VOTING RIGHTS SYMPOSIUM

CONGRESSIONAL REDISTRICTING IN TEXAS: TIME FOR A CHANGE

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In Texas, the responsibility for congressional redistricting falls to the Texas State Legislature.[1] Historically, the "Prime Directive"[2] of redistricting in Texas has been to protect incumbents.[3] Over the

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1. Article III, section 28 of the Texas Constitution requires that the "[l]egislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts . . . ." TEX. CONST. art. III, § 28. This constitutional provision makes no mention of apportioning congressional districts. *See id*. However, the authority to redistrict congressional districts stems from the Legislature's general lawmaking authority provided in Article III, section 1. *See* TEX. CONST. art. III, § 1. Moreover, Article III, section 28 provides that if the Legislature fails to apportion state Senate and House districts, then the Legislative Redistricting Board must apportion the districts. *See* TEX. CONST. art. III, § 28. This Board is an ex officio body comprised of the Lieutenant Governor, the Speaker of the House, the Attorney General, the Land Commissioner, and the State Comptroller. *See id*.

2. *See* Joint App. at 246, Bush v. Vera, 116 S. Ct. 1941 (1996) (Nos. 94-805, 94-806, 94-988) [hereinafter Joint App.]. This term was used by former State Representative Paul Colbert of Houston, Texas to describe the redistricting process in Texas. Specifically, Mr. Colbert stated that protection of incumbents was the prime directive. He added: "[t]his was the #1 rule of House Redistricting Committee Chair Tom Uher. Pairing or seriously undermining incumbents was not tolerated unless there was no alternative." *Id*.

3. As used here, incumbency protection includes any of the following redistricting objectives: one, to the extent possible, keeping a congressional representative's constituency intact; two, if this first goal is not possible, then keeping the partisan makeup of the district intact; three, not pairing incumbents in a district; and four, satisfying the congressional aspirations of Texas legislative incumbents when newly appor-

last three decades, that goal has become increasingly more difficult to achieve because of changes in the law that have fundamentally altered the rules of the redistricting process. These fundamental changes in the law I refer to as "paradigmatic shifts,"[4] or changes in the way we view the redistricting process.

This Article briefly reviews the history of congressional redistricting in Texas since the 1960s. It considers the Legislature's effort to achieve its prime directive of incumbency protection and the effect of three paradigmatic shifts in the law of redistricting on that effort.

The first paradigmatic shift occurred in 1962, when the United States Supreme Court announced its landmark decision in *Baker v. Carr*.[5] *Baker* overruled *Colegrove v. Green*,[6] in which the Supreme Court had refused to enter the "political thicket" of legislative redistricting.[7] *Baker* established that a state's redistricting decisions could be reviewed by federal courts to ensure compliance with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[8] Two years later, in 1964, the Supreme Court pronounced the "one-person, one-vote" doctrine[9] and made it

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tioned congressional districts must be drawn. *See Bush*, 116 S. Ct. at 1952–54 (1996).

4. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23 (2d ed. 1970). Kuhn says that "[i]n its established usage, a paradigm is an accepted model or pattern . . . ." *Id*.

> In this standard application, the paradigm functions by permitting the replication of examples any one of which could in principle serve to replace it. In a science on the other hand, a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions.

Id.

Kuhn further says that, when there has been a change in paradigm, "the profession will have changed its view of the field, its methods, and its goals." *Id*. at 85; *see* Shaw v. Reno, 509 U.S. 630 (1993). In the case of redistricting, the legal view of the field has changed in the last 30 years: from no federal court involvement in the "political thicket" of redistricting, to the requirement of one-person, one-vote, to the further requirement of non-dilution and non-retrogression of minority votes, to the strictures against racial gerrymandering recognized in *Shaw*. *See id*. at 630; *see also* Colegrove v. Green, 328 U.S. 549 (1946).

5. 369 U.S. 186 (1962).

6. 328 U.S. 549 (1946).

7. *See Baker*, 369 U.S. at 237; *Colegrove*, 328 U.S. at 556.

8. *See* U.S. CONST. amend. XIV, § 1.

9. *See* Reynolds v. Sims, 377 U.S. 533 (1964). The Supreme Court defined this doctrine in the following manner: "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id*. at 560–61.

applicable to congressional elections.[10] The one-person, one-vote requirement alone forced the Legislature to redraw its congressional districts after each decennial census.[11] Before then, Texas had not redrawn its congressional districts on any periodic basis.[12]

The second paradigmatic shift occurred in 1975 when Texas became a jurisdiction covered by section 5 of the Voting Rights Act.[13] Section 2 of the Act prohibited redistricting bills that diluted the votes of a state's racial and language minority citizens[14] and section 5 proscribed redistricting legislation that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[15] These requirements, more specifically, the lawsuits filed to enforce these requirements, forced the Legislature to ensure that its redistricting decisions did not adversely affect the state's racial and language minorities. Until passage of the Act, the Legislature's redistricting decisions ignored the needs of these minorities.[16]

The third paradigmatic shift occurred in 1993 when the Supreme Court recognized for the first time in *Shaw v. Reno*[17] that

> a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[18]

The *Shaw* doctrine directly impacted Texas when, on June 13, 1996,

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10. *See* Wesberry v. Sanders, 376 U.S. 1 (1964).

11. *See* TEX. CONST. art. III, § 28. The Texas Constitution requires the Legislature to reapportion the House and Senate at its first regular session following the decennial census. *See id.*; Vera v. Richards, 861 F. Supp. 1304, 1312 (S.D. Tex. 1994); *see also supra* note 1 and accompanying text.

12. *See* Bush v. Vera, 116 S. Ct. 1941 (1996).

13. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1994) (as amended).

14. *See id.*

15. Beer v. United States, 425 U.S. 130, 141 (1976).

16. *See* White v. Regester, 412 U.S. 755, 765–66 (1973) (stating that challenged voting practices have a disproportionate impact on the ability of minority groups to participate effectively in the political process).

17. 509 U.S. 630 (1993).

18. *Id.* at 649.

the Supreme Court issued its opinion in *Bush v. Vera*.[19] *Bush* invalidated three of Texas' thirty congressional districts on grounds that the Legislature had racially gerrymandered them in violation of the Equal Protection Clause of the Fourteenth Amendment.[20] The three districts were majority-minority districts.[21]

From a legislator's viewpoint, these paradigmatic shifts in the law have made it more difficult to protect incumbents, but not impossible. This Article concludes that protecting incumbents has always been the driving force behind the redistricting process despite the strictures of the applicable legal standards, and will continue to be the driving force so long as the Legislature continues to draw district lines. The Legislature's irrepressible desire to protect incumbents has led to protracted litigation over its redistricting decisions.[22]

In the 1990s alone, the State of Texas has been embroiled in redistricting litigation that finally ended in 1997.[23] If history is any indication, the Legislature's redistricting effort in 2001 will probably result in litigation that will once again take years to resolve. This Article suggests that the State would be better served by having an independent, nonpartisan commission be responsible for redistricting. The use of a commission would minimize, if not eliminate, the possibility of successful litigation against the State.[24] A commission would also minimize, if not eliminate, the blatant self-interest that permeates redistricting.

I. CONGRESSIONAL REDISTRICTING IN TEXAS BEFORE

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19. 116 S. Ct. 1941 (1996).

20. *See id*. at 1964.

21. *See id*. at 1950–51.

22. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941 (1996); Upham v. Seamon, 456 U.S. 37, 40 (1982); White v. Weiser, 412 U.S. 789, 797 (1973); White v. Regester, 412 U.S. 755 (1973); Vera v. Richards, 861 F. Supp. 1304, 1312 (S.D. Tex. 1994); Terrazas v. Slagle, 789 F. Supp. 828 (W.D. Tex.), *aff'd*, 506 U.S. 801 (1992); Seamon v. Upham, 536 F. Supp. 931 (E.D. Tex.), *vacated*, 456 U.S. 37 (1982).

23. On remand, the *Vera* three-judge panel ordered an interim redistricting plan that changed 13 of the 30 congressional districts to be used for the fall 1996 elections. *See* Vera v. Bush, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996). The 75th Texas Legislature failed to pass a congressional redistricting plan during the session, which began in January 1997 and ended June 2, 1997. Thus, the three-judge panel ordered its interim plan to be used for the remainder of the decade. *See* Vera v. Bush, No. CIV.A.H.-94-0277, 1997 WL 597823, at *3 (S.D. Tex. Sept. 15, 1997) (second interim remedial order).

24. *See infra* notes 172–80 and accompanying text.

THE 1970 CENSUS

Nothing in the Texas Constitution or in Texas law specifically requires the Legislature to redraw congressional districts.[25] In fact, from 1933 to 1957, the Texas Legislature did not redraw its congressional districts at all.[26] And after the 1960 census, from which Texas gained one congressional seat, the Legislature did not redraw districts, but rather made the additional congressional seat an at-large one.[27] The option to make the new congressional seat at-large was established by the Supreme Court in *Smiley v. Holm*.[28] Such an option, devoid as it was of the one-person, one-vote requirement and of the Voting Rights Act requirements, promoted incumbency protection because all of the incumbent members of Congress continued to be elected from the same districts as before.

Thus, prior to 1962, there was nothing that expressly required the Legislature to redraw congressional districts after the decennial

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25. 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS at 158 (David A. Anderson et al. eds., 1977) (stating "[t]raditionally, reapportionment has been exclusively a legislative duty, and, in many instances, the job did not get done"); *see supra* note 1 and accompanying text.

26. Vera v. Richards, 861 F. Supp. 1304, 1312 (S.D. Tex. 1994).

27. *See id*.; 1965 Tex. Gen. Laws 743 (repealed 1967) (current version at TEX. REV. CIV. STAT. ANN. art. 197(c) (West 1988)).

28. 285 U.S. 355 (1932). The issue in *Smiley v. Holm* involved Minnesota's failure to pass congressional redistricting legislation that reflected a decrease in its congressional delegation from ten members of Congress to nine resulting from a decrease in Minnesota's population as reflected in the fifteenth decennial census. *See id*. at 374–75. Although Minnesota's Legislature had passed a congressional redistricting bill referred to as House File No. 1456, the Governor vetoed it. *See id*. at 361–62. The bill was nonetheless filed with the Secretary of State's office. *See id*. at 361. Smiley sued Holm as the Secretary of State of Minnesota seeking an injunction that prohibited congressional elections from proceeding under the plan in House File No. 1456 because it was a nullity due to the Governor's veto and the Legislature's failure to override the veto. *See id*. at 362. The Secretary of State argued, inter alia, that under Article 1, section 4 all that was needed was the action of the Legislature, which was defined in the Minnesota Constitution to be comprised of the Minnesota Senate and House of Representatives. *See id*. at 362–63. The Supreme Court disagreed, ruling that Article 1, section 4 envisioned that congressional redistricting would be accomplished by passing legislation in a manner consistent with the state constitution. *See id*. at 372–73. The Court went on to rule that 2 U.S.C. § 4, as amended in 1911, required that if a state had been apportioned more congressional seats than it previously had, "such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law" until such State shall be redistricted." 285 U.S. 355, 362 (1932). On the other hand, if a state had lost congressional seats and had not passed redistricting legislation that reflected this fact, then all members of Congress must run at large until the state passed redistricting legislation. *See id*.

census. This resulted from the Supreme Court's ruling in *Colegrove v. Green*, a case involving a constitutional challenge to a state's malapportioned congressional districts.[29] The petitioners in *Colegrove* were three qualified Illinois voters in districts that had larger populations than other Illinois congressional districts.[30] They brought suit against the Governor, the Secretary of State, and the Auditor of the State of Illinois to prohibit them from proceeding with an election in November 1946 according to Illinois law.[31] The petitioners claimed that the provisions of Illinois law governing congressional districts were invalid because they violated article I, sections 2 and 4 of the Constitution[32] and section 3 of the Reapportionment Act of August 8, 1911,[33] in that subsequent changes in population in the congressional districts for the election of the House of Representatives "lacked compactness of territory and approximate equality of population."[34] The three-judge panel dismissed the case and the Supreme Court affirmed, explaining that the petitioners had presented a wholly political question.[35] Justice Frankfurter, writing the plurality opinion, concluded that the "appellants ask this Court what is beyond its competence to grant . . . . Due regard for the effective working of our government reveal[s] this issue to be of a peculiarly political nature and therefore not meet for judicial determination."[36] He concluded, in words that have since become famous: "Courts ought not to enter this political thicket."[37] Thus, the states were left to redistrict their congressional districts as they saw fit and without federal court review.

This was the state of the law until *Baker* overruled *Colegrove*.[38] In *Baker*, qualified voters in Tennessee sought a declaration that a 1901 state apportionment statute[39] violated the Equal Protection

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29. *See* Colegrove v. Green, 328 U.S. 549 (1946).
30. *See id*. at 550.
31. *See id*.
32. *See id*.; U.S. CONST. art. I, §§ 2, 4.
33. *See* Reapportionment Act of August 8, 1911, 2 U.S.C. § 2(a)(3) (1994) (as amended).
34. Colegrove v. Green, 328 U.S. 549, 550–51 (1946).
35. *See id*. at 556.
36. *Id.* at 552.
37. *Id.* at 556.
38. *See* Baker v. Carr, 369 U.S. 186 (1962).
39. *See* 1901 Tenn. Pub. Acts 122.

Clause of the Fourteenth Amendment.[40] The district court dismissed the claim, inter alia, on the basis that the subject matter of the suit was not justiciable under *Colegrove*.[41] This time, the Supreme Court disagreed, reasoning:

> We understand the District Court to have read . . . [*Colegrove*] as compelling the conclusion that since the appellants sought to have a legislature apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable . . . . [T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question . . . . Appellants' claim that they are being denied equal protection is justiciable . . . .[42]

The Court also discussed the function of the separation of powers and the need for case-by-case inquiry into the justiciability of political questions.[43]

II. THE RULE OF POPULATION EQUALITY: THE FIRST PARADIGMATIC SHIFT AND ITS EFFECT IN THE CONGRESSIONAL REDISTRICTING OF 1971

In 1964, after the Supreme Court overruled[44] *Colegrove v. Green*,[45] the Court pronounced the one-person, one-vote doctrine in *Reynolds v. Sims*,[46] which applied to state legislative districts, and

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40. *See* U.S. CONST. amend. XIV, § 1.

41. *See* Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962).

42. Baker v. Carr, 369 U.S. 186, 209 (1962).

43. *See id*. at 210–11 (noticing that "deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution").

44. *See* Baker v. Carr, 369 U.S. 186 (1962).

45. 328 U.S. 549 (1946).

46. 377 U.S. 533 (1964). "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within the State." *Id*. at 560–61. *Reynolds* involved a challenge to Alabama's state legislative redistricting plan. *See id*. at 537. In *Reynolds*, the Supreme Court struck down as violative of the Equal Protection Clause Alabama's house and senate redistricting plans because they were not based on population and because they lacked rationality. *See id*. at 567–87.

in *Wesberry v. Sanders*,[47] which applied to congressional districts. Moreover, in 1969, in *Kirkpatrick v. Preisler*,[48] the Supreme Court interpreted the *Wesberry* equal population requirement as allowing for variances that "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[49] These decisions and the legislation passed by Congress in 1967 requiring that a state's entire congressional delegation be elected from single-member districts[50] completely changed the manner by which congressional districts were to be reconfigured in the 1970s. No longer could the Legislature simply make any new congressional district that Texas was apportioned an at-large seat and maintain current districts boundaries as it had done in 1961.[51] Rather, in 1971, the Legislature was faced with the task of redrawing all of its congressional districts, a task that before then it seldom had to accomplish.[52] In fact, the Legislature had not redrawn any of its congressional districts since 1933.[53] In short, the task facing the Legislature

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47. 376 U.S. 1 (1964). *Wesberry* involved a challenge to Georgia's congressional redistricting plan. *See id*. at 3. In *Wesberry*, contrary to the district court's ruling, the Supreme Court held that apportionment of Georgia congressional districts, so that a single member of Congress represented two to three times as many District 5 voters as were represented by each member from other Georgia congressional districts, grossly discriminated against voters in District 5. *See id*. at 7–18. The district court had adopted the language and reasoning of *Colegrove*. *See id*. at 3–4. However, Justice Black concluded that

> [w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Id. at 18.

48. 394 U.S. 526 (1969). *Kirkpatrick* involved a challenge to Missouri's congressional redistricting plan. *See id*. at 527. In *Kirkpatrick*, the Court indicated that for congressional redistricting, Missouri could make adjustments to the federal census to account for anticipated population growth if the projections were thoroughly documented, shown to have a high degree of accuracy, and systematically applied throughout the state. *See id*. at 530–31.

49. *See id*. at 531.

50. *See* 2 U.S.C. § 2c (1994) ("[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.").

51. Acts of 1965, 1965 Tex. Gen. Laws 743 (repealed 1967) (current version at TEX. REV. CIV. STAT. ANN. art. 197(c) (West 1988)).

52. *See* discussion *supra* Part I.

53. *See* Vera v. Richards, 861 F. Supp. 1304, 1312 (S.D. Tex. 1994); *see also supra*

in 1971 would prove to be difficult, not only because of the new constitutional and statutory requirements arising in the 1960s, but also because of the intense political struggle that redistricting all congressional districts would engender, especially the concerns for incumbency protection.

Senate Bill One (S.B. 1)[54] the Legislature's congressional redistricting plan in 1971, contained twenty-four single-member districts with an average population deviation of .745% and a maximum deviation of 2.43% above and 1.7% below the ideal.[55] It was successfully challenged as a violation of the one-person, one-vote rule in *White v. Weiser*.[56] The Legislature's justification for the deviations from equal population in the districts contained in S.B. 1 was incumbency protection or, more artfully worded, to promote "constituency-representative relations."[57] The Supreme Court noted that "constituency representative relations [was] a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives."[58] The district court had invalidated S.B. 1 as unconstitutional and ordered into effect an alternative congressional redistricting plan that "was based entirely upon population considerations and

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note 25 and accompanying text.

54. *See* 1971 Tex. Gen. Laws 38.

55. *See* Seamon v. Upham, 536 F. Supp. 931, 942 n.12 (E.D. Tex.), *vacated*, 456 U.S. 37 (1982). The three-judge panel's decision succinctly explains this concept:

> To illustrate, if hypothetical Congressional District A has a total population of 100 people and Congressional District B has a total population of 10 people, persons living in . . . District A are under-represented, while those living in . . . District B are over-represented . . . . Since the solitary congressman from District A represents 100 people, the voters in his constituency are casting ballots worth 1/10 the value of those cast by the people living in District B.
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> If Districts A and B were the only two congressional districts in the state, the ideal population for a . . . district would be 55 people. As a result, District A would have a variance of 45 people from the population norm. It would have a deviation of 81.82%. District B would have a variance of -45 people from the population norm and a deviation of -81.82%.

Id.

56. 412 U.S. 783 (1973). The *White* Court upheld a congressional redistricting plan that more closely complied with the Texas Legislature's goal of protecting incumbents. *See id*.; *see also* Wesberry v. Sanders, 376 U.S. 1, 7 (1964). The *Wesberry* court pointed out that article I, section 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id*.

57. *White*, 412 U.S. at 791.

58. *Id.*

made no attempt to adhere to the district configurations" contained in S.B. 1.[59] The Supreme Court affirmed the district court's ruling of the unconstitutionality of S.B. 1, explaining that "we do not find legally acceptable the argument that variances are justified if they necessarily result from a state's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."[60] The Court, however, reversed that portion of the judgment that imposed the alternative redistricting plan.[61] The Supreme Court did not disparage the Legislature's interest in incumbency protection, noting that "district boundaries [that] may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."[62] Rather, the Court did not decide whether incumbency protection was sufficient justification for the deviations in S.B. 1 because an alternative plan[63] was more faithful to the Legislature's objectives, but with smaller population deviations.[64] It therefore remanded the case to the district court for it to determine the appropriate remedy.[65]

From the Legislature's point of view, *White* served to confirm that its concern for incumbency protection was a legitimate legislative objective that was neither unconstitutional nor undesirable[66] and that was to be accorded due respect under the principle of federalism.[67] However, this interest had to be subordinated to the consti-

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59. *Id*. at 793.

60. *White*, 412 U.S. at 791 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 533–34 (1969)).

61. *See id*. at 797.

62. *Id*.

63. *See id*. at 796 (stating "Plan B . . . represented an attempt to adhere to the districting preferences of the state legislature while eliminating population variances . . . . Despite the existence of Plan B, the District Court ordered implementation of Plan C, which . . . ignored legislative districting policy and constructed districts solely on the basis of population considerations.").

64. *See id*. at 797.

65. *See id*.

66. *See id*. The Supreme Court noted that "the District Court did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable." *Id*.

67. *See White*, 412 U.S. at 795 (stating "whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment").

tutional goal of equal population.[68] This point of view was reinforced in *Karcher v. Daggett,*[69] in which the Supreme Court reiterated that "[a]s between two standards — equality or something less than equality — only the former reflects the aspirations of Art. I, § 2."[70] The Court noted that the equal population requirement was less difficult to achieve than it had been in 1964 when the Court established the principle in *Wesberry* because "[t]he rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."[71] The Court noted that New Jersey's proffered reason for the population deviations — keeping political subdivisions intact — "while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without the specific showing described."[72] The showing required was "that a State must specify that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions."[73] Moreover, the Court recognized that "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives, [a]s long as [they were] nondiscriminatory, [were] all legitimate objectives that

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68. *See id*. at 795–97.

69. 462 U.S. 725 (1983). *Karcher* involved a challenge to New Jersey's congressional redistricting plan. *See id*. at 729. In *Karcher*, the Supreme Court invalidated New Jersey's partisan gerrymandering of its congressional districts because it violated the one-person, one-vote requirement. *See id*. at 743–44. The Court recognized that the census may result in an undercount, but the census is still "the `best population data available,'" and stated that "it is the only basis for good-faith attempts to achieve population equality" in a congressional plan. *Id*. at 737–38 (citing Kirkpatrick v. Preisler, 394 U.S. 526, 528 (1969)). The Supreme Court reasoned,

> if state legislators knew that a certain de minimis level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality. Furthermore, choosing a different standard would import a high degree of arbitrariness into the process of reviewing apportionment plans. In this case, appellants argue that a maximum deviation of approximately 0.7% should be considered de minimis. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?

Karcher, 462 U.S. at 731–32 (citations omitted).

70. *Id.* at 732.

71. *Id.* at 733.

72. *Id.* at 734 n.5.

73. *Id.* at 741.

on [the] proper showing could justify minor population deviations."[74]

Finally, the Supreme Court recognized that the requirement of equal population for congressional districts resulting from article I of the Constitution and the *Wesberry* line of cases was more stringent than the equal population requirement resulting from the Equal Protection Clause of the Fourteenth Amendment and the *Reynolds* progeny that applies to state legislative redistricting.[75] Thus, future congressional redistricting would continue to be imbued with the goal of incumbency protection constrained only by the requirement of equal population. The Legislature was not legally required to respect political subdivision boundaries when drawing congressional districts.[76] Indeed, respecting political subdivision boundaries could not be used to explain variances in population among districts that were other than minor.[77] Thus, the Legislature's drive to meet the equal population requirement for congressional districts in future redistricting efforts would impel it to ignore county, city, or any type of political boundary.[78] Moreover, the Supreme Court's admonishment in *Karcher* that the use of computers should make the goal of equal population easier to attain contributed to the Legislature's belief that respect for political boundaries was not as important in congressional redistricting as it is in state legislative redistricting.[79]

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74. *Id.* at 740.

75. *See, e.g.,* Karcher, 462 U.S. at 732–33 (stating that "we have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, § 2, as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures"); *cf.* White v. Regester, 412 U.S. 755, 763–66 (1973) (upholding a total range of population deviation of 9.9% in the Legislative Redistricting Board's plan for the Texas House of Representatives); Gaffney v. Cummings, 412 U.S. 735, 741–43 (1973) (reiterating the distinction made in *Mahan v. Howell* between state and congressional deviation, and upholding a state house plan with a total range of population deviation of 7.83%); Mahan v. Howell, 410 U.S. 315, 321–23 (1973) (definitively establishing that population deviations in state legislative redistricting plans are not to be judged by the more stringent standards applicable to congressional redistricting plans).

76. *See* TEX. CONST. art. III, § 26. This provision requires respect for county lines only when drawing Texas House districts. *See id*.

77. *See, e.g.*, *Karcher*, 462 U.S. at 740; White v. Weiser, 412 U.S. 783, 791 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 533–34 (1969).

78. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941 (1996).

79. *See* Karcher, 462 U.S. at 743–44.

III. THE RULE OF NON-DILUTION AND NON-RETROGRESSION OF MINORITY VOTING STRENGTH: THE SECOND PARADIGMATIC SHIFT AND ITS EFFECT ON THE CONGRESSIONAL REDISTRICTING OF 1981

In 1965, Congress passed the Voting Rights Act to ensure that the voting rights of minorities would not be diluted by actions taken by state and local governments.[80] Section 5 of the Act, which requires preclearance of any change affecting voting made by a state or local government, did not apply to Texas until 1975.[81] Moreover, during the 1970s, the state's population continued to grow.[82] As a result of this population growth, the State was apportioned three new congressional districts in 1981.[83] Thus, in 1981, the Legislature was faced with the prospect of incorporating three newly apportioned districts into its redistricting plan; with satisfying the equal population requirement of article I, section 2 of the Constitution; and with making sure that the plan neither diluted the voting strength of minorities nor retrogressed their position.[84] All of these legal requirements had to be achieved while also protecting incumbents.[85] The legislative resolution of these various requirements and

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80. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1994) (as amended). The Voting Rights Act provides that

> all citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Id. § 1971.

81. *See id*. § 1973(c); *see also* Katzenbach v. North Carolina, 383 U.S. 301 (1966). Section 5 of the Act, which offends traditional notions of federalism in that it allows the federal government to intrude into the legislative acts of the states, was, nonetheless, ruled to be constitutional because of the rampant discriminatory practices in voting perpetrated by the jurisdictions covered by the section. *See id*. at 337. Texas was not originally a covered jurisdiction but became so in 1975. *See* 28 C.F.R. pt. 51 app.

82. *See* CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1 1970 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION 45-4, 45-5 (1973).

83. Texas gained Districts 25 (South Houston and Southeast suburbs), 26 (Ft. Worth suburbs, Arlington, Denton), and 27 (Gulf Coast — Corpus Christi, Brownsville). CONGRESSIONAL QUARTERLY, CONGRESSIONAL DISTRICTS IN THE 1980'S, at 548–50 (1983).

84. *See supra* notes 79–81 and accompanying text.

85. *See supra* note 2 and accompanying text; *see also* Bush v. Vera, 116 S. Ct. 1941, 1952–54 (1996); White v. Weiser, 412 U.S. 783, 791 (1973); Vera v. Richards, 861 F. Supp. 1304, 1317–18 (S.D. Tex. 1994).

goals resulted in the passage on August 10, 1981, of S.B. 1[86] in the first called special session of the Sixty-Seventh Legislature.[87]

The Legislature located one of the newly apportioned districts, District 27, in South Texas. District 27 ran from the Mexican border east to the Gulf of Mexico.[88] It was adjacent to, and north of, District 15, which under the 1973 redistricting plan was composed of the four southernmost counties in Texas.[89] The placing of District 27 in such a geographic manner caused District 15's population to be 80.36% Hispanic, and District 27's population to be 52.9% Hispanic.[90] Reconfiguring the districts so that they ran from north to south would have resulted in a 71.4% Hispanic population in District 15, and 62.4% Hispanic population in District 27; a more equal distribution of Hispanic voting power, which the Legislature did not opt to use.[91] The Legislature's chief reason for its choice of configuration was that Hidalgo and Cameron counties had always been in the same congressional district (District 15) and it wished to preserve a "continuity of representation" (i.e., incumbency protection).[92] The Department of Justice did not preclear the plan because it concluded that Hispanic voters in South Texas had been packed into District 15 and that the adjacent, newly created District 27 had diluted Hispanic votes.[93]

Like the congressional redistricting plan of 1971, the congressional redistricting plan of 1981 was successfully challenged in court.[94] Unlike the challenge to the congressional plan of 1971, which focused on equal population concerns, the focus of the challenge to the 1981 plan was an alleged unconstitutional gerry-

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86. *See* TEX. REV. CIV. STAT. art. 197(f) (repealed 1983).

87. *See* TEX. CONST. art. III, § 5. The decision to call a special session is exclusively left to the governor under the State constitution. *See id.*; *see also* Walker v. Baker, 196 S.W.2d 324, 328 (Tex. 1946).

88. The new District 27 included five counties: Cameron, Kenedy, Kleberg, Nueces, and Willacy. CONGRESSIONAL QUARTERLY, CONGRESSIONAL DISTRICTS IN THE 1980'S, at 550 (1983).

89. *See* Seamon v. Upham, 536 F. Supp. 931, 1009 (E.D. Tex.) (Justice, C.J., concurring), *vacated*, 456 U.S. 37 (1982).

90. *See* CONGRESSIONAL QUARTERLY, CONGRESSIONAL DISTRICTS IN THE 1980'S, at 521 (1983).

91. *See Seamon*, 536 F. Supp. at 1010.

92. *Id.* at 1013.

93. Letter from U.S. Dep't of Justice to David A. Dean, Texas Secretary of State (Jan. 29, 1982).

94. *See Seamon*, 536 F. Supp. at 959.

mander that resulted in the dilution of minority voting strength under the Fourteenth[95] and Fifteenth[96] amendments, as well as a violation of section 2 of the Voting Rights Act.[97] Specifically, one group of minority plaintiffs alleged that District 15 in South Texas had been "packed" with Hispanics while the adjacent newly created District 27 diluted Hispanic voting power.[98] The district court agreed.[99] It ruled that District 15 had been unconstitutionally packed. In *Upham v. Seamon*,[100] the Supreme Court upheld that ruling. The district court redrew the districts in South Texas so that they more equally reflected the voting strength of Hispanics in that region.[101]

Also at issue in *Upham* was the distribution of minority voters in districts 5[102] and 24[103] in the Dallas area.[104] In 1981, the Legislature had redrawn the boundaries of these two adjacent districts in a manner that took sizeable numbers of minorities out of District 5 and placed them in District 24.[105] As a result, minority voting

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95. *See* U.S. CONST. amend. XIV, § 1.

96. *See* U.S. CONST. amend. XV, § 1.

97. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994) (as amended).

98. *See Seamon*, 536 F. Supp. at 936. "One group of minorities argued basically it was `packed' into a single congressional district in order to minimize the political influence it had enjoyed previously. A group of minorities from another area of the State argued S.B. 1 `fragmented' the minority population in order to decrease its voting strength." *Id*.

99. *See id*. at 949 n.27. "A legislature or court must be wary . . . that its scheme `packs' minorities, thereby causing a retrogression in electoral access in one area of the state with no concomitant increase in access elsewhere . . . . [T]his Court, in fashioning a remedial order, is cognizant of how a districting scheme that `fragments' a concentrated minority group may dilute minority voting strength." *Id*.

100. 456 U.S. 37, 37 (1982). "Although a court must defer to legislative judgements on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans." *Id*.

101. *See Seamon*, 536 F. Supp. at 958.

102. District 5 at the time was represented by Jim Mattox, a Democrat. *See* 1 Congressional Quarterly, CONGRESSIONAL QUARTERLY STATE POLITICS AND REDISTRICTING 69 (1982).

103. District 24 at the time was (and still is today) represented by Martin Frost, a Democrat. *See id*.

104. Before the redistricting of 1981, the configurations of these two districts were the result of the court's remedy in *White v. Weiser*. *See supra* text accompanying notes 55–63.

105. *See Upham*, 456 U.S. at 38 (1982). The Supreme Court described the change in the following manner:

Under S.B.1, minority strength in District 5, in Dallas County, would have

strength increased in District 24, but decreased in District 5. The boundaries were redrawn for two reasons: one, a desire expressed by some in the minority community in the Dallas area for a safe district from which they could elect a representative of their choosing,[106] and two, an expressed commitment from then-Republican Governor William Clements that he would veto any redistricting bill that did not provide minorities in the Dallas area with a safer district.[107] Minority plaintiffs from the Dallas area alleged that their votes had been diluted because they now had one district in which they had real voting influence, as opposed to two districts.[108]

The Department of Justice had not objected to the configuration of these two districts in its preclearance letter to the State. Moreover, only one of the three judges on the panel hearing this case ruled this portion of the redistricting plan unconstitutional.[109] Nonetheless, the three-judge panel changed the Dallas County portion of the redistricting plan to remedy the dilution of minority voting power.[110] The Supreme Court reversed this action of the district court because "in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature."[111]

The Republican governor's rather unusual support for a minority influence district in 1981 demonstrated the increasingly sophisticated political war between the ever-ascending Republican Party and the Democratic Party. These partisan battles manifested themselves in concerns for incumbency protection. Specifically, the Democrats in the Legislature were trying to protect the incumbent Democratic congressmen in these two districts from a perceived Republi-

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> gone from 29.1 percent to 12.1 percent. Apparently, the minority votes had been shifted to District 24, which increased in minority population from 37.4 percent to 63.8 percent.

Id.

106. *See Seamon*, 536 F. Supp. at 996–1001 (E.D. Tex.) (Justice, C.J., concurring), *vacated*, 456 U.S. 37 (1982).

107. *See id*. at 996.

108. *See id*. at 931–36.

109. *See Upham*, 456 U.S. at 39 (1982). "Judge Justice alone determined that the S.B. 1 plan for Dallas County was unconstitutional." *Id*.

110. *See id*. at 38, 44.

111. *Id*. at 43.

can threat. The Republicans, on the other hand, hoped to gain a district. This political battle would once again be waged in the redistricting of 1991.[112] Once again, the Legislature's congressional redistricting effort resulted in costly litigation that the state lost. Although the redistricting plan properly satisfied the one-person, one-vote rule, it failed to protect the voting strength of Hispanics in South Texas.

IV. THE RULE OF SHAW v. RENO*: THE THIRD PARADIGMATIC SHIFT AND ITS EFFECT ON THE CONGRESSIONAL REDISTRICTING OF 1991*

As a result of population gains reflected in the federal census of 1990,[113] Texas was apportioned three new congressional seats.[114] Since a large portion of the population gains were in parts of the state with large Mexican-American and African-American populations,[115] the Legislature determined to make these newly apportioned districts majority-minority.[116] Also motivating the Legislature to make these districts majority-minority was the successful litigation by minority plaintiffs after the redistricting of the 1980s.[117] The political melee that resulted from the redistricting wars of 1991 were among the worst the legislature had experienced. The process had indeed become complicated for several reasons. First, the addition of three newly apportioned districts required a complete remake of the congressional plan so as to provide for thirty single-member districts each with equal populations. Second, the requirements of the Voting Rights Act and the demands from minority organizations emboldened by their success in prosecuting their claims under the

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112. *See generally* Bush v. Vera, 116 S. Ct. 1941 (1996).

113. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: TEXAS 1–14 (1992).

114. *See* 2 U.S.C. § 2(a) (1994). Under federal law, the 1990 federal census results are used to determine the number of congressional seats apportioned to each state for the 1990s. *See id*.; TEX. CONST. art. III, § 26. The Texas Constitution requires the Texas Legislature to redraw congressional districts after each decennial census. *See id*.

115. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: TEXAS at 29-138, 29-153 through 29-158 (1992).

116. *See* H.B. 1, 72d Leg., 2d C. Sess. (Tex. 1991); *see also* Letter from John R. Dunne, Assistant Attorney General, U.S. Dep't of Justice, to John Hannah, Jr., Texas Secretary of State (Nov. 18, 1991), *reprinted in* Joint App., *supra* note 2, at 343.

117. *See* Seamon v. Upham, 536 F. Supp. 931 (E.D. Tex.), *vacated*, 456 U.S. 37 (1982); *see also supra* Part II.

Act during the 1980s demanded attention be paid to the racial composition of the newly drawn districts. Finally, the perennial concerns of protecting incumbents impacted the process. Ted Lyon, a former member of the Texas House and Senate who had been involved in the process in the 1980s and the 1990s, described the resulting confusion:

> [C]ompactness is not a traditional districting principle in Texas. For the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can. There is no reason why the State should now have to draw compact majority-minority districts when it has shown no interest over the years in drawing compact majority-white districts.[118]

In 1991, the Legislature passed House Bill One (H.B. 1), the congressional redistricting plan.[119] It contained thirty single-member districts, of which eight were majority-minority districts.[120] After the congressional elections of 1992, ten members of Congress were Republican and twenty were Democrats; moreover, of the thirty members, twenty-three were Caucasian, five were Hispanic,[121] and two were African-American.[122]

A group of Republican plaintiffs filed the first challenge to H.B. 1 in federal court in the case of *Terrazas v. Slagle*.[123] They alleged that H.B. 1 was a political gerrymander in violation of the Fourteenth Amendment and that minority communities were split in order to protect Caucasian-Democrat incumbents in violation of section 2 of the Voting Rights Act.[124] District 30 in Dallas was one of the newly apportioned districts.[125] It was between districts 5 and 24,

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118. Vera v. Richards, 861 F. Supp. 1304, 1313 n.9 (S.D. Tex. 1994).

119. *See id*. at 1309; H.B. 1, 72d Leg., 2d C. Sess. (Tex. 1991).

120. *See Vera*, 861 F. Supp. at 1311 n.7.

121. The voters in District 29, one of the newly created majority-minority districts, elected a Caucasian representative. *See* CONGRESSIONAL QUARTERLY CONGRESSIONAL DISTRICTS IN THE 1990S: A PORTRAIT OF AMERICA 745 (1992).

122. *Cf.* 1 CONGRESSIONAL QUARTERLY, STATE POLITICS AND REDISTRICTING 65–81 (1982). Before the congressional elections of 1982, nineteen of the members of Congress were Democrat and five were Republican; of the twenty-four members of Congress, twenty-one were Caucasian, two were Hispanic, and one was African-American. *Id*.

123. *See* Terrazas v. Slagle, 789 F. Supp. 828 (W.D. Tex.), *aff'd*, 506 U.S. 801 (1992).

124. *See id*. at 833–34.

125. *See id*. at 834.

the districts involved in the Supreme Court's *Upham v. Seamon* decision.[126] In denying the plaintiffs' motion to impose an interim plan, the *Terrazas* court noted:

> [T]he configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States. Though this Court is concerned with the flagrant abandonment of compactness and preservation of communities in this district, the Court further finds that a primary motive for any gerrymandering was to enhance Black voters' ability to elect a candidate of their choice. The mere fact that the Republican plaintiffs have fashioned a more compact District 30 with identical voting age population percentages, though more aesthetically pleasing, does not give rise to a finding of a Sec. 2 violation by this Court at this time. This Court further finds that District 30 as drawn in H.B. 1 does not dilute the minority vote in adjacent districts, including Hispanics, as has been found in the House and Senate plans passed by the legislature.[127]

In so ruling, the court implicitly recognized that the goal of creating a majority-minority district pursuant to section 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles*[128] overrode the more pedestrian concerns of compactness and preservation of communities. Until then, such concerns, though important, were considered to be state legislative prerogatives — not requirements of federal law. The court subsequently granted the State's motion for summary judgment and dismissed the plaintiffs' claims.[129] Thus,

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126. *See* Upham v. Seamon, 456 U.S. 37, 39 (1982); *see also supra* Part II.

127. *See Terrazas*, 789 F. Supp. at 834–35.

128. 478 U.S. 30 (1986).

129. *See* Terrazas v. Slagle, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993). Dismissing the action, the court focused on the Republican plaintiffs' allegations of political gerrymandering:

> [T]he plaintiffs seem to view the congressional delegation as another state political structure and argue that because they lack influence in regard to other state structures, they were denied influence in selecting the apportionment plan for the congressional delegation. Assuming that this claim may be analyzed in reference to the state political structures, the plaintiffs fail to make a showing that they lack influence in the state political process as a whole. The plaintiffs contend that they carry half or more of the state in statewide baseline elections but they have never had a majority in either house of the state legislature . . . . Assuming that these contentions are true, the plaintiffs have not shown that they cannot block a Democrat-backed redistricting plan and thereby

H.B. 1 survived one legal challenge — but there was one more challenge to come. The next challenge was the result of the Supreme Court's 1993 ruling in *Shaw v. Reno*.[130]

Shaw involved a congressional redistricting plan from North Carolina that was alleged to violate the Equal Protection Clause of the Fourteenth Amendment because it was racially gerrymandered.[131] The North Carolina Legislature's original congressional redistricting plan contained one majority-minority district.[132] The Department of Justice objected to the plan because the legislature "could have created a second majority-minority district `to give effect to black and Native American voting strength . . . ' by using boundary lines `no more irregular than [those] found elsewhere in the proposed plan,' but failed to do so for `pretextual reasons.'"[133] It, therefore, did not preclear the plan.[134] To gain preclearance from the Department of Justice, the North Carolina Legislature passed another plan that contained two majority-minority districts.[135] One of the districts, District 1, was compared to a "Rorschach ink-blot test" and a "bug splattered on a windshield."[136] The other majority-minority district, District 12, was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas `until it gobbles up enough enclaves of black neighborhoods.'"[137] The district court dismissed the action for failure to state a claim.[138] The Supreme Court reversed the district court's dismissal.[139] It recognized for the first time a cause of action against a state for "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional

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have no influence in crafting such a plan.

Id. at 1174.

130. 509 U.S. 630 (1993).

131. *See id*. at 633–34.

132. *See id*. at 633; *see also* 1991 N.C. Sess. Laws 7.

133. *Shaw*, 509 U.S. at 635.

134. *See id*. at 633.

135. *See id*. at 634 (citations omitted); *see also* 1991 N.C. Sess. Laws 7.

136. *See Shaw*, 509 U.S. at 635 (citations omitted).

137. *Id*. at 635–36 (quoting Shaw v. Barr, 808 F. Supp. 461, 475 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part, dissenting in part)).

138. *See* Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992).

139. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993).

districting principles and without sufficient compelling justification."[140] The *Shaw* decision engendered much confusion. At the very least, there was a belief that a district's shape determined its constitutionality; if it looked bizarre, then it was unconstitutional.[141]

In 1994, encouraged by the Supreme Court's ruling in *Shaw*, a different group of Republican plaintiffs sued the State of Texas,

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140. *Id*.

141. In 1995, the Supreme Court clarified its ruling in *Shaw*. *See id*. at 658; Miller v. Johnson, 515 U.S. 900 (1995). *Miller* presented the Supreme Court with a congressional redistricting plan from Georgia. *See id*. at 2483. The Georgia Legislature originally passed a plan that contained two majority-minority districts, Districts 5 and 11, and one influence district, District 2, which contained a black voting age population of more than 35%. *See id*. This plan contained one more majority-minority district than had existed previously; nonetheless, the Department of Justice objected to the plan because it contained only two majority-minority districts — although three could have been drawn. *See id*. at 2483–84.

In response, the Georgia Legislature next passed a plan that increased the black populations in each of the three districts. *See id*. The result of this plan was that it still contained only two majority-minority districts and one influence district. *See id*. at 2484. The Department of Justice objected once again because it determined that alternative plans existed that provided for the creation of three majority-minority districts and that the Georgia Legislature "`failed to explain adequately' its failure to create a third majority-minority district." *Id*. (quoting App. at 125).

Finally, the Georgia Legislature passed a plan that contained three majority-minority districts; the Department of Justice precleared this plan. *See id*.

Some residents of District 11 sued the State alleging that their district had been racially gerrymandered. *See Miller*, 515 U.S. at 909. The three-judge district court panel agreed with the plaintiffs. *See id*. The Supreme Court affirmed, ruling that

> parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. Today's case requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge . . . .
>
> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Id. at 2488 (citation omitted). If a plaintiff can show that race predominated in the redistricting process, then the state has to meet the strict scrutiny standard; that is, it must show that the redistricting plan was narrowly tailored to achieve a compelling state interest. *See id*.

alleging that twenty-four of the thirty districts in H.B. 1 had been racially gerrymandered as in *Shaw*.[142] The State contended that the district boundaries were the result of various objectives: compliance with the constitutional requirement of one-person, one-vote; compliance with the requirements of section 2 of the Voting Rights Act as interpreted by the Supreme Court in *Thornburg*; compliance with the traditional redistricting policy of incumbency protection; and compliance with other redistricting principles, including contiguity, compactness, and keeping communities of interest intact.[143] The district court ruled that three of the twenty-four districts — 18, 29, and 30 — were racially gerrymandered.[144] In so ruling, the district court correctly described the role played by concern for incumbent protection:

> It is important to realize that as enacted in Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people.[145]

For example, District 30 was created to protect incumbents.[146] In 1991, then-State Senator Eddie Bernice Johnson[147] was the chair of the Senate Subcommittee on Congressional Districts. She announced early in the redistricting process that she would be a candidate for the new congressional seat in the Dallas area, and she

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142. *See* Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994).

143. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

144. *See Vera*, 861 F. Supp. at 1309.

145. *Id*. at 1334 (citations omitted).

146. *See* Terrazas v. Slagle, 789 F. Supp. 828, 834 (W.D. Tex.), *aff'd*, 506 U.S. 801 (1992).

147. Eddie Bernice Johnson was a State Senator from Dallas from 1984 to 1992. In 1992, she was elected to Congress from District 30. *See* SENATE ENGROSSING AND REPRODUCTION OFFICE, 2 MEMBERS OF THE TEXAS LEGISLATURE 703 (1992).

drew a highly compact district from which she could easily be elected.[148] The configuration of the proposed district, however, was unacceptable to two incumbent Democratic congressmen, Martin Frost[149] and John Bryant,[150] because it siphoned off too many of their Democratic voters and endangered their own re-election chances.[151] In this struggle for Democratic voters, the incumbents knew that African-Americans in the Dallas/Fort Worth area were Democrats.[152] The horse-trading between these incumbents and Senator Johnson was intense. As Johnson's proposed district shed Democrats in the south to Frost and Bryant, it began to send tendrils to the north and west to find other Democrats to replace them. These tendrils contained much *lower* percentages of minority residents than did the core of the district,[153] and had the effect of *lowering* the overall African-American concentration in the district. In effect, they made the district more, rather than less, multi-ethnic.[154]

The bizarre shape of Democratic District 30 found a cousin in the equally bizarre shape of District 6, a predominantly Republican

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148. *See* Vera v. Richards, 861 F. Supp. 1304, 1321 (S.D. Tex. 1994).

149. Martin Frost has represented District 24 since 1978. *See* U.S. GOVERNMENT PRINTING OFFICE, CONGRESSIONAL DIRECTORY 291 (1997).

150. John Bryant represented District 5 from 1982 to 1994. *See* U.S. GOVERNMENT PRINTING OFFICE, CONGRESSIONAL DIRECTORY 287 (1994).

151. *See Vera*, 861 F. Supp. at 1321.

152. *See id*. In *Vera*, the court referred to Senator Johnson's letter to John Dunne, which stated:

> For primary elections, approximately 97% of the total votes cast by Blacks in the Dallas/Fort Worth metroplex area are cast in the Democratic primary. Because of the consistency of this voting pattern, Democratic incumbents generally seek to include as many Blacks as possible into their respective districts. Throughout the course of the Congressional redistricting process, the lines were continuously reconfigured to assist in protecting the Democratic incumbents in the Dallas/Fort Worth metroplex area by spreading the Black population to increase the Democratic party index in those areas.

Id. at 1322 (citing letter from Texas Senator Eddie Bernice Johnson to Assistant United States Attorney General John Dunne (Aug. 28, 1991)).

153. Indeed, the most vicious fight between Johnson and Frost was over Anglo Democratic voters in Grand Prairie to the west of Dallas. *See* State's Exhibit 33, Joint App., *supra* note 2, at 335. Both Johnson's senate district and Frost's congressional district had included these voters and both wanted to include them in their new districts. Ultimately, they were split between the two. *See* Joint App., *supra* note 2, at 388.

154. Congressional District 30 is thus not an example of racial "Balkanization" as described by the Court in *Shaw v. Reno* and *Miller v. Johnson*. It is, rather, a multi-ethnic district (50.9% African American, 17.1% Hispanic, 31.4% Anglo, and 2.4% other) within a single metropolitan area. *See* Plaintiff's Exhibit 34-O, Joint App., *supra* note 2, at 160.

district.[155] The shape of District 6 resulted from the same political give and take necessary to protect incumbents.[156] District 6, however, was held constitutional.[157] District 30 was not.[158] Justice Stevens aptly compared and contrasted the two districts in his dissenting opinion in *Vera* in the following manner:

> For every geographic atrocity committed by District 30, District 6 commits its own and more. District 30 split precincts to gerrymander Democratic voters out of Republican precincts; District 6 did the same. District 30 travels down a river bed; District 6 follows the boundaries of a lake. District 30 combines various unrelated communities of interest within Dallas and its suburbs; District 6 combines rural, urban, and suburban communities. District 30 sends tentacles nearly 20 miles out from its core; District 6 *is* a tentacle, hundreds of miles long (as the candidate walks), and it has no core.[159]

Nonetheless, the Supreme Court disagreed with Justice Stevens' analysis and affirmed the ruling of the district court, holding that, in District 30, traditional districting criteria were subordinated to racial considerations and, therefore, that strict scrutiny applied.[160] The Supreme Court noted:

> It is true that District 30 does not evince a consistent, single-minded effort to "segregate" voters on the basis of race and does not represent "apartheid." But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre noncompact shape and overwhelming evidence that the shape was essentially dictated by racial considerations of one form

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155. *See* Bush v. Vera, 116 S. Ct. 1941, 1982 (1996) (Stevens, J., dissenting). *Compare* the map of District 30, *with* that of District 6, App., *infra*.

156. *See id*.

157. *See id*. at 1951.

158. *See id*.

159. *Bush*, 116 S. Ct. at 1982 (1996) (Stevens, J., dissenting) (citations omitted).

160. *See id*. at 1953. "For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*." *Id*. (emphasis in original).

> or another is exceptional; Texas Congressional District 6, for example, which Justice Stevens discusses in detail has only the former characteristic. That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny.[161]

The Supreme Court found that H.B. 1 was not narrowly tailored to comply with the requirements of section 2 of the Voting Rights Act,[162] which the Supreme Court assumed to be a compelling state interest.[163] Therefore, the Supreme Court affirmed the judgment of the three-judge panel and remanded the case for a determination of the appropriate remedy.[164]

From the Legislature's perspective, the *Vera* case demonstrated that there was no safe haven from litigation that the victory in the *Terrazas* case had implied in 1992. Rather, the State expended a substantial amount of time and money in defending redistricting litigation well into 1997.[165]

V. A NEW BEGINNING FOR THE TWENTY-FIRST CENTURY: THE USE OF A REDISTRICTING COMMISSION

This brief history of the Texas Legislature's experience with congressional redistricting compels one obvious conclusion: Litigation has been an integral part of the redistricting process in Texas.[166] In the last three decades, successful litigation has resulted in

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161. *Id*. at 1958 (citations omitted). One interpretation of this result, albeit cynical, is that concerns for protecting incumbents by insuring that his or her constituency reflects his or her other party affiliation — an objective of the Legislature's configuration of both District 30 and 6 and indeed of all of Texas' 30 districts — is unconstitutional only when the constituency is African-American or Hispanic. *See id*. at 1959. For a graphic comparison of District 30 and District 6, see *id.* at 1959; App., *infra*.

162. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994) (as amended).

163. *See Bush*, 116 S. Ct. at 1969.

164. *See id*. at 1964.

165. Although *Vera*'s three-judge panel redrew 13 districts to remedy the constitutionally defective districts and ordered the court-drawn districts to be used in the elections of Fall 1996, the Legislature failed to pass any congressional redistricting legislation in 1997. *See* Vera v. Bush, No. CIV.A.H.-94-0277, 1997 WL 597823, at *1 (S.D. Tex. Sept. 15, 1997) (second interim remedial order). Thus, the panel has ordered its interim redistricting plan to be used until the Legislature redraws congressional districts in 2001. *See id*. at *3; *supra* note 23.

166. *See* HOUSE RESEARCH ORGANIZATION, REDISTRICTING FOR THE NINETIES: A PROGRESS REPORT 175 (Feb. 28, 1992). The Texas House Research Organization said this of the redistricting process in a special legislative report:

> The redrawing of boundaries for legislative, congressional and State Board of

changing district configurations that the Legislature drew in an attempt to protect incumbents.[167] One cannot assume that incumbency protection will cease to be the overriding objective in 2001, the year that the Texas Legislature must next redraw congressional districts, simply because of the result in *Vera*.[168] Although some commentators have lamented over the illegitimacy of incumbency protection as a redistricting objective,[169] reality suggests that political self-interest and partisan politics, both of which are aspects of incumbency protection,[170] will continue to play a prominent role in redistricting as long as the Legislature continues to perform that task.

> Education districts to reflect the population shifts revealed by the 1990 census has been beset by legal challenges and political wrangling, as were the redistricting rounds of the 1970s and 1980s. The legal and political hurdles involved in the decennial process of redistricting often prove too high for the Legislature to surmount on the first try, resulting in a series of different plans that produce political uncertainty and voter confusion.

Id. at 1.

167. *See, e.g*., Bush v. Vera, 116 S. Ct. 1941 (1996); Upham v. Seamon, 456 U.S. 37 (1982); White v. Weiser, 412 U.S. 789 (1973).

168. In fact, the Census Bureau projects that Texas stands to gain two new congressional seats in the year 2000 as a result of continuing population growth. *See* Michelle Mittelstadt, *Texas May Gain 2 House Seats in Next Census*, AUSTIN AM.-STATESMAN, Apr. 13, 1997, at B2. This means that Texas will once again have to completely reconfigure its congressional districts to accommodate the districts to be newly apportioned.

169. *Id.*; *see Vera*, 861 F. Supp. at 1334. The three-judge panel in *Vera v. Richards* expressed the same sentiment about Texas' incumbent gerrymandering: "The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." *Id*.; *see also* Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996). Silverberg analyzes incumbency protection or, as she terms it, the incumbent gerrymander under the microscope of Arrow's Theorem, which "holds that a social choice is never fully independent of the method by which it was reached." *Id*. at 915. She concludes:

> The insight of social choice theory is that the ability to control or manipulate an election agenda is paramount. While this insight raises questions about every process of collective decisionmaking, the consequences of agenda manipulation are especially troubling when the agenda-makers have a strong incentive to manipulate the process to their own advantage and have been able to avoid being held accountable for doing so. When an election has been subsumed to a process so carefully designed to produce a particular result, the purpose of collective decisionmaking is lost.
>
> The decennial battle over redistricting evidences this type of troubling agenda manipulation. If the right to vote is about the electorate's ability to secure meaningful and responsive representation, what is the effect of permitting representatives to avoid being held accountable through the skillful manipulation of a legislative power?

Id. at 940.

170. *See* Bush v. Vera, 116 S. Ct. 1941, 1954 (1996).

Moreover, litigation over congressional districts has been time-consuming and expensive. Thus far in the 1990s, Texas has spent nearly four million dollars in attorneys' fees alone as a result of these lawsuits.[171] After including other litigation costs like deposition costs, expert witness fees, and the like, the amount likely exceeds five million dollars. If history repeats itself, Texas will once again find itself in court after the redistricting that follows the decennial census of the year 2000.[172] If Texas is to avoid this seemingly Sisyphean fate, then it must make a dramatic change to the redistricting process.[173] It is this reality that compelled the Attorney General of Texas to call for the creation of an independent, nonpartisan redistricting commission.[174]

In calling for this reform, the Attorney General properly observed:

> [W]hen state legislators redraw district lines, they know that how they draw the boundaries will go a long way to determine whether or not they can win reelection. Consequently, the redistricting process is politics at its worst. Neighborhoods are fought over block by block on the basis of income, political affiliation, and racial and ethnic makeup. District boundaries, which are supposed to be reasonably compact and maintain a community of interest, are twisted like pretzels to accommodate the self interest of elected officials and to preserve the status quo.[175]

The redistricting commission "could include not only members of both parties, but also legal and demographic experts well-versed in the complexities of redistricting. The commission, detached from the need to preserve political careers, could make independent decisions

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171. The actual amount of attorneys' fees incurred by the State is $3,746,868.23. This figure includes the attorneys' fees paid to plaintiffs' counsel who represented the prevailing party under 42 U.S.C. § 1988. *See* TEXAS OFFICE OF THE ATTORNEY GENERAL (on file with Author).

172. *See* Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 855–61 (1997). One commentator has correctly observed that "[t]he state legislature has become a redistricting battleground from which there emerges no winner, only bloody combatants heading off to the courthouse." *Id*. at 855.

173. *See id*.

174. *See* Texas Attorney General Dan Morales, Press Release (June 27, 1996) (copy on file with Author).

175. Texas Attorney General Dan Morales, *Independent Commission Should Handle Redistricting*, AUSTIN AM.-STATESMAN, July 31, 1995, at A9.

on behalf of the public interest, not partisan interests."[176]

A redistricting commission stands a better chance of producing a redistricting plan that is a safe haven from litigation, i.e., a plan that the State can successfully defend in court.[177] Certainly, California's experience in the 1990s is instructive. After the California Legislature failed to pass a congressional redistricting plan, the task fell to a panel of three state judges that acted as special masters.[178] The plan they developed was successfully defended in court; the federal district court that heard the *Shaw* challenge to the plan ruled that the special masters had properly balanced the different redistricting objectives, including the consideration of race, in drawing majority-minority districts.[179] Unlike the Texas congressional redistricting plan's experience in *Vera*, the California plan was not beleaguered with the thorny issue of whether race was used as a proxy for partisan affiliation in order to protect incumbents.[180] The reason for this is obvious: the special masters in California were not

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176. Texas Attorney General Dan Morales, *Redistricting Is Politics at Its Worst*, SAN ANTONIO EXPRESS NEWS, Aug. 7, 1995, at 11A.

177. *See* Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45. One commentator has observed that:

> A number of factors have come together to make redistricting increasingly complex. Computer technology has made ever greater manipulations of district lines not only possible but readily accessible to a vast array of interested parties. Political players, not only parties but interested factions, are more attentive to the spoils of redistricting. But the imprecision of legal constraints and the absence of any appreciable safe haven from litigation have brought the process to the brink of collapse. Since 1980 there has been a marked increase in the number of state and local bodies unable to discharge their redistricting obligations and instead leaving the battles to be fought out in the courts or settled before nonpartisan commissions. Now that the Court has decisively added equal protection uncertainty, redistricting begins to appear as only the initial step in a decade's worth of expensive and caustic litigation.
>
> If one bright spot emerges from the Court's 1994 Term it is the prospect that nonpartisan commissions may provide the same protection from equal protection challenge as they appear to have from charges of partisan gerrymandering. Perhaps the Court is adding one more signal that the time has come to remove redistricting entirely from the hands of political actors who are most susceptive to capture.

Id. at 68; *see* Kubin, *supra* note 172, at 862. Another commentator has concluded that a redistricting commission "does not guarantee a balanced redistricting plan capable of surviving judicial scrutiny, but it improves the likelihood of success." *Id*.

178. *See* Wilson v. Eu, 823 P.2d 545, 547–48 (Cal. 1992).

179. *See, e.g.*, DeWitt v. Wilson, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), *aff'd*, 115 S. Ct. 2637 (1995).

180. *See* Bush v. Vera, 116 S. Ct. 1941 (1996).

as concerned with incumbency protection as was the Texas Legislature.[181]

In short, use of an independent, nonpartisan redistricting commission will substantially diminish, if not eliminate, much of the self-interest and partisanship that now characterizes redistricting by the Legislature.[182]

CONCLUSION

The law of redistricting has undergone immense change in the last thirty-seven years. Up until 1960, federal courts generally did not enter the "political thicket" of state legislative and congressional redistricting because of the 1946 Supreme Court ruling in *Colegrove v. Green*; thus, redistricting plans passed by state legislatures were immune from federal court intrusion.[183] That paradigm, of no federal court review of redistricting, ended with the Supreme Court's landmark decision in *Baker v. Carr*. Since 1962, the changes in the law of redistricting have been swift and significantly felt by state legislatures: in 1964, the recognition of the one-person, one-vote requirement in *Reynolds v. Simms*; in 1965, the passage of the Voting Rights Act, especially the preclearance requirements of section 5 of the Act, which proscribed diminution of minority voting strength; and, in 1992, the recognition of racial gerrymandering as a violation of the Equal Protection Clause of the Fourteenth Amendment in *Shaw v. Reno*. Each of these changes in the law made the job of redistricting much more difficult and complicated. Although the increasing sophistication of computers eased the mechanical difficul-

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181. *See Wilson*, 823 P.2d at 553 ("In drawing voting district lines, the Masters expressly declined to consider the effects of reapportionment on political parties or incumbents . . . . [T]he Masters' plans quite properly were intended to be politically nonpartisan and `incumbent neutral.'"). *DeWitt* did not refer to incumbency protection. *See Wilson*, 856 F. Supp. at 1411.

182. *See* Kubin, *supra* note 172, at 849. Kubin states that "the goal of commission-based redistricting is to efficiently formulate new district maps that are less egregiously partisan than those created by a legislature and that adhere more closely to the redistricting mandates of federal and state law, thereby avoiding judicial intervention." *Id*.

183. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960). In 1960, the Supreme Court reversed the dismissal of an action in which African-American plaintiffs alleged a violation of their Fourteenth and Fifteenth Amendment rights as the result of a local act passed by the Alabama Legislature that changed the City of Tuskegee's boundaries from a square to a 28-sided figure that resulted in the exclusion of most of the African-American residents of the city. *See id*. at 347.

ty of the process, it also created new problems. Computers not only facilitated the drawing of boundaries that satisfied the constitutional requirement of one-person, one-vote, but also facilitate the drawing of boundaries that reflect a congressional incumbent's partisan, political orientation. Thus, some districts, especially those in densely populated areas, took on bizarre shapes.

This Article has focused on the Texas experience with congressional redistricting. It underscores the point that so long as the Legislature does the redistricting, incumbency protection will continue to be the prime directive. Only by placing the responsibility of redistricting on an independent, nonpartisan commission are we to mitigate the seemingly endless litigation that ensues after each redistricting session.

APPENDIX