The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 9 | Number 3 Article 2

3-1-2007

The Golden Rule of Texas: Restricting and the Reduction of Minority Voting Power.

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COMMENTS

THE GOLDEN RULE OF TEXAS: REDISTRICTING AND THE REDUCTION OF MINORITY VOTING POWER

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The Golden Rule of Texas

"What you do not want done to yourself, do not do to others."[1]

The Golden Rule is a universal ethical norm that has been taught by Jesus, Confucius, and Aristotle,[2] and it has been described as the foundation upon which the natural moral law of human behavior is established.[3]

In 2003, the Texas Legislature provided its own interpretation of the ages-old Golden Rule. As amended, the Golden Rule of Texas reads: "He who has the gold makes the rules, without regard for what is done to others." The Texas Legislature's new ethical watchword was prominently displayed as the members of both chambers engaged in a prolonged redistricting saga to redraw Texas's thirty-two congressional districts in a blatant partisan power play.

I. Introduction

Redistricting is the process by which the boundary lines of congressional districts within a particular state are redrawn, created, or eliminated to adjust for relative shifts and growth in population among congressional districts. Redistricting promotes equal representation in the U.S. House of Representatives based on the population of the state. Article 1, Section 2, of the United States Constitution requires the federal government to conduct a census every ten years, in part, for the purpose of allocating the number of seats to the U.S. House of Representatives each state may have.[4] The most recent census was taken on April 1,

1. *See* W. Patrick Cunningham, *The Golden Rule as Universal Ethical Norm*, 17 J. Bus. Ethics 105, 105 (1998) (quoting the Golden Rule).

2. *See id.* (noting that the Golden Rule has been featured in one form or another, in the teachings of most religious and philosophical writers over a very lengthy period of time in human history).

3. *See id.* at 108 (explaining that "[t]he Golden Rule continues to stand as a universal expression of the highest ethic, an encoding of the natural moral law, and a fulfillment of both the Mosaic and Christian ideals of behavior").

4. U.S. Const. art. 1, § 2.

> The House of Representatives shall be composed of members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legis-

2000.[5] Census data determines how the 435 congressional seats will be apportioned[6] to each of the fifty states. The Texas Legislature typically redraws congressional district boundaries during the first regular session after publication of the federal decennial census.[7]

In 2001, Republicans controlled the governor's mansion and the Texas Senate, but the Democrats maintained their historical majority in the Texas House.[8] The two chambers of the Legislature failed to reach a consensus on congressional redistricting, and to produce a map of new congressional districts that would reflect the updated census data. In federal court,[9] a panel consisting of three federal judges ratified a version of the map that had been drawn following the 1990 census, but modified it to include the two new seats that Texas was apportioned because the population of Texas increased, relative to the nation as a whole, substantially between 1990 and 2000.

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lature . . . . Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. *Id.*

5. *See* Texas Secretary of State Webpage, http://www.sos.state.tx.us/elections/voter/faqcensus.shtml (last visited Feb. 25, 2007) (noting that the most recent state-wide data collected by the U.S. Census Bureau in the state of Texas was during the year 2000).

6. *See* BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF THOMAS JEFFERSON, BENJAMIN FRANKLIN, JOHN ADAMS & JAMES MADISON 90 (1995) (discussing how Thomas Jefferson and Alexander Hamilton debated which method should be established to round the fractions up for purposes of apportioning congressional districts among the states).

7. *See* Texas Secretary of State Webpage, http://www.sos.state.tx.us/elections/voter/faqcensus.shtml (last visited Mar. 4, 2007) (discussing Texas law and legislative history that requires the Legislature to "redistrict Texas' congressional districts. The Texas Legislature usually redistricts congressional districts at the first regular session after publication of the federal decennial census . . . .").

8. *See* Jeffrey Toobin, *Drawing the Line*, THE NEW YORKER, Mar. 6, 2006, *available at* http://www.newyorker.com/printables/fact/060306fa_fact (discussing the Texas House of Representatives as then being the last bastion of Democratic power in a state government otherwise dominated by Republican officeholders).

9. *See id.* ("A deadlock between the two legislative bodies prevented Texas from adopting any redistricting plan, and the conflict ended up in federal court."). "The following year, a three-judge panel, ill-disposed to take sides in a political fight, ratified a modified version of the 1991 map, with two new seats awarded to high-growth districts." *Id.* "'The court essentially carried forward the 1991 Democratic gerrymander of Texas, which is increasingly problematic, given the over-all Republican tilt of the state,' Samuel Issacharoff, a professor at New York University School of Law, told me." *Id.* "The status-quo ante looked like a distortion." *Id.*

In the 2002 Texas state representative elections, then-U.S. Rep. Tom DeLay sought to sweep the Democrats out of the majority in the Texas House of Representatives. In pursuit of his goal, U.S. Rep. DeLay created two political action committees (PACs) which amassed $3.4 million and distributed the funds among twenty-two races for the Texas House.[10] On Election Day in 2002, Republicans took control as the majority party for the first time since Reconstruction in the Texas House of Representatives.[11] After a bitter political battle and rancorous debate on the issue,[12] H.B. 3[13] was enacted by the 78th Legislature, 3rd Called Session on October 12, 2003.[14] The Republican-controlled Texas Legislature finally had possession of the gold—and they clearly demonstrated that they would make the rules.

H.B. 3 altered the congressional districts in Texas in a way that would benefit Republican congressional candidates in the 2004 election and beyond. The new congressional districts map compromised the substantive value of the votes of millions of Texas African-American and Latino citi-

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10. *See id.*

> In the 2002 elections, DeLay set out to give the Texas House a Republican majority and thus remove the last obstacle to full Republican control of the state. That year, he created two PACs, which raised and spent $3.4 million on twenty-two races for the Texas House. The law firm of Jack Abramoff, the lobbyist whom DeLay has described as one of his "closest and dearest friends," contributed twenty-five thousand dollars to the cause. On October 4, 2002, the DeLay PAC known as Texans for a Republican Majority sent a hundred and ninety thousand dollars to seven candidates for the State House. The following month, all seven were elected, and Republicans became the majority party in the Texas House. *Id.*

11. *See* Clay Robison, *It's a Grand Old Sweep*, HOUS. CHRON., Nov. 6, 2002, at A1, *available at* 2002 WLNR 13653547 ("Republicans swept the other statewide races and . . . were gaining a majority in the Texas House for the first time since Reconstruction.").

12. *See* CNN.com, Texas House Paralyzed by Democratic Walkout, http://www.cnn.com/2003/ALLPOLITICS/05/13/texas.legislature/index.html (last visited Feb. 25, 2007).

> The Democrats are trying to thwart a GOP redistricting plan they say is being pushed by U.S. Rep. Tom DeLay, the majority leader in the U.S. House of Representatives and a Texan. Democrats call the plan "an outrageous partisan power grab." They have gathered in Ardmore, just across the state line and beyond the jurisdiction of Texas state police, whom the House's Republican majority has ordered to bring them back to the state Capitol. "We're here in Ardmore, Oklahoma, because the real problems of Texas are budget problems, are school finance problems, are health care problems that are being cast aside because of a power play by Tom DeLay," [one state representative] said. "We are here trying to get Texas government back on the right path." *Id.*

13. Tex. H.B. 3, 78th Leg., 3rd C.S. (2003) (referring to the legislation that contained the enacted redistricting plan and map).

14. *See* Texas Redistricting 2000-2006 News Items, http://www.tlc.state.tx.us/redist/doc/00-03redistnews.htm (last visited Feb. 25, 2007) (indicating that H.B. 3 was enacted by the 3rd Called Session of the 78th Texas Legislature on October 12, 2003).

zens, many of whom had struggled for generations to build voting coalitions across racial and ethnic lines.[15] In three of the newly drawn congressional districts, African-Americans' votes were marginalized by being placed in noncompetitive districts.[16] In Texas other twenty-nine newly drawn congressional districts, "minority voters [had] no position to influence outcomes, let alone elect candidates of choice."[17]

"African-American and Latino voters [who previously had a strong voice in deciding who represented them] [now] found themselves in districts represented by Anglo Republicans with dismal records of responsiveness to minority voters' concerns—and no incentive to [represent minorities] better."[18]

Ultimately, the Republican-controlled Texas Legislature's redistricting plan produced its intended result and Republicans reached a majority of the state's congressional delegation for the first time since Reconstruction, ousting several senior Democrats from Congress in the process.[19] There is no doubt that Republicans emerged victorious, but they did so only by compromising the political and democratic viability of their fellow Texans.

This comment will address the role of the 2003 Texas redistricting saga in diluting the voting power, reducing the representation, and violating the constitutional rights of African-Americans and Latinos in Texas. To

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15. *See* Brief of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Appellants at 12, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) (recognizing the phenomenon that there are communities in which "coalitions are formed among minority groups or small, reliable levels of crossover voting from white voters that provide certain minorities, who themselves may not comprise a majority of the voting population, with a reasonable opportunity to elect" candidates of their choice).

16. *See* Brief for the Texas State-Area Conference of the NAACP as Amicus Curiae Supporting Appellants at 11, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) (explaining that in those three congressional districts, African Americans' votes are not urgently needed because those House seats were already relatively "safe").

17. *Id.* (underscoring that the remaining twenty-nine congressional districts were home to most of the black citizens in Texas, and that none of those districts provided an opportunity for African-Americans to influence the congressional elections in those districts).

18. *Id.* at 10–11 (explaining how once-empowered African-American and Latino voting communities were disempowered by being divided into congressional districts where they could be ignored with impunity by the members of Congress elected from those districts).

19. *See* Holly Yeager, *Texas Republicans in Legal Battle on Voting Maps: The Supreme Court Is About to Review the Controversial Redrawing of Districts*, FIN. TIMES UK, Feb. 28, 2006, at 9, *available at* 2006 WLNR 3418961 ("New Republican-drawn districts were used in the 2004 elections and the state's House delegation reflected the change, with Republicans holding 21 seats.").

that end, the statute establishing the new congressional districts map in Texas will be analyzed in conjunction with the United States Supreme Court's decision in *League of United Latin American Citizens v. Perry*,[20] the United States Constitution, and the Voting Rights Act of 1965.[21] This comment will present constructive solutions to remedy the discriminatory effects that have resulted in the aftermath of the most recent episode of Texas redistricting.

II. Legal History

A. *How a Texas Redistricting Bill Becomes a Law*

During the period between Reconstruction and the early 1970's, Texas was a thoroughly Democratic state. Political divisions in that era were not between Democrats and Republicans, but between the conservative and moderate/liberal wings of the Democratic Party. After President Lyndon Johnson left the White House in 1969, his Democratic Party began to lose its grip on his Lone Star State, and Texas began its thirty-year-long transformation into a Republican stronghold.

In 2001, Democrats maintained one final bastion of power in state government: the Texas House of Representatives. It was the Democrats in the Texas House that fought against the Republican-controlled Texas Senate which sought to drastically change the Texas congressional districts to benefit Republican candidates in the 2002 elections. Democrats in the Texas House in 2001 were considered to be conservative by national standards, but they were still viewed as an obstacle to the fulfillment of the ambitions of a powerful Texas Republican in Washington: U.S. Rep. Tom DeLay.

A conservative, DeLay was elected to the U.S. House of Representatives in 1984. He became known as "The Hammer" for his enforcement of Republican Party discipline in close votes and his reputation for taking political retribution on opponents. He was appointed Deputy Minority Whip in 1988, and was elected House Majority Whip in 1995 after Republicans gained a majority in the U.S. House of Representatives. DeLay was elected House majority leader after the 2002 midterm elections.

Rep. DeLay was very forthright about his disdain for the Democrat-controlled Texas House, and his desire to redraw the congressional districts to advantage Republicans was equally clear: "I'm the majority

20. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (introducing the United States Supreme Court case that addressed the redistricting actions by the Texas Legislature in 2003).

21. 42 U.S.C. § (2000).

leader, and we want more seats,"[22] DeLay said. Discussing his Democratic colleagues in the House DeLay added, "[t]hey may look at themselves as important. But I look at them as irrelevant."[23] Majority Leader DeLay obviously wanted new Republican-leaning congressional districts to increase and protect the Republican majority in the U.S. House.[24] However, it was not just more Republicans that DeLay wanted in the U.S. House; DeLay wanted more *Texas* Republicans on whose vote he could rely to maintain a position of power.

Rep. DeLay knew how to overcome the obstacle to his ambitions, and it came in the form of a political action committee. During campaigns for the 2002 Texas House and Senate elections, a DeLay-controlled PAC known as Texans for a Republican Majority (TRMPAC) distributed campaign funds into several successful state House campaigns that paved the way for Republicans to win a majority of the 150 seats in the House. The new GOP majority elected Midland Republican, and DeLay ally, Tom Craddick as its new speaker.[25]

Republican Governor Rick Perry welcomed Republican majorities in both chambers when the new Legislature convened in January of 2003. Rep. DeLay wasted little time urging the state's legislators, many of whom he helped elect with TRMPAC funds, to take a redistricting bill and send more Republicans to Congress from Texas.[26]

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22. Todd J. Gillman, *DeLay: We Could Do Without a Democrat or 7*, DALLAS MORNING NEWS, May 7, 2003, at 6A (quoting U.S. Rep. Tom DeLay's comments during an interview in which DeLay discussed his purely partisan motivation for redrawing the congressional districts in Texas).

23. *Id.* (quoting DeLay's condescension regarding Democratic members of Congress and his dismissal of their role as a minority party in the political process).

24. *See* Dave McNeely, *Redistricting a Contentious Issue for Texas Legislature*, AUSTIN AM.-STATESMAN, Apr. 24, 2003 ("DeLay's motive for wanting a new map is obvious: increase the number of Republicans in Congress to pad the GOP's current narrow majority. His office says the map released by Frost is only one of several that have been drafted.").

25. *See* Guillermo X. Garcia, *Redistricting May Sting S.A. Demos; Congressmen Face Realignments of Their Constituencies*, SAN ANTONIO EXPRESS-NEWS, May 2, 2003, at 10A.

> Democrats, meanwhile, are angry that DeLay, a close ally of Texas House Speaker and fellow Republican Tom Craddick, is pushing for redistricting a year after a three-judge panel drew congressional lines because the Legislature was unable to agree on a map. A DeLay-controlled political action committee funneled campaign funds into a number of successful state house races that allowed the Republicans to win 88 of the 150 House seats. That GOP majority in turn elected Craddick speaker - the first member of his party to hold that post in modern Texas history-"or at least in the last couple of thousand years," as Craddick jokingly notes. *Id.*

26. *See* Chuck Lindell, *DeLay: Lawmakers Should Redraw Map of Districts*, AUSTIN AM.-STATESMAN, Feb. 26, 2003, at B2.

> The Texas Legislature should draw new congressional districts because the court-mandated map sent too many Democrats to Congress, U.S. House Majority Leader Tom

Republicans in the Texas House waited until May, at the end of the five-month regular legislative session, to take up congressional redistricting. The process began with hearings held by the House committee assigned to redistricting. The hearings were drawn out and contentious, and several committee members clashed with the committee's chairman, Republican Rep. Joe Crabb.[27] Democratic Rep. Richard Raymond fought with Rep. Crabb over the manner in which the chairman handled the public hearings. Rep. Raymond urged Rep. Crabb to hold hearings outside of Austin, the capital of Texas. Rep. Raymond specifically recommended hearings in communities with large minority populations. Rep. Crabb refused to hold hearings outside of Austin even after Rep. Raymond threatened to file a complaint with the U.S. Justice Department.[28] Chairman Crabb explained that, "[t]here are only two people I know of [sic] on the committee that speak Spanish. The rest of us would have a very difficult time if we were out in [another] area . . . to have committee hearings and to be able to converse with people that did not speak English."[29]

On May 6, 2003, the House redistricting committee approved a redistricting bill, H.B. 3398,[30] which substantially changed the thirty-two con-

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DeLay said Tuesday. "It does not reflect the people of Texas and where they are right now . . . . [57%] of Texans voted for a Republican congressman, yet we have [47%] of the delegation. That is not what our founding fathers contemplated as reapportionment or redistricting." Texas' [thirty-two] congressional districts were drawn by three federal court judges after the Legislature deadlocked in 2001. The judges made few changes, allowing 17 Democrats to retain their seats in November's election. So in Texas, where every statewide office is held by a Republican, Democrats hold a two-seat majority in Congress. DeLay has been pressing the Legislature to revisit the issue. "All over this country, courts are drawing the districts," DeLay said. "That is unconstitutional in my eyes, and you have to stop it by standing up and accepting your responsibility as called for by the Constitution." *Id.*

27. *See* Guillermo X. Garcia, *New Congressional Map Would Beef up the GOP; Measure Due in House Would Affect Rodriguez*, SAN ANTONIO EXPRESS-NEWS, May 7, 2003, at 9A (explaining that the House redistricting hearings were drawn out and contentious, with committee members clashing with the committee's chairman "on a number of issues").

28. *See id.*

Rep. Richard Raymond . . . fought with Crabb over the chairman's handling of public hearings. Raymond said holding hearings outside of Austin is vital, especially in areas with large minority populations, and said he planned to file a complaint with the U.S. Justice Department, alleging Crabb violated federal law. Crabb has said there's not enough time to hold those meetings and denied that he was discriminating against Hispanic voters. *Id.*

29. Editorial, *No Reason Other than Petty Vindictiveness for Redistricting*, AUSTIN AM.-STATESMAN, May 8, 2003, at A18 (editorializing its criticism of Chairman Joe Crabb for the manner in which he approached public hearings on the redistricting issue).

30. *See* Texas Redistricting 2000-2006 News Items, http://www.tlc.state.tx.us/redist/doc/00-03redistnews.htm (last visited Feb. 25, 2007) ("May 6, 2003—The House Committee

gressional districts in Texas. The redistricting map that was reported out of committee was designed to increase the number of Republican districts by five to seven seats while protecting all fifteen Republican incumbents.[31] Democrats said the map weakened minority voting strength because it packed minority voting blocs into existing minority districts and split other minority blocs into existing minority districts.[32]

After the redistricting bill was introduced, it was on the fast-track for passage in the Republican-controlled House.[33] Democrats understood that the only way to stop the map from passing was to prevent a vote on the bill, and wait for the legislative session to expire.

With exceptional stealth, more than fifty House Democrats quietly slipped out of Texas under cover of darkness on May 11, 2003.[34] The Democrats' disappearance deprived the 150-seat House of a quorum. Without the requisite number of legislators present, the House was effectively shut down and no votes could be called.[35]

The Democrats checked-in at the Holiday Inn of Ardmore, Oklahoma, where Texas law enforcement officers had no jurisdiction to arrest them under the governor's order.[36] Their whereabouts unknown, several of the missing Democrats released a statement on May 12th as their absence

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on Redistricting approves a committee substitute . . . for H.B. 3398, relating to the composition of the districts for the election of members of the U.S. House of Representatives from Texas.").

31. *See* Lee Hockstader, *GOP Plan Prompts a Texas Exodus; Democrats Stall State Legislature's Redistricting Vote*, WASH. POST, May 13, 2003, at A01 (reporting about the political goals that the Republican redistricting map was designed to achieve).

32. *See* Guillermo X. Garcia, *New Congressional Map Would Beef up the GOP; Measure Due in House Would Affect Rodriguez*, SAN ANTONIO EXPRESS-NEWS, May 7, 2003, at 9A (noting that Democrats in the Texas Legislature objected to the proposed map because of its manipulation of minority voting communities in various parts of the state).

33. *See* LOU DUBOSE & JAN REID, THE HAMMER: TOM DELAY, GOD, MONEY, AND THE RISE OF THE REPUBLICAN CONGRESS 210 (2004) ("The redistricting plan voted out of the committee was hurtling toward passage like a runaway train.").

34. *See* Lee Hockstader, *GOP Plan Prompts a Texas Exodus; Democrats Stall State Legislature's Redistricting Vote*, WASH. POST, May 13, 2003, at A01 ("Moving with . . . tactical coordination, more than [fifty] Democratic state lawmakers in Texas packed their bags and quietly slipped out of the state . . . late Sunday and early [Monday].").

35. *See id.* (explaining that the walkout deprived the Texas House of a quorum and basically shut down its ability to legislate because 100 members must be present for the 150-member House to conduct business).

36. *See* Carolyn Barta, *Legislature 2003: Fiscal Restraint and Partisanship*, in TEXAS ALMANAC 398 (Elizabeth Cruce Alvarez ed., 2004) (discussing the Demcocrats' destination and the reasons why they chose the small town of Ardmore, Oklahoma).

became conspicuous in Austin: "We won't be present today—or any day—that the House plans to consider this outrageous partisan action."[37]

Gov. Perry ordered state troopers to track down the Democrats and haul them back to Austin.[38] State troopers interrogated nurses in a hospital where a missing Democrat's wife had just given birth.[39] In El Paso, troopers were inside another legislator's home without a warrant questioning a seventeen-year-old girl regarding her father's whereabouts.[40]

Four days after arriving in Ardmore, the Democrats returned to Texas with a small victory. On May 15, Speaker Craddick adjourned the House of Representatives regular legislative session and the redistricting bill was effectively dead as a result.[41]

On June 18, Gov. Perry ordered the Texas Legislature to convene in a special session, for the first time in over a decade, to redraw the state's congressional districts.[42] Republicans praised the governor for calling the special session, while Democrats criticized him for a legislative session that would cost $1.7 million to pursue a purely partisan issue.[43] Gov. Perry indicated that funding for medical schools in the Lower Rio Grande Valley and El Paso may be added to the special session agenda if redistricting passes, but Democrats accused the governor of using funding for medical schools in Latino communities as blackmail to buy the redistricting votes of Latino lawmakers.[44]

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37. Lee Hockstader, *GOP Plan Prompts a Texas Exodus; Democrats Stall State Legislature's Redistricting Vote*, WASH. POST, May 13, 2003, at A01 (highlighting the alleged principles for the Democrats' quorum-breaking journey to Oklahoma).

38. *See* LOU DUBOSE & JAN REID, THE HAMMER: TOM DELAY, GOD, MONEY, AND THE RISE OF THE REPUBLICAN CONGRESS 211 (2004) ("[Gov. Perry] ordered troopers to find the fugitives, arrest them, and haul them back.").

39. *See id.* ("On reported orders of [Gov.] Perry, troopers harangued nurses in a neonatal hospital ward in Galveston where a House member's wife had given birth to premature twins.").

40. *Id.*

41. *See* Dave Harmon & Laylan Copelin, *Back in Texas*, AUSTIN AM.-STATESMAN, May 16, 2003, at A1 (reporting that the regular legislative session expired without the Texas Legislature passing a redistricting bill due to a lack of a quorum).

42. *See* R.G. Ratcliffe & Clay Robison, *New Battle Brews over Redistricting; Perry Calls Special Session; White House Lobbies*, HOUS. CHRON., June 19, 2003, at A1 (reporting that a special session was called for the purpose of passing a redistricting bill and noting that the calling of a special session is an extraordinary event in Texas government).

43. *See id.* (reporting the expenses billed to taxpayers as a result of the special session and noting the partisan rancor surrounding the session).

44. *See id.* (describing lucrative political deals offered to some Democrats as a means of securing their vote in favor of a Republican redistricting map).

Democrats counted on their colleagues in the Senate to block the redistricting map in the special session.[45] Democrats held eleven of the thirty-one seats in the Texas Senate, but a traditional rule required two-thirds of the Senate to agree to take up any bill.[46] Without at least some Democratic consent, Republicans were barred from introducing legislation, including a redistricting bill. On July 25th, Lt. Gov. David Dewhurst, a Republican, informed reporters that the redistricting plan did not have sufficient support in the Senate to pass during the special session.[47] Democrats once again prevailed on a procedural technicality, but the Republicans persisted.

When the special session expired on July 28th, Gov. Perry immediately called a second session.[48] Lt. Gov. Dewhurst, as presiding officer of the Senate, abolished the longstanding two-thirds tradition to allow the redistricting bill to come up for a vote without the consent of the Democrats.[49] Without the two-thirds rule, Senate Democrats decided to prevent the two-thirds quorum, and fled from Texas just before the second special session gaveled into order.[50] The purpose of the exodus was the same as the House Democrats' four-day trip to Oklahoma two months earlier. Senate Democrats embedded themselves in Albuquerque, New Mexico, and stayed there for the duration of the month-long second special session.[51] While the Senate Democrats were in exile, Republican leaders in Austin agreed to fine each absentee senator $5000 per day, and revoke parking, printing, and mail privileges for their staffers in the Capitol.[52]

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45. *See id.* (noting that the Senate's rules provided a useful weapon for the Democrats to block a redistricting bill).

46. *See Democrats Derail Texas GOP Plan For House Seats; Redistricting Bill Has White House Support, But Not Enough Votes*, WASH. POST, July 26, 2003, at A03 (discussing the Senate tradition of not introducing legislation unless two-thirds of the senators vote to consider the bill or resolution).

47. *See id.* (reporting that the Senate's traditional "two-thirds" rule had not been invoked regarding the redistricting bill).

48. *See Another Try at Redistricting, Another Trip for Democrats*, AUSTIN AM.-STATESMAN, July 29, 2003, at A8 (reporting that after the first special session was unsuccessful in passing a redistricting bill, Gov. Perry called a second special session to pass the redistricting bill).

49. *See id.* (reporting that Lt. Gov. Dewhurst abolished the "two-thirds" rule to force the redistricting bill onto the floor against the will of a substantial number of senators).

50. *See id.* (reporting that Senate Democrats fled to New Mexico to prevent a quorum in the Senate to preclude the chamber from voting on the redistricting bill).

51. *See* Edward Walsh, *Texas Legislature Adjourns Special Session; Governor to Call Members Back a 3rd Time to Force Vote on GOP Redistricting Plan*, WASH. POST, Aug. 27, 2003, at A04 (discussing the Senate Democrats' exile in Albuquerque, New Mexico).

52. *See* Peggy Fikac, *Demos' Office Privileges Stripped; Republican Senators Vote to Cut Off their AWOL Colleagues Unless Fines Paid*, SAN ANTONIO EXPRESS-NEWS, Aug. 16, 2003, at 1B (discussing Republican leadership's plans to levy fines against absentee senators and their staffers).

An editorial in the *Austin American-Statesman* said that punishing the Democrats in that manner underscored the entire redistricting saga:

> Partisanship—and not racism—likely motivated Republican senators to levy fines against their absent Democratic colleagues . . . . But there is no doubt that those actions are having racial effects. The fines in particular levied last week by 17 white senators on 11 senators—nine of whom are Latino or African American— . . . have drawn comparisons to poll taxes once imposed to thwart African Americans and Hispanics from voting . . . . In the latest move Republicans . . . are raising ghosts of Texas' racial past. It began with their vote to fine the group of largely minority senators up to $57,000 each if they did not end their boycott and return to the Senate . . . . Democrats have charged that the fines symbolically amount to a poll tax.[53]

The Texas Legislature adjourned on August 26th unable to bring the redistricting bill up for a vote.[54] Democratic leader Sen. Leticia Van de Putte, said after the session expired, "[u]ntil [Gov.] Perry decides to listen to the people of the state of Texas instead of taking orders from Washington, D.C., partisans, we will remain firm in protecting our constituents."[55]

On September 9th, Gov. Perry called an extraordinary third special session of the Texas Legislature for the purpose of passing a redistricting bill.[56] One of the Democratic hold-outs returned to the Capitol and gave the Senate a quorum,[57] and the remaining Senate Democrats followed suit.[58] After over a month of debate in both chambers of the Legislature, Gov. Perry signed the redistricting bill on October 13th.[59]

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53. Alberta Phillips, Editorial, *Regardless of Intent, Senate Fines Raise Specter of Racism*, AUSTIN AM.-STATESMAN, Aug. 17, 2003, at E3 (editorializing the hostile undercurrent of the Senate showdown).

54. *See* Edward Walsh, *Texas Legislature Adjourns Special Session; Governor to Call Members Back a 3rd Time to Force Vote on GOP Redistricting Plan*, WASH. POST, Aug. 27, 2003, at A04 (reporting that the second special session also expired without passing the Republicans' redistricting bill).

55. *Id.* (quoting Sen. Leticia Van de Putte).

56. *See* Lee Hockstader, *Texas Governor Orders Session; Legislature to Take up Redistricting as Democrats Return*, WASH. POST, Sept. 10, 2003, at A02 (reporting that Gov. Perry called a third special session of the Texas Legislature to pass a redistricting bill).

57. *See id.* (reporting that one of the Democrats-in-exile returned to Austin and provided the Texas Senate with the quorum necessary to take up redistricting legislation).

58. *Id.*

59. *See* Pete Slover, *Governor Signs Redistricting Bill; Dispute over Whether it Hurts Minority Power Will Go to Court Next*, DALLAS MORNING NEWS, Oct. 14, 2003, at 5A (reporting that the Republican redistricting bill was signed into law on October 13, 2003).

B. *The Aftermath/ A Tale of Two Districts*

The new congressional districts had their desired effect after they were put into place for the 2004 elections for the U.S. House of Representatives. The candidate (Democrats and Republicans both) preferred by minority voters won in only fifteen of the thirty-two congressional races. Conversely, the previous districts that were in place for during the 2002 elections sent the minority-preferred candidate (Democrats and Republicans both) to Washington in twenty-one of the Texas congressional districts.[60]

The negative impact of the new redistricting map on the rights of minorities in Texas is most vivid in two districts: Congressional District 23 (CD23) Congressional District 24 (CD24), which will accordingly be the focus of this comment.

1. Congressional District 23

CD 23 is a geographically expansive area along the Rio Grande spanning from the extreme western part of Texas near El Paso to Laredo and San Antonio. CD 23 is a predominantly rural district and contains many small farming and ranching towns with substantial Latino populations.[61] Before being redrawn, CD 23 included the whole of Laredo, a fast-growing border port of entry with a population of almost 200,000—94% of whom are Latino.[62]

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60. Rep. Tom DeLay's role in the 2003 Texas redistricting ultimately led to his resignation as House majority leader and as a member of Congress. *See* Carl Hulse, *DeLay Is Quitting Race and House, Officials Report*, N.Y. TIMES, April 4, 2006, at A1 ("Representative Tom DeLay, the relentless Texan who helped lead House Republicans to power but became ensnared in a corruption scandal, has decided to leave Congress"). "Mr. DeLay is under indictment in Texas on campaign-finance related charges for his role in a state redistricting plan that gained Republican House seats in the state but focused national scrutiny on his political tactics. The indictment forced him to step aside from his leadership post, but he had intended to [run for re-election] if he beat the charges." *Id.* "DeLay was indicted last September in Texas on unrelated charges involving violations of state election laws including money laundering and conspiring to funnel illegal corporate contributions to Republican statehouse candidates in 2002. The charges were later scaled back by a state judge to the money-laundering counts and remain the subject of an appeal." *Id. See also* Jonathan Weisman, *Effort to Secure Texas Led to Fall of Tom DeLay*, WASH. POST, June 29, 2006, at A6 ("Tom DeLay's dogged quest for a new congressional map for Texas led to a disciplinary slap from the House ethics committee, his indictment on money-laundering charges, his fall from the House leadership ranks and, this month, his resignation from Congress.").

61. *See* Brief for Appellants GI Forum of Texas at 6, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-439) (describing the 23rd congressional district of Texas).

62. *See id.* (discussing the demographics of CD 23).

During the 1990's, San Antonio Republican U.S. Rep. Henry Bonilla represented CD 23 after being elected and re-elected with limited support from Latino voters. However, by the end of the 1990's, the district's Latino voting-age population (VAP) rose from 46% to 58%.[63] The growth in the Latino population made CD 23 an opportunity for Latinos to elect their candidate of choice. Latinos increasingly voted against Rep. Bonilla, and he was almost defeated in 2002. Because Bonilla's re-election bid would be threatened even more in 2004, the Legislature severed Laredo in half and moved 100,000 members of the cohesive Latino community into another congressional district that was already a safe harbor for Latino voters.[64] As a result, the Latino voters left behind in CD 23 had virtually no opportunity to elect the candidate of their choice. The Latino extraction from CD 23 undermined years of progress made by a Latino community that has been victimized by voting-related discrimination in the past. "Against this background, the Latinos' diminishing electoral support for Bonilla indicates their belief he was 'unresponsive to the particularized needs of a minority group.' In essence the State took away the Latinos' opportunity because Latinos were about to exercise it."[65]

2. Congressional District 24

CD 24 is an urban district that is based in the Dallas-Fort Worth Metroplex. Prior to redistricting, CD 24 was a district that presented an opportunity for black voters to elect the candidate of their choice.[66] In the 2000 and 2002 elections, African-Americans represented 68% of the voters in the CD 24 Democratic primary, and the winner of the Democratic primary typically had an excellent opportunity to win the general election with significant support from both black and Latino voters.[67] In every election from 1978 through 2002, voters in CD 24 elected Arlington Democrat U.S. Rep. Martin Frost to Congress. Rep. Frost was a bitter political enemy of Rep. Tom DeLay, and Frost's ouster was deemed a priority in the redistricting process. In fact, one of the proposed redistricting maps that redrew CD 24 was withdrawn by one Republican because of concerns that it would violate the Voting Rights Act by diluting the strength of minority voters because it was imperative to eliminate Frost

63. *Id.*

64. *See Citizens v. Perry*, 126 S. Ct. at 2621 (illustrating the severance of the Latino community into another congressional district).

65. *Id.* at 2622.

66. Allan J. Lichtman, Report of Allan J. Lichtman on Voting-Rights Issues in Texas Congressional Redistricting 23 (Nov. 14, 2003) (unpublished manuscript, on file with author).

67. *Id.* at 24 (unpublished manuscript, on file with author). Lichtman's manuscript details the impact redistricting can have on minority communities and candidates. *Id.*

by any means necessary. However, those concerns were ultimately swept aside. The means employed to dismantle CD 24 were simple. Black voters were splintered into five other districts represented by white Republicans.[68] The ratio of whites to blacks among the voting age population in the five districts ranged from 4.6:1 to 12.3:1, thus allowing white Republican members of Congress to be indifferent to the needs of their minority constituents who were previously well-represented in Congress before their voice was silenced by redistricting.[69]

C. *Equal Protection & the Voting Rights Act of 1965*

The Voting Rights Act of 1965 was signed into law by President Lyndon Johnson during the peak of the Civil Rights Movement in the United States. The Voting Rights Act enhances the Fourteenth Amendment by specifying which state laws "abridge the privileges or immunities of citizens," and the Act also enforces the equal protection of the voting laws of the several states.[70]

The United States Supreme Court's 1964 decision in *Reynolds v. Sims*[71] was a watershed case in addressing the rights of voters amid gerrymandering of legislative districts. The *Reynolds* Court held that the Constitution protects the right to vote in federal and state elections for all

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68. *See* Brief for the Texas State-Area Conference of the NAACP as Amicus Curiae Supporting Appellants at 9, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) ("[T]he African-American voters who had sent Representative Frost to Congress found themselves splintered among five different districts . . . .").

69. *See id.* at 9–10 (explaining that the five different districts were "represented by Anglo Republicans whose districts were drawn such that they could afford to be indifferent to their new minority constituents. The ratio of Anglos . . . to blacks . . . in the five districts range[d] from 4.6:1 and 12.3:1").

70. *See* 42 U.S.C. § 1973 (2000) (explaining, in part, the policy basis for the Voting Rights Act). A pertinent portion of the Voting Rights Act reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in . . . this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extents to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. *Id.*

71. 377 U.S. 533 (1964).

qualified citizens.[72] The Court added that a state can deny voting rights by diluting the power of a citizen's vote in a manner that is just as effective as prohibiting the practice entirely.[73] Speaking to the level of scrutiny that redistricting requires, the *Reynolds* Court held:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[74]

D. *Equal Protection & Freedom of Speech*

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . Nor deny to any person within its jurisdiction the equal protection of the laws."[75]

The First Amendment to the United States Constitution grants, among other rights, the freedom of speech: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[76]

The First Amendment, like the U.S. Constitution itself, reflects both an inherent and intentional commitment to democracy. The First Amendment places the citizens of the American democracy at its core. "The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government."[77] Political participation and the dem-

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72. *See* Reynolds v. Sims, 377 U.S. 533, 554 (1964) (explaining the constitutional importance of the right to vote).

73. *See id.* at 555 (explaining the danger and the potential risks involved with the dilution of voting power).

74. *See id.* at 561–62 (insisting that voting rights are fundamental rights under the rule of law in America, and that attempts to modify the fundamental right to vote will trigger strict scrutiny under constitutional jurisprudence).

75. U.S. CONST. amend. XIV, § 1 (setting forth the Equal Protection Clause of the Fourteenth Amendment).

76. U.S. CONST. amend. I.

77. Brief for the Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Appellants at 21, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) (describing how James Madison envisioned the First Amendment as the protection of political activity among citizens as a means of protecting a democratic form of governance).

ocratic election of officials is therefore the First Amendment's core purpose.

The United States Supreme Court held in *Anderson v. Celebrezze* that the act of voting and the participation in the political process are as important as exercises of free speech.[78] First Amendment issues materialized when Texas gerrymandered congressional districts in such a way that burdened a group of voters' political and representational rights.[79]

E. *Litigation: Texas Voters v. the 2003 Texas Redistricting Plan*

After the redistricted congressional map became the law of Texas, individual voters, public officeholders, minority interest groups, and civil rights organizations filed suits in the United States Court for the Eastern District of Texas. These suits asked the federal court to reinstate the 2001 congressional district boundaries and invalidate the 2003 redistricting plan on the grounds that the gerrymandered congressional districts violate the Equal Protection Clause, the First Amendment, Article I of the United States Constitution, and the Voting Rights Act.

The cases were consolidated into *Session v. Perry*, and the expedited trial began in December 2003. On January 6, 2004, the Eastern District Court handed down a divided opinion that upheld the 2003 redistricting plan. The decision in *Session v. Perry*[80] was vacated by the United States Supreme Court, and was remanded to the district court with instructions that the consolidated cases be considered in the light of the Supreme Court's recent decision,[81] *Vieth v. Jubelirer.*[82]

In its second opinion, the district court again upheld the 2003 redistricting plan, and an appeal to the United States Supreme Court ensued. On March 1, 2006, the United States Supreme Court heard arguments in *League of United Latin American Citizens v. Perry,* and the case was decided on June 28, 2006.[83]

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78. Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) (equating voting and political participation to the exercise of the freedom of speech).

79. *See* Brief for the Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Appellants at 22, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276) ("In the context of partisan gerrymandering . . . First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.").

80. 298 F. Supp. 2d 451 (E.D. Tex. 2004) (per curiam).

81. Henderson v. Perry, 543 U.S. 941 (2004).

82. 541 U.S. 267 (2004).

83. *See Citizens v. Perry*, 126 S. Ct. at 2626 (rejecting "the statewide challenge to Texas' redistricting as an unconstitutional political gerrymander and the challenge to the redistricting of the Dallas area as a violation of § 2 of the Voting Rights Act[,]" but holding "that redrawing the lines in District 23 violates § 2 of the Voting Rights Act").

III. Legal Analysis

A. *Roles of Branches of Government in Congressional Redistricting*

When the Court heard the arguments in *League of United Latin American Citizens v. Perry* (hereinafter *LULAC*), it was mindful of the different roles played by different sectors of the government in arranging congressional districts. The United States Constitution delegates the apportionment of congressional districts primarily to state legislatures.[84]

Article I of the Constitution provides in Section 2 that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."[85] Section 4 delegates that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[86]

Notwithstanding the Constitution's broad delegation of congressional apportionment to the legislative branch, the judiciary plays an important role when a legislature's congressional redistricting plan violates the Constitution.[87]

> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action.[88]

The *LULAC* Court recognized the precedents that provided an underlying assumption for the federal courts to prefer a congressional redistricting plan drawn by a state legislature, but held those lawmaking bodies should not abuse the assumed separation of powers to rely on improper criteria in the redistricting process.[89]

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84. *See* Growe v. Emison, 113 S. Ct. 1075, 1081 (1993) (explaining that the text of Article I "leaves with the States the primary responsibility for apportionment of their federal congressional . . . districts"); *see also* Chapman v. Meier, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature.").

85. U.S. Const. art. I, § 2, cl. 1 (organizing the structure and composition of the U.S. House of Representatives).

86. U.S. Const. art. I, § 4, cl. 1 (delegating certain responsibilities to state governments regarding the assembling of a national Congress).

87. *See, e.g.,* Wesberry v. Sanders, 376 U.S. 1, 6 (1964) (stating that the right to vote is too important to be stripped of judicial review).

88. Wise v. Lipscomb, 437 U.S. 535, 540 (1978).

89. *See Citizens v. Perry*, 126 S. Ct. at 2609 ("Judicial respect for legislative plans . . . cannot justify legislative reliance on improper criteria for districting determination.").

B. *LULAC Part I: Constitutionality of Mid-decade Partisan Redistricting*

The Court recognized the appellant voters first claim as a request to declare the 2003 redistricting plan unconstitutional. The voters, represented by LULAC, contended that a mid-decade redistricting battle with purely partisan motives violates the First Amendment and equal protection because: 1) it burdens certain citizens on account of their political views;and, 2) because it does not serve any legitimate public purpose.[90] The State disputed the argument that the Texas Legislature's 2003 redistricting plan was motivated exclusively by partisan gain for Republicans.[91]

The Court was not convinced by the appellant-voters' initial theory. "The sole-intent standard offered here is no more compelling when it is linked to the circumstance that [the new redistricting plan] is mid-decennial legislation. The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to [redraw congressional districts]."[92]

The appellant-voters noted that the map was drawn in 2003 based on census data that was gathered in 2000. Because of shifts in the population of Texas during those three years, the voters contended that the 2003 redistricting plan "created unlawful interdistrict population variances,"[93] and that those discrepancies are repugnant to the one person, one vote doctrine. The appellant-voters relied on the *Karcher* holding, which states that variances in congressional districts are permissible only if they "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[94]

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90. *See id.*

91. *See id.*

> [T]he state appellees dispute the assertion that partisan gain was the 'sole' motivation for the decision to replace Plan 1151C. There is some merit to that criticism, for the pejorative label overlooks indications that partisan motives did not dictate the plan in its entirety. The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, but partisan aims did not guide every line it drew. As the District Court found, the contours of some contested district lines were drawn based on more mundane and local interests. *Id.*

92. *Id.* at 2610.

93. *Id.* (explaining the negative impact of stale U.S. Census Bureau data in the redistricting process).

94. Karcher v. Daggett, 462 U.S. 725, 729 (1983) (discussing population variances among representative districts).

Ultimately, the Court held that absolute equal apportionment is a legal fiction,[95] and the Court rejected the appellant-voters' two theories asserting that mid-decade, partisan redistricting is unconstitutional.[96]

C. *Congressional Redistricting & Voting Rights Act Jurisprudence*

A state redistricting plan violates Section 2 of the Voting Rights Act if:

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[97]

In *Thornburg v. Gingles*, the Supreme Court identified three conditions for establishing a violation of § 2 of the Voting Rights Act.[98] The three "*Gingles* requirements" are: 1) the existence of a large and compact minority racial group that constitutes a majority in the congressional district; 2) that is politically cohesive; and, 3) one in which White voters usually vote in a bloc "to defeat the minority group's preferred candidate."[99]

If all three of the *Gingles* requirements are met, then the Voting Rights Act directs the courts to consider the totality of the circumstances in deciding whether members of a racial group have a diminished opportunity compared to other voters.[100] The "totality of the circumstances" in Voting Rights Act jurisprudence has been identified as including:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting . . . is racially polarized; the extent to which the State . . . has used voting practices or procedures that tend to enhance the opportunity for discrimination against the

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95. *See Citizens v. Perry*, 126 S. Ct. at 2610 ("States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability.").

96. *See id.* at 2612.

> In sum, we disagree with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders. We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge. *Id.*

97. 42 U.S.C. § 1973(b) (2000).

98. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (setting out the *Gingles* requirements for identifying violations of § 2 of the Voting Rights Act).

99. *See* Johnson v. De Grandy, 512 U.S. 997, 1006–1007 (1994) (quoting Growe v. Emison, 507 U.S. 25 (1993) (quoting Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986))).

100. *See* Abrams v. Johnson, 521 U.S. 74, 91 (1997).

> minority group . . . ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction . . . . [E]vidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's . . . use of the contested practice or structure is tenuous may have probative value.[101]

D. *LULAC Part II: Congressional District 23, the Voting Rights Act & Equal Protection*

The second question addressed by the *LULAC* Court was whether the 2003 redistricting plan violates § 2 of the Voting Rights Act in regard to the 23rd congressional district, represented by Henry Bonilla. The appellant voters argue that the redrawing of CD 23 diluted voting rights in the Latino community that was not partitioned off by the new map.[102] Specifically, redistricting CD 23 resulted in a drop from 57.5% to 46% in the Latino share of the voting-age population.[103]

To determine whether the reduction amounted to vote dilution in the Latino electorate, the Court employed the *Gingles* analysis. "[I]t is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23. The District Court found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State.'"[104] Polarization in CD 23 was stark. In 2002, "92% of Latinos voted against Bonilla," while the congressman simultaneously received 88% of the non-Latino vote.[105] It was further projected that Anglo voters would typically vote in a bloc to prevent Latinos from electing their preferred candidate.[106]

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101. *Gingles*, 478 U.S. at 44–45 (quoting S. REP. No. 97–417 (1982)).

102. *See Citizens v. Perry*, 126 S. Ct. at 2614–15 ("Appellants argue that the changes to District 23 diluted the voting rights of Latinos who remain in the district.").

103. *See id.* at 2615 (recognizing that the redistricting plan unquestionably weakens Latino voting strength in the district).

104. *Id.* (discussing the District Court's finding of polarized voting in different regions of Texas).

105. *See id.* (indicating the polarization along racial lines of the votes for and the votes against Rep. Bonilla in CD 23).

106. *See id.* ("[T]he projected results in new District 23 show that the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district.").

The first *Gingles* condition requires a racial group to be "sufficiently large and geographically compact to constitute a majority in a [congressional] district."[107] The Court held that Latinos in CD 23 constituted a majority under the old plan, and that the district provided precisely the type of electoral opportunity protected by § 2 of the Voting Rights Act.[108]

The Court was satisfied that appellant-voters established that CD 23 was clearly a Latino opportunity district under the previous plan, and that redistricting took that opportunity away.[109]

The State conceded that CD 23 satisfied the *Gingles* requirements, but argued that § 2 was not violated because the 2003 redistricting plan offset CD 23 with another Latino opportunity district in a different part of the State when it created CD 25.[110]

The Court agreed that states are given a great deal of leeway in drawing congressional districts and complying with the Voting Rights Act, but the Court rejected the State's premise that redistricting can take away opportunity from certain individuals by giving a greater opportunity to others.[111] Furthermore, CD 25 was not an "offset" for the former CD 23,

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107. *Gingles*, 478 U.S. at 50 (discussing the first *Gingles* requirement).

108. *See Citizens v. Perry*, 126 S. Ct. at 2615.

> For all these reasons, appellants demonstrated sufficient minority cohesion and majority bloc voting to meet the second and third *Gingles* requirements. The first *Gingles* factor requires that a group be "sufficiently large and geographically compact to constitute a majority in a single-member district." Latinos in District 23 could have constituted a majority of the citizen voting-age population in the district, and in fact did so under Plan 1151C. Though it may be possible for a citizen voting-age majority to lack real electoral opportunity, the Latino majority in old District 23 did possess electoral opportunity protected by § 2. *Id.*

109. *See id.* at 2616.

> Plan 1374C's version of District 23, by contrast, "is unquestionably not a Latino opportunity district." Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now. *Id.*

110. *See id.* ("The State argues . . . that it met its § 2 obligations by creating new District 25 as an offsetting opportunity district. It is true, of course, that 'States retain broad discretion in drawing districts to comply with the mandate of § 2.'" (quoting Shaw v. Hunt, 517 U.S. 899, 917, n. 9 (1996))).

111. *See id.*

> This principle has limits, though. The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others . . . . These conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be

and it could hardly be considered a Latino opportunity district. The newly-drawn CD 25 linked disparate Latino enclaves in a very narrow district that stretches over 300 miles from Austin in the north through rural areas down the to the Lower Rio Grande Valley in the south. The Latinos in the old CD 23 were a community that voted together in a cohesive way. The Latinos in the new CD 25 are associated only by their race and are too far away from one another to seize any opportunity that might be available to them under the 2003 redistricting plan.

Satisfied that the appellant-voters proved all three *Gingles* requirements regarding CD 23, and that CD 25 did not present an adequate remedy to the dilution of CD 23, the Court assessed the "totality of the circumstances" to complete its analysis of the Voting Rights Act claim.

The district court recognized "the long history of discrimination against Latinos and Blacks in Texas."[112] Other courts have recognized the troublesome aspect of Texas history.

> Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act.[113]

Latino voters in CD 23 were becoming increasingly active in voting and politics. In successive elections, the Latino community voted against U.S. Rep. Bonilla. In response to the threat to Bonilla's incumbency, the Texas Legislature divided the cohesive Laredo Latino community in the 2003 redistricting map. The shift of 100,000 Latinos out of the district left the remaining Latinos with almost no opportunity to elect the candidate of their choice. The 2003 redistricting plan undermined the years of progress that Latinos had made in overcoming voter-related discrimination and adversity.

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accommodated. As to the first *Gingles* requirement, it is not enough that appellants show the possibility of creating a majority-minority district that would include the Latinos in District 23. *Id.*

112. Session v. Perry (*Session*), 298 F. Supp. 2d 451, 473 (2004) (discussing the often racially discriminatory nature of Texas history).

113. Bush v. Vera, 517 U.S. 952, 981–82 (1996) (recognizing racial and ethnic discrimination in Texas history, primarily the discriminatory tactics used to suppress the voting power of minorities in Texas).

The essence of the assessment of the totality of the circumstances showed that "the State took away the Latinos' opportunity because Latinos were about to exercise it."[114] The Court held that the situation caused in CD 23 by the Texas Legislature's 2003 redistricting plan demonstrated a violation of § 2 of the Voting Rights Act, under the "totality of the circumstances."

Because the Court held that the redrawing of CD 23 in the 2004 redistricting plan violated § 2 of the Voting Rights Act, the Court ordered that congressional districts in South and West Texas must be revised to remedy the voting rights violation.[115] However, because some of the congressional districts would have to be redrawn, the Court declined to confront the Texas voters' claims of First Amendment and equal protection violations, since those complaints had the possibility of becoming moot after the Court-ordered redrawing.

E. *LULAC Part III: Congressional District 24, the Voting Rights Act*

The appellant-voters similarly challenged the changes made to CD 24 during the 2003 redistricting battle. An African-American stronghold was simply partitioned out of existence in a classic case of divide-and-conquer. Specifically, the voters contended that African-Americans had an opportunity to elect the candidate of their choice in CD 24 under the pre-2003 maps in the Dallas–Fort Worth area, and that dismantling CD 24 diluted the strength of the African-American vote and violated § 2 of the Voting Rights Act.[116]

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114. *Citizens v. Perry*, 126 S. Ct. at 2622 (quoting the opinion of the Court).

115. *See id.* at 2623.

> Based on the foregoing, the totality of the circumstances demonstrates a § 2 violation. Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination—cannot be sustained . . . . The districts in south and west Texas will have to be redrawn to remedy the violation in District 23, and we have no cause to pass on the legitimacy of a district that must be changed . . . . District 25, in particular, was formed to compensate for the loss of District 23 as a Latino opportunity district, and there is no reason to believe District 25 will remain in its current form once District 23 is brought into compliance with § 2. We therefore vacate the District Court's judgment as to these claims. *Id.*

116. *See id.* at 2624 ("Appellants also challenge the changes to district lines in the Dallas area, alleging they dilute African-American voting strength in violation of § 2 of the Voting Rights Act. Specifically, appellants contend that an African-American minority effectively controlled District 24 under Plan 1151C, and that § 2 entitles them to this district.").

Whites were the single largest racial group in CD 24 prior to the 2003 redistricting and comprised 49.8% of the voting-age population.[117] African-Americans comprised 25.7% while Latinos made up 20.8%.[118] The Court accepted that it is possible for a racial group to state a claim under § 2 of the Voting Rights Act even though it makes up less than half of the voting-age population.[119]

The relatively small African-American community in former CD 24 could constitute a sufficiently large minority to elect the candidate of their choice because 64% of the voters in the Democratic primary were African-American.[120] The appellant-voters argued that because a substantial number of Latinos and Anglos voted for the Democratic candidate in the general election, African-American control of the Democratic primary was equated to effective control of the general election.[121]

The District Court found that African-Americans could not elect the candidate of their choice[122] because CD 24 consistently elected a white Democrat, Martin Frost, to Congress. The Supreme Court then held that, although African-Americans were an influential bloc of voters in former CD 24, that influence was not sufficient to state a § 2 claim.[123] The op-

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117. *See id.* (discussing the racial demographics of the congressional district).

118. *See Citizens v. Perry*, 126 S. Ct. at 2624.

119. *See id.*

> Accepting that African-Americans would not be a majority of the single-member district they seek, and that African-Americans do not vote cohesively with Hispanics . . . appellants nonetheless contend African-Americans had effective control of District 24. As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population. *Id.*

120. *See id.* (explaining the potent political power of African-Americans in CD 24's Democratic primary).

121. *See id.*

> The relatively small African-American population can meet this standard, according to appellants, because they constituted 64% of the voters in the Democratic primary. Since a significant number of Anglos and Latinos voted for the Democrat in the general election, the argument goes, African-American control of the primary translated into effective control of the entire election. *Id.*

122. *See Session*, 298 F. Supp. 2d at 483–84 ("In short, that Anglo Democrats control this district is the most rational conclusion.").

123. *See Citizens v. Perry*, 126 S. Ct. at 2624.

> Appellants fail to demonstrate clear error in this finding. In the absence of any contested Democratic primary in District 24 over the last 20 years, no obvious benchmark exists for deciding whether African-Americans could elect their candidate of choice. The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an Afri-

portunity "to elect representatives of their choice"[124] the Court held, required more than influence over the outcome of the election when none of the candidates running were a candidate of choice among African-Americans.[125] However, the Court almost immediately negated its own logic by noting: "There is no doubt that African-Americans preferred Frost . . . . The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for the purposes of § 2."[126]

F. *The Rule of* LULAC

1. Mid-decade redistricting of congressional districts does not inherently violate the Equal Protection Clause, the First Amendment, or the principle of "one person, one vote."[127]
2. The 2003 redistricting of the 23rd congressional district diluted the votes of Latinos, in violation of § 2 of the Voting Rights Act, and it was ordered to be redrawn.[128]
3. The disintegration of a strong African-American voting community in the former 24th congressional district did not violate § 2 of the Voting Rights Act.[129]

The plurality decision in *LULAC* was the final settlement of the law for appellant-voters, and it was not an adequate remedy for the violation of the rights of millions of Texas voters. The Court's holding appeared to be very selective regarding the precedents and statutes it chose to apply in the case. Indeed, the problems posed by redrawing congressional districts are beyond the scope of the plurality decision in *LULAC*.

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can-American candidate of choice were to run, especially given Texas' open primary system. *Id.*

124. *See* 42 U.S.C. § 1973(b) (2000) (providing Voting Rights Act statutory language).

125. *See Citizens v. Perry*, 126 S. Ct. at 2625.

> The opportunity "to elect representatives of their choice" . . . requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of § 2. *Id.*

126. *Id.* (explaining why CD 24 was not an opportunity district for African-Americans).

127. *See generally Citizens v. Perry*, 126 S. Ct. 2594 (summarizing the Court's opinion).

128. *See id.* at 2601–02.

129. *Id.* at 2602.

IV. PROPOSAL

The remainder of this comment will propose three steps that federal courts and the Texas Legislature should take to avoid the obvious pitfalls that are inherent in mid-decade partisan redistricting episodes. Each step will be discussed at length below. The first step would require congressional redistricting to serve a legitimate public interest. In the second step, courts would apply a burden-shifting test in cases wherein the constitutionality of a particular congressional district is legitimately challenged. The third step would require the Texas Legislature to institute comprehensive reforms to better guide itself through the process of redistricting while serving the interest of the citizens of Texas and protecting the rights of Texas voters.

Step 1: Redistricting to Serve a Legitimate Public Interest

The Supreme Court has previously held that the decision of a state legislature to redraw congressional districts must, at least, fulfill a legitimate public interest.[130] The ongoing stability of congressional district boundaries is important to voters and candidates alike. Redistricting must be undertaken to reflect population changes and apportionment based on the data released by the U.S. Census Bureau every ten years. Congressional districts must also be redrawn if they are found to violate the Voting Rights Act or the Constitution. However, the regular campaigning, voting, and communication between representatives and their constituents highlight the importance of maintaining *stability* in the drawing of congressional boundaries. This *stability* should not be undermined for a purely partisan endeavor.

A purely partisan desire "to minimize or cancel out the voting strength of racial or political elements of the voting population"[131] is not a legitimate purpose.

In his dissent in the *LULAC* case, Justice Stevens wrote that "a straightforward application of settled constitutional law leads to the inescapable conclusion that the State may not decide to redistrict if its sole motivation is 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'"[132]

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130. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding that legislative bodies of state governments should redraw congressional districts only in pursuit of a legitimate public interest).

131. Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (explaining that pure partisanship in pursuit of a political goal is not a legitimate public interest).

132. *Citizens v. Perry*, 126 S. Ct. at 2634 (Stevens, J., dissenting) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

The sole motivation, however, of the Texas Legislature for redrawing the state's congressional districts in 2003 was the intent to minimize the voting strength of Democratic voters in Texas.[133] A plan devised for that purpose should not withstand constitutional scrutiny.

The Fourteenth Amendment's equal protection component requires action taken by the government to be supported by some legitimate interest—a desire to harm a politically disfavored group is no such interest.[134] This constitutional protection underscores the fundamental duty of the government to govern impartially.[135]

The Texas Legislature's decision to redraw congressional districts in 2003 was inconsistent with the constitutional principles in the First and Fourteenth Amendments. "By taking an action for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially."[136]

Where, as in the case of Texas redistricting in 2003, a state legislature redraws congressional districts for a purpose that does not fulfill a legitimate public purpose, it should not pass constitutional muster. *A fortiori*, where a redistricting plan has a malicious partisan purpose and violates the constitutional and voting rights of citizens, it would be even more egregious for the Court to acquiesce to a mid-decade gerrymandered redistricting map.

Step 2: Application of a Burden-Shifting Test of Constitutionality

Justice Stevens recognized that state legislatures will perpetually be aware of politics, and that the courts must tolerate politics to some degree in the redistricting process.[137] However, it was also clear to Justice Stevens that "when a plaintiff can prove that a legislature's predominant motive in drawing a particular district was to disadvantage a politically salient group, and that the decision has the intended effect, the plaintiff's constitutional rights have been violated."[138]

Based on Justice Stevens's dissenting opinion, this comment proposes a burden-shifting test that courts should apply when the constitutionality of

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133. *See Session*, 298 F. Supp. 2d at 470 (outlining the political motivation behind the Texas Legislature's redistricting activity).

134. *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 477 (1985) (explaining that harming a politically disfavored group serves no public interest, in and of itself, and that doing so also raises questions regarding equal protection).

135. *See* Lehr v. Robertson, 463 U.S. 248, 265 (1983) (promoting impartial governance in the public interest).

136. *Citizens v. Perry*, 126 S. Ct. at 2634 (Stevens, J., dissenting).

137. *See id.* at 2641 (understanding that politics and political elements cannot be altogether eliminated, because they are inherent in the process to a limited degree).

138. *Id.* at 2642.

particular redrawn congressional districts is called into question. The application of such a test would have avoided the inconsistent holding that CD 23 was redrawn in an impermissible manner, but that CD 24 was not—even though the redrawing of each seemed to violate the rights of voters in nearly identical ways. The test would provide a manageable remedy for blatant unconstitutional partisan gerrymanders.

First, in order to have standing, a plaintiff would have to be "either a candidate or a voter" in the district that is being challenged.[139] Second, a plaintiff with proper standing would have to satisfy a two-pronged test that proves that the redrawing of the congressional district had: 1) an improper purpose; and, 2) an improper effect.[140]

Under the improper purpose prong, if the plaintiff proves that race was the predominant motivation to redraw the district, then strict scrutiny would apply.[141] Under strict scrutiny, "the State must justify its districting decision by establishing that it was narrowly tailored to serve a compelling state interest, such as complying with § 2 of the Voting Rights Act."[142] However, strict scrutiny would not apply if race was simply one motivating factor, among others, to redraw the district.[143]

Applying this test to a political gerrymandering case, Justice Stevens would require that "if a plaintiff carried her burden of demonstrating that redistricters subordinated neutral districting principles to political considerations and that their predominant motive was to maximize one party's power,"[144] she would satisfy the improper purpose prong of the constitutional test.

With regard to the improper effects prong, a plaintiff would have to demonstrate three facts: 1) under the old plan, her preferred candidate won election; 2) her residence was redistricted into a non-competitive "safe" district for the opposite party; and, 3) her new district is not as compact as her old district.[145]

The first two facts required would measure whether the plaintiff has been harmed by the congressional district being redrawn, while the third

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139. *See id.* (Stevens, J., dissenting) (establishing the required component that a plaintiff have standing to challenge a redistricting plan in court).

140. *See id.* (outlining the "improper purpose and effect" test).

141. *See Citizens v. Perry*, 126 S. Ct. at 2642 (Stevens, J., dissenting).

142. King v. Illinois Bd. of Elections, 979 F. Supp. 619 (N.D. Ill. 1997), aff'd 522 U.S. 1087 (1998).

143. *See* Easley v. Cromartie, 532 U.S. 234, 241 (2001) (quoting Bush v. Vera, 517 U.S. 952, 958 (1996)) (limiting the application of strict scrutiny, even where race is a motivating factor in the redistricting process).

144. *Citizens v. Perry*, 126 S. Ct. at 2642–43 (Stevens, J., dissenting) (demonstrating how a plaintiff would satisfy the improper purpose component of the two-pronged test).

145. *Id.* at 2643.

fact would provide evidence that the district was redrawn in a manipulative and discriminatory manner.[146]

If a plaintiff with standing meets the improper purpose and improper effects prongs of the test, then the "plaintiff would clearly have demonstrated a violation of her" rights under the Constitution and other federal law.[147]

Applying the test to CD 24, plaintiffs redistricted out of CD 24 can demonstrate that the Texas Legislature's new map violated their constitutional rights by dismantling their former district. First, there are plaintiffs who currently reside in four districts who previously lived in CD 24, and would therefore have proper standing. Second, plaintiffs could satisfy their burden by proving that the predominant purpose in redrawing their congressional district was to achieve partisan gain.[148]

In his dissent, Justice Stevens elaborated:

> [A]n impermissible, predominantly partisan, purpose motivated the cracking of former District 24 is further demonstrated by the fact that, in my judgment, this cracking caused [the 2003 redistricting plan] to violate § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The State's willingness to adopt a plan that violated its legal obligations under the Voting Rights Act, combined with the other indicia of partisan intent in this litigation, is compelling evidence that politics was not simply one factor in the cracking of District 24, but rather that it was an impermissible, predominant factor.[149]

Applying the burden-shifting test outlined above would enable courts to fairly and consistently assess the constitutionality of redrawn congressional districts that have been challenged by voters and candidates who have been adversely impacted by the process. The existence of such a clear test would also provide guidelines by which state legislatures could conduct the process by which they redraw congressional districts. However, in the case of the Texas Legislature, greater reforms in the congressional redistricting process are necessary before the 2010 census is released.

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146. *Id.*

147. *Id.*

148. *See id.* (demonstrating how a plaintiff would satisfy the burden of proving a predominant partisan purpose in the redrawing of their congressional district).

149. *Citizens v. Perry*, 126 S. Ct. at 2644 (Stevens, J., dissenting) (explaining why the dismantling of CD 24 would be a violation of the Voting Rights Act under this proposed judicial test).

Step 3: Procedural Reform: Establish a Texas Redistricting Commission

The Texas Legislature should institute reform in the time, place, and manner by which it redraws congressional districts. Comprehensive reformation would serve the Legislature's interest and public approval, while conserving state revenue for the taxpayers and protecting the rights of the state's voters. Genuine reform of the redistricting process, however, would require it to be taken out of the purview of the Texas Legislature entirely.

State Senator Jeff Wentworth, during each of the last seven legislative sessions in the Texas Senate, introduced legislation that would establish a bipartisan commission to do the "heavy lifting" in the redistricting process.[150] Similar House bills have been introduced in the 80th legislative session.[151] Although the proposed reforms take steps in the right direction of redistricting reform, most fall short of achieving the needs of Texas voters. This comment proposes an amendment to the Texas Constitution[152] that would establish a Texas Redistricting Commission (hereinafter the "Commission"). This Commission would be responsible for

150. See Editorial, *Common-sense Way to Draw New Districts; Legislators Should Not Be in the Business of Drawing Congressional Districts— or Their Own*, SAN ANTONIO EXPRESS-NEWS, May 15, 2003, at 6B (editorializing that if legislators had passed Sen. Wentworth's legislation, the Legislature would not have become paralyzed by redistricting). "For the sixth consecutive legislative session, Wentworth, a San Antonio Republican, has filed legislation proposing a constitutional amendment that would establish a bipartisan Texas Redistricting Commission." *Id.* "Redistricting is the ugliest, most partisan business conducted by the Legislature, regardless of which party is in control . . . . As Wentworth put it, the minority never gets a fair deal when the majority draws the lines." *Id.* "Under the Wentworth proposal, House Republicans and House Democrats each would select two members of the commission. Senate Republicans and Senate Democrats would do the same." *Id.* "Redistricting plans would have to win the support of at least five voting members of the commission [which] would lead to more balanced districts with fair input from both parties. The result would be more competitive races and less gerrymandering for partisan advantage." *Id.* "Since the decisions wouldn't be made in the Legislature, Texas would avoid divisive squabbles such as the one impeding all other business in the Texas House. The job of drawing legislative districts would take place without self-interested incumbents seeking to preserve their own power." *Id.* "The real winners would be the disgusted voters." *Id.*

151. *See* Tex. H.R.J. Res. 22, 80th Leg., R.S. (2007) (proposing an amendment to the Texas Constitution to establish a redistricting commission to draw legislative and congressional districts). The proposed amendment would form a seven-member commission that would adopt redistricting maps based on U.S. census data by approval of five of the seven members. *Id.*; *see also* Tex. H.B. 112, 80th Leg., R.S. (2007) (providing another example of a bill to reform the redistricting process through the establishment of an independent redistricting commission). H.B. 112, introduced by Rep. Mark Strama, would if enacted, outline the duties and functions of the commission. *Id.*

152. *See* TEX. CONST. art. XVII (outlining the method required to amend the Texas Constitution).

drawing congressional districts in bipartisan fashion, on a regular decennial basis, based on up-to-date census data, and oversight from the people of Texas.

The Commission would be comprised of nine members, and chaired by the Texas Redistricting Commissioner, who would be directly elected by Texas voters in the general election in each year ending in the number "0." Four seats of the Commission would be reserved for members of the Texas Legislature. These positions would be filled by the most senior member of each of the two political parties in each chamber of the Texas Legislature. In the event that there are more than one senior member in each chamber, each chamber would vote to determine which one would fill the seat. Two retired federal judges would also occupy two "judicial" seats on the Commission. The judges would be required to have been appointed by presidents of different political parties to retain a degree of bipartisan balance on the Commission. The judges would be appointed by the commissioner, but would be required to receive approval from three of the four legislators sitting on the Commission before taking their position on the panel. The last two seats on the Commission would be occupied by experience demographers who would be competent to analyze population shifts within the state and could determine how congressional districts could be best apportioned in a consistent and efficient manner. The demographers would be appointed by the commissioner and would be required to be confirmed by no fewer than four of the six legislators and judges on the commission.

(a) The Legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may propose amendments revising the Constitution, to be voted upon by the qualified voters for statewide offices and propositions, as defined in the Constitution and statutes of this State . . . . The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals. (b) A brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the State which meets requirements set by the Legislature for the publication of official notices of offices and departments of the state government. The explanatory statement shall be prepared by the Secretary of State and shall be approved by the Attorney General. The Secretary of State shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election on said amendment . . . . (c) The election shall be held in accordance with procedures prescribed by the Legislature, and the returning officer in each county shall make returns to the Secretary of State of the number of legal votes cast at the election for and against each amendment. If it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this Constitution, and proclamation thereof shall be made by the Governor. *Id.*

Once properly in place, the Commission would be charged with drawing the Texas congressional districts in a manner consistent with the United States Constitution, the laws of the United States, and the laws of the state of Texas. The Commission would have two months to draw the boundaries of the congressional districts from the date the United States Census Bureau released its data.

The Commission's drafted plan or plans would each be accompanied by a report. The reports must include:[153]

1) for each district in the plan, the total population and the percentage deviation from the average district population;
2) an explanation of the criteria used in developing the plan, with a justification of any population deviation in a district from the average district population; [and]
3) a map or maps of all the districts[.][154]

After the maps and reports have been drafted, the Commission would be required to hold public hearings across the state of Texas, subject to the Texas Open Meetings Act.[155] After seeking public input regarding the proposed plan or plans through the hearings and any other means, the Commission would be required to consider any valid and legal proposals that would strengthen the plan.

One state representative in the 80th Session proposed a bill that would compel disclosure of redistricting data.[156] Full disclosure is necessary and would be included in the proposed amendment to the Texas Constitution. Essentially, the Commission would be required to make available to the public, via the Internet, "all plans submitted . . . hearing transcripts, minutes of meetings, maps, narrative descriptions of proposed district, and other data used . . . ."[157]

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153. *See* Tex. H.B. 112, 80th Leg., R.S. (2007) (proposing a form that should be prepared for each district in a plan adopted by a redistricting commission).

154. *Id.* (outlining the criteria that would be included in the report).

155. *See* TEX. GOV'T CODE ANN. § 551.002 (Vernon 2004) ("Every regular, special, or called meeting of a governmental body shall be open to the public[.]"); *see also* Office of the Attorney General of Texas, Open Meetings 2006 Handbook, http://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb2006.pdf ("The Texas Open Meetings law was adopted to make governmental decision-making accessible to the public. It requires meetings of governmental bodies to be open to the public . . . and to be preceded by public notice of the time, place and subject matter of the meeting.").

156. *See* Tex. H.B. 112, 80th Leg., R.S. (2007) (proposing transparency in the process so that the public can be knowledgeable about how changes are made in they way that they are represented and to minimize manipulation and abuse of the process by government officials who redraw the state's congressional districts).

157. *Id.* (requiring the disclosure of redistricting data through appropriate means to the public).

The Commission would then be required to adopt one map consisting of validly-drawn congressional districts. Adoption of the new congressional districts would require the affirmative vote of no fewer than seven of the nine members of the Commission. The map of the new congressional districts must be adopted no later than one month prior to the adjournment *sine die* of the regular session of the Texas Legislature in the year immediately following the release of the census data. The Commission's adopted redistricting plan would become effective by operation of law upon adjournment of the regular session of the Legislature unless both houses specifically reject the Commission's adopted plan by a two-thirds majority.

The redistricting plan would take effect during the elections immediately succeeding adoption by the Texas Redistricting Commission. The Commission would only reconvene if the adopted plan is found to be repugnant to the United States Constitution or other federal law. The entire process would be repeated beginning with the election of a new Texas Redistricting Commissioner and the next decade's census data.

Congressional redistricting has a menacing impact on American governance and the ability of the people to be adequately represented in the political process. The 2003 redistricting episode in Texas is a classic case study of the phenomenon, and the *LULAC* decision failed to provide either a remedy to the problem or a measure to prevent future voting rights violations. The three steps articulated above in this comment provide the crucial steps that must be taken collectively by the state of Texas and the federal courts regarding the redrawing of congressional districts. First, the scope of redistricting must be limited to one which must serve a legitimate public interest. Second, the courts must apply a burden-shifting test to assess the constitutionality of redistricting plans. Third, the voters of Texas must amend their state's constitution to establish a commission that will work with all parties in a transparent manner to redraw congressional districts in a utilitarian manner that comports with the laws of the land.

V. Conclusion

This comment reviewed the 2003 redistricting saga in Texas by explaining the questionable means by which it produced a partisan-gerrymandered congressional map in the middle of a decade for the sole purpose of expanding the power of the Republican Party. The aftermath of that redistricting saga impacted Texas voters in profound ways, particularly the Latino community in CD 23 and African-American voters in CD 24.

The litigation that ensued ended in the United States Supreme Court, where it was decided that mid-decade redistricting is frowned upon, but nonetheless constitutional. The Court also found that CD 23 was

redrawn in a way that violated the rights of the district's Latino voters under § 2 of the Voting Rights Act, but a nearly identical claim by African-American voters in CD 24 was found not to be a violation.

To remedy the inherent problems of the process of redistricting in Texas, and the jurisprudence of voting rights and constitutional complaints as a result of redistricting, this comment proposed a three step process to remedy the problem: 1) redraw districts only to serve the public, 2) adjudicate complaints using a fair burden-shifting test, and 3) establish a Texas Redistricting Commission to promote fairness and openness in the process.

Observers have argued that the Voting Rights Act was signed into law to protect voters against past injustices relating to the franchise and to protect the right to actually cast a ballot. They also contend that Texas redistricting does not prevent anyone from casting a ballot and this does not trigger the protections provided by the Voting Rights Act.

Redistricting is certainly not a poll tax or a literacy test, but efforts to suppress minority voting rights have always been adapted to circumvent the spirit of the law. Redistricting is perhaps the Twenty-first century's version of the poll tax or literacy test. Nonetheless, the Voting Rights Act protects not only the right to cast a ballot in an election, but also protects the right of the voter to have their vote count equally—meaning that vote has an equal opportunity to help elect the voter's candidate of choice.

Observers also argued that the 2003 redistricting of Texas was necessary to right the wrongs of previous gerrymandering of the state's congressional districts—that the 2003 map is the one that actually reflects the true politics of Texas. Certainly, the 1991 map was drawn with gerrymandered districts to benefit the Democratic Party, but the 2001 map drawn by the panel of three federal judges was perhaps the fairest map in Texas history—and it was drawn to give the Republican Party an advantage by drawing the two newly added districts in predominantly Republican regions in the state. However, it was the voters, not the map that sent more Democrats than Republicans to Congress because voters split[158] their votes between the parties.[159] Republican voters would often vote to

158. *See* BENJAMIN GINSBERG, THEODORE J. LOWI & MARGARET WEIR, WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS 365 (1999) (explaining that split-ticket voting occurs when a voter supports candidates from different parties on the same ballot).

159. *See* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 124 (7th ed., 2000).

> [V]oters seeking different attributes in presidents and lawmakers, often find those attributes in candidates of different parties. Americans harbor inconsistent views about government, its benefits, and its burdens. Republican officeholders have purveyed a rhetoric of limited government . . . while Democrats in elective office have tradition-

re-elect their Democratic congressmen, and so the map that favored Republicans did not immediately send more Republicans to Congress. Furthermore, if the 2003 map sought to correct a prior injustice, it did so through injustice to the opposite extreme.

Regarding the proposed Texas Redistricting Commission, a critic will argue that the Commission would concentrate power into a handful of individuals to make crucial decisions regarding congressional redistricting. The Commission certainly limits the number of players within the government, but it tempers that concentration of power with checks, balances, and direct oversight by the voters of Texas. The appointment and approval process makes the members of the Commission accountable to one another, the public hearings and election of the commissioner ensure accountability to the people, and the possibility of a legislative veto provides a role for the Legislature. Retired federal judges would be able to provide legal analysis, and specialized demographers would bring practical expertise. The Commission would be designed to operate with transparency, fairness, and accountability. Most importantly, the Commission would require a great degree of consensus to take action. Bipartisan consensus prevents extremism from dominating or hijacking the process.

Redistricting creates many problems.[160] In Texas in 2003, it violated the rights of minority voters. It threw the Texas Legislature into chaos,

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ally promoted government services that voters favor. Egged on by candidates' appeals, voters are encouraged to think they can have their cake and eat it too. This account of voters' behavior provides a commonsense explanation for [ticket-splitting]. *Id.*

160. *See* Editorial, *The Soviet Republic of Texas*, WASH. POST, Oct. 14, 2003, at A22. You might think America's rigged system of congressional elections couldn't get much worse. Self-serving redistricting schemes nationwide already have left an overwhelming number of seats in the House of Representatives so uncompetitive that election results are practically as preordained as in the old Soviet Union. In the last election, for example, 98% of incumbents were reelected, and the average winning candidate got more than 70% of the vote. More candidates ran without any major-party opposition than won by a margin of less than 20%. Yet even given this record, the just-completed Texas congressional redistricting plan represents a new low . . . . Texas Republicans, egged on by U.S. House Majority Leader Tom DeLay, violated a long-standing tradition by redrawing the map in the middle of a census cycle. Their new rule seems to be, why wait 10 years if you can cram something down your opponents' throats today? And their plan is designed to wipe out moderate and white Democrats from the Texas congressional delegation . . . . [I]t will aggravate the triumph of extremes in Washington while further sovietizing America's already-fixed electoral game . . . . The goal here is not subtle . . . . The pernicious effect of partisan redistricting in general is the weakening of the center with the creation of "safe" seats for both parties—which encourages the election of people considerably to the left or right of the state's political center of gravity. Do Texans really want a polarized delegation of 22 conservative Republicans and 10 liberal Democrats, as the current plan envisions? Do they really want a state with a white party and a minority party? Republican politi-

and forced it to break its own rules, operate in secret, and contaminate cooperation by operating under authoritarian partisanship.

In an ideal world, congressional districts would only be drawn once, but population growth and shifting make redistricting a necessity. The three-step solution proposed by this comment would avoid the pitfalls of redistricting by prohibiting it, except when it is necessary to serve a legitimate public interest such as the release of decennial census data. When a complaint arises because of redistricting, the courts should be able to address the issue and provide or deny relief accordingly. The Court was not able to do this in *LULAC*, but the burden-shifting test proposed in this comment would allow the courts to adjudicate future claims. The proposed burden-shifting test would allow the lower courts to have a clear standard by which to uniformly apply the law to balance states' rights with the voting rights and constitutional rights of voters, and it would also provide states like Texas with a clear blueprint explaining what is and what is not a violation of the laws of the United States. The Texas Redistricting Commission would empower the people of Texas to exercise their voice in redistricting and would avoid making the process an absolutely partisan free-for-all in the Texas Legislature. The Commission would require consensus in the interest of the voters of Texas rather than in the interest of partisan political power plays.

"He who has the gold makes the rules, without regard for what is done to others," should no longer be the Golden Rule in redistricting Texas. The right to vote is as valuable as gold in a democracy, and should not be played as if it were a pawn by a state legislature. For the original Golden Rule to again prevail in Texas, voting rights must be returned to minority communities—or the voting rights of *all* Texans will continue to be redistricted away.

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cians are engineering it that way, whatever voters may want. For redistricting—quite the inverse of elections—is a process in which politicians get to choose their voters. It is a process that a healthy democracy would seek to reform. *Id.*