as well as physically distant. *Id.*

(Data from Population Density for Block Groups in Texas, 2000, produced by the Texas State Data Center using shapefiles supplied by ESRI.)

But the concepts of geographic compactness and cultural compactness are quite consistent (and equally dependent on judicial norms not present in either the statute or state law).<sup>209</sup> Indeed, Justice Kennedy's "new" concept may better satisfy the purposes of the *Gingles* threshold than the *Gingles* original. The only possible rationale for *Gingles'* geographic compactness requirement is the notion that representation based on shared ethnic minority status and shared political preference is insufficient to make out a possible Section 2 claim, even before weighing the totality of circumstances. The *Gingles* Court never explained why this should be so. The most likely answer is that the further requirement of compactness is designed as a proxy for a further showing of common representational interests. *LULAC*'s more direct discussion of shared needs and interests merely cuts to the chase.

Ultimately, the *LULAC* Court found that "it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes."<sup>210</sup> This formulation is quite intriguing. "Cultural compactness" was widely perceived as an additional requirement for plaintiffs to meet. But as the quote above suggests, it might instead be an either/or choice. If this is indeed what the Court meant, *LULAC* realigns redistricting caselaw with the (plausible, but unstated) purpose of the *Gingles* compactness threshold. The Court seems to demand shared representational interests beyond ethnicity and political preference. Perhaps any of several alternatives will suffice. That is, it may be that a community dispersed across some distance but with a demonstrated showing of shared needs beyond partisan political preferences could be deemed compact enough for Section 2.<sup>211</sup> And it may be that a community with a tight geographic tie signifying shared local interests, but otherwise possessing very different socioeconomic needs, could be deemed compact enough for Section 2.<sup>212</sup> The next case awaits.

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<sup>209</sup> *Id.* at 507 ("Section 2 is, after all, part of the Voting Rights Act, not the Compactness Rights Act. The word "compactness" appears nowhere in § 2, nor even in the agreed-upon legislative history.").

<sup>210</sup> *Id.* at 435 (majority opinion).

<sup>211</sup> *Id.* ("We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity."). Indeed, this might describe the Court's interpretation of District 23, which was substantially far-flung but was not the subject of findings at trial about disparity of interests. It is not clear whether the Court's focus on the absence of evidence of disparity, as compared to the presence of evidence of disparity in District 25, reflects an implicit shift of burden.

<sup>212</sup> *Id.* (perhaps drawing strength from the very same quote).

## V. Epilogue

From one perspective, *LULAC* confronted a host of very big issues, but arrived at some fairly narrow legal decisions (which nevertheless had a substantial impact on Texan representation in Congress). Theoretically, the courts remain open to claims of unconstitutional partisan gerrymandering, but no set of plaintiffs offered a theory sufficient to convince five Justices that they should have struck down Texas's 2003 map. If state law permits,<sup>213</sup> courts will not stop legislatures from replacing court-drawn maps with their own, even mid-decade, and even with an admission that the reason for the redrawing is 110% partisan. Meanwhile, Section 2 of the Voting Rights Act offers protection for sizable populations of politically cohesive minorities, where the historical and political context leaves reason to worry about undue dilution—but only if those minority communities have something in common beyond ethnicity and electoral preference. Those conditions were not sufficiently proven in Dallas or in the “bacon strip” between Austin and McAllen, but they were in the southwest. A dollop of legal doctrine and a more substantial dose of contextual application.

From another perspective, *LULAC* represents an intriguing historical inflection point. The quorum breaks may not have been the first of their kind, but they had been sufficiently rare—not only in Texas, but across the country—to make the Ardmore and Albuquerque ventures generationally significant. Indiana House members broke quorum in 2005 and 2012, and even left the state in 2011, a few weeks after quorum-breaking colleagues in Wisconsin did the same. It is not clear how much they looked to the Texan legislators of 2003 as a model, or the extent to which that experience will serve as a model in the future. Similarly, Texas's re-redistricting was not a legislature's first intercensal attempt to redraw districts that were legally valid, but it was the most significant in the modern era. It was followed by similar acts in Georgia, New Hampshire, and North Carolina, and threats to redraw lines in several other states.<sup>214</sup> *LULAC* marks a significant shift in legal advocacy as well: the *Shaw* line of cases involved challenges to majority-minority districts in the 1990s, over the vociferous protests of minority advocates. In *LULAC*, however, minority plaintiffs prevailed in part by challenging the legitimacy of majority-minority District 25, at least as a substitute for District 23. In the 2010 redistricting cycle, minority plaintiffs brought

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<sup>213</sup> See generally Levitt & McDonald, *supra* note 27 (reviewing state law).

<sup>214</sup> See Levitt & McDonald, *supra* note 27, at 1248. The 2010 cycle has seen fewer attempts to redraw existing valid district lines, perhaps because of more limited shifts in state legislative control and hence more limited apparent partisan opportunity. See, e.g., Nat'l Conference of State Legis., State Partisan Composition, Apr. 1, 2015, <https://perma.cc/R33H-CM55>. Note that legislative control does not usually alone determine redistricting authority; governors have a role in most states, and non-legislative commissions have a role in several. See, e.g., All About Redistricting, Who Draws the Lines?: State Legislature, <http://perma.cc/E7RP-QLMJ> (showing partisan control over state legislative districts in 2011).

several claims challenging majority-minority districts.<sup>215</sup> Perhaps the future will reveal further ways in which *LULAC* set a trend.

From yet another perspective, *LULAC* is a fairly fundamental reaction to some very stubborn old instincts. It is a made-for-TV example of the result when the mix of race and party turns toxic. A majority of the Court seemed offended at the state's "cynical use of race,"<sup>216</sup> making it look like District 23 would respond to its Latino population when the district was in fact designed to do just the opposite, targeting a mobilized community in Laredo for particular disfavor. Given the facts of the case, the Voting Rights Act was a ready vehicle to address the concern. Doctrine was merely the tool at hand.

In 1990, a leading federal jurist summed up a case against Los Angeles County with a similar step back, in words that need only a slight change of venue to describe *LULAC*:

When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.

But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hostility corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. Incumbency carries with it many other subtle and not-so-subtle advantages, . . . and incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act. Today's

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<sup>215</sup> See Levitt, *supra* note 203 (cataloguing cases); Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 378–79 (2016) (noting the change in litigation strategy).

<sup>216</sup> Interview with Nina Perales, Vice President of Litigation, MALDEF (July 13, 2015).

case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely gives weight to the . . . observation that “many devices employed to preserve incumbencies are necessarily racially discriminatory.”

. . . The record before us strongly suggests that political gerrymandering tends to strengthen the grip of incumbents at the expense of emerging minority communities. Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was a result of intentional discrimination, even absent the type of smoking gun evidence uncovered by these plaintiffs. State and local officials nationwide might well take this lesson to heart as they go about the task of decennial redistricting.<sup>217</sup>

In Texas, this lesson would seem to need special reinforcement. In 2006, the *LULAC* Court found that Texas had, in the service of protecting an incumbent, deprived the Latinos of District 23 of real electoral opportunity, “because Latinos were about to exercise it.”<sup>218</sup>

In 2011, after the new census, Texas redrew its congressional district map . . . and, predictably, litigation followed. At trial, the court asked a political scientist serving as an expert for the state what advice he would have given Texas in drawing the new map. “With a slight memory of history,” he said, “‘Don’t mess with the 23rd.’ That would be my first rule for drawing the districts.”<sup>219</sup>

Texas messed with the 23rd. Again. In fact, state officials in 2011 came very, very close to doing precisely what was done in 2003: they drew a district—indeed, the very same district—that would look like it served the Latino population but was designed to do just the opposite. The court adjudicating the state’s 2011 preclearance submission found that

[t]he mapdrawers consciously replaced many of the district’s active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23’s Anglo citizens. In other words, they sought to reduce Hispanic voters’ ability to elect without making it look like anything in CD 23 had changed. . . . We also received an abundance of evidence that Texas, in fact, followed this course by using various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness. . . . Texas’s protestations that the district has remained functionally

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<sup>217</sup> *Garza v. County of Los Angeles*, 918 F.2d 763, 778–79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

<sup>218</sup> *LULAC*, 548 U.S. at 440.

<sup>219</sup> Transcript of Bench Trial, vol. 8, at 1840, *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. Sept. 14, 2011).

identical are weakened first by the mapdrawers' admissions that they tried to reduce the effectiveness of the Hispanic vote and then, more powerfully, by evidence that they did.<sup>220</sup>

The language above technically has no legal impact, after the court's decision was vacated in light of *Shelby County* and the effective invalidation of most of the preclearance regime.<sup>221</sup> But litigants have returned to court, presenting the same evidence to a three-judge federal court in San Antonio, and hoping for the same conclusion.<sup>222</sup>

Indeed, there is at present a chance that this new San Antonio case could put Texas back under federal electoral supervision, resuscitating a now-dormant portion of the Voting Rights Act. As mentioned above, the Supreme Court in 2013 struck down the portion of the Act requiring preclearance for most of the jurisdictions that had previously been covered.<sup>223</sup> But a preclearance provision remains in the law. If a court finds that a jurisdiction has *intentionally* discriminated based on race or ethnicity with respect to voting, the court can order that jurisdiction to submit new election rules to the court or to the Department of Justice before they can be enforced, much like the old preclearance regime.<sup>224</sup> As this chapter goes to press, only two small cities and one small county are subject to preclearance, nationwide.<sup>225</sup> If the plaintiffs prevail in Texas based on intentional discrimination from 2011,<sup>226</sup> preclearance suddenly becomes substantially more prominent once again.

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<sup>220</sup> *Texas v. United States*, 887 F. Supp. 2d 133, 155 (D.D.C. 2012) (three-judge court), *vacated on other grounds* by 133 S. Ct. 2885 (2013).

This tactic recalls one of the most notorious maps of the 1981 redistricting cycle: the Georgia plan that mildly increased the African-American voting-age population of Georgia's lone majority-minority congressional district, while ensuring that the district retained a substantial Anglo majority of registered voters so that it would be unlikely to perform as a meaningful opportunity district for the African-American electorate. *Busbee v. Smith*, 549 F. Supp. 495, 498–99 (D.D.C. 1982). The purported architect of the plan, the chair of Georgia's House redistricting committee, explained his decisions in part by proclaiming, "I don't want to draw nigger districts." *Id.* at 501.

<sup>221</sup> For a more comprehensive discussion of *Shelby County*, see Professor Ellen Katz's piece in this volume.

<sup>222</sup> See Plaintiffs' Joint Advisory to the Court on Issues Relating to Section 3(c) of the Voting Rights Act at 17–21, *Perez v. Texas*, No. 5:11-cv-00360 (July 22, 2013).

<sup>223</sup> See *supra* text accompanying note 85 and note 85.

<sup>224</sup> 52 U.S.C. § 10302(c); see also Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010). The primary difference between this "bail-in" preclearance and the form of preclearance struck by the Court is that "bail in" is available only after a specific finding of intentional discrimination. Bail-in is also distinct in that the scope and duration of a bail-in order is at the issuing court's discretion, and the issuing court is the entity to review new election policies, rather than a three-judge federal court in Washington, D.C.

<sup>225</sup> Consent Decree, *Blackmoon v. Charles Mix County*, No. 05-cv-04017 (D.S.D. Dec. 4, 2007); Consent Decree, *United States v. Village of Port Chester*, No. 06-cv-15173 (S.D.N.Y. Dec. 21, 2009); Order, *Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Jan. 13, 2014).

<sup>226</sup> This is quite a substantial "if," given the threshold of proof for such claims and the reluctance of judges, much less Texan judges, to make such a finding.

And yet, as powerful as this medicine would be, it would still address a symptom—a pernicious symptom, but a symptom nevertheless—of a broader underlying problem. It is possible that the underlying reason for the 2003 violation in District 23 was the desire to dilute the votes of Latino residents solely because they were Latino. But it seems more likely, as with the supervisors of Los Angeles County, that the protection of incumbency was the primary goal, and the manipulation of the Latino community's franchise "only" the means. (Whether either diagnosis is correct, the action is neither excusable nor lawful.)

The Court has crafted doctrinal paths to address this issue at the margins. *LULAC* affirmed that officials may not discriminate on the basis of race to favor incumbents. A case two years earlier affirmed that officials may not create districts of unequal population to favor incumbents.<sup>227</sup> But these holdings are built on doctrines primarily concerned with race and representational equality, and not particularly well suited to other tasks.

There are many legitimate reasons why a legislature might act to protect its incumbents' relationships with their voters. But it is very difficult to articulate a legitimate reason consistent with the basic premises of representation why a legislature might act to protect its incumbents *from* their voters. In *LULAC*, Justice Kennedy clearly articulated that distinction, in a portion of the opinion garnering support from four other Justices.<sup>228</sup> The Court went on to hold that this sort of incumbent protection could not justify the effect on Latino voters in south Texas. But perhaps legislators need to be told that this sort of incumbent protection cannot be justified, period.

Now *that* would be a blockbuster sequel.

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<sup>227</sup> *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge court), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947 (2004).

<sup>228</sup> See League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399, 440–41 (2006) (majority opinion).