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LEGISLATIVE REDISTRICTING IN 1991-1992: THE TEXAS BILL OF RIGHTS v. THE VOTING RIGHTS ACT

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I. INTRODUCTION

Every decade, after the federal government has taken the census, Americans endure the tedious and often painful process of redistricting[1] Congress, state legislatures, county commissioner precincts, school boards, city councils, and a host of other elected bodies. The population's ever-changing geographic configurations and its diverse ethnic and racial composition contribute to the complex and often confounding nature of reapportionment. Fluctuating federal judicial decisions, as well as the increasing inclination of state courts to involve themselves in what was once the exclusive domain of state legislators and federal judges, further complicate this process.[2]

Governed by the interplay of federal, state, and local law, the reapportionment process would seem to be a relatively easy task; in theory, one could simply divide the jurisdiction's overall population by the total number of positions available. However, overrid-

1. The terms "redistricting" and "reapportionment" are used synonymously throughout this Article.

2. Many state courts have addressed the redistricting process. *E.g.*, Brooks v. McKinnon, 631 So. 2d 883, 884 (Ala. 1993); Kenai Peninsula Borough v. State, 743 P.2d 1352, 1363 (Alaska 1987); Wilson v. Eu, 816 P.2d 1306, 1306 (Cal. 1991); McCall v. Legislative Assembly, 634 P.2d 223, 236 (Or. 1981) (en banc).

ing forces unique to the political arena and the judiciary's voice in redistricting questions undermine the implementation of such a simple system. For example, incumbents consistently seek to maximize their prospects of re-election, precluding quick resolutions of reapportionment issues. Additionally, political parties often act to safeguard and expand their electoral power. Narrow interpretations of the Voting Rights Act of 1965[3] by the United States Supreme Court and lower federal courts further intensify this controversy. Two recent United States Supreme Court decisions have limited the application of the Voting Rights Act to redistricting challenges based on race.[4] Similarly, the United States Court of Appeals for the Fifth Circuit has narrowly construed the Voting Rights Act with respect to redistricting challenges.[5]

In contrast, Texas state courts, relying on the equal rights provisions in the Texas Bill of Rights, have attempted to safeguard the voting rights of those claiming racial bias in reapportionment.[6] Notably, the 1991-1992 Texas reapportionment process was largely driven by the intervention of Hidalgo County 332d District Court Judge Mario E. Ramírez, Jr. This Article will explore the effects of the Texas Republican Party's attempts to undermine Judge Ramírez's efforts by using the Voting Rights Act in a friendly federal forum for partisan purposes.

Because reapportionment occurs only once every ten years, institutional memories of battles fought and resolutions achieved are

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3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

4. *See* Shaw v. Reno, 113 S. Ct. 2816, 2828 (1993) (allowing nonminority voters, who showed no injury, to proceed with Fourteenth Amendment challenge to majority-minority election district created in response to Voting Rights Act because of district's peculiar configuration); Presley v. Etowah County Comm'n, 112 S. Ct. 820, 827–28 (1992) (limiting preclearance requirements under § 5 of Voting Rights Act for state rules affecting voting).

5. *See, e.g.*, Rangel v. Morales, 8 F.3d 242, 245 (5th Cir. 1993) (reversing trial court's finding that legally significant, racially polarized voting bloc existed); LULAC v. Clements, 999 F.2d 831, 877 (5th Cir. 1993) (en banc) (precluding relief under Voting Rights Act due to insubstantial proof that "minority-preferred candidate lost 'on account of race'" rather than party affiliation), *cert. denied*, 114 S. Ct. 878 (1994).

6. *See* Del Valle Indep. Sch. Dist. v. López, 863 S.W.2d 507, 510 (Tex. App.—Austin 1993, writ denied) (evaluating claim against board of trustees that election scheme for school board members violated Texas Equal Rights Amendment). Texas courts are not alone in their increased solicitude with respect to the franchise; courts in other states have undertaken similar endeavors. *See, e.g.*, *Wilson*, 816 P.2d at 1306–07 (deciding to draft reapportionment plan after governor vetoed three successive plans passed by legislature).

often lost, thus dooming history to repeat itself in a later era.[7] In part, this Article serves to memorialize the machinations underlying the redistricting of the Texas Legislature during 1991-1992.[8] This Article also illustrates the interplay between state-court and federal-court intervention in the reapportionment process. Specifically, Part II explains the various state and federal rulings concerning the constitutionality of the different Texas reapportionment plans, presents a chronology of legal and political events, and concludes that the 1991-1992 redistricting process almost precipitated a constitutional crisis. Part III describes the legal theory minority plaintiffs successfully utilized to accomplish equitable reapportionment of the Texas Legislature.

To date, only one state court appellate decision has squarely addressed the effect of the Texas Bill of Rights on the redistricting process.[9] Because of the dearth of reported Texas decisional law on this issue, recording of lower court rulings is part of this Article's import as well. The discussion that follows will be of current interest to persons considering the dynamic relationship between the Texas Bill of Rights and the Voting Rights Act. In addition, this Article is intended to serve as a historical tool for participants in future reapportionment battles.

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7. *See generally* Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation*, *in* MINORITY VOTE DILUTION 65–81 (Chandler Davidson, ed., 1984) (presenting historical discussion of various Texas voting rights struggles outside of legislative reapportionment context).

8. This Article does not address the reapportionment of United States congressional districts since federal redistricting materialized through a special legislative session after the litigation discussed in this Article began. Furthermore, federal reapportionment met with the general approval of Texas's Mexican-American and African-American communities, and although Republican leaders invited the United States District Court in Austin to intervene, that court declined to do so.

9. *López*, 863 S.W.2d at 507. That decision, issued by the Third Court of Appeals, held that Article I, § 3a of the Texas Constitution required a school district to change from an at-large election of its board of trustees to elections by single-member districts. *See id.* at 14–15 (rejecting argument that controversy involved political question that was best left to legislature).

II. The Texas Redistricting Struggle and the Republicans' End Run Around the State Court Resolution[10]

Post-1990 redistricting in Texas was a nightmare of political maneuvering generally conducted without regard for the concerns and rights of minority voters. In all, nine actions were filed in state and federal courts: four by minority voters,[11] four by the Republican Party of Texas,[12] and one by the State of Texas.[13]

A. *State Court First*

On February 7, 1991, in *Mena v. Richards*, four Mexican-American plaintiffs initiated the first action challenging the 1990 redistricting scheme.[14] The case was assigned to a Mexican-American judge in Hidalgo County, State District Judge Mario E. Ramírez,

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10. Part II presents a chronology of legal and political events surrounding the 1991–1992 Texas redistricting process. This chronology traces events that transpired in the courtroom as well as other important developments which affected post-1990 reapportionment. The authors were involved in the redistricting process from the beginning and possess intimate insight into events that often were not documented. Part II, therefore, is based largely upon the personal knowledge and impressions of the authors.

11. *See* Plaintiff's Motion for Temporary Restraining Order, LULAC v. Richards, No. A-92-CA-30 (W.D. Tex., Feb. 17, 1992); Complaint for Declaratory and Injunctive Relief, Mena v. Mosbacher, No. CA B-91-018 (S.D. Tex., Feb. 7, 1991); Plaintiff's Original Petition for Declaratory and Injunctive Relief, Quiroz v. Richards, No. C-4395-91-F (332d Dist. Ct., Hidalgo County, Tex., Oct. 7, 1991); Plaintiffs' Original Petition for Declaratory and Injunctive Relief, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Feb. 7, 1991). *LULAC v. Richards* was later transferred to the Austin Division and renumbered. Motion for Leave to File Amended Original Complaint, LULAC v. Richards, No. 92-CA-147 (W.D. Tex., Mar. 13, 1992).

12. *See* First Amended Original Complaint, Terrazas v. Slagle, No. A-91-CA-428 (W.D. Tex., Sept. 11, 1991); First Amended Original Complaint, Terrazas v. Slagle, No. A-91-CA-425 (W.D. Tex., June 7, 1991); Complaint, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., May 22, 1991); Plaintiff's Original Petition, Craddick v. Richards, No. A-38,899 (238th Dist. Ct., Midland County, Tex., Jan. 8, 1992).

13. *See* Texas v. United States, 802 F. Supp. 481, 482 (D.D.C. 1992) (addressing reapportionment plan for Texas Senate).

14. Plaintiff's Original Petition for Declaratory and Injunctive Relief, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Feb. 7, 1991). On June 17, 1991, the complaint was amended to add nine additional plaintiffs and an organizational plaintiff from El Paso, totalling thirteen plaintiffs from across Texas. Plaintiffs' First Amended Original Petition for Injunctive and Declaratory Relief at 4–5, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., June 17, 1991).

Jr., who would become an influential participant in the reapportionment battle.[15]

As the case was originally filed, the *Mena* plaintiffs challenged the State's use of the United States Census Bureau's unadjusted 1990 census data for statewide redistricting purposes.[16] The plaintiffs alleged that the census data had not been "adjusted" to accommodate the inherent, systematic, and disproportionate undercounting of minority populations in Texas.[17] Under the plaintiffs' rationale, reliance upon the flawed census data in the redistricting process would dilute minority voting strength in violation of Article I, Section 3a of the Texas Constitution.[18]

The State's new redistricting plans, House Bill 150 (HB 150)[19] and Senate Bill 31 (SB 31),[20] became law on June 16, 1991.[21] The

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15. *How It Happened*, HOUS. CHRON., Jan. 17, 1992, at A12. For the first time in Texas history, a minority judge confronted the issue of state legislative redistricting and its effect on minority voters. Furthermore, a county in which minorities constituted the majority of the population was, for the first time, home to litigation involving legislative redistricting. According to the 1990 census, Mexican-Americans comprised 85% of the population of Hidalgo County. Findings of Fact and Conclusions of Law at 8, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991).

16. Plaintiff's Original Petition at 5–6, *Mena*, No. C-454-91-F (Feb. 7, 1991).

17. *Id.* at 6. Since 1950, the Census Bureau has known that its methodology disproportionately bypasses certain population groups, primarily African-American and Hispanic populations. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 7 (1993) (recognizing Census Bureau's failure to accurately count African-American population). Analysis of the 1990 census undercount data showed that, for metropolitan Dallas and Houston, Mexican-Americans and African-Americans were undercounted at the rate of 9.9% and 9.8% respectively. *See generally* Lori Rodriguez, *Census Errors May Mean Texas Windfall*, HOUS. CHRON., Aug. 10, 1994, at A1 (discussing early allegations that nationwide undercounting in 1990 census exceeded 10% for Mexican-Americans and 20% for African-American males).

18. Plaintiffs' Original Petition at 5, *Mena*, No. C-454-91-F (Feb. 7, 1991); *see* TEX. CONST. art. I, § 3a (prohibiting denial of equality under law "because of sex, race, color, creed, or national origin"). The same plaintiffs simultaneously filed a similar suit in federal court, alleging federal causes of action. Complaint for Declaratory and Injunctive Relief, Mena v. Mosbacher, No. B-91-018 (S.D. Tex., Feb. 7, 1991). The plaintiffs filed separate suits for strategic and legal reasons. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (noting that absent consent, Eleventh Amendment proscribes suit against state or state agency in federal court).

19. Act of May 24, 1991, 72d Leg., R.S., ch. 899, 1991 Tex. Sess. Law Serv. 3073 (Vernon).

20. Act of May 24, 1991, 72d Leg., R.S., ch. 892, 1991 Tex. Sess. Law Serv. 3016 (Vernon).

21. Governor Ann Richards allowed the plans to become law without her signature, in part because of objections from the state's minority communities that the new plans did

following day, the *Mena* plaintiffs amended their petition to challenge the plans under the Texas Constitution.[22] Discovery in *Mena*, which corresponded with the legislative and field hearings on redistricting, proceeded throughout the regular legislative session.[23] By the time the session ended, the attorneys involved in the *Mena* litigation stood ready to present their case to the trial court.

B. *The Republicans' End Run to Federal Court*

On May 21, 1991, another group of plaintiffs filed three actions in the United States District Court for the Western District of Texas, Austin Division, alleging that the redistricting plans were politically motivated and that the plans constituted ethnic and racial gerrymanders.[24] The plaintiffs in these actions, Louis Ter-

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not accurately represent Texas Mexican-Americans and African-Americans. Bruce Hight, *Richards Lets Controversial Bills Pass*, AUSTIN AM.-STATESMAN, June 17, 1991, at 1. Based on advice from the Texas Attorney General, the State delayed submission of its legislative redistricting plans, pursuant to § 5 of the Voting Rights Act, until after the August *Mena* hearing. Letter from James C. Harrington, Counsel for *Mena* Plaintiffs, to Bob Bullock, Texas Lieutenant Governor (Feb. 10, 1992) (on file with authors); *see infra* note 32 and accompanying text. The United States Solicitor General later capitalized on that critical delay to successfully argue in the United States Supreme Court that a stay of the *Terrazas* Christmas Eve order should be denied. Memorandum of the United States as Amicus Curiae in Opposition to Application for Stay Pending Appeal at 9, Richards v. Terrazas, No. A-498 (U.S. Sup. Ct., Jan. 14, 1992); *see infra* notes 74–75, 92–93 and accompanying text.

22. Plaintiffs' First Amended Original Petition at 6, *Mena*, No. C-454-91-F (June 17, 1991). Throughout the legislative process, the State recognized the *Mena* plaintiffs as the sole representives of minority voter interests. Both authors of this Article, along with José Garza, an attorney with Texas Rural Legal Aid, served as counsel for the *Mena* plaintiffs. George Korbel, another voting rights attorney, and Bob Brischetto, Executive Director of the Southwest Voter Research Institute, served as experts in the case.

23. In mid-May 1991, the *Mena* plaintiffs sought to depose the leadership and chairs of the house and senate redistricting committees. In response, the State filed suit to prevent the depositions. Motion to Quash and for Protective Order, *In re* Bob Bullock, No. 91-6771 (221st Dist. Ct., Travis Co., Tex., May 10, 1991). Rather than seeking protection from the Hidalgo County judge presiding over the case, the State asked a Travis County district court to quash the deposition subpoenas. *Id.* at 3. The judge ruled, however, that Texas procedure empowered only the court with jurisdiction over the case to prevent the depositions from being taken.

24. *See* First Amended Original Complaint, Terrazas v. Slagle, No. A-91-CA-428 (W.D. Tex., Sept. 11, 1991); First Amended Original Complaint, Terrazas v. Slagle, No. A-91-CA-425 (W.D. Tex., June 7, 1991); Complaint, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., May 22, 1991). Subsequently, a court order consolidated the three *Terrazas* cases. Summary Opinion and Judgment at 26, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Dec. 24, 1991).

razas,[25] Tom Craddick,[26] and Ernest Angelo,[27] were subsequently joined by intervenors.[28] These lawsuits challenged the State's redistricting plans for both houses of the Texas Legislature and for the United States House of Representatives,[29] asserting violations of Section 5 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution.[30] Although the Texas

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25. Terrazas, a Mexican-American businessman from Bexar County, served as the only minority plaintiff in the Texas Republican Party's 1981 redistricting challenge under the Voting Rights Act. In the 1991 litigation, however, Terrazas, apparently a peripatetic plaintiff, was identified as both a Mexican-American and a Republican. Complaint at 2, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., May 22, 1991).

26. Craddick, an Anglo from Midland, was a Republican member of the Texas House of Representatives and served as the Chair of the GOP Caucus. *See* Tom Craddick, *Sky Isn't Falling, So Reject School Amendment*, HOUS. CHRON., Feb. 23, 1993, at A17 (identifying Representative Craddick as Chairman of Republican Caucus of Texas House of Representatives).

27. Angelo, another Midland Anglo and a member of the Republican National Committee, was also a former state campaign chair for both Ronald Reagan and George Bush. *See* Simon Alterman, *Oil Slump Poses Problems for Texas—and for George Bush*, REUTERS LTD., Aug. 11, 1988, *available in* LEXIS, News Library, Arcnws File (describing Angelo as Texas manager of 1980 Reagan-Bush campaign).

28. A Mexican-American and an African-American from Dallas were allowed to intervene in the action and were represented by the same attorneys as the original plaintiffs. Motion to Intervene at 1, Terrazas v. Slagle, No. A-91-CA-426, (W.D. Tex., Aug. 13, 1992). The San Antonio law firm of McCamish, Martin & Loeffler represented the Republican plaintiffs. Importantly, John McCamish served as counsel for the Republican plaintiffs in the 1981 Texas redistricting challenge. Tom Loeffler is a former Republican congressman from the San Antonio area. *See* David L. Wilson, *Washington's Movers and Shakers*, 21 NAT'L J. 815, 815 (Apr. 1, 1989) (describing Loeffler as attorney with San Antonio firm McCamish, Martin, Brown & Loeffler and former Republican Representative); *see also* Siobhan Morrissey, *Washington*, STATES NEWS SERVICE, Aug. 23, 1988, *available in* LEXIS, News Library, Arcnws File (describing Loeffler as George Bush's right-hand man in Texas). McCamish and Loeffler's law firm also lobbies for Republican interests in Washington, D.C. The August 1992 Republican National Convention applauded McCamish and Loeffler as members of the party's "brain trust" and for their work on behalf of the party in the Texas redistricting process.

29. The filing of the three *Terrazas* suits preceded the enactment of any redistricting plans. However, unlike its efforts in *Mena v. Richards*, the State did not seek to have the *Terrazas* actions dismissed as premature.

30. *See* First Amended Original Complaint at 1, Terrazas v. Slagle, No. A-91-CA-425 (W.D. Tex., June 7, 1991) (noting that basis of action included violations of Fourteenth Amendment and § 5 of Voting Rights Act). All federal statewide constitutional challenges to state reapportionment laws are heard by a three-judge panel, which includes the judge of the court where the action is filed, another district court judge, and a circuit judge. 28 U.S.C. § 2284 (1988). The chief judge of the appellate circuit for the district court assigns the two additional members of the panel. *Id.* At the time the *Terrazas* litigation was filed, Henry Politz, a Republican appointee, was chief judge of the United States Court of Appeals for the Fifth Circuit.

House and Senate plans became law on June 16, 1991, the Texas Legislature did not address the congressional redistricting issue until an August 1991 special session.[31]

C. *Relief in State Court and an Appeal*

During a week-long hearing,[32] the *Mena* plaintiffs sought a preliminary injunction against the HB 150 and SB 31 redistricting

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The judges assigned to hear the *Terrazas* cases, Judge James Nowlin, the convening judge, Judge Walter Smith of the Western District's Waco Division, and Judge Will Garwood of the Fifth Circuit, were all Republican appointees. R.G. Ratcliffe, *GOP Loses Map Flap Over Senate Districts*, HOUS. CHRON., Apr. 6, 1993, at A1. After Chief Judge Politz assigned the panel, defendants Bob Slagle, Chair of the Texas Democratic Party, and the State of Texas filed motions seeking to have Judge Nowlin recused because of his role in the last decade's redistricting litigation and his past relationship with the plaintiffs and their attorneys. *See* Terrazas v. Slagle, 142 F.R.D. 136, 137 (W.D. Tex. 1992) (acknowledging Chairman Slagle's motion to recuse Judge Nowlin); *see also* Gordon Hunter, *Nowlin Awaits Recusal Decision: U.S. Supreme Court to Decide Rare Venue Question*, TEX. LAW., May 25, 1992, at 5 (discussing mandamus action filed by Slagle that sought disqualification of Judge Nowlin). As a Bexar County Republican representative, Nowlin had participated in the 1980 redistricting of the Texas Legislature. In 1982, after nomination to the federal bench, Nowlin testified for the Republican plaintiffs as an expert on "political gerrymandering." Defendants also sought recusal of Judge Smith because of his brother's political affiliation with Republican candidates, particularly Senator David Sibley of Waco. *See* Defendant Slagle's Second Motion to Recuse District Judges, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., Jan. 23, 1992) (noting reasons Judge Smith should be recused). While the redistricting issue was before the legislature, Senator Sibley paid $23,000 to Judge Smith's brother, who acted as a consultant in Sibley's campaign for special election to the Texas Senate. Robert Suro, *Texas G.O.P. Wins on Redistricting*, N.Y. TIMES, Jan. 17, 1992, at A15. The panel later allowed Senator Sibley to intervene in the *Terrazas* senate litigation. Summary Opinion and Judgment at 1, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Dec. 24, 1991).

Neither judge responded to the recusal motions until the spring of 1992. This response occurred after the panel had effectuated a plan for senate elections that effectively changed the partisan balance of seven senate districts. *See* Order, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Mar. 9, 1992) (order by Judge Nowlin) (finding insufficient evidence to support recusal).

31. *See* Act of Aug. 25, 1991, 72d Leg., 2d C.S., ch.7, 1991 Tex. Gen. Laws 41 (codified at TEX. REV. CIV. STAT. ANN. art. 197h (Vernon Supp. 1994)) (designating districts of United States Congress); *see also* Mary Lenz & Gardner Selby, *Legislature Wraps Up, Packs Up: Lawmakers Send Prison Bill, Redistricting Plan to Governor*, HOUS. POST, Aug. 26, 1991, at A1 (discussing congressional voting along partisan lines).

32. *See* Terrazas v. Ramírez, 829 S.W.2d 712, 714 (Tex. 1991) (discussing *Mena* hearing that occurred August 4–8, 1991). A week before the scheduled *Mena* hearing, the Texas Attorney General filed a motion in the *Terrazas* cases seeking to enjoin the proceedings in *Mena* until conclusion of the federal action. Terrazas v. Slagle, 789 F. Supp. 828, 830–31 (W.D. Tex. 1991). The State contended that the supremacy of the federal action (and federal law) to the state action (and the Texas Constitution) prohibited the state court from making any determination with respect to the legislative redistricting plans. *Id.* at 831. The

plans.[33] After the plaintiffs presented their evidence, attorneys for the Texas Senate approached plaintiffs' counsel concerning a possible settlement, prompting immediate negotiations.[34] The Texas Attorney General's Office was fully apprised of the settlement efforts.[35]

On August 22, 1991, Judge Ramírez enjoined the use of HB 150 and SB 31 for the 1992 elections. Judge Ramírez further ordered the State to present new redistricting plans by September 30, 1991.[36] In response, the State appealed directly to the Texas Supreme Court.[37] The appeal stayed the district court's order, ultimately ensuring use of the original redistricting plans for the 1992

Mena plaintiffs filed the first of several motions to intervene in the *Terrazas* case for the sole purpose of opposing the stay. *See* Motion to Intervene For Limited Purposes at 1, Terrazas v. Slagle, No. A-91-CA-428 (W.D. Tex., July 31, 1991) (noting limited purpose of intervention). On August 2, 1991, the *Terrazas* court denied the State's request for a stay and determined that the *Mena* plaintiffs' request to intervene was moot. *Terrazas*, 789 F. Supp. at 831.

33. Temporary Injunction and Partial Summary Judgment and Declaratory Relief, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Aug. 22, 1991). Throughout the *Mena* proceedings, John Shields, a member of the law firm representing the *Terrazas* plaintiffs, sat as an observer in the courtroom. The *Terrazas* plaintiffs, however, never attempted to enter *Mena* as parties, even though they too had challenged HB 150 and SB 31 as dilutive of minority voting rights in the federal litigation. At the time, Shields was serving his second term as a member of the State Board of Education. In 1992, Shields won election to the Texas House of Representatives from one of the eleven new Bexar County election districts that resulted from the 1991 reapportionment.

34. Under § 5 of the Voting Rights Act, certain states with a history of discrimination must submit all proposed changes affecting voting in those states or their political subdivisions to the United States Department of Justice (DOJ) or a three-judge federal court in the District of Columbia for approval. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)). Texas is one of the states subject to § 5 preclearance. *Id.*

At the close of the *Mena* proceedings in August 1991, the State submitted the senate redistricting plan to the DOJ for review. Although the Texas Senate's special counsel vigorously defended the senate plan throughout the *Mena* preliminary injunction hearing, counsel later conceded that the DOJ would probably not preclear the State's redistricting plan. The house plan was submitted one month later.

35. References to actions of the State of Texas in the 1991–1992 litigation are interchangeable with those of the Texas Attorney General.

36. *See* Temporary Injunction and Partial Summary Judgment and Declaratory Relief at 5, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Aug. 22, 1994) (enjoining use of HB 150 and SB 31 and ordering presentment of new plans).

37. *See* Richards v. Mena, 820 S.W.2d 371, 371 (Tex. 1991) (tracing events leading to State's direct appeal to Texas Supreme Court). Direct appeal to the Texas Supreme Court is permitted in certain circumstances. *See* TEX. GOV'T CODE ANN. § 22.001(c) (Vernon 1988) (authorizing direct appeal from trial court to Texas Supreme Court when interlocutory or permanent injunction on statute's constitutionality is granted or denied).

elections.[38] Meanwhile, negotiations continued between the *Mena* plaintiffs and the Texas Senate.[39]

One month after Judge Ramírez issued his order, the Texas Attorney General asked the Texas Supreme Court to expedite the appeal and to stay the district court proceedings.[40] The next day, the court complied with the Attorney General's request, effectively tying the hands of Judge Ramírez for the duration of the appeal.[41]

The following week, the Texas Senate reached a settlement agreement with the *Mena* plaintiffs. The Attorney General, however, refused to file a motion with the supreme court to sever the senate portion of the case and remand it to the district court so that the settlement could be entered.[42] As a result, the stay eliminated the means to effectuate the negotiated plan.

Time was running out for the senate plan, as a Section 5 preclearance determination regarding SB 31 was scheduled for October 8, 1991.[43] The weekend prior to the Section 5 determination,

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38. *Mena*, 820 S.W.2d at 371–72.

39. Earlier in the 1991 regular legislative session, the senate attempted to preclude the Attorney General's Office from representing the State in redistricting challenges. Minority groups thwarted that effort, asserting that senate actions against Attorney General Dan Morales stemmed from his Mexican-American heritage. In a compromise with the Attorney General's Office, the senate agreed to hire special counsel to function under the Attorney General's direction.

40. *See* Letter from Renea Hick, Special Assistant Attorney General, Civil Rights Division, United States Department of Justice, to James C. Harrington, Counsel for *Mena* Plaintiffs (Sept. 23, 1991) (on file with authors) (notifying counsel of motions filed to advance argument and stay of trial court proceedings). The Attorney General later explained that the appeal and stay were necessary to protect the State because *Mena* had been scheduled for trial on October 1, 1991. Aware of the ongoing settlement negotiations, the Attorney General also filed an action in the United States District Court for the District of Columbia under § 5 of the Voting Rights Act, seeking to preclear SB 31 and HB 150. Texas v. United States, No. 91-2382 (D.D.C. Sept. 20, 1991). That litigation was not amended until March 9, 1992. Notice of Filing of Section 5 Determination, Terrazas v. Slagle, No. A-91-CA-425 (W.D. Tex., Mar. 9, 1992). On the same day, the DOJ issued its controversial letter of objection to the *Mena/Quiroz* plan that replaced SB 31 in October 1991.

41. *Mena*, 820 S.W.2d at 371.

42. Despite the continuing negotiations between the parties, the Attorney General appealed the August 22 order. The Attorney General complained that asking the supreme court to remand part of an appeal the State had sought to accelerate only a few days before would cause embarrassment.

43. *See supra* note 34; *see also* Texas v. United States, 785 F. Supp. 200, 202 (D.D.C. 1992) (noting that preclearance for SB 31 was scheduled to occur 60 days after original submission). The DOJ's decision to object to SB 31 was imminent since the plan protected incumbents at the expense of creating new minority districts. That knowledge, along with

the *Mena* attorneys and the Texas Attorney General decided to file a separate action in state court to track the *Mena* challenge of the senate plan and the agreed settlement. The Attorney General agreed to seek a severance and remand of the senate portion of *Mena* from the Texas Supreme Court after the separate action was filed.

Subsequently, on October 7, 1991, *Quiroz v. Richards* was filed,[44] and Judge Ramírez entered settlement in that case. The *Quiroz* action mirrored *Mena* and was supported by the *Mena* August hearing record, as stipulated by the parties. The State immediately withdrew SB 31 from Section 5 consideration and substituted for preclearance the new senate redistricting plan, Senate Bill 1 (SB 1), commonly known as the *Mena/Quiroz* plan.[45] Thereafter, the Attorney General asked the Texas Supreme Court to sever the senate portion of the *Mena* appeal and remand it to the district court for settlement. The court remanded the senate plan on October 10, 1991.[46] The following day, Judge Ramírez entered the same order in *Quiroz* as he had entered in *Mena* regarding the prior senate redistricting scheme.[47]

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the less-than-subtle threat of the Austin federal three-judge panel, prompted the senate's negotiations with the *Mena* plaintiffs.

44. Plaintiffs Original Petition for Declaratory and Injunctive Relief, Quiroz v. Richards, No. C-4395-91-F (332d Dist. Ct., Hidalgo County, Tex., Oct. 7, 1991).

45. *See* TEX. REV. CIV. STAT. ANN. art. 193c (Vernon Supp. 1994) (delineating reapportioned senatorial districts). The senate settlement plan addressed the United States Census Bureau's undercount of minority populations by systematically underpopulating all minority districts up to 6.5% below the "ideal" district. The plan populated Anglo districts to levels of 3.5% over the ideal, for a total deviation range of 10%. The final version of the house redistricting settlement used the same methodology to confront the undercount. *See* TEX. REV. CIV. STAT. ANN. art. 195a–11 (Vernon Supp. 1994) (delineating reapportioned state representative districts). Through the *Mena* settlement, Texas became the first state to formally acknowledge the dilutive effect of the census undercount on minority voters. More significantly, Texas took affirmative steps to accommodate for that missing population in the redistricting process.

46. On October 7, 1991, through a motion to modify the stay order, the Attorney General fully advised the Texas Supreme Court of the underlying proceedings in *Quiroz* and their connection with the *Mena* appeal. *See* Motion to Modify and Stay Order at 1–3, Richards v. Mena, No. D-1549 (Tex. Sup. Ct., Oct. 7, 1991) (outlining proceedings leading to final judgment in *Quiroz*).

47. On October 28, 1991, Democratic Senators Eddie Lucio of Brownsville and Bill Sims of San Angelo filed an opposition to the State's motion for modification of the stay order with the Supreme Court. The senators accused the State and the Attorney General of collusion regarding settlement with "private" plaintiffs, which they deemed illegal and unconstitutional. Senators Lucio and Sims further accused the Attorney General of ex-

D. *The Sua Sponte Response of the Federal Court*

Having remained dormant for more than four months, the *Terrazas* cases were revived during the final days of the senate settlement activities, as approval of the *Mena/Quiroz* plan was sought from individual senators. The federal district court presiding over the *Terrazas* cases entered a scheduling order on its own motion.

On October 9, 1991, the *Terrazas* plaintiffs asked the federal court to enjoin the *Mena/Quiroz* settlement.[48] Without a shred of evidence and with full knowledge of the rigorous, adversarial nature of the state court proceedings,[49] the Republican plaintiffs characterized the *Mena/Quiroz* settlement as a "collusive deal," cut in the "dark of night" in "a smoke-filled, back room," and tainted by "Duval County politics."[50] The *Terrazas* plaintiffs further claimed that a settlement with the *Mena/Quiroz* plaintiffs would violate their constitutional and statutory rights.[51] Essentially, the Texas Attorney General's failure to safeguard SB 31 lay at the center of the injury alleged by the plaintiffs. SB 31, however, represented the same senate plan challenged in *Terrazas* as a racial and ethnic gerrymander and found by Judge Ramírez in *Mena* to discriminate

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ceeding his authority in settling the action and failing to defend the original senate plan, SB 31. Letter from Judith A. Sanders-Castro, Counsel for *Mena* Plaintiffs, to Senator Robert J. Glasgow (June 16, 1992) (on file with authors) (chastising Attorney General for failing to protect welfare of clients); *cf.* Letter from James C. Harrington, Counsel for *Mena* Plaintiffs, to Bob Bullock, Texas Lieutenant Governor (Feb. 10, 1992) (criticizing Attorney General for appealing order issued by Judge Ramírez at Attorney General's request). The senators also filed an unsuccessful motion to intervene in *Mena*, and on November 5, they filed a motion for new trial in the case. *Terrazas*, 829 S.W.2d at 717.

During the litigation press conferences, Senator Lucio announced his involvement and accused Judge Ramírez of participating in secret meetings with representatives of the plaintiffs with the intent to compromise Lucio's senatorial election district. At a hearing on *Mena* on January 6, 1992, Senator Lucio, under subpoena to testify, apologized to Judge Ramírez for his prior statements and stated on the record that he had no information to substantiate his allegations.

48. *See* Terrazas v. Slagle, 789 F. Supp. 828, 831 (W.D. Tex. 1991) (mentioning plaintiffs' attempts to obtain temporary restraining order to prevent substitution of *Quiroz* plan).

49. The *Terrazas* plaintiffs knew the details of *Mena* and *Quiroz* because John Shields, a member of the firm representing the *Terrazas* plaintiffs, had attended every court proceeding involving these actions.

50. *See* Application for Preliminary Injunction, or in the Alternative for Ex Parte Temporary Restraining Order Against State Defendants at 9–13, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., Oct. 9, 1981) (attacking settlement reached in *Mena v. Richards*).

51. *Id.* at 3. Interestingly, the *Terrazas* plaintiffs alleged that the *Mena* settlement violated the Voting Rights Act. *Id.*

against Mexican-American voters.[52] At a preliminary hearing in October, United States District Judge James Nowlin refused to enjoin the *Mena/Quiroz* settlements, but suggested that the *Terrazas* plaintiffs seek mandamus from the Texas Supreme Court to invalidate the order.

E. *End of the Appeal, Relief Again, But Then a Mandamus*

On October 30, 1991, the Texas Supreme Court vacated its stay of the *Mena* proceedings.[53] The United States Department of Justice (DOJ) subsequently issued a letter of objection to HB 150, the Texas House plan, citing problems with districts in Dallas, Bexar, and El Paso counties, as well as in the Winter Garden area and the Rio Grande Valley.[54] On November 18, 1991, the DOJ precleared the *Mena/Quiroz* senate plan.[55]

On November 25, 1991, the same day trial on the merits began in *Mena* concerning the house redistricting plan, the *Terrazas* plaintiffs filed an original mandamus action in the Texas Supreme Court against Judge Ramírez, the Attorney General, and Governor Ann Richards.[56] The *Terrazas* plaintiffs petitioned the Texas Supreme Court to set aside the order implementing the precleared *Mena/Quiroz* senate plan.[57] The court scheduled argument for Decem-

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52. *See* Complaint at 3–4, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., May 23, 1991) (alleging that SB 31 dilutes minority votes by impermissibly dividing districts); Findings of Fact and Conclusions of Law at 41–42, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991) (concluding that SB 31 violates Texas Constitution because of its dilutive and discriminatory impact on voting strength of Texas minorities).

53. *See* Richards v. Mena, 820 S.W.2d 371, 372 (Tex. 1991) (vacating stay and allowing proceedings in district court to continue).

54. *See* Terrazas v. Slagle, 789 F. Supp. 828, 831 n.2 (W.D. Tex. 1991) (discussing DOJ's objection letter pertaining to HB 150). The DOJ found that the plan "diluted minority voting strength in several specific areas of the state." *Id.*

55. *See* Defendant Slagle's Response in Opposition to Plaintiff's Emergency Motion to Enforce Injunctions, Application for Temporary Restraining Order, and Application for Temporary Injunction and Supporting Brief at 1, Terrazas v. Slagle, No. A-91-CA-426 (W.D. Tex., Aug. 13, 1992) (describing facts supporting implementation of SB 1).

56. Terrazas v. Ramírez, 829 S.W.2d 712, 717 (Tex. 1991) (orig. proceeding).

57. *See id.* at 713 (reviewing mandamus action challenging *Mena/Quiroz* plan). The grounds supporting the mandamus basically mirrored those asserted by the *Terrazas* plaintiffs when they requested a federal injunction of state court proceedings in early October. Although state practice rules require an attempt to participate or seek relief in a lower court proceeding prior to seeking mandamus from the Texas Supreme Court, the *Terrazas* petitioners asserted that attempting to intervene was futile since the district court denied

ber 10, 1991.[58] Coincidentally, the federal court set a hearing on the *Terrazas* plaintiffs' preliminary injunction for the same day.[59]

On November 27, after three days in hearing,[60] Judge Ramírez held that HB 150 discriminated against Mexican-American voters and ordered that a new plan for the Texas House elections be im-

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the late-filed intervention applications of Senators Sims and Lucio. The petitioners failed to advise the supreme court that a member of their counsel's firm attended every proceeding throughout the *Mena* litigation.

58. Terrazas v. Ramírez, 35 Tex. Sup. Ct. J. 170 (1991) (order setting cause for submission). Over petitioners' objections, the court allowed the *Mena* plaintiffs to intervene. However, the court allotted the *Mena* plaintiffs only five minutes for oral argument, taken from the State's time, even though they arguably had the most at stake.

59. Summary Opinion and Judgment at 1, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Dec. 24, 1991) (noting that hearing began on December 10, 1991 and lasted four days). Interestingly, an Attorney General investigation of the activities surrounding the *Terrazas* action revealed that, during this same general time period, telephone calls had taken place between the chief justice of the Texas Supreme Court, Thomas R. Phillips, and the federal district judge presiding over the *Terrazas* case, James Nowlin. Chief Justice Phillips and Judge Nowlin also spoke near the date the supreme court issued its mandamus, which required Judge Ramírez to vacate the *Mena/Quiroz* senate settlement orders. *See* Fifth Circuit Judicial Council, Report of Special Comm. on Complaint of Lewis H. Earl Against Judge James R. Nowlin at 19–20 (May 5, 1992) (discussing contact between Chief Justice Phillips and Judge Nowlin); *infra* notes 69–72 and accompanying text.

When interviewed by the Fifth Circuit Judicial Committee regarding charges of impropriety against Judge Nowlin, Chief Justice Phillips related that he had telephoned Judge Nowlin out of courtesy to inform him of the mandamus scheduling. Fifth Circuit Judicial Council, Report of Special Comm. on Complaint Against Judge James R. Nowlin at 19–20 (May 5, 1992). Based solely on this and other interviews, the committee found that the contact between Chief Justice Phillips and Judge Nowlin did not relate to the merits of the pending litigation and that no impropriety had occurred. *Id.*

60. During the hearing's second day, the court recessed the case after the State's attorneys indicated their willingness to discuss settlement. The Attorney General's staff offered to fly plaintiffs' counsel to Austin in a state plane for negotiations. Upon arriving in Austin, plaintiffs' counsel were taken to the Insurance Committee room in the Reagan Building at the Capitol complex. The State enlisted the "help" of the Insurance Committee's chair, Representative Eddie Cavazos of Corpus Christi, for the negotiations.

State attorneys sporadically visited plaintiffs' counsel and alleged that they lacked the authority to discuss settlement. After six hours, plaintiffs' counsel learned that the House Redistricting Committee was meeting on the fourth floor, attempting to "pass" a house redistricting plan, and that the committee had no intentions of negotiating.

At that point, plaintiffs' attorneys asked for the state plane to return them to Edinburg since no commercial flights were available. However, the only plane had gone to East Texas to pick up enough members of the redistricting committee to pass the "new" redistricting plan. Thus, plaintiffs' attorneys were stranded in Austin without a means of transportation to return to Edinburg for the hearings scheduled to resume the next morning.

mediately proposed.[61] The filing period for the elected offices was scheduled to commence December 3, 1991.

After a week of intensive negotiations, the *Mena* plaintiffs and the State reached settlement on a new house plan,[62] which Judge Ramírez promptly accepted. The plan was immediately submitted to the DOJ for Section 5 preclearance.[63]

F. *Federal Court Intervention*

At the December 10, 1991 hearing in federal court, the *Terrazas* plaintiffs sought to enjoin the SB 31 and HB 150 plans, which Judge Ramírez had previously deemed discriminatory against Mexican-American voters. After invalidating the plans under the Texas Constitution, Judge Ramírez had enjoined their use and replaced them with settlement plans negotiated between the State and the *Mena* plaintiffs.

During the four-day *Terrazas* preliminary injunction hearing, the *Mena* plaintiffs made three unsuccessful attempts to intervene.[64]

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61. *See* Statement of Facts, vol. III, at 336, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Nov. 27, 1991) (accepting plan proposed by *Mena/Quiroz* plaintiffs).

62. Statement of Facts, vol. I, at 2–3, Mena v. Richards, No. C-454-91-F (332d Dist Ct., Hidalgo County, Tex., Dec. 9, 1991). Ken Fleuriet, an Anglo freshman Republican from the Rio Grande Valley, was the only affected house member allowed to participate in these negotiations. The Mexican-American population in Representative Fleuriet's district faced a reduction during the 1991 reapportionment. After the district was reconfigured, a Mexican-American Democrat defeated Fleuriet in the 1992 elections.

63. *See* Letter from William R. Leo, Hidalgo County Clerk, to John Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Nov. 27, 1991) (on file with authors) (submitting plan for preclearance); *see also* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to John Hannah, Jr., Texas Secretary of State (Mar. 10, 1992) (on file with authors) (noting receipt of preclearance request on January 10, 1992).

64. *See* Order at 1, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Feb. 25, 1992) (noting that three intervention petitions had been filed). Under the Federal Rules of Civil Procedure, the court should have granted the *Mena* plaintiffs intervention as a matter of right. *See* FED. R. CIV. P. 24 (allowing intervention when "applicant claims an interest relating to the property or transaction . . . [and] is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"). In fact, joinder of the *Mena* plaintiffs in the litigation should have been mandatory as well. *See* FED. R. CIV. P. 19 (describing procedure for joinder of persons needed for just adjudication). The court denied the intervention motions on grounds of untimeliness. *See* Order at 2, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Feb. 25, 1992) (finding subsequent intervention motions untimely because second intervention motion was held untimely).

Judge Nowlin did, however, allow the *Mena* plaintiffs to participate as amici curiae. Although the *Terrazas* plaintiffs adamantly opposed intervention by the *Mena* plaintiffs, they did not oppose the intervention of several state legislators and other nonminority intervenors.[65] Judge Nowlin granted the other interventions throughout the hearing and even after its conclusion.

On its own initiative, the DOJ participated as amicus curiae in the preliminary injunction proceedings.[66] The DOJ represented that its interest was limited to the house redistricting challenge.[67] At the close of the hearing on December 13, 1991, the DOJ, which had promised a determination on the recently submitted house plan, informed the court that one of the parties to the litigation had requested a delay of any decision on that plan. The DOJ further notified the court that the *Terrazas* parties had requested a meeting the following Monday in Washington, D.C.[68]

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65. *See* Terrazas v. Slagle, 789 F. Supp. 828, 830 (W.D. Tex. 1991) (listing plaintiff-intervenors in hearing). *But see* Letter From Bob Slagle, Chairman of the Texas Democratic Party, to the Supreme Court of the United States (Jan. 14, 1992) (on file with authors) (asserting that Judge Nowlin had denied four separate intervention pleas by *Mena/Quiroz* plaintiffs).

66. The DOJ has appeared in only one other legislative redistricting suit involving Hispanic interests. *See generally* De Grandy v. Wetherell, 815 F. Supp. 1550, 1555–58 (N.D. Fla. 1992) (discussing DOJ's involvement in Florida redistricting controversy). In Florida, the DOJ aligned with the Republican Party on behalf of the Cuban-American community, attempting to preclude the Democratic legislature from placing too many Cuban-Americans in one district. *Id.* at 1559. Preventing Florida from "packing" districts would create more Hispanic districts and would increase the number of potential Republican districts since Cuban-Americans, unlike Mexican-Americans and Puerto Ricans, tend to register and vote as Republicans. *See id.* at 1570 (noting political cohesiveness of Cuban-Americans and their loyalty to Republican Party).

67. Attorneys for the *Mena* plaintiffs had been in constant contact with DOJ representatives during the December hearing in Austin and had frequently telephoned the Washington, D.C. office to urge immediate preclearance of the recently submitted house plan.

68. Upon learning that the parties which requested the delay were the *Terrazas* plaintiffs, attorneys for the *Mena* plaintiffs scheduled a meeting to follow the *Terrazas* meeting in Washington. During the Monday meeting, the *Mena* plaintiffs' counsel once again urged the DOJ to quickly preclear the *Mena* house settlement.

Prior to this meeting, the DOJ had reviewed and objected to one house plan, reviewed two senate plans (preclearing the *Mena/Quiroz* plan), and reviewed congressional and State Board of Education plans (preclearing both). Despite its policy of expediting consideration of plans that satisfy the requirements of the Voting Rights Act when (1) an election is imminent, (2) the DOJ is aware of the background and demographics involved, and (3) the state has submitted a plan designed to correct prior Voting Rights Act deficiencies, the DOJ did not preclear the house plan.

Four days later, the Texas Supreme Court ordered Judge Ramírez to vacate his order pertaining to the *Mena/Quiroz* settlement of the Texas Senate challenge.[69] According to the supreme court, Judge Ramírez failed to follow the "proper procedure"[70] of notifying all potentially interested parties of his intent to enter a plan and allowing presentation of alternative plans.[71] The court further in-

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The house plan was still under consideration when the Texas Supreme Court issued its mandamus order requiring Judge Ramírez to vacate his order implementing the senate settlement. At that time, the DOJ declined to preclear the house plan because of the supreme court's mandamus order and the questionable validity it supposedly cast on the house plan. *See generally Terrazas*, 789 F. Supp. at 829–31 (outlining procedural history of DOJ's preclearance activities).

69. Terrazas v. Ramírez, 829 S.W.2d 712 (Tex. 1991) (orig. proceeding).

70. Prior to the *Mena* litigation, only one voting rights case, *López v. Del Valle Independent School District*, had been filed under the Texas Constitution. At the time the *Terrazas* mandamus issued, no election plan had been ordered in the *López* case. Thus, no "proper procedure" for a state-court election plan existed, and Judge Ramírez had no procedure, other than that used in federal cases, to follow.

71. When asked by the Texas Supreme Court about their efforts to intervene in *Mena*, the *Terrazas* petitioners admitted that they had made no attempt to do so. Nevertheless, the supreme court determined that any effort by petitioners to join *Mena* would have been "useless" and excused them from the general requirement that parties first attempt to obtain redress in lower courts before seeking the extraordinary remedy of original mandamus. *Terrazas*, 829 S.W.2d at 724–25.

In his dissent from the court's mandamus order, Justice Oscar Mauzy discussed the purely partisan actions of the federal *Terrazas* panel and Texas Supreme Court:

> In this extraordinary proceeding, the Republican Relators object to a redistricting plan designed to increase Mexican-American representation in the Texas Senate. This plan has received pre-clearance approval from the Department of Justice under the administration of President George Bush and has been approved in a timely manner by the trial court so as to avoid disruption of both the filing deadline and the election day for the party primaries. Finding this highly distasteful, and determined to have an appointed federal judiciary guide the process by which Texans elect their legislators, the Relators demand that this court accept their condemnation of Attorney General Dan Morales and declare void the redistricting plan he negotiated.
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> . . . .
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> The real issue in this proceeding concerns whether this court should adopt a special, unprecedented rule for a group of Republicans who literally sat on their rights on a bench at the Hidalgo County Courthouse quietly watching the trial court. For these particular parties, this court, of course obliges. Republican is the self-description of Relators, whose principal complaint in the federal court proceeding is that the redistricting plan discriminates against their political party. . . . Confidence in our system of justice is dependent upon our judiciary affording equal treatment under the law, regardless of political affiliation. We believe these particular Relators are entitled to equal treatment, but not the special treatment the majority today affords them. Today, the majority responds to these Relators in a manner never done in the history of Texas and perhaps in the history of the United States.

Id. at 739–40 (Mauzy, J., dissenting) (footnotes omitted).

structed Judge Ramírez to notify by broad publication all potentially interested persons concerning the public hearing on the entry of the redistricting plans. Additionally, the court ordered Judge Ramírez to provide time for a legislative response.[72] Accordingly, on December 18, Judge Ramírez scheduled a public hearing for later that month. After Governor Richards announced a special legislative session on redistricting, Judge Ramírez rescheduled the hearing for January 6, 1992.[73] Judge Ramírez ordered the *Mena* plaintiffs to publicize the hearing by giving actual notice to all *Terrazas* parties and the individual members of the legislature, and by placing notices in all major newspapers.

G. *Lumps of Coal on Christmas Eve for Texas Minorities*

With full knowledge of Judge Ramírez's scheduled action and Governor Richards's call for a special session, the *Terrazas* court, at 4:30 p.m. on Christmas Eve, ordered that the 1992 elections be held under its own plans.[74] On December 29, 1991, the State filed

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Billing records and responses, revealed during depositions of the *Terrazas* Republicans' attorneys, indicated that the *Terrazas* attorneys had carefully monitored the *Mena* litigation and settlement negotiations. One billing notation revealed that *Terrazas* counsel was aware of the settlement of the house redistricting challenge before the *Mena* attorneys were notified by the State. Although the *Mena* plaintiffs' motion for rehearing presented evidence of the blatant misrepresentations made by the *Terrazas* petitioners, the supreme court remained unmoved.

72. *See Terrazas*, 829 S.W.2d at 726 (detailing "proper" course of action for court to follow regarding legislative consideration of reapportionment plans).

73. *See* Letter from James C. Harrington, Counsel for *Mena* Plaintiffs, to Special Assistant Attorney General Renea Hicks et al. (Dec. 19, 1991) (on file with authors) (informing interested parties of rescheduling); *see also* Statement of Facts, vol. I, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Jan. 6, 1992) (memorializing hearing that occurred on January 6, 1992).

74. Terrazas v. Slagle, 789 F. Supp. 828, 839 (W.D. Tex. 1991). Throughout the December 24 order, the *Terrazas* panel consistently referred to the plaintiffs as Republicans rather than minority or Mexican-American plaintiffs; the reference to "Republican plaintiffs" appeared at least 11 times. *See id.* at 830–39. Indeed, the court specifically distinguished the *Terrazas* plaintiffs from those identified as Mexican-American or *Mena* plaintiffs in the state court litigation. Yet, the court relied on the Voting Rights Act and protection of minority voting rights to support its decision. *Id.* at 830.

The house plan ordered by the federal court closely resembled the plan negotiated by the *Mena* plaintiffs. *Id.* at 836–37. In fact, the *Terrazas* plan changed only three of the 150 house districts. The changes, however, reduced the Mexican-American population, voting age population, and Spanish-surname voter registration of three predominantly Mexican-American house districts in the *Mena* plan. While two of these districts were represented by Republican incumbents, the third was represented by a conservative Anglo Democrat

an emergency motion to stay the *Terrazas* court's order with the United States Supreme Court.[75]

H. *Legislative Approval of the Settlement, But Still No Relief*

During the special session, which began on January 3, 1992, the Texas Legislature held hearings on the *Mena/Quiroz* house and senate plans (HB 1 and SB 1), both of which virtually mirrored the *Mena/Quiroz* settlement.[76] Minority legislators, representatives of minority organizations, and the attorneys for the *Mena* plaintiffs testified at the legislative hearings in unanimous support for SB 1.[77] John McCamish, lead counsel for the *Terrazas* plaintiffs, presented a letter by John Dunne, Assistant United States Attorney General for the DOJ's Civil Rights Division, which effectively withdrew the DOJ's November 18, 1991 preclearance of the *Mena/Quiroz* senate

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who had announced his intentions to retire, leaving that position open. *See id.* at 835–38 (explaining effect of different plans on minority representation in respective districts).

The *Terrazas* court's plan had a much more profound effect on the Texas Senate districts. The plan significantly changed the geographic configurations of about half the senate districts and altered the political makeup of about seven senate seats. *Id.* at 835–37.

An Attorney General investigation conducted soon after the court's January 10, 1992 order found that persons advising the court had ordered partisan political analysis of the plans as they were developed. Moreover, the investigation revealed that all changes made by those persons were implemented to the advantage of Republican interests and candidates. Except for two districts, every Mexican-American district created by the *Terrazas* senate plan had lower levels of Mexican-American population and voter registration from those in SB 1.

The Texas Senate has 31 members, 9 of whom were Republican before the 1992 elections held under the *Terrazas* plan. The Texas House has 150 members, 57 of whom were Republican before the 1992 elections. Clearly, reaching a majority would require a gain of fewer seats in the senate than in the house. Furthermore, under the senate's parliamentary rules, control of one-third or more of the senate seats would still allow the Republicans to control legislation.

The importance of the potential gain in senate seats engendered a committee headed by Rick Perry, Texas Agriculture Commissioner, and Kay Bailey Hutchison, State Treasurer, to solicit funds statewide to help potential Republican candidates in eight Senate districts created under the *Terrazas* plan. Ultimately, the Republicans captured four of those districts. In all, the Republicans held 13 senate seats after the 1992 general elections.

75. *See* Richards v. Terrazas, 112 S. Ct. 924 (1992) (order denying application for stay).

76. However, the legislature left intact the *Terrazas* house plan for the 1992 election, activating the *Mena/Quiroz* plan thereafter to avoid problems of delay. The *Mena* plaintiffs agreed to this modification.

77. Tex. S.B. 1, 72d Leg., 3d C.S. (1991).

settlement plan.[78] Nevertheless, on January 8, 1992, the legislature passed both HB 1 and SB 1 (the *Mena/Quiroz* settlements), which Governor Richards signed into law that same day.[79] The State promptly submitted a motion to the *Terrazas* court requesting that the court replace the interim plans by ordering the newly legislated plans into effect.

On January 10, members of the Texas Legislature, accompanied by the attorneys for the *Mena* plaintiffs and a delegation of minority state senators and representatives, personally submitted HB 1 and SB 1 to the DOJ for preclearance. The delegation met with Assistant Attorney General Dunne and several staff members of the DOJ's Voting Rights Section. The delegation urged the DOJ to immediately preclear the plans in light of the March 10 primary and the ongoing election process.

On the same day the delegation met with the DOJ, the *Terrazas* panel denied the State's request to substitute SB 1 for its own interim plan, determining that SB 1 could not be precleared because it violated Section 2 of the Voting Rights Act.[80] Steven Rosenbaum, the Acting Chief of the DOJ's Voting Rights Section, later wrote an advisory memorandum at the request of Assistant Attorney General Dunne. In the memorandum, Rosenbaum stated that, since the DOJ had precleared essentially the same plan in November, SB 1 would probably meet the requirements for Section 5 preclearance.[81] According to Rosenbaum, a Section 5 objection to

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78. *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to John N. McCamish, Attorney for *Terrazas* Plaintiffs (Jan. 4, 1992) (responding to McCamish's letter dated Jan. 3, 1992 and stating that failure to object to earlier plan does not preclude objection of later version of same plan). DOJ policy prescribes that a determination on a submission must first be directed to, and communicated with, the jurisdiction or submitting authority. No other party is given advance notice of that decision. The regulations governing the § 5 administrative review process specifically require the DOJ to notify the submitting authority before the DOJ withdraws a preclearance. Processing of Submissions, 28 C.F.R. § 51.43 (1993). The DOJ did not follow that policy and those regulations in this situation.

79. *See* Texas v. United States, 785 F. Supp. 201, 203 (D.D.C. 1992) (tracing chronology of events concerning Texas reapportionment struggle and noting enactment of both bills).

80. *Id.*

81. Memorandum from Steven H. Rosenbaum, Acting Chief, Voting Rights Section, Civil Rights Division, United States Department of Justice, to John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Jan. 12, 1992) (on file with authors).

SB 1 would be difficult to defend in light of the *Terrazas* panel's reliance upon the plan's Section 2 infirmities.[82] Noting the superiority of SB 1, Rosenbaum stated that the *Terrazas* plan for the predominantly Mexican-American districts located in Harris and Bexar counties actually impaired minority voting opportunities. Rosenbaum recommended that further action on SB 1 be delayed until the United States Supreme Court ruled on the State's application for stay of the *Terrazas* plan.[83]

During the public hearing scheduled by Judge Ramírez pursuant to the Texas Supreme Court's mandamus order, the *Terrazas* plaintiffs, along with Senators Bill Sims and Eddie Lucio, sought intervention for the first time in *Mena*.[84] The judge allowed these interventions and rescheduled the hearing for January 13, 1992, providing the legislature time to respond. The following day, the *Mena* plaintiffs served deposition notices on the *Terrazas* intervenors. On January 8, the *Terrazas* intervenors nonsuited in *Mena* and filed a separate state action, *Craddick v. Richards*,[85] asserting the same state constitutional arguments employed by the *Mena* plaintiffs in their challenge of HB 150 and SB 31. In *Craddick*, however, the *Terrazas* intervenors attacked the new *Mena/Quiroz* plans by alleging that the plans discriminated on the basis of political affiliation.[86]

On January 13, at the joint request of the State and the *Mena* plaintiffs, Judge Ramírez ordered SB 1 and HB 1 into effect.[87] In

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82. *Id.*

83. *Id.*

84. Statement of Facts, vol. I, at 12, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Jan. 6, 1992). The court allowed Senator Lucio to intervene after hearing testimony from Lucio that he had no basis for accusing Judge Ramírez of secret meetings with plaintiffs to draft a redistricting plan.

85. Plaintiff's Original Petition, Craddick v. Richards, No. A-38,899 (238th Dist. Ct., Midland County, Tex., Jan. 8, 1992).

86. *Id.* at 4. The petition maintained that SB 1 "unconstitutionally violates the rights of Texas Republican, black, and hispanic voters to elect candidates of their choice by intentionally diluting the voting strength of Republicans, blacks, and hispanics." *Id.*

87. Statement of Facts, vol. I, at 119–120, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Jan. 13, 1992). The *Terrazas* court also entered an order correcting demographic descriptions in its January 10 order, which contained errors in virtually every senate district. *See* Amended Order and Judgment, Terrazas v. Slagle, Nos. A-91-CA-425, -426 (W.D. Tex., Jan. 13, 1992) (amending judgment nunc pro tunc). At that point, suspicion arose concerning the origins of the plan and its errors. Within a few days, a state computer operator disclosed that Republican Representative George Pierce of Bexar County worked with one of Judge Nowlin's law clerks on a plan at the computer

doing so, Judge Ramírez waived the Texas constitutional rule that prevents legislation passed by a simple majority vote from becoming effective for ninety days.[88] Because the order was a final judgment, the court also awarded attorneys' fees to the *Mena* plaintiffs.[89] Although the State agreed to the order except for the award of attorneys' fees, the Texas Attorney General immediately appealed the entire order. The appeal automatically stayed the order's effect.

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operator's station. *See* Gary Taylor, *Judge Investigated*, NAT'L L.J., Mar. 2, 1992, at 2 (noting affidavits submitted by three legislative council redistricting employees who allegedly observed Representative Pierce working with Nowlin's assistant on council's computers). An extensive investigation ensued that tracked hours of conversation between Pierce's state office number and Judge Nowlin's chambers and residence during the period preceding and following entry of the December 24 *Terrazas* order. Defendants' efforts to depose the law clerks of the three *Terrazas* panel judges regarding the ex parte contacts failed when the judge to whom the issue was referred, United States District Judge Sam Sparks of Austin (another Republican appointee), quashed the subpoenas. Terrazas v. Slagle, 142 F.R.D. 136, 140 (W.D. Tex. 1992).

The Fifth Circuit Judicial Committee later reprimanded Judge Nowlin for his and the clerk's ex parte work and communications. Order, Fifth Circuit Judicial Council, Complaint of Lewis H. Earl Against United States District Judge James R. Nowlin Under the Judicial Conduct and Disability Act of 1980 (May 15, 1992) (on file with authors); *see* Gordon Hunter, *Nowlin Awaits Recusal Decision: U.S. Supreme Court to Decide Rare Venue Question*, TEX. LAW., May 25, 1992, at 5 (noting Judge Nowlin's silence concerning reprimand). The Committee, however, comprised primarily of Republican appointees, conducted no independent investigation. The Committee's investigation consisted only of interviews with Chief Justice Phillips, Judge Nowlin, Representative Pierce, and the law clerks for the *Terrazas* panel. The Committee accepted at face value their explanations with respect to what had transpired despite the contradictions with Pierce's deposition testimony in *Terrazas v. Slagle*. In its final report, the Committee excused Judge Nowlin's actions stating that, while his actions appeared improper, Judge Nowlin had not acted with malicious intent. The United States Supreme Court, reviewing the matter by certified question from the United States Court of Appeals for the Fifth Circuit, declined to overturn the *Terrazas* judgment based on the Committee's report. *See* Slagle v. Terrazas, 113 S. Ct. 29 (1992) (finding that report did not demonstrate corruption or improper motive).

Judge Nowlin subsequently withdrew from participation in the *Terrazas* litigation on his own initiative. Order, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., July 21, 1992) (order by Judge James Nowlin). Judge Nowlin feared that his association might negatively impact the panel due to publicity regarding his difficulties, especially if a court imposed penalties against any of the attorneys or parties under Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 1–2. Judge Harry Hudspeth, a Democratic appointee from El Paso, replaced Judge Nowlin on the panel. Order, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., July 2, 1992) (order by Chief Judge Henry Politz). No sanctions were ever imposed.

88. TEX. CONST. art. III, § 39.

89. Statement of Facts, vol. I, at 119–120, Mena v. Richards, No. C-454-91-F (332d Dist. Ct., Hidalgo County, Tex., Jan. 13, 1992).

I. *Federal Intervention Again*

At the *Terrazas* plaintiffs' request, the three-judge *Terrazas* panel entered a temporary restraining order on January 14 enjoining the *Mena* parties, the *Terrazas* defendants, and their attorneys from interfering with the implementation of its plans.[90] Subsequently, the court converted the temporary restraining order into a permanent injunction.[91] On the same day the temporary restraining order was entered, United States Solicitor General Kenneth Starr filed an opposition to the State's request for a stay of the *Terrazas* court's order in the United States Supreme Court.[92] Solicitor General Starr cited the *Terrazas* panel's findings that SB 1 was inferior to the *Terrazas* plan and that the senate plan violated Section 2 of the Voting Rights Act.[93] The Supreme Court denied

90. Temporary Restraining Order, Terrazas v. Slagle, Nos. A-91-CA-425, -426 (W.D. Tex., Jan. 14, 1992). The court continued to deny the *Mena* plaintiffs intervention in the federal litigation; they had filed five applications at that point. When the court entered the temporary restraining order, the *Mena* plaintiffs were not parties to *Terrazas*. In fact, the court simply refused to act on six of the nine requests to intervene until after the District of Columbia court had precleared SB 1 and the 1992 general election had been conducted under the *Terrazas* senate plan.

91. *See* Preliminary Injunction, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Jan. 24, 1992). On February 17, 1992, the opening date for primary early voting, minority plaintiffs filed another federal action in the Western District of Texas, Midland/Odessa Division, seeking to preclude implementation of the *Terrazas* plan. Judge Lucius Bunton denied a temporary restraining order after the DOJ filed an opposition to the motion. Judge Bunton transferred the case to the *Terrazas* court. Although the *Terrazas* plaintiffs sought sanctions against the *Mena* attorneys for violation of the January 24 injunction in *Terrazas*, the court never acted on their motion.

92. Memorandum of the United States as Amicus Curiae in Opposition to Application for Stay Pending Appeal, Richards v. Terrazas, No. A-498 (U.S. Sup. Ct., Jan. 14, 1992).

93. *See id.* at 5 (citing *Terrazas* court's reasons for determining superiority of its plan). The United States filed the memorandum despite the DOJ's comparative analysis of the two plans, which showed contrary results and indicated that a § 5 objection to SB 1, based on the *Terrazas* order, would be indefensible. *See* Memorandum from Steven H. Rosenbaum, Acting Chief, Voting Rights Section, Civil Rights Division, United States Department of Justice, to John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Jan. 12, 1992) (on file with authors) (noting that *Mena* plan should meet requirements of § 5).

the State's motion for stay.[94] Furthermore, the DOJ took no immediate action to preclear SB 1.[95]

J. *Back to the District of Columbia Court*

On February 5, the Texas Attorney General sought summary judgment preclearance of SB 1 in the United States District Court for the District of Columbia.[96] The *Mena* and *Terrazas* plaintiffs were permitted to intervene. The United States opposed the summary judgment motion, claiming that SB 1 required renewed evaluation under Section 5,[97] that the *Terrazas* plan represented the benchmark against which SB 1 should be compared, and that retrogression analysis of SB 1 was not a simple task.[98]

During the hearing on the State's motion for summary judgment, the DOJ argued that the *Terrazas* panel's Section 2 findings regarding SB 1 were binding on the District of Columbia court as well as

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94. Richards v. Terrazas, 112 S. Ct. 1073, 1073 (1992). The Court also denied the *Mena* plaintiffs' attempt to intervene in the case. Richards v. Terrazas, 112 S. Ct. 2272, 2272 (1992).

95. *See* Memorandum from Steven H. Rosenbaum, Acting Chief, Voting Rights Section, Civil Rights Division, United States Department of Justice, to John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Jan. 12, 1992) (on file with authors) (discussing reasons for delaying preclearance determination). The DOJ's delay ensured that preclearance of the Texas Senate plan would not occur before the March 10 primary and that the primary would be held under the Republican-preferred *Terrazas* plan. *Id.* The DOJ's actions were surprising in light of the Acting Chief Rosenbaum's assertion that the *Terrazas* plan provided less opportunity for Mexican-Americans to elect members of their choice to the Texas Senate. *Id.*

96. *See* Texas v. United States, 785 F. Supp. 201, 202 (D.D.C. 1992) (addressing claims asserted by Texas in reapportionment controversy). As previously noted, § 5 of the Voting Rights Act authorizes this court to preclear redistricting plans. *See* Voting Rights Act of 1965, Pub. L. No. 89–110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. 1973c (1988)) (authorizing District of Columbia court to render declaratory judgment that certain practices or policies do not deny or abridge right to vote on basis of race). The Texas Attorney General, however, did not amend his pending original complaint to conform with the newly legislated plans for which preclearance was sought.

97. *See* Memorandum of the United States in Opposition to State of Texas' Motion for Partial Summary Judgment at 14, Texas v. United States, No. 91-2383 (D.D.C., Feb. 13, 1992) (arguing that adoption process for SB 1 "clearly differs" from prior, court-mandated plan and must receive § 5 preclearance before implementation).

98. *Id.* at 15–18. These positions asserted by the United States contradicted the assessments in the DOJ's January 12, 1992 internal memorandum. *See* Memorandum from Steven H. Rosenbaum, Acting Chief, Voting Rights Section, United States Department of Justice, to John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Jan. 12, 1992) (on file with authors) (hailing SB 1 as superior to *Terrazas* plan).

the DOJ.[99] Despite the DOJ's January memorandum, which found no credible evidence of discriminatory intent in SB 1's enactment, the DOJ urged the District of Columbia court to review SB 1 for discriminatory purpose. The DOJ also advised the court that, unless drastic changes occurred between the summary judgment hearing and March 9, the *Terrazas* Section 2 findings would require the DOJ to object to SB 1.[100]

When questioned by the court regarding the delay on the Texas submission, the DOJ denied that any such delay had occurred, even though SB 1 had been before it for more than a month and had received preclearance in November 1991.[101] The DOJ contended that its inaction on SB 1 had caused the State no harm since another redistricting plan was in place, albeit not one of the State's choosing.[102] As the DOJ was well aware, Texas minority communities vehemently opposed the *Terrazas* plan; only the Republicans supported that plan.

In its opinion on the State's motion, rendered February 25, 1992, the District of Columbia Court expressly deferred to the DOJ's interpretation of the Voting Rights Act.[103] Relying on the DOJ's representation that SB 1 would not be precleared before March 10, the court determined that a full evidentiary hearing was necessary. This hearing, in the court's view, should occur after the March 10

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99. Federal courts located in § 5 jurisdictions are prohibited from scrutinizing a legislated plan for constitutional or statutory errors until after the DOJ completes a § 5 review and makes its preclearance determination. Terrazas v. Clements, 537 F. Supp. 514, 525 (N.D. Tex. 1982).

100. The DOJ currently maintains that, if the Texas Attorney General had effectively carried his burden in the preclearance process or in the District of Columbia court, SB 1 could have been precleared before the primary elections.

101. At the time of Rosenbaum's January memorandum, the 60-day review period for the *Mena/Quiroz* settlement plan had not yet expired. Had the DOJ genuinely believed that SB 1 violated § 2, the DOJ could have issued a letter of objection concerning the *Mena/Quiroz* plan on January 14, 1992. A determination preclearing or objecting to the plan would have caused the issue to be resolved by the District of Columbia court, possibly in time for the State to substitute SB 1 for the *Terrazas* plan.

102. The *Terrazas* plaintiffs echoed the DOJ's request that the District of Columbia court do nothing. Significantly, the minority community being protected by the DOJ was, in reality, the minority partisan community—the Republicans.

103. *See Texas v. United States*, 785 F. Supp. at 205 n.3 (recognizing policy of deference to DOJ's construction of Voting Rights Act).

primary and after the DOJ had made its contemplated objections to the *Mena/Quiroz* plan.[104]

K. *A Department of Justice Ploy*

The DOJ's position before the District of Columbia court, which vastly differed from Acting Chief Steven Rosenbaum's assessment that SB 1's superiority to the *Terrazas* plan warranted preclearance, caused a postponement in the case. On March 9, the DOJ issued a letter of objection to SB 1, relying on the *Terrazas* panel's finding that SB 1 violated Section 2 of the Voting Rights Act.[105] The DOJ further contested the validity of House Bill 2

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104. *See id.* at n.2 (noting court's belief that SB 1 would not receive preclearance before March 10, 1992).

105. *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to John Hannah, Jr., Texas Secretary of State (Mar. 9, 1992) (on file with authors) (objecting to use of SB 1). The *Terrazas* panel's § 2 finding was based on its creation of the "minority influence" (combined Mexican-American and African-American) district in Dallas and Tarrant counties absent from SB 1. Ironically, in an earlier case involving a challenge to at-large elections for the Austin City Council, Judge Nowlin considered evidence regarding the effectiveness of single-member districts similar to that used by the court to justify the *Terrazas* plan. Judge Nowlin found that evidence insufficient to support a violation of § 2 of the Voting Rights Act. *See* Overton v. City of Austin, No. A-84-CA-189, 1987 U.S. Dist. LEXIS 14647, at *56 (W.D. Tex. Sept. 15, 1987) (mem.). This evidence included a detailed data and statistical analysis that showed political cohesion between African-Americans and Mexican-Americans. *See id.* at *6–19 (detailing data offered by *Overton* plaintiffs). Furthermore, it demonstrated significant racially polarized voting between minority and Anglo voters. In *Overton*, Judge Nowlin held that the plaintiffs could not meet one of the *Thornburg v. Gingles* criteria—the ability to create a remedial electable single-member district—because the predominantly Mexican-American district created by the plaintiffs' plan contained only 49.9% of the Mexican-American voting-age population, even though the additional African-American population in the district put it well over the 50% minority voting-age population required under *Thornburg*. *See* Thornburg v. Gingles, 478 U.S. 30, 49 (1986) (requiring "politically cohesive, geographically insular minority group" for successful § 2 claim); *Overton*, 1987 U.S. Dist. LEXIS 14647, at *42 (finding no political cohesion between Mexican-American and African-American voters). Finally, Judge Nowlin found data demonstrating that African-American and Mexican-American voters voted together 95% of the time insufficient to show cohesion in the separate minority groups or between the minority groups. *Overton*, 1987 U.S. Dist. LEXIS 14647, at *7-17, 56.

In an opinion authored by Judge Nowlin, the *Terrazas* court did not require statistical proof of cohesion between minority groups in the Dallas-Tarrant county district. Furthermore, the court did not require its cross-county district to contain a majority of the combined minority voting-age population, nor did it require that one or the other group compose a majority. Remarkably, the court took judicial notice of racially polarized voting in the state without presentation of any statistical evidence specific to the Dallas-Tarrant counties area.

(HB 2),[106] which passed during the special session and provided the State a mechanism to implement SB 1 if preclearance occurred after the primary elections.[107]

On March 19, 1992, the District of Columbia court issued a case schedule, closing discovery in two months. On June 24, in a surprising response to the State's request for a trial setting, the DOJ asserted that it no longer opposed preclearance of SB 1, negating the need for a trial.[108] The DOJ further contended that, because the December 24, 1991 and January 10, 1992 *Terrazas* orders were not final judgments, the orders did not carry preclusive weight barring the District of Columbia court from preclearing SB 1.[109]

Two months after the DOJ adopted this new position regarding SB 1, the *Quiroz* plaintiffs asked Judge Ramírez to certify a statewide class and to enter a final judgment incorporating the *Mena/*

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106. Act of Jan. 8, 1992, 72d Leg., 3d C.S., ch. 3, 1992 Texas Gen. Laws 163 (providing that primary election would be rescheduled for April 11, 1992 if SB 1 was not ordered into effect by January 17, 1992).

107. *Cf.* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to John Hannah, Jr., Texas Secretary of State (Mar. 10, 1992) (on file with authors) (objecting to parts of HB 2). From meetings and communications with minority legislators and the *Mena* plaintiffs, the DOJ understood the minority community's desire to have HB 2 precleared so that SB 1 could be implemented for 1992 senate elections.

Judge Ramírez also accepted HB 2 and ordered the plan into effect, even though it basically overrode a constitutional provision. Judge Ramírez took this action to ensure that his remedial order adopting SB 1 would be implemented immediately, essentially finding that relief ordered under the Texas Bill of Rights provisions superseded a conflicting constitutional provision.

108. According to the DOJ, its reversal in stance stemmed from new information gained in discovery as well as the administrative review process prior to its March 9 objection letter. Except for the March primary results, all the information collected by the DOJ had been available since January 10, when the State initially submitted SB 1. The March primary results confirmed the DOJ's predictions concerning the Mexican-American district in Harris County: the Anglo incumbent prevailed over the Mexican-American candidate. The results were directly attributable to the district's loss of Mexican-American population under the *Terrazas* plan from its population level under SB 1.

A post-election projection analysis of the results of the March primary showed that the Mexican-American candidate in the Harris County Mexican-American district would have secured the Democratic nomination without a runoff, even against the same Anglo incumbent who won the nomination, had the election been conducted under SB 1.

109. The orders had not substantively changed since the DOJ informed the District of Columbia court that the *Terrazas* findings on SB 1 controlled. Since the DOJ relied on a 1970 case as authority, the state of the law remained the same as well. The only change from February 1992 to late June 1992 was that the primary had been conducted under the *Terrazas* plan.

Quiroz settlement.[110] The *Quiroz* plaintiffs sought certification because *Craddick v. Richards*, a pending state case initiated by the *Terrazas* plaintiffs, created the potential for a collateral attack upon the *Mena/Quiroz* settlements. Judge Ramírez certified the requested class action on May 18, 1992.[111] The *Quiroz* plaintiffs expended considerable funds in publishing class action notices in newspapers throughout Texas. Surprisingly, the Attorney General filed an interlocutory appeal,[112] even though such an appeal appeared contrary to the State's interests.[113]

On June 29, 1992, the United States Supreme Court summarily affirmed *Terrazas*.[114] Subsequently, the *Terrazas* intervenors filed a summary judgment motion in the District of Columbia action, seeking to defeat preclearance of SB 1.[115] The *Terrazas* plaintiffs cited the Supreme Court's affirmance of *Terrazas* as authority for their position.[116] Importantly, all other parties opposed the motion, urging the court to preclear SB 1. On July 27, in an opinion critical of the *Terrazas* order dated January 10, 1992, the United States District Court for the District of Columbia precleared SB 1.[117]

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110. *See* Order on Plaintiffs' Motion to Certify Class Action, Quiroz v. Richards, No. C-4395-91-F (332d Dist. Ct., Hidalgo County, Tex., May 18, 1992) (discussing reasons supporting certification of class).

111. *See generally* TEX. R. CIV. P. 42 (allowing court to consolidate actions involving common questions of law or fact).

112. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon 1986 & Supp. 1994) (delineating situations in which individual may appeal from interlocutory order of district court). The statute permits appeal when a district court "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure." *Id.*

113. Almost one year later, the Corpus Christi Court of Appeals reversed the class certification. Richards v. Quiroz, 848 S.W.2d 819, 822 (Tex. App.—Corpus Christi 1993, no writ). Ruling the issue moot, the court found that the plaintiffs failed to demonstrate sufficient probability of collateral attack so as to necessitate class protection. *Id.* at 821.

114. Richards v. Terrazas, 112 S. Ct. 3019 (1992). The issue of the *Terrazas* "finding," or dicta, regarding the alleged § 2 violation was not pursued by any of the litigants before the Court. Mexican-American efforts to intervene in the Supreme Court proceedings were denied.

115. *See* Texas v. United States, 802 F. Supp. 481, 482 (D.D.C. 1992) (discussing efforts of *Terrazas* intervenors to obtain summary judgment).

116. *See id.* at 484–85 (rejecting argument that Supreme Court affirmed § 2 statement when it affirmed appeal filed by State of Texas). As the court noted, "a summary affirmance decides only the precise questions presented on appeal." *Id.* at 485.

117. *See id.* at 487 (preclearing SB 1 after determining that plan would not deny or abridge right to vote on basis of race).

L. *Retaliation by the Austin Federal Court*

On August 6, 1992, Texas Secretary of State John Hannah issued an administrative order mandating that the November general elections be conducted under SB 1.[118] Secretary Hannah instructed the state's political parties to ensure that candidates nominated in March were situated in the proper districts. The order also required the nomination of a candidate when a party lacked a nominee.[119] The *Terrazas* plaintiffs immediately asked the *Terrazas* court for protection. Although the minority communities supported Secretary Hannah's order, the DOJ appeared in the case and urged the court to enjoin Hannah from implementing his order.[120] Within one week, the *Terrazas* panel enjoined the order, precluding implementation of SB 1 for purposes of the general election.

As a result of the November elections, four Republicans replaced Democratic incumbents. Furthermore, one Mexican-American Democrat in Bexar County narrowly retained his seat in a district Acting Chief Rosenbaum had characterized in his January 12, 1992 memorandum as "potentially weakened" under the *Terrazas* plan. According to Rosenbaum, the *Terrazas* plan created

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118. Directive from John Hannah, Jr., Secretary of the State of Texas, to County Clerks, Voter Registrars, Election Administrators, and Party Officials (Aug. 6, 1992) (on file with authors).

119. *Id.* The State Democratic Executive Committee met the following weekend to respond to the Secretary of State's order. Minutes of State Democratic Executive Committee Meeting (Aug. 8, 1992) (on file with authors). As a result of the meeting, Román Martínez, the Mexican-American candidate defeated in the March primary by John Whitmire, the Anglo incumbent left in the Harris County Mexican-American district under the *Terrazas* plan, was nominated to run in the Harris County Mexican-American SB 1 district. *Id.* Whitmire lived in a neighboring district under SB 1 and became the nominee in that district. *See id.* (reconfirming Whitmire's nomination through Democratic Executive Committee's adoption of subcommittee report).

120. Initially the DOJ appeared to participate in the house redistricting case before the *Terrazas* court. This time, however, the DOJ appeared to argue that all voters, not just minority voters, would suffer injury if SB 1 was implemented for the general election. The DOJ asserted its statutory duty was on behalf of all voters of the state, a rather anomalous position under the Voting Rights Act. At this point, the *Mena* plaintiffs again sought intervention to voice their support for the Secretary's action. Application for Intervention and Supporting Memorandum, Terrazas v. Slagle, A-91-CA-425, -426, -428 (W.D. Tex., Dec. 8, 1992). The court ignored their request and, as before, allowed no presentation by minority representatives.

the possibility that minority representation would disappear in this district during the next decade.[121]

M. *Victory from the Wreckage*

After the November general election, the *Terrazas* panel ordered all parties to submit their summary judgment motions by December 7, 1992.[122] In April 1993, the *Terrazas* court granted the State and defendant Slagle's motions for summary judgment in all three Republican cases.[123] Thus, the *Mena/Quiroz* plaintiffs ultimately prevailed, ensuring that the legislative elections in 1994 and thereafter will be conducted under SB 1 and HB 1, the *Mena/Quiroz* redistricting plans.

Despite the apparent success of the *Mena/Quiroz* plaintiffs, the redistricting saga has not yet reached its conclusion. Oral argument in *Richards v. Mena*[124] took place before a three-justice panel of the Corpus Christi Court of Appeals on September 17, 1992. Remarkably, on its own initiative, the entire six-justice court recused itself from the case without explanation. Consequently, Chief Justice Thomas R. Phillips of the Texas Supreme Court as-

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121. Memorandum from Steven H. Rosenbaum, Acting Chief, Voting Rights Section, Civil Rights Division, United States Department of Justice, to John R. Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice (Jan. 12, 1992).

122. Order, Terrazas v. Slagle, Nos. A-91-CA-425, -426, -428 (W.D. Tex., Nov. 5, 1992). The DOJ declined to participate at this time.

123. The *Mena* minority plaintiffs, who were parties to the state court litigation and the SB 1 settlement, were never allowed to participate in the federal court litigation, despite having filed 11 motions to intervene. Thus, they remained subject to the injunction issued in *Terrazas* on January 24, 1992, which prohibited them from acting at any time or place "to interfere" with the *Terrazas* plans. On April 6, 1993, Judge Hudspeth issued an order denying the minority intervenors' latest intervention application, citing the other denials by that court and mootness of the request because of the court's decision the previous day. In sum, in litigation under the Voting Rights Act, the court decided minority voting rights issues without minority voter participation, which was prevented by the Republican-dominated court at the request of Republican plaintiffs.

In its April 5 order, the *Terrazas* panel took one last attack at the Mexican-American plaintiffs who had succeeded in securing increased senate representation through state court litigation, but were denied the right to participate in the federal litigation to protect those gains. The court gratuitously characterized the state litigation as "nonadversarial." The *Terrazas* court sent a clear message. Despite its own documented record of backroom deals, the court still maintained the view that "a different kind of justice" exists in South Texas courts where Mexican-American judges preside.

124. Richards v. Mena, No. 13-92-100-CV (Tex. App.—Corpus Christi, Sept. 17, 1992) (argued, decision pending).

signed a special panel, composed of three justices from other intermediate appellate courts, to hear the case.[125] The new panel denied the *Mena* appellees' request for further oral argument, but agreed to listen to tapes of the argument made before the Corpus Christi appellate court.[126] That panel then recused itself, and yet another was appointed. The second new panel, which also denied appellees' request for additional oral argument, has not yet ruled on the only remaining issue—the plaintiffs' request for attorneys' fees and costs.[127]

In conclusion, by blocking the implementation of SB 1 and HB 1, which could have altered minority representation in the Texas Legislature, the *Terrazas* court inflicted extensive injury on minority communities. Issues of primary importance to minority voters were decided in the 1993 legislative session, such as equalization of public school financing, equalization of funding for higher educational institutions, reformation of the judicial election processes,[128] and innumerable consumer issues. As a result of *Terrazas* and the surrounding developments, all of these issues were severely compromised or completely frustrated to the detriment of Texas's minority communities. A new Texas Senate, though impermanent,[129]

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125. *Cf.* TEX. GOV'T CODE ANN. § 74.003(a) (Vernon 1988 & Supp. 1994) (permitting chief justice of Texas Supreme Court to temporarily assign appellate court judges from other courts).

126. *See* Letter from Cathy Wilborn, Clerk, Court of Appeals, 13th Judicial District, Corpus Christi, to James C. Harrington, Counsel for *Mena* Plaintiffs (Oct. 25, 1993) (on file with authors) (informing parties that motion for additional oral argument had been denied).

127. In 1993, the Texas Legislature passed an appropriations bill that specifically allocated two million dollars for payment of attorneys' fees pertaining to redistricting litigation. The Attorney General, however, still refuses to dismiss the *Mena* appeal.

128. For example, when proposed legislation for reformation of judicial election systems to single-member districts was scheduled for senate debate, the entire 13-member Republican delegation (christened the "Killer Wasps" by the media) "took a walk" and refused to return to the senate floor until agreement was reached that the legislation would be abandoned. Senator Sibley led the walkout, and other senators reportedly "disappeared" to his office. Senator Sibley asserted that the effort was intended to warn the Democrats in the Senate against clearly partisan legislative moves. In reality, however, the walkout constituted a partisan move to protect the Republican strongholds in the judiciary in the major metropolitan counties. A revision of the at-large election systems in those counties would have provided a more equitable opportunity for election of Mexican-American and African-American candidates to the bench.

129. The *Terrazas* plan provided for the election of four new Republican members to the senate. Although those senators will run in reconfigured districts in 1994, they will

has resulted from the redistricting efforts of the Republican Party of Texas in the name of the Voting Rights Act.

III. State Constitutional Legal Theories

This Part presents an overview of the primary state constitutional legal theories on which the minority plaintiffs in the *Mena v. Richards* and *Quiroz v. Richards* suits ultimately prevailed.[130] The *Mena/Quiroz* litigation remains unique in the nation; no other legislative redistricting suit has been brought under a state's equal rights amendment.[131] In a larger context, however, as discussed below, *Mena* and *Quiroz* were not the first voting rights cases brought under the Texas Bill of Rights, nor did these cases constitute the first litigation under the Texas Equal Rights Amendment (ERA).[132] The latter distinction belongs to an ERA challenge to Del Valle Independent School District's former at-large elections of its seven trustees.[133]

To some extent, minority communities' reliance on the Texas Constitution to protect the voting franchise reflects state court constitutionalism around the nation. Judges, legal scholars, and liti-

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have the advantage of incumbency. Therefore, the change in the senate makeup effected by the *Terrazas* court may be long lasting.

130. In addition to the equal rights theories described in this Article, the *Mena/Quiroz* plaintiffs also successfully urged that the reapportionment scheme violated their substantive due course of law franchise right. *See* Findings of Facts and Conclusions of Law, Mena v. Richards, No. C-454-91-F (322d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991) (relying on Article I, §§ 19 and 29 of Texas Constitution).

131. Eighteen states have adopted equal rights amendments, although many do not include a ban on racial, ethnic, religious, or color discrimination along with the proscription on gender bias. *See* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses 3–9 (1992) (categorizing different types of equal rights amendments).

132. Tex. Const. art. I, § 3a. Article I, § 3a of the Texas Constitution provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." *Id.*

133. *See* Del Valle Indep. Sch. Dist. v. López, 863 S.W.2d 507, 515 (Tex. App.—Austin 1993, writ denied) (affirming trial court's finding that at-large elections system was unconstitutional). Filed in 1989, the parties settled the case in February 1994 on all issues except attorneys' fees. *See* First Amended Partial Consent Decree at 1, López v. Del Valle Indep. Sch. Dist., No. 475-874-A (261st Dist. Ct., Travis County, Tex., Feb. 11, 1994). The new election system expanded Del Valle ISD's seven single-member trustee districts to nine. *Id.* at 2. After the DOJ, under the Voting Rights Act, blocked successive attempts by Del Valle ISD to implement a 5-2 (five single-member, two at-large) and a 6-1 (six-single-member, one at-large) election scheme, the parties settled the case. *See López*, 863 S.W.2d at 513 (discussing preclearance problems encountered before settlement of litigation).

gants, unsatisfied with the federal courts' pinched construction of the federal Bill of Rights and of congressional enactments such as the Voting Rights Act of 1965, facilitated this movement. Furthermore, state court constitutional adjudication expands state jurisprudence and allows litigants more expedient relief than that afforded by federal litigation. Additionally, as *Mena* and *Quiroz* illustrate, state constitutional adjudication often incorporates the best federal statutory models for guidance in interpretation.[134]

The *Mena/Quiroz* plaintiffs sought declaratory and injunctive relief. Prevailing under the state Declaratory Judgments Act,[135] the *Mena/Quiroz* plaintiffs established that the legislative reapportionment scheme violated various Texas Bill of Rights provisions[136]—mainly the equal rights guarantees[137]—and constituted a violation of the state prohibition against discrimination.[138] They also obtained an injunction against use of the redistricting plans and orders implementing new plans.[139] Finally, the plaintiffs successfully secured attorneys' fees and costs.[140]

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134. For suggestions regarding litigation of state constitutional issues, see James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399 (1993).

135. TEX. CIV. PRAC. & REM. CODE ANN. ch. 37 (Vernon 1986 & Supp. 1994).

136. TEX. CONST. art. I, §§ 3, 3a, 13, 19, 29.

137. *Id.* §§ 3, 3a.

138. Findings of Fact and Conclusions of Law at 4–5, Mena v. Richards, No. C-454-91-F (322d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991). Chapter 106 of the Texas Civil Practices and Remedies Code prohibits government officials, acting in their official capacities, from precluding a person from participating in a program operated by or on behalf of the state or a political subdivision, from refusing to grant a benefit to a person, and from imposing an unreasonable burden on the person. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 106.001 (a)(4)–(6) (Vernon 1986 & Supp. 1994) (outlining prohibited discriminatory actions by state officials).

139. Findings of Fact and Conclusions of Law at 5–6, Mena v. Richards, No. C-454-91-F (322d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991).

140. *Id.* at 6. The plaintiffs sought attorneys' fees and costs under the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986 & Supp. 1994) (permitting fees which are "equitable and just"); *see also* Texas Educ. Agency v. Leeper, 37 Tex. Sup. Ct. J. 968, 979 (June 15, 1994) (holding that Declaratory Judgments Act waives government immunity in actions to construe legislative enactments, and upholding award of attorneys' fees against state agency). The Texas Supreme Court has also held that immunity does not bar an award of reasonable fees and costs when a violation of the Civil Practice and Remedies Code's prohibition against discrimination is shown. Camarena v. Texas Employment Comm'n, 754 S.W.2d 149, 152 (Tex. 1988); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 106.002 (Vernon 1986 & Supp. 1994) (allowing recovery of attorneys' fees if violation of § 106.001 has occurred). The *Mena* plaintiffs won fees and costs under both provisions. However, that issue remains on appeal and is unresolved. *See* Findings of Fact and Conclusions of Law at 13, *Mena v. Richards*, No. C-454-91-F (322d

A. *The Texas Bill of Rights and Relief in Voting Rights Cases*

In the two cases filed to date under the Texas Constitution seeking protection of minority voting rights (*Mena v. Richards* and *López v. Del Valle Independent School District*), the defendants, as a threshold issue, have argued that a state district court lacks authority to declare an election scheme unconstitutional. In both cases, the defendants pursued a separation of powers argument that redistricting is a political question best left to the respective legislative body. As the preceding Part noted, however, in 1991, the Texas Supreme Court resolved the issue in favor of the plaintiffs in *Terrazas v. Ramírez*.[141] In *Terrazas*, the supreme court held that the state judiciary is fully empowered to declare whether a redistricting statute is valid. As the court stated:

> The judiciary . . . is both empowered and, when properly called upon, obliged to declare whether an apportionment statute enacted by the Legislature is valid . . . . A judicial determination that an apportionment statute violates a constitutional provision is no more an encroachment on the prerogative of the Legislature than the same determination with respect to some other statute. The Legislature, as well as the judiciary, must comply with the United States Constitution and the Texas Constitution.[142]

Terrazas is consistent with the supreme court's 1966 decision in *Avery v. Midland County*,[143] which allowed a constitutional challenge on some of the same grounds alleged by the *Mena/Quiroz* plaintiffs. *Avery* upheld the trial court's finding that a county commissioners court's districting scheme violated the equal rights section of the Texas Constitution.[144] Subsequently, the Amarillo

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Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991) (noting that defendants filed notice of direct appeal).

141. 829 S.W.2d 712 (Tex. 1991) (orig. proceeding).

142. *Terrazas*, 829 S.W.2d at 717 (citations omitted); *see also* Del Valle Indep. Sch. Dist. v. López, 863 S.W.2d 507, 515 (Tex. App.—Austin 1993, writ denied) (quoting Texas Supreme Court's assertion that judiciary may determine validity of apportionment statutes enacted by legislature).

143. 406 S.W.2d 422 (Tex.), *vacated on other grounds*, 390 U.S. 474 (1966).

144. TEX. CONST. art. I, § 3. The Texas Supreme Court held, however, that while the county commissioners court's districting plan violated state and federal equal protection guarantees because it was enacted arbitrarily and invidiously, it did not violate the "one person, one vote" rule asserted in *Reynolds v. Sims*, 377 U.S. 533 (1964). *Avery*, 406 S.W.2d at 428. The United States Supreme Court reversed on Fourteenth Amendment grounds, holding that, as a political subdivision of the state with general governmental

Court of Civil Appeals cited *Avery* in holding that a commissioners court's redistricting plan was subject to constitutional challenge in the Texas courts.[145] Furthermore, *Terrazas* clearly recognized the trial courts' authority to redress claims of unconstitutional electoral discrimination and to require appropriate relief, even to the extent of ordering implementation of their own reapportionment schemes.[146]

Texas courts are not alone in this constitutional endeavor. Other state appellate courts have sustained the authority of trial judges to decide the legality of apportionment plans under both state and federal constitutional theories.[147]

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powers over a geographical area, the county commissioners court was subject to the "one person, one vote" rule. Avery v. Midland County, 390 U.S. 474, 485–86 (1968). The Texas Supreme Court remanded the case to the trial court for further proceedings consistent with the United States Supreme Court's decision. Avery v. Midland County, 430 S.W.2d 487 (Tex. 1968). Interestingly, the trial judge who granted relief in *Avery* also granted relief in *López v. Del Valle Independent School District* some 27 years later.

145. *See* Gumfory v. Hansford County Comm'rs Court, 561 S.W.2d 28, 31 (Tex. Civ. App.—Amarillo 1977, writ denied) (refusing to follow precedent emphasizing judicial laissez-faire in matters of apportionment).

146. *Terrazas*, 829 S.W.2d at 717–18. As the court stated: "Although state courts in Texas have invalidated apportionment statutes, none has ever imposed a substitute plan upon the state. Nevertheless, we do not doubt the power of our courts to do so." *Id.*

147. *See, e.g.*, Kenai Peninsula Borough v. State, 743 P.2d 1352, 1355 (Alaska 1987) (holding that creation of state senate district violated equal protection clause of Alaska Constitution); *In re* Apportionment Law, 263 So. 2d 797, 799 (Fla. 1972) (indicating that legislative reapportionment is primarily legislative concern, but that courts will review such plans when legislature's plan does not pass federal and state constitutional requirements); Krvidenier v. McCulloch, 142 N.W.2d 355, 361–62 (Iowa) (holding that it is responsibility of state supreme court to harmonize constitutional provisions on reapportionment with other parts of state constitution), *cert. denied*, 385 U.S. 851 (1966); McCall v. Legislative Assembly, 634 P.2d 223, 236 (Or. 1981) (en banc) (declaring that reapportionment measure failed to comply with Oregon Constitution); *see also* Hughes v. Maryland Comm. for Fair Representation, 217 A.2d 273, 277, 280 (Md.) (stating that one senate reapportionment bill, which allowed 37% of state population to elect majority of senators, was unconstitutional, but that another bill, which allowed 47.8% of state population to elect majority of senators, was constitutional), *cert. denied*, 384 U.S. 950 (1966); *In re* Oran's Petition, 257 N.Y.S.2d 839, 875 (Sup. Ct. 1965) (ruling that statute providing for state assembly of 165 representatives violated state constitution that provided for 150-member assembly). Appellate courts have not limited their review of apportionment plans to those applying to state legislatures. *See* Appeal of Apportionment of Wayne County, 321 N.W.2d 615, 617 (Mich. 1982) (noting that apportionment schemes for commissioners on county board must preserve city and township boundaries and satisfy other statutory requirements without violating United States Constitution); Franklin v. Board of Educ., 378 A.2d 218, 223 (N.J.) (reviewing constitutionality of plan to apportion seats on regional high school boards), *cert. denied*, 435 U.S. 950 (1977).

B. *Finding Discriminatory Effects and Invalidating the Reapportionment Scheme*

After overcoming the threshold question of their ability to attack the validity of the legislative reapportionment scheme, the *Mena* plaintiffs had to determine which tests would apply to measure their constitutional attack under each of the two equal rights provisions of the Texas Constitution.[148] To that issue this Article now turns, looking first to the Texas ERA and then to the state constitution's original equal rights guarantee. As the following discussion demonstrates, the two provisions overlap.

1. The Texas Equal Rights Amendment

The *Mena* plaintiffs first challenged the legislative redistricting plan under the Texas ERA, a constitutional provision without federal counterpart. The Texas ERA, because of its unique and unequivocal prohibition against the denial of equality under the law, appeared to provide the vehicle to invalidate a discriminatory reapportionment system.

a. History and Purpose of the Texas ERA

Texas voters ratified the ERA in 1972 by a resounding four-to-one margin following unanimous senate approval of the measure and approval by nearly a five-to-one margin in the house of representatives.[149] Although no official record exists of the Texas House or Senate debates surrounding passage of the ERA, the Texas Legislative Council's pre-ratification analysis provides guidance in interpreting the ERA's purpose.[150]

According to the Council's analysis, the legislature intended the ERA not only as a prohibitory device, but also as a remedial device. The Texas ERA's purpose was to eradicate invidious discrimination by changing the status quo.[151] The Council's report summarized the parameters of the federal Equal Protection

148. TEX. CONST. art. I, §§ 3, 3a.

149. *See* William W. Kilgarlin & Banks Tarver, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 TEX. L. REV. 1545, 1546–49 (1990) (tracing history of Texas ERA from introduction in 1959 to passage in 1972).

150. TEXAS LEGISLATIVE COUNCIL, 62D LEG., R.S., 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED 23–24 (1972).

151. *Id.* at 23.

Clause,[152] the Civil Rights Act of 1964,[153] and the additional protection afforded by the proposed Texas ERA. Although the ERA is consistent with the Civil Rights Act and the United States Constitution's Fourteenth Amendment, the report stated, it was "designed expressly to provide protection which supplements the federal guarantees of equal treatment."[154]

Opponents of the ERA challenged the legislation as unnecessary "because discriminatory laws now existing may be repealed by statute."[155] Rejecting this contention, however, legislators stated: "The protection afforded by constitutional guarantees is more effective than statutory prohibitions and the repeal or amendment of discriminatory statutes. Victims of discrimination need the right to use the judicial process to challenge the constitutionality of discriminatory legislation."[156] Thus, legislative history clearly indicates that the drafters intended the ERA as a double-edged sword. On one level, the ERA would prevent enforcement of discriminatory statutes and practices currently in effect and subsequently enacted. On another level, the ERA would serve as a remedial device to correct continuing wrongs caused by both past and future official action.[157]

The ERA was designed to change the status quo and to provide minorities equal opportunities for empowerment in Texas society.[158] A critical and intrinsic part of political empowerment is an equal opportunity to elect political representatives of one's choice. The state effectively deprives minority communities of this oppor-

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152. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

153. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 1971 (1988)).

154. TEXAS LEGISLATIVE COUNCIL, 62D LEG., R.S., 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED 23–24 (1972).

155. *Id.*

156. *Id.*

157. *See* Findings of Fact and Conclusions of Law at 47, Mena v. Richards, No. C-454-91-F (322d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991) (noting that Texas ERA serves remedial as well as prohibitory purposes).

158. *See In re* T.E.T., 603 S.W.2d 793, 802 n.3 (Tex. 1980) (Steakley, J., dissenting) (referring to ERA's breadth and arguing that ERA should be considered in its contemporary, social, and legal context). *See generally* Susan Crump, Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUS. L. REV. 136, 137 (1973) (discussing "breadth and absolute nature" of Texas ERA).

tunity by maintaining electoral schemes that dilute their voting power.

b. Applying the Texas ERA

The legislative redistricting scheme violated the ERA because of its substantial discriminatory impact against minority voters, decidedly depriving them of the effective exercise of their fundamental right to elect representatives of their choice. The scheme infringed on the franchise, a recognized fundamental constitutional right in Texas.[159]

In the first Texas Supreme Court case directly interpreting the ERA, *In re McLean*,[160] the court established a two-prong test and held that any statute which deprives a person of equality because of race, national origin, gender, color, or creed must be supported by a compelling state interest to survive judicial scrutiny.[161] As the supreme court articulated:

> The first step in a case invoking this provision is to determine whether equality under the law has been denied. . . . Our next inquiry is whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin. . . . [T]he Equal Rights Amendment does not yield except to compelling state interests.[162]

The original legislative reapportionment scheme clearly met *McLean*'s first step. The scheme denied Texas minority communities equality by diluting their voting strength and denying them the opportunity to democratically elect state legislators of their choice in proportion to their representation in the population.[163]

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159. *See* Burroughs v. Lyles, 181 S.W.2d 570, 574 (Tex. 1944) (explaining that Article I, § 3 of Texas Constitution guarantees equal rights, including political rights, to all state citizens).

160. 725 S.W.2d 696 (Tex. 1987).

161. *McLean*, 725 S.W.2d at 697.

162. *Id.* at 697–98. Notably, although the state legitimation statute was at issue, *McLean* does not limit its focus to gender discrimination. *See id.* at 697–98 (refusing to adopt per se standard to invalidate discriminatory distinctions). Whether Texas's compelling government interest standard is more rigorous than the federal standard, which asks whether the government can show that no other means can satisfy it compelling interest, is an issue which remains unresolved. *Id.* at 698. The nuances of this argument did not play out in *Mena/Quiroz* (or, for that matter, in *López*).

163. Both SB 31 and HB 150 created only a number of minority districts equivalent to those in existence during the 1980s. These districts were basically unavoidable because

Concerning the second prong of the *McLean* test, the *Mena/Quiroz* issue differed from *McLean* in that the statute challenged in the latter case was facially discriminatory. By its own language, the statute treated one parent differently solely because of sex.[164] The reapportionment plan, in contrast, appeared facially neutral. In reality, however, the plan was as discriminatory as the *McLean* statute in its adverse effect.[165] Determining whether an effect is impermissibly discriminatory "because of" race or national origin depends greatly on the interpretation of the phrase "because of." The Texas Supreme Court has addressed this issue by mandating that, if "the meaning of the language of a constitutional provision is plain, the courts must give full effect thereto, without regard to consequences."[166]

In ordinary language, the meaning of "because of" seems plain: The phrase "*X* because of *Y*" is equivalent to "if *Y*, then *X*."[167] Thus, deprivation of equal rights is "because of" membership in a protected class whenever the following statement is true: If a person is a member of the protected class, then that individual will be deprived of equal treatment.[168]

Applying that formula to *Mena*, the reapportionment plan deprived minority constituents of the opportunity to cast votes equal in weight to the votes of their Anglo neighbors. Thus, the plan denied these minority constituents equal treatment because of

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they contained tremendous minority concentrations. Despite the huge growth of the Mexican-American population during that decade, the State fractured large concentrations of minority populations to preserve the positions of the Anglo incumbents. Acting in the interest of preserving incumbents' seats, the State adopted plans for the election of legislative representatives that diluted the potential of minority voters to elect representatives of their choice.

164. *See McLean*, 725 S.W.2d at 697 (distinguishing between burdens of proof for men and women under legitimation statute).

165. Actually, the redistricting issue presents a significantly greater problem than that illustrated in *McLean* because, unlike the legitimation statute at issue in that case, redistricting implicates citizens' frequently used, fundamental right to vote.

166. Cramer v. Sheppard, 167 S.W.2d 147, 154 (Tex. 1942); *see* Leander Indep. Sch. Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. 1972) (stating that language in constitution is to be interpreted as it is generally understood); *cf.* Gallagher v. State, 690 S.W.2d 587, 591 (Tex. Crim. App. 1985) (mandating that unambiguous constitutional provisions be construed to full effect regardless of consequences).

167. *See generally* IRVING M. COPI, SYMBOLIC LOGIC § 2.2 (5th ed. 1979).

168. This concept is perhaps more succinctly stated in the "but for" test of causation in tortious negligence analysis: But for membership in the suspect class, the person would not suffer discrimination.

their race or national origin. Furthermore, the "but for" test, suggested by the plain language rule and followed in other jurisdictions, offers the only test that will effectively satisfy the ERA's remedial purpose.[169]

The final question under *McLean* is whether Texas had a compelling interest in preserving its new redistricting system that it could protect "in no other manner."[170] The only interest the new plan served was to allow the constituents of Texas to elect the members of the state senate and house of representatives. That interest, however, was essentially an interest in having an efficient, properly apportioned democratic voting procedure, not in having any particular voting system.

c. An Effects Test Best Serves the Remedial Purpose of the Texas ERA

To prevail under the ERA, no Texas case requires a plaintiff to establish that a legislative body deliberately intended to discriminate against a protected class in enacting a statute. Such a precondition would contravene the history, intent, and plain reading of the ERA.

Until 1972, the Texas Legislature did not maintain official records of debates surrounding the passage of legislation. Even today, most political subdivisions keep no detailed records of their legislative debates. Hence, proving that legislators enacted a facially neutral statute for an invidious purpose is generally an impossible task. Furthermore, as the Texas redistricting battle illustrates, elected officials are not likely to admit to a discriminatory purpose. Thus, requiring voting rights plaintiffs to show explicit discriminatory intent on the part of officials would create a stifling burden of proof and defeat their effective exercise of the franchise. Such a requirement also would exacerbate hostile feelings, espe-

169. *Cf.* Luguana W. Treadwell & Nancy W. Page, Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CAL. L. REV. 1086, 1086–1112 (1977) (discussing state standards of review of equal rights provisions).

170. *McLean*, 725 S.W.2d at 698. *McLean*'s compelling interest test, requiring that there be "no other manner to protect" the interest, is arguably stronger than the federal compelling interest test. This observation supports the argument that the Texas ERA affords greater protection to racial and ethnic minorities than the United States Constitution's Fourteenth Amendment.

cially in smaller communities, by eliciting finger-pointing and name-calling.[171]

In keeping with its remedial function, the ERA does not require a showing that the statute was enacted for an invidious purpose, but instead only requires that the statute discriminate or deny equality on certain bases.[172] Courts may use the ERA remedially to strike down statutes, the purpose for which may not have been recorded, but the result of which is clearly and impermissibly discriminatory.[173] Furthermore, given the ERA's remedial nature, courts can require implementation of alternative voting structures to correct the effects of past discrimination.[174] The Texas ERA also allows corrective relief, though such relief encompasses race and ethnicity considerations, because the state or political subdivision has a compelling interest in remedying discrimination and its effects, whether new or ongoing.[175]

Thus, in reality, Texas has a compelling interest in equalizing minority representation in its legislative bodies and in assuring racial and ethnic minorities that their opportunity to participate in the political process is not diluted. The final judgment in *Mena* indisputably served that interest.

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171. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 36–37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214–15 (claiming intent test is divisive because charges of racism must be asserted against officials); Thornburg v. Gingles, 478 U.S. 30, 43 n.7, 44–45 (1986) (citing S. REP. NO. 417 with approval and quoting assertion that intent test is unnecessarily divisive). Although the *Mena/Quiroz* plaintiffs cited federal cases and statutes to strengthen their arguments, they did so only for analogous and informative purposes and not because those authorities were controlling. The plaintiffs asserted only state constitutional claims. *Cf.* Michigan v. Long, 463 U.S. 1032, 1037–44 (1983) (discussing Supreme Court's reluctance to issue opinions grounded solely upon state constitutional grounds).

172. *McLean*, 725 S.W.2d at 697–98. *But see* Nelson v. Clements, 831 S.W.2d 587, 590 (Tex. App.—Austin 1992, writ denied) (declaring that plaintiff must show intentional or purposeful discrimination in statute's application).

173. *See* Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (finding former Texas Guest Statute unconstitutional because statute was not rationally related to legitimate state interests).

174. The *Mena* plaintiffs proved the historical patterns in Texas of pervasive discrimination against Mexican-Americans and African-Americans, not just with respect to voting, but also with regard to housing, economics, education, employment, and the like.

175. *See McLean*, 725 S.W.2d at 698 (requiring state to prove compelling interest once distinction has been made on basis of suspect class of gender).

d. Summary

The Texas ERA's remedial purpose is to cure past and present discriminatory practices and effects. Furthermore, under the plain language rule, the Texas ERA is unequivocal in its prohibition against discrimination, regardless of whether such discrimination is intentional. Thus, the strictest scrutiny applies to a challenged reapportionment scheme once minority citizens show the scheme to have a discriminatory impact on groups protected by the ERA. The Texas ERA allows state courts to protect and restore minority citizens' fundamental right to employ the franchise in a manner equally effective to that enjoyed by their Anglo counterparts.

The original state reapportionment scheme proposed after the 1990 census violated the Texas ERA by depriving Mexican-American and African-American citizens equal treatment under the law because of their ethnicity and race and by burdening their fundamental right to vote. Additionally, no compelling interest existed to justify a redistricting system that disenfranchised its minority communities to a significant degree. Thus, the reapportionment scheme was unconstitutional.

2. The Texas Equal Rights Section

a. Federal Analysis

Although federal law is not the benchmark for Texas equal rights analysis,[176] some federal cases provide helpful analogues for developing an approach to voting rights cases alleging violations of Article I, Section 3 of the Texas Constitution.[177] The *Mena* plaintiffs adopted this approach, which the state district court in Hidalgo County accepted.

Until the mid-1980s, minority plaintiffs typically filed vote dilution claims under the federal Equal Protection Clause,[178] even

176. *See Whitworth*, 699 S.W.2d at 196 (noting that once minimum federal standard has been met, state is free to interpret state laws in light of its own constitution); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (recognizing that states are free to embrace or reject federal holdings once federal constitutional standards are satisfied).

177. *See* TEX. CONST. art. I, § 3 (establishing that "all free men, when they form a social contract, have equal rights" and that "[n]o man or set of men shall have special emoluments").

178. Although various electoral methods can effectively disenfranchise minority voters, one common technique involves "cracking" minority populations or the creation of electoral districts that spread minority voters among different districts. Because of racially

when the Voting Rights Act provided an alternative means of obtaining relief.[179] *White v. Regester*,[180] the seminal reapportionment case under the Fourteenth Amendment, invalidated a Texas legislative redistricting scheme that included multimember election districts because the scheme unconstitutionally discriminated against minority voters by diluting their voting power.[181] To measure whether an apportionment system violates the Equal Protection Clause, the United States Supreme Court formulated a disparate impact test, known as the effects test, based on the totality of the circumstances. Importantly, the Court did not require that plaintiffs also prove purposeful or intentional discrimination by public officials.[182] In contrast with other types of equal protection cases, federal courts had gradually developed a different threshold for proving discriminatory purpose in vote dilution cases.[183]

In *Zimmer v. McKeithen*,[184] the Fifth Circuit crystallized the Supreme Court's approach in *White*, holding that minority vote dilution was unconstitutional. To prove discrimination, the *Zimmer* court required a historical demonstration of official discrimination manifested in areas such as obstacles to voting and voter registration, disproportionately low numbers of minority candidates elected to office, stark differences in socio-economic position of the minority population when compared to that of the Anglo population, and racially polarized voting.[185] Additionally, situations involving tenuous policies favoring status quo reapportionment over

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polarized voting, the minority voters do not have sufficient numbers to elect a minority-preferred candidate. Other common approaches include use of an at-large or multimember election system, which prevents minority voters from having sufficient numbers to elect their preferred representative, and "packing" minorities into districts so that there are too many in a district and they occupy fewer districts. The legislative reapportionment scheme was flawed because it diluted minority voting strength by use of both "cracked" and "packed" minority districts.

179. *See generally* RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW, §§ 18.4-18.6 (1986) (discussing equal protection review and classification based on race or national origin).

180. 412 U.S. 755 (1973).

181. *White*, 412 U.S. at 765–67.

182. *Id.* at 769.

183. *See id.* at 761–62 (acknowledging that federal courts interpreted prior decisions to "require any deviations from equal population among districts to be justified by 'acceptable reasons' grounded in state policy").

184. 485 F.2d 1297 (5th Cir. 1973) (en banc).

185. *Zimmer*, 485 F.2d at 1305.

alternative districting methods, lack of access to candidate slating, large district sizes in terms of population or geography, lack of residency requirements for candidates, prohibitions on single-shot balloting, and majority vote requirements for electoral victory could also serve to demonstrate discrimination.[186] The court noted that plaintiffs need not prove all factors, but instead need only show an aggregate of these obstacles to indicate purposeful discrimination.[187] Once a sufficient number of these factors was established, *Zimmer* required trial courts to apply strict scrutiny and declare the electoral scheme unconstitutional unless the government could demonstrate a compelling interest in preserving the plan. This method of analysis became standard in Texas vote dilution cases until 1982. Federal courts, moreover, employed strict scrutiny in Fourteenth Amendment dilution cases on the theory of impairment of a fundamental right and did not require proof of intent.

In its 1980 decision in *Mobile v. Bolden*,[188] however, a plurality of the Supreme Court imposed an intent requirement in voting rights cases. In *Mobile*, the plurality held that, except in some limited situations, a plaintiff must show conscious, discriminatory intent on the part of officials to warrant strict scrutiny.[189] *Mobile* was somewhat confusing since it failed to define what would constitute intent.[190] However, the *Mobile* court did note that disparate impact, or the burdening of a group's fundamental rights by official action, may indicate a compellingly discriminatory purpose.[191]

By generally discarding the sufficiency of *Zimmer*-like indicators of intent and adopting a subjective burden of proof, *Mobile* rendered voting rights cases virtually impossible to prove.[192] In abandoning the effects test, at least partially, *Mobile* ushered in a lower level of judicial scrutiny for voting laws that were facially neutral, but which nevertheless harmed a protected group or burdened a

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186. *Id.* The *Mena* plaintiffs proved these factors with respect to historical discrimination against the state's Mexican-American and African-American communities.

187. *Id.*

188. 446 U.S. 55 (1980).

189. *Mobile*, 446 U.S. at 66. *Mobile* also construed § 2 of the Voting Rights Act as having the same effect as the Fifteenth Amendment. *Id.* at 60–61.

190. *See id.* at 66–70 (failing to clarify standard of intent).

191. *Id.* at 70.

192. *See id.* at 73–74 (explaining *Zimmer* factors as insufficient and requiring showing of discriminatory intent).

fundamental right.[193] Consequently, *Mobile* brought voting rights litigation to a virtual halt.

In 1982, Congress neutralized the *Mobile* decision by amending Section 2 of the Voting Rights Act to implicitly incorporate the *Zimmer* indicators of discriminatory intent in vote dilution claims.[194] These factors basically mirror those set out in the Senate Report accompanying the amendment and in *White*.[195] Ultimately, the *Mena* plaintiffs succeeded in applying the *White* and *Zimmer* methodology to prove their claim under Article I, Section 3 of the Texas Constitution, advocating that approach in light of Section 3's greater protection than the federal Equal Protection Clause. This independent state analysis avoided the eviscerating effects of a *Mobile*-like result.

b. Judicial Support for Independent State Analysis of Section 3

Texas courts have adopted their own analytical standards for state equal rights questions. As the Texas Supreme Court observed in *Whitworth v. Bynum*:[196]

> Subject to adhering to minimal federal standards, we are at liberty to interpret state statutes in light of our own constitution and to fashion our own tests to determine a statute's constitutionality. The states are free to accept or reject federal holdings and to set for themselves such standards as they deem appropriate so long as the state action does not fall below the minimum standards provided by the federal constitutional protections.[197]

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193. Thus, in cases involving population deviations between electoral districts in reapportionment schemes or dilution of minority voting strength, once a plaintiff has shown deviations outside of acceptable tolerances or dilution under certain conditions, the state must justify the deviation or dilution by acceptable reasons grounded in state policy. The state need only show a substantial interest in retaining the law, which was a nearly impossible burden for plaintiffs to overcome.

194. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)) (allowing violation of Voting Rights Act to be shown by totality of circumstances).

195. *See White*, 412 U.S. at 769 (recognizing importance of totality of circumstances in proving § 2 violation); S. REP. No. 417, 97th Cong., 2d Sess. 28-29 & n.13 (embracing factors articulated in *Zimmer*).

196. 699 S.W.2d 194 (Tex. 1985).

197. *Whitworth*, 699 S.W.2d at 196 (citing Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983)).

Not only may a state grant greater substantive protections, but state constitutional exegesis need not mirror a specific federal analytical model.[198] The framers of the Texas Constitution did not intend its bill of rights as a mere redundancy; it is an important document in its own right.[199] In view of the historical animosity of Texans toward central governmental power, the populist Granger-dominated constitutional convention of 1876, and the prominent position of the equal rights section at the beginning of the Texas Bill of Rights, it is evident that Texans expected, and continue to expect, a greater degree of protection than the United States Constitution affords.[200]

Texas's equal rights section does provide greater protection than the Fourteenth Amendment.[201] While the federal constitution acts as a floor, a de minimis standard, in terms of protection, the Texas Constitution acts as the ceiling.[202] Furthermore, federal equal protection guarantees, ratified in 1868 after the Civil War, are essentially negative proscriptions on government power. In contrast, Texas's equal rights section has stood at the beginning of every Texas Constitution since 1836.[203] An affirmative proclamation of freedom, it affords Texans specific rights in addition to circumscribing state power.

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198. For a more complete discussion of this subject, see James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399 (1993).

199. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc) (stressing that framers of 1845 Texas Constitution opposed interpreting document exactly as United States Constitution); *see also* Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 108–09 (1988) (noting that Texas Bill of Rights reinforced natural rights of citizens while federal Bill of Rights established minimum standards).

200. *See generally* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 6:8-21 (2d ed. 1993) (discussing history of equal rights under Texas Constitution); J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 458 (1959) (characterizing 1830s Texan as "militant individualist").

201. *See Whitworth*, 699 S.W.2d at 196 (stating that "we are at liberty to interpret state statutes in light of our own constitution and to fashion our own tests to determine a statute's constitutionality").

202. LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986); *see Heitman*, 815 S.W.2d at 690 (recognizing that "state constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens").

203. In the 1836 Declaration of Rights, the Texas equal rights guarantee was set out first. Constitution of the Republic of Texas, Declaration of Rights (1836), *reprinted in* TEX. CONST. app. 493 (Vernon 1993). It is currently found at Article I, § 3 of the state constitution. TEX. CONST. art. I, § 3.

Although *Whitworth* refers to the test it applied as a rational basis test, it should not be confused with the federal rational basis test. *Whitworth* clearly illustrates this distinction between the state and federal analysis. The statute at issue in *Whitworth* had previously been challenged and upheld against a federal equal protection attack.[204] However, as the Texas Supreme Court noted, "[t]here was no discussion of the legislative purpose, nor was there any analysis of whether there was a rational connection between the statute's objectives and the means used to accomplish those objectives."[205] Thus, while federal courts need only inquire whether some rational basis might exist for the state to legislate as it did, the supreme court has indicated that Texas courts, under the state constitution, must go further:

> Even when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose . . . . Under the rational basis test . . . similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so.[206]

Texas courts should also avoid federal equal protection analysis in voting rights cases because, as *Mobile* demonstrates, the intent-limited analysis imposes a nearly impossible and unworkable burden of proof on plaintiffs in such cases.[207] The *Mobile* result is inherently unfair and unjust, and it deadens the vitality of Article I, Section 3. Moreover, in another context, the Texas Supreme Court has recognized that disparate impact is sufficient to prove racial or ethnic discrimination for Section 3 equal rights purposes.[208]

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204. Campbell v. Paschall, 121 S.W.2d 593, 594–95 (Tex. 1938) (citing various decisions upholding Texas Guest Statute against constitutional attack).

205. *Whitworth*, 699 S.W.2d at 195.

206. *Id.* at 197.

207. However, even if Texas retains an intent-limited analysis under its equal rights guarantee, plaintiffs bringing voting rights claims simultaneously under the Texas ERA should be able to prevail by showing effects rather than proving intent. That result would give meaning to the difference between the two equal rights guarantees and the elevated protection afforded by the ERA.

208. *See* Richards v. LULAC, 868 S.W.2d 306, 313–14 (Tex. 1993) (recognizing supreme court's findings that disproportionate impact alone is sufficient in some cases to establish discrimination, but determining that issue need not be decided in case at bar). In addition, the court cited authority indicating this possibility with respect to the ability of suspect classes to exercise their federal civil rights. *Id.* at 313 n.9 (citing NAACP v. City of Dearborn, 434 N.W.2d 444, 449–50 (Mich. Ct. App. 1989)).

3. Adopting an Analytical Model

In constructing an analytical model for redistricting cases brought under the state bill of rights, Texas courts may adopt the standards expressed in the legislative history of the Voting Rights Act and in *White v. Regester*.[209] The *Mena* plaintiffs urged such an adoption, and the trial court accepted their request to that effect.

In 1982, Congress amended Section 2 of the Voting Rights Act to invalidate any voting structure that results in discrimination.[210] The 1982 amendments served the dual purpose of overruling the intent test promulgated in *Mobile v. Bolden*[211] and re-establishing the effects test endorsed by *White*.[212]

In its 1986 decision in *Thornburg v. Gingles*,[213] the United States Supreme Court held that proof of discriminatory intent on the part of the body that established the voting scheme is not a necessary element of relief under the Voting Rights Act.[214] The Court viewed Congress's amendment of the Act as a rejection of the intent test for three primary reasons:

> The intent test . . . is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." The "right" question . . . is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[215]

Thornburg outlined several "objective factors" suggested by the Senate Report to establish the existence of discrimination:

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209. 412 U.S. 755 (1973).

210. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)) (establishing § 2 violation for denial or abridgement of right to vote); *see also* S. REP. NO. 417, 97th Cong., 2d Sess. 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193 (declaring that purpose of amendment was to reject proof of discriminatory intent requirement).

211. 446 U.S. 55 (1980).

212. S. REP. NO. 417, 97th Cong., 2d Sess. 15–16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192–93.

213. 478 U.S. 30 (1986).

214. *Thornburg*, 478 U.S. at 43–44.

215. *Id.* at 44 (citations omitted) (quoting S. REP. NO. 417, 97th Cong., 2d Sess. 28, 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–14). Senate Report 417 accompanied the 1982 amendments to § 2 of the Voting Rights Act.

> (1) a history of voting-related discrimination in the political subdivision;
> (2) the extent of racial polarization in state or political subdivision elections;
> (3) the degree to which officials have used voting practices or procedures that tend to enhance the opportunity for discrimination against a minority group, such as unusually large election districts, majority vote requirements in runoff elections, or prohibitions against bullet voting;
> (4) the exclusion of members of a minority group from candidate-slating process;
> (5) the degree to which minority group members bear the effects of past discrimination in areas such as education, employment, and health services, which combine to hinder their ability to participate effectively in the political process;
> (6) use of overt or subtle racial appeals in campaigns; and
> (7) the historical success of minority group members in winning elective offices in the jurisdiction.[216]

Under the Court's rationale, the Senate Report did not require plaintiffs to prove the existence of all these factors, any specific number of them, or even a majority of them.[217] Rather, the factors provided guidelines that tended to prove residual discrimination and assisted with "a searching and practical evaluation of the 'past and present reality'" and "a 'functional' view of the political process" that would determine if a given scheme allowed minority voters to meaningfully elect candidates of their choice.[218] Additionally, *Thornburg* noted the Senate Judiciary Committee's desire to effectuate remedial relief in voting rights cases:

> The senate committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." As the Senate Report notes, the purpose of the Voting Rights Act was "'not only to correct an active history of

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216. *Id.* at 44–45. The *Mena* Plaintiffs proved these factors at trial, and the trial court made specific conclusions of law in their favor. *See* Findings of Fact and Conclusions of Law at 44–47, Mena v. Richards, No. C-454-91-F (322d Dist. Ct., Hidalgo County, Tex., Sept. 30, 1991) (concluding that gerrymandering continues to limit political representation of minorities).

217. *Thornburg*, 478 U.S. at 45.

218. *Id.* at 45–46 (quoting S. REP. No. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208).

discrimination, . . . but also to deal with the accumulation of discrimination.'"[219]

The totality of the circumstances test in the Senate Report on the 1982 amendments reflected the *White* approach.[220] This test is one of effect: Is it the case that a minority community would be able to elect the candidate of its choice, but for the election structure of the political subdivision? If so, the voting structure is invalid, regardless of explicit intent.

Thornburg is a helpful analogue in construing the Texas equal rights guarantees because it examines the totality of the situation to ascertain whether discrimination exists under the challenged law and whether discrimination occurs "because of" plaintiffs' membership in a protected class. This analysis is especially useful in vote dilution cases. Also, because *Thornburg* and *White* emphasize the local nature of the violation and leave the most appropriate remedy to judicial determination, these cases serve as appropriate models for Texas courts.[221]

The *Thornburg/White* approach permeated the *Mena/Quiroz* litigation because it provided a reasoned method of addressing the realities of voting rights discrimination in view of the equal rights commands of the Texas Constitution. The plaintiffs employed the *Thornburg/White* methodology for purposes of Article I, Section 3 and ERA analysis because, even if the approach constituted too strict a construction for Section 3 purposes, it could still be used to prove an ERA violation. Furthermore, the *Thornburg/White* approach provided a useful means of demonstrating the effects and continuing residual impact of discrimination, and it gave objective measure to the "because of" language of the ERA.

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219. *Id.* at 44 n.9 (quoting S. REP. NO. 417, 97th Cong., 2d Sess. 5, 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182, 218 (quoting 111 CONG. REC. 8295 (1965) (remarks of Senator Javits))).

220. S. REP. NO. 417, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

221. For example, under the totality of circumstances, the trial court in *López* determined that the proper remedy would include an increase of board members to enable the creation of electable minority districts. *See* First Amended Partial Consent Decree at 1, López v. Del Valle Indep. Sch. Dist., No, 475-874-A (261st Dist. Ct., Travis County, Tex., Feb. 11, 1994) (explaining that agreement contained nine single-member districts previously ordered by court).

4. Interfacing with the Voting Rights Act

Under Section 5 of the Voting Rights Act, all new redistricting plans, whether adopted by a state legislature or a state court, must be precleared by either the DOJ or the United States District Court for the District of Columbia.[222] Importantly, the plan cannot have the purpose or effect of denying or abridging the right to vote on account of race or national origin.[223] This limitation holds true when the state constitution affords greater protection than federal constitutional guarantees; any new redistricting plan must still meet the stringent standards of the Voting Rights Act.

By using the Texas ERA to ensure maximum minority participation in redistricting, the *Mena/Quiroz* plaintiffs virtually ensured early preclearance of their plan. Ultimately, early preclearance played a key role in helping the plaintiffs preserve the victory they had achieved. On the other hand, plaintiffs can use the preclearance requirement to kill less-than-satisfactory remedial plans.[224] Plaintiffs using this approach have the best of both worlds: strong Texas constitutional commands and a federal check on insufficient relief.

5. Conclusion

Texas's initial legislative reapportionment scheme violated both the Texas ERA and the equal rights section of the state bill of rights. The redistricting plan violated the ERA because it had the effect of discriminating against Mexican-Americans and African-Americans on account of race and ethnicity; but for their membership in racial and ethnic classes, the minority communities' votes would not have been diluted. The State had no interest, compelling or otherwise, in maintaining a reapportionment scheme that effectively disenfranchised a sizeable segment of its citizens.

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222. Voting Rights Act of 1965, Pub. L. No. 89–110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)).

223. 42 U.S.C. § 1973c (1988); 28 C.F.R. § 51.1 (1993).

224. *See* Del Valle Indep. Sch. Dist. v. López, 863 S.W.2d 507, 513 (Tex. App.—Austin 1993, writ denied) (showing invalidation of proposed 5-2 plan). The *López* plaintiffs ultimately achieved, via settlement, the nine single-member districts they had initially sought. *See* First Amended Partial Consent Decree at 1, López v. Del Valle Indep. Sch. Dist., No. 475-874-A (261st Dist. Ct., Travis County, Tex., Feb. 11, 1994) (indicating future elections would be held under nine single-member districts).

The reapportionment scheme also violated the equal rights section of the Texas Constitution because, even though its purpose appeared to be neutral, the reapportionment scheme burdened a fundamental right of two racial and ethnic groups that historically have suffered illegal discrimination—groups now protected by the ERA. Because the redistricting system was not reasonably designed to achieve a substantial state interest, that is, to ensure equal access to democratic participation, no reasonable basis existed for maintaining the reapportionment scheme. The reapportionment scheme was properly rendered unconstitutional.

IV. Final Comments

In summation, even though the state's Mexican-American and African-American communities ultimately prevailed in their constitutional attack on the Texas reapportionment scheme, the interim damage inflicted by the three-judge *Terrazas* federal court proved extensive. As stated earlier, issues of primary importance to minority voters were decided in the 1993 legislative session. All of these issues were severely compromised or completely frustrated, particularly in the Texas Senate, to the detriment of Texas's minority communities.

Nevertheless, without the state court litigation, Texas Mexican-Americans and African-Americans would have likely suffered an even greater loss. The state court litigation provided an alternative forum and a different conclusion that significantly impacted the decisions of the Texas Legislature, the *Terrazas* court, the Department of Justice, and the District of Columbia court. In this instance, the Texas Equal Rights Amendment proved to be a true protector of Texas minorities.