

“Hispanic in Everything but Its Voting Patterns”: Redistricting in Texas and Competing Definitions of Minority Representation

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Based on unprecedented population growth revealed by the 2010 census, Texas picked up four additional congressional districts. Although minorities made up 89% of the population growth between 2000 and 2010, Texas lawmakers added only one Hispanic opportunity district to the map. Voting-rights groups alleged that this violated § 2 of the Voting Rights Act (VRA), which prohibits dilution of minority groups’ voting strength via the redistricting process. This Note examines the development of VRA jurisprudence and suggests that the source of the current redistricting controversy in Texas is divergent conceptions of minority representation. While Texas legislators claim that only Hispanic citizens should be counted for purposes of the VRA, voting-rights groups assert that all Hispanics of voting age should be represented under a new redistricting plan. In order to bring more clarity to § 2 case law, courts should articulate which population measure will be used at each point in the analysis.

I. INTRODUCTION

In February 2011, the U.S. Census Bureau released the results of the 2010 census.¹ The data revealed that, over the past ten years, Texas experienced unprecedented growth: the state’s overall population grew to 25.1 million, a 20.6% growth — an in-

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1. *2010 Census Data Products: United States*, CENSUS.GOV, <http://www.census.gov/population/www/cen2010/glance/> (last visited Oct. 26, 2012).

crease larger than any other state.² As mandated by the U.S. Constitution³ and the United States Code,⁴ the reapportionment of the Federal House of Representatives allocated four additional seats to the state, bringing its total delegation to thirty-six members.⁵ Texas lawmakers needed to draw a new congressional map to account for these changes.⁶

Almost immediately after the census data was released, controversy erupted over how this new map should look.⁷ Increases in minority population accounted for 89% of the total population growth, and many worried that this change would not be adequately represented in the redistricting process.⁸ In Texas, minority groups tend to vote for Democrats over Republicans,⁹ and, in order to preserve their majority, the Republicans in the state legislature historically have politically gerrymandered districts with high Hispanic populations, often at the expense of the minority's voting power.¹⁰

2. James C. McKinley, Jr., *Population 'Tipping Point' in Texas, as Hispanics Get Closer to Parity with Whites*, N.Y. TIMES, Feb. 17, 2011, at A20; see also Paul Mackun & Steven Wilson, *Population Distribution and Change: 2000 to 2010*, U.S. CENSUS BUREAU, 2 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> (“[B]etween 2000 and 2010, Texas experienced the highest numeric increase, up by 4.3 million people.”).

3. U.S. CONST. art. I, § 2 cl. 3 (constitutional authority for apportionment of representatives); see also *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.”).

4. 2 U.S.C. § 2a (2006) (statutory authority for apportionment of representatives).

5. Sabrina Tavernise & Jeff Zeleny, *South and West See Large Gains in Latest Census*, N.Y. TIMES, Dec. 21, 2010, at A1.

6. See U.S. CONST. art. I, § 2.

7. Tavernise & Zeleny, *supra* note 5, at A1 (“The release [of the data] rang the opening bell for the inevitable battles over redrawing Congressional districts. . . . It is a complex landscape of shifting advantages, and lawyers for both parties are already designing legal strategies in the event of stalemates in state legislatures, where redistricting battles play out.”).

8. McKinley, *supra* note 2, at A20. (“Most of the new population that drives the four additional seats is Hispanic, but in the Texas state government the people who draw the boundaries are all Republicans,” said Cal Jillson, a political scientist at Southern Methodist University in Dallas.”).

9. In 2010, 61% of Texas Hispanic voters voted for the Democratic candidate for governor. Mark Hugo Lopez, *The Latino Vote in the 2010 Elections*, PEW HISPANIC CTR. 11 fig.10 (Nov. 3, 2010), <http://www.pewhispanic.org/files/reports/130.pdf>. In 2008, 63% of Hispanic voters in Texas voted for then-Senator Obama. Mark Hugo Lopez, *The Hispanic Vote in the 2008 Election*, PEW HISPANIC CTR. 11 fig.12 (Nov. 7, 2008), <http://www.pewhispanic.org/files/reports/98.pdf>.

10. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 441 (2006) [hereinafter *LULAC v. Perry*] (“The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohe-

When drawing a new district map, state legislatures are constrained by § 2 of the Voting Rights Act (VRA), which outlaws discriminatory voting practices, including the dilution of minority power via redistricting.¹¹ One way of measuring minority voting power under the VRA is to count "majority-minority districts" — districts in which a certain minority group is a majority of the voting-age population.¹² Tim Storey, Senior Fellow at the National Conference of State Legislatures and an expert on redistricting, has noted the limitations imposed by the VRA on the Texas map-drawing process: "Just because Texas is getting four new seats does not mean the Republicans will get four new Republicans to Congress. . . . You don't have unfettered ability to draw new boundaries."¹³

The Hispanic population represented a majority of the new growth, and now amounts to 37.6% of the overall Texas population.¹⁴ Based on the census data alone, State Representative Carol Alvarado speculated that "the Latino community should receive

sive and politically active Latino community in the district."). For this reason, Texas Republican's political gerrymanders often run afoul of the VRA's requirement that minority voting strength not be diluted. See 42 U.S.C. § 1973 (2006) (outlawing the imposition of any standard, practice, or procedure resulting in members of a minority group having "less opportunity than other members of the electorate to participate in the political process").

11. Tavernise & Zeleny, *supra* note 5, at A1; see also 42 U.S.C. § 1973.

12. See Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1289 (2007) ("The function of majority-minority districts is most simply understood as a districting mechanism aimed to provide minority groups a viable shot at electing (also known as an "opportunity to elect") a candidate of their choice through the purposeful aggregation of votes."); Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 226 (1997) (defining a majority-minority district as a "voting district[] in which minority voters form[] a majority of the members of the district"); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208 (2003) (defining majority-minority district as "those in which a majority of the residents (and often the voters as well) are African-American or Latino").

Courts have been hesitant to state how many majority-minority districts are "enough" for any given state, given the VRA's explicit caveat that it is not intended to bring about proportional representation. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring) ("We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters."). The "Dole Proviso" of § 2 of the VRA establishes that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b) (2006).

13. Tavernise & Zeleny, *supra* note 5, at A1.

14. *Id.*

three of the new congressional seats or better.”¹⁵ But in the summer of 2011, the Texas legislature enacted a new district map.¹⁶ Of the four new districts added to the map, only one was a Hispanic majority-minority district.¹⁷

Minority advocacy groups were outraged by the disconnect between the demographics of the population growth and the demographics of the four new districts.¹⁸ The plan was immediately challenged under § 2 of the VRA by various voting-rights groups.¹⁹ At the same time, Texas requested a declaratory judgment from a D.C. federal court stating that the plan was in compliance with § 5 of the VRA.²⁰

While the two provisions of the VRA have a similar goal, their enforcement mechanisms are slightly different. Section 5 requires that certain states obtain advance approval (“preclearance”) of their new congressional maps from the Federal Department of Justice (DOJ) in order to ensure that the maps do not diminish existing minority voting strength.²¹ Section 2 applies to

15. Julian Aguilar et al., *2010 Census Data for Texas Released*, TEX. TRIB. (Feb. 17, 2011), <http://www.texastribune.org/texas-counties-and-demographics/census/2010-census-data-for-texas-released/>.

16. S.B. 4, 82d Leg., 1st Sess. (Tex. 2011), available at <http://www.capitol.state.tx.us/tlodocs/821/billtext/pdf/SB00004F.pdf>.

17. Ross Ramsey, *Challenge to Texas Redistricting Opens in Federal Court*, TEX. TRIB. (Sept. 6, 2011), <http://www.texastribune.org/texas-redistricting/redistricting/challenge-texas-redistricting-opens-federal-court/> (“Nina Perales, director of litigation with the Mexican American Legal Defense and Education Fund, or MALDEF, and representing the Latino Task Force that includes that and other groups, appealed to the judges to do what the Legislature wouldn’t. While 89 percent of the state’s growth from 2000 to 2010 was minority growth, lawmakers didn’t add any minority seats to the state’s political maps.”).

18. Gary Martin, *Sheila Jackson Lee Testifies that Texas Redistricting Plan Is “An outrage”*, HOUSTON CHRON. (Jan. 23, 2012), <http://blog.chron.com/txpotomac/2012/01/sheila-jackson-lee-testifies-that-texas-redistricting-plans-are-an-outrage/>.

19. See *Perez v. Perry*, No. SA-11-CV-788, 2011 WL 5904716 (W.D. Tex. Nov. 25, 2011); Ross Ramsey, *Redistricting Fights Move from the Capitol to the Courthouse*, TEX. TRIB. (July 8, 2011), <http://www.texastribune.org/texas-redistricting/redistricting/redistricting-fights-move-capitol-courthouse/>.

20. See Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court, *Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011) (No. 11CV01303), 2011 WL 2883549 [hereinafter Complaint for Declaratory Judgment]; Ross Ramsey, *Court Cartography*, TEX. TRIB. (Sept. 8, 2011), <http://www.texastribune.org/texas-redistricting/redistricting/court-cartography/> (“The Texas cases are moving on two tracks. Instead of asking the U.S. Department of Justice (part of a Democratic administration) for pre-clearance, Attorney General Greg Abbot sent that request to the federal courts in the District of Columbia.”).

21. 42 U.S.C. § 1973c(b) (2006).

all states, and is enforced through litigation.²² Essentially, in § 5 cases, states engage with the federal government, and in § 2 cases, states engage with private parties and the courts.

At their core, both cases regarding the new Texas map, Plan C185, hinge on whether Texas has adequately represented the minority population.²³ In defense, the State argues that the enacted map reflects the voting realities of Texas — 24.7% of the citizen voting-age population of Texas is Hispanic, and eight of the thirty-six total congressional districts, or 22%, are Hispanic majority-minority.²⁴ However, in denying Texas’s request for § 5 preclearance, the DOJ asserts that Texas’s proposed congressional districts do not “protect the electoral power of the state’s minority populations as required” by § 5 of the VRA.²⁵ It found that the failure to provide for more than one new majority-minority district neither accounted for the fact that minorities made up 89% percent of the state’s overall population growth, nor preserved minority representation already in place.²⁶

The plaintiffs in Texas federal court assert that Plan C185 violates § 2 of the VRA by failing to add as many majority-minority districts as practicable.²⁷ The enacted plan only added one additional majority-minority district,²⁸ but plaintiffs in the § 2 litiga-

22. 42 U.S.C. § 1973(b) (2006).

23. See *Texas v. United States*, Civil Action No. 11-1303(TBG-RMC-BAH), 2012 WL 3671924, at *37 (D.D.C. Aug. 28, 2012); Plaintiff Intervenor LULAC First Amended and Supplemental Complaint at 2, *Perez v. Perry*, No. 5:11-CV-0360-OLG-JES-XR (W.D. Tex. 2011), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PerezLULACamendedcomplaint.pdf> [hereinafter *Perez Complaint*].

24. Ramsey, *supra* note 17.

25. Ross Ramsey, *Feds: Proposed Texas Maps Undermine Minority Vote*, TEX. TRIB., (Sept. 20, 2011), <http://www.texastribune.org/texas-redistricting/redistricting/justice-texas-maps-undermine-minority-vote/>.

26. *Id.* For example, one retrogression challenge “contends that [Texas legislators] traded Hispanic precincts in the 23d Congressional District for Hispanic precincts that are the same size but have smaller voter turnout. The idea, according to plaintiffs, was to create a district that is Hispanic in everything but its voting patterns.” Ramsey, *supra* note 17.

27. See *Perez Complaint*, *supra* note 23, at 5–6.

28. Order at 3, *Perez v. Perry*, No. SA-11-CV-360 (W.D. Tex. Nov. 26, 2011), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orderadoptingPlan.pdf> [hereinafter *Perez Nov. 26 Order*]. Some voting-rights groups allege that no additional majority-minority districts were drawn, see, e.g., *Perez Complaint*, *supra* note 23, at 3, but the State asserts that it drew one new majority-minority district along the I-35 corridor, *Perez Nov. 26 Order*, *supra* note 28, at 3. This disconnect could stem from the fact that plaintiffs also alleged that the state legislature dismantled existing majority-minority districts, therefore leaving the *total* number of majority-minority districts the same. In the order

tion assert that at least one additional Hispanic majority-minority district could have been drawn, bringing the number of Hispanic opportunity districts²⁹ to nine, and the total number of majority-minority districts to twelve.³⁰

Section 2 requires that minority populations be sufficiently represented in new districts,³¹ but Texas has attempted to represent only the growth in the *citizen* minority population³² — even though non-citizen population growth has also contributed to Texas’s gain of additional congressional seats.³³ The controversy surrounding this practice hinges on differing conceptions of minority representation: some believe that only Hispanic citizens should be entitled to congressional representation,³⁴ while others

implementing a court-drawn interim plan, the Texas district court endorsed the State’s view, but did not speak to the issue of the preexisting districts. *See id.* at 16.

29. An “opportunity district” is a district in which a minority group has an opportunity to elect the candidate of their choice. *See, e.g.*, Gary D. Allison, *Democracy Delayed: The High Court Distorts Voting Rights Principles to Thwart Partially the Texas Republican Gerrymander*, 42 TULSA L. REV. 605, 612 (2007). The terms “opportunity district” and “majority-minority district” are often used interchangeably. *See, e.g.*, LULAC v. Perry, 548 U.S. 399, 402 (2006) (using the terms interchangeably); Bush v. Vera, 517 U.S. 952, 1002 (1996) (quoting State’s use of term “opportunity district”).

30. MALDEF Unveils Texas Redistricting Plans at State Capitol, MALDEF.ORG, http://www.maldef.org/news/releases/redistricting_texas/# (last visited Oct. 16, 2012). This certainly is not the first time that Texas’s congressional map has given rise to VRA litigation: Texas’s congressional map based on 1990 census data was challenged in *Bush v. Vera*, 517 U.S. 952 (1996). In 2000, the state legislature was unable to agree to a map and a federal court had to order one. *LULAC*, 548 U.S. at 400. In 2003, Texas lawmakers attempted to draw a new district map in between censuses in order to ensure a Republican majority, and in *LULAC v. Perry*, the Supreme Court held that Texas could create new district maps whenever they wished, but that the enacted map diluted minority voting strength. 548 U.S. 399, 411–12, 423 (2006). Plaintiffs in the current VRA litigation assert that for at least twenty years, “only the courts and the U.S. Department of Justice have added Latino seats to the Texas maps.” Ramsey, *supra* note 17. Echoing that sentiment, Rolando Rios, an attorney for the plaintiffs, has stated, “Texas has never given anything to Latinos that wasn’t forced by the federal courts.” Ramsey, *supra* note 17.

31. 42 U.S.C. 1973 (2006).

32. *See* Ramsey, *supra* note 17. During opening statements in the Texas federal court case, the State of Texas “had stats of its own . . . including one that said 24.7 percent of the citizen voting age population is Hispanic, and that eight of the state’s 36 new congressional districts, or 22 percent, are Hispanic opportunity districts.” Ramsey, *supra* note 17.

33. *See* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 769 (2011) (noting that “the census counts people regardless of their citizenship status” and that census figures determine congressional apportionment).

34. *See, e.g.*, Jim Slattery & Howard Bauleke, “The Right to Govern is Reserved for Citizens:” *Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227, 228 (1988) (“[T]he authors conclude inclusion of undocumented aliens in the reapportionment census count diminishes the value of the voting franchise held by American citizens in states that include a relatively insignificant undo-

argue that the entire Hispanic population should be accounted for in new districts.³⁵ The courts have not explicitly stated whether either theory is an acceptable interpretation of what § 2 requires.³⁶ Instead, they continue to examine proposed district maps on a case-by-case basis, asking whether the "totality of circumstances" indicates that minorities will have an adequate opportunity to elect candidates of their choice.³⁷

The saga of Texas redistricting litigation illustrates two outstanding questions in voting-rights jurisprudence: First, how should the mandates of the VRA be reconciled with the question of who "counts" in congressional representation? And second, just how much minority representation constitutes effective representation under § 2? The court's current practice of analyzing VRA compliance on a case-by-case basis will become untenable in the long run. Redistricting law needs a manageable standard by which to determine whether states are effectively representing minorities in congressional redistricting plans.

cumented alien population and, therefore, is unconstitutional."); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 969 (1991) ("[S]ince illegal aliens are not eligible to vote, their inclusion in the reapportionment base violates the constitutional principle of one person one vote.").

35. Persily, *supra* note 33, at 769 ("In light of the data problems the 2010 Census presents, courts should reconsider their decisions requiring citizen voting age population as the basis for a section 2 vote dilution claim."); Aide Cristina Cabeza, Comment, *Total Population: A Constitutional Basis for Apportionment Reaffirmed in Garza v. Los Angeles County*, 13 CHICANO-LATINO L. REV. 74, 78 (1993) ("apportionment based on total population is the appropriate standard to apply in future apportionment cases, and . . . is . . . supported by Constitutional doctrine and Congressional legislative history, as well as Supreme Court jurisprudence."); Joshua M. Rosenberg, Developments in the Law, *Defining Population for One Person, One Vote*, 42 LOY. L.A. L. REV. 709, 720 (2009) ("The Equal Persons measure of political equality recognizes that representational rights include more than the right to vote. Every person, regardless of his or her eligibility to vote, has certain rights by virtue of living in a certain area.").

36. See *Burns v. Richardson*, 384 U.S. 73, 91–92 (1966) (stating that the question of which population measure to use in "one person, one vote" analysis was "carefully left open"); Rosenberg, *supra* note 35, at 711 (quoting *Burns*, 384 U.S. at 91–92) ("The U.S. Supreme Court has never adopted a particular measure of equality as a bright-line rule because the question has been 'carefully left open' for the states to decide as a political matter.").

37. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (acknowledging that the Senate committee report accompanying the VRA listed various factors to consider under "totality of circumstances" analysis); see also *Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (holding that *Gingles* factors must be established before court can proceed to "totality of circumstances" analysis).

This Note examines how VRA jurisprudence has developed so as to leave open the proper formulation of minority representation, and asserts that the current Texas redistricting controversy is traceable to this lack of consensus. Part II provides an overview of redistricting jurisprudence in four parts: Part II.A outlines the requirements of redistricting law generally, and the evolution of the “one person, one vote” standard for map-drawing; Part II.B examines the development of VRA case law pertaining to minority vote dilution via redistricting; Part II.C describes VRA case law specifically regarding Texas redistricting in the past twenty years; and Part II.D summarizes the current controversy regarding Texas’s new redistricting plan. Part III provides an explanation of why Texas’s maps have been consistently challenged under the VRA: the problem, this Note argues, is that courts have been unwilling to articulate which population data must be used when evaluating § 2 claims. Part IV argues that § 2 analysis should be purpose-driven, and that courts should use different measures of population depending on the goal they are seeking to achieve: sizes of minority populations should be derived from voting-age population data, and measurements of a minority group’s electoral strength should be based on citizenship data. Such an approach will bring clarity to VRA case law and will ensure that minority groups are given effective representation.

II. WHAT THE LAW REQUIRES OF REDISTRICTERS

This Part will outline the relevant laws governing redistricting. Part I.A will describe the development of the “one person, one vote” standard under the Constitution; Part I.B will discuss additional redistricting restrictions put in place by the VRA; Part I.C will outline the case law pertaining to redistricting in Texas specifically; and Part I.D will discuss the pending litigation regarding redistricting following the 2010 census.

A. THE EVOLUTION OF THE CONSTITUTIONAL “ONE PERSON, ONE VOTE” STANDARD

Before addressing minority representation in redistricting law, it is important to understand the baseline legal requirements for creating district maps. Article I, Section 2 of the Con-

stitution states, "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."³⁸ However, challenges to the constitutionality of imbalanced congressional redistricting plans were initially non-justiciable under the political question doctrine.³⁹ In *Colegrove v. Green*, the Supreme Court refused to evaluate the fairness of the district map of Illinois, stating, "[c]ourts ought not to enter this political thicket."⁴⁰ The Court feared that intervening in such controversies would hinder the proper functioning of Congress.⁴¹ Justice Frankfurter explained that malapportioned congressional districts were to be remedied through the political system, rather than the courts: the people could elect state legislators who would redistrict more fairly, or they could call on Congress to create more stringent apportionment rules.⁴² Since the Court determined that evaluating constitutional challenges to redistricting plans was not an endeavor fit for the courts, redistricting jurisprudence remained undeveloped for a number of years.⁴³

The nonjusticiability of apportionment controversies remained unchanged until the middle of the twentieth century. In 1962, the Supreme Court reversed course in *Baker v. Carr* and held that attacks on legislative apportionment are justiciable under the Equal Protection Clause of the Fourteenth Amendment.⁴⁴

38. U.S. CONST. art. I, § 2, cl. 3.

39. *Colegrove v. Green*, 328 U.S. 549, 552 (1946) ("Due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.").

40. *Id.* at 556.

41. *Id.* Justice Frankfurter further noted that "[t]o sustain this action would cut very deep into the very being of Congress." *Id.*

42. *Id.* ("The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.").

43. *Id.* at 552 ("We are of opinion that the petitioners ask of this Court what is beyond its competence to grant."). Under the *Colegrove* standard, the Court dismissed apportionment cases for want of a substantial federal question. See *Radford v. Gary*, 352 U.S. 991, 991 (1957); *Kidd v. McCanless*, 352 U.S. 920, 920 (1956); *Anderson v. Jordan*, 343 U.S. 912, 912 (1952); *Remmey v. Smith*, 342 U.S. 916, 916 (1952); *MacDougall v. Green*, 335 U.S. 281, 283–84 (1948), *overruled by Moore v. Ogilvie*, 394 U.S. 814 (1969); *Colegrove v. Barrett*, 330 U.S. 804, 804 (1947).

44. 369 U.S. 186, 198 (1962) ("In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.").

Charles Baker, a resident of an urban congressional district, had filed suit against the State of Tennessee, alleging that the state legislature had not redrawn its General Assembly districts since 1901.⁴⁵ In the intervening sixty years, Baker asserted, a steady stream of urban-to-rural migration caused urban districts to become vastly more populous than rural districts, effectively diluting the voting strength of urban residents.⁴⁶ Reversing *Colegrove*, the Supreme Court held that the issue of legislative apportionment was, in fact, justiciable, because the common characteristics of a political question were not present in redistricting cases.⁴⁷

Baker opened the floodgates of challenges to legislative apportionment plans, which gave the Court ample opportunity to sketch out the affirmative requirements of such plans. In *Wesberry v. Sanders*, in 1964, the Supreme Court held that Article I, Section 2 requires that, as “nearly as is practicable one person’s vote in a congressional election is to be worth as much as another’s.”⁴⁸ Under that standard, Georgia’s apportionment plan “grossly discriminat[ed] against” voters in certain congressional districts because some congressmen represented two to three times as many voters as were represented by congressmen in any other district in the state.⁴⁹ The Court took issue with the fact that the resulting congressional map “contract[ed] the value of

45. *Baker*, 369 U.S. at 191. In the sixty years between when this case was brought and when the legislature had last enacted an apportionment map, in 1901, all proposed redistricting plans had failed to pass. *Id.*

46. *Id.* at 192–93.

47. *Id.* at 226 (“We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable ‘political question’ bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”).

48. 376 U.S. 1, 8 (1964).

49. *Id.* at 7.

some votes and expand[ed] that of others.”⁵⁰ This plainly violated the Constitution:

To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected “by the People,” a principle tenaciously fought for and established at the Constitutional Convention.⁵¹

Wesberry v. Sanders is often hailed as the original interpretation of “one person, one vote” as requiring equal-sized districts.⁵²

The Court has rejected any de minimis exceptions to the “one person, one vote” rule, swearing fidelity in *Karcher v. Daggett* to “absolute population equality” as “the paramount objective.”⁵³ The Court reasoned that adopting any other standard would “subtly erode the Constitution’s ideal of equal representation.”⁵⁴ The Court rejected the defendants’ arguments that census data was a flawed measure of population, and that using it to balance districts’ populations would only create “artificial” population equality;⁵⁵ the Court observed that any standard would involve some level of artificiality.⁵⁶ When faced with a decision between the two standards at hand — “equality or something-less-than equality” — the Court found that only equality would conform with constitutional requirements.⁵⁷

50. *Id.*

51. *Id.* at 8–9.

52. In *Reynolds v. Sims*, the Court stated that the *Wesberry* holding required “equality of population among districts.” 377 U.S. 533, 577 (1964).

53. 462 U.S. 725, 732 (1983) (“[W]e 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 . . .”).

54. *Id.* at 731 (citations omitted). Additionally, the Court noted that “[i]f 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.” *Id.*

55. *See id.* at 732 (“As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed.”).

56. *Id.* (“[P]roblems with the data at hand apply equally to any population-based standard we could choose.”).

57. *Id.* However, the Court was not unanimous on this issue. In his dissent, Justice Powell expressed doubt that the Constitution “could be read to require a rule of mathematical exactitude in legislative reapportionment.” *Id.* at 784. In a separate dissent,

Though the *Karcher* Court required population equality among a state's congressional districts, the Court has declined to require population equality among districts in different states.⁵⁸ For example, in *United States Department of Commerce v. Montana*, Montana claimed that, since the population of its single congressional district was significantly larger than that of districts in other states, the national apportionment of congressional seats was in violation of *Wesberry*.⁵⁹ The majority upheld apportionment of seats based on population of states, stating that mathematical precision required by *Wesberry* for congressional districts in each individual state could not feasibly be required when making comparisons between states.⁶⁰ The Court recognized that, although it was a "significant departure from the ideal," the current apportionment method was the only realistic way to allocate congressional seats.⁶¹ Since the Constitution guarantees a minimum of one representative for each state, it would be "virtually impossible" to have districts of exactly the same size in every state.⁶² This case indicates an important limit on the requirement of absolute population equality among districts.

Another such limit is illustrated by cases regarding statistical sampling. Despite the Constitution's instruction to conduct an "actual Enumeration,"⁶³ there are significant accuracy problems with the census.⁶⁴ These problems result in a net "undercount" of

Justice White stated, "One must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes fair and effective representation . . ." *Id.* at 765 (internal quotation marks omitted).

58. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 465 (1992).

59. *Id.* at 460.

60. *Id.* at 463.

61. *Id.* at 460.

62. *Id.* at 463.

63. U.S. CONST. art. I, § 2, cl. 3.

64. See Thomas R. Belin & John E. Rolph, *Can We Reach Consensus on Census Adjustment?*, 9 STAT. SCI. 486, 487 (1994) ("Thomas Jefferson's suspicion of an undercount in the 1790 census has often been cited in the adjustment debate as an early sign in our history that the census needs fixing. There was a differential undercount between blacks and whites after the Civil War, and the Census Bureau has published black-white differentials based on demographic analysis from the 1940 census onward."); Sheldon T. Bradshaw, *Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee A Constitutional Right to Census Accuracy?*, 64 GEO. WASH. L. REV. 379, 386-87 (1996) ("Historically the decennial census has undercounted the total population. The very first census, conducted in 1790, revealed an undercount. . . . The current undercount results from, among other things, the failure of millions of United States residents to return census forms, the failure of these individuals to be counted by other

the total population.⁶⁵ For example, the Census Bureau determined that population as counted by the 1970 census was 2.7% lower than the actual population.⁶⁶ Even faced with potential solutions to the problem of inaccurate data, however, courts have hesitated to use anything but existing census data to evaluate the size of districts. As a case in point, in the mid-1980s, the Census Bureau developed a method of large-scale statistical adjustment by which to remedy undercounting.⁶⁷ The Bureau director decided to adopt the method for the 1990 census, but was ultimately overruled by the Secretary of Commerce.⁶⁸ A group of states, cities, citizen's groups, and individual citizens challenged this decision, and in *Wisconsin v. City of New York*, the Supreme Court held that Secretary of Commerce was not required to use statis-

means, the difficulty of locating individuals who lack a fixed home or mailing address, and the existence of individuals who want to avoid contact with any representative of the government."); Kristen K. West & David J. Fein, *Census Undercount: An Historical and Contemporary Sociological Issue*, 60 SOC. INQUIRY 127, 128 (1990) ("In statistical, as well as political terms, undercount is a much greater problem than overcount. Undercount has a greater effect on the bias due to coverage error, because it is greater in magnitude and more systematic in its overall effects than is the case for overcount. . . . Net census undercount has steadily declined in recent U. S. censuses. One set of estimates based on demographic analysis indicates that the national net undercount was 5.6 percent in 1940, 4.4 percent in 1950, 3.3 percent in 1960, 2.9 percent in 1970, and only 1.4 percent in 1980. Despite the apparent improvement in overall coverage, a differential distribution in net undercount rates persists. Hispanics and blacks still are undercounted at higher rates than whites.").

65. *Wisconsin v. City of N.Y.*, 517 U.S. 1, 8 (1996); see also Mary H. Mulry & Bruce D. Spencer, *Accuracy of the 1990 Census and Undercount Adjustments*, 88 J. AM. STAT. ASSOC. 1080, 1080 (1993) ("The 1990 census counts of population, like previous censuses, are known to be incorrect. The net undercount is the difference between undercount arising from missed persons and overcount arising from duplicate and other erroneous enumeration."); West & Fein, *supra* note 64, at 129 (explaining the phenomenon of differential undercount, in which minority groups escape counting more frequently than their white counterparts). West and Fein observe, "Despite the apparent improvement in overall coverage, a differential distribution in net undercount rates persists. Hispanics and blacks still are undercounted at higher rates than whites." West & Fein, *supra* note 64, at 129.

66. *Wisconsin*, 517 U.S. at 6.

67. *Id.* at 8.

68. *Id.* at 10. Among the reasons for his decision, the Secretary noted that statistical adjustment would "abandon a two hundred year tradition of how we actually count people." *Id.* Additionally, the Secretary felt that the process of statistical adjustment was flawed because "although numerical accuracy (at the national level) might be improved through statistical adjustment, [the Secretary] could not be confident that the distributive accuracy of the census-particularly at the state and local level-would be improved by [statistical] adjustment. In particular, the Secretary noted, the adjusted figures became increasingly unreliable as one focused upon smaller and smaller political subdivisions." *Id.* at 11.

tical adjustment to remedy undercounting.⁶⁹ Following this ruling, the Census Bureau developed a plan to use statistical sampling to remedy the undercount in the 2000 census, this time with the approval of the Department of Commerce.⁷⁰ When this practice was challenged as well, the Supreme Court extended its *Wisconsin* holding even further, ruling that the Census Act does not authorize the Secretary of Commerce to use statistical sampling to modify the count.⁷¹ These cases indicate the Court's reluctance to stray from the census data in any manner.

Though redistricting cases were only ruled justiciable in the latter half of the 20th century, the Supreme Court has established a rigorous standard for population equality under Article I, Section 2. But although the Supreme Court has formulated a strict rule of population equality for federal congressional districts, this rigor has been somewhat undermined by inaccuracy in census counting. Nevertheless, courts are currently unwilling to

69. *Id.* at 24 (“The Constitution confers upon Congress the responsibility to conduct an ‘actual Enumeration’ of the American public every 10 years, with the primary purpose of providing a basis for apportioning political representation among the States. Here, the Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census, determined that in light of the constitutional purpose of the census, an ‘actual Enumeration’ would best be achieved without the PES-based statistical adjustment of the results of the initial enumeration. We find that conclusion entirely reasonable. Therefore we hold that the Secretary’s decision was well within the constitutional bounds of discretion over the conduct of the census provided to the Federal Government.”).

70. *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 324 (1999). It is important to note that the Census Bureau developed this plan at the urging of Congress, who passed the Decennial Census Improvement Act of 1991, instructing the Bureau to contract with the National Academy of Sciences (Academy) to study the means by which the Government could achieve the most accurate population count possible. Among the issues the Academy was directed to consider was “the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data.”

Id. at 323. However, by the time the Bureau submitted the plan to use statistical sampling, Congress had preemptively amended the Census Act, prohibiting, “sampling or any other statistical procedure, including any statistical adjustment . . . used in any determination of population for purposes of the apportionment of Representatives in Congress among the several States.” H. R. REP. NO. 105-119, at 67 (1997) (Conf. Rep.). President Clinton vetoed the amendment. Message to the House of Representatives Returning Without Approval Emergency Supplemental Appropriations Legislation, 33 Weekly Comp. of Pres. Doc. 846, 847 (1997). Congress, the President, and the Census Bureau eventually came to a compromise wherein the Bureau could use sampling, but any person aggrieved by the use of sampling could bring a legal action before a three-judge panel of a federal district court. *Dep’t of Commerce*, 525 U.S. at 326–27.

71. *Id.* at 343.

experiment with potentially more accurate measures of population.

B. THE DEVELOPMENT OF THE "VOTE DILUTION" STANDARD
UNDER § 2 OF THE VRA

As discussed in Part II.A, courts were initially reluctant to rule on the fairness of redistricting plans.⁷² In spite of this, even under *Colegrove*, they were willing to strike down electoral structures tainted by racial discrimination. In *Gomillion v. Lightfoot*, the Supreme Court struck down an Alabama statute that altered the boundaries of the city of Tuskegee from the shape of a square to a twenty-eight-sided figure.⁷³ The new urban boundaries were intentionally drawn to exclude all but a few of the city's 400 African-Americans, but no white voters, thereby eliminating African-Americans' political power.⁷⁴ The Court noted that racial considerations "lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation," therefore making the case justiciable under the Equal Protection Clause.⁷⁵

However, there were limits to what the Supreme Courts was willing to overturn. In a landmark case, *City of Mobile, Alabama v. Bolden*, the Court held that at-large voting structures⁷⁶ could not be overturned merely because minorities were unable to elect their preferred candidate.⁷⁷ Mobile, Alabama was governed by a City Commission consisting of three commissioners, each of which was elected by the residents of the city at large.⁷⁸ Although Mobile had a substantial black population, no black person had ever been elected to the Commission.⁷⁹ The plaintiffs challenged

72. See *supra* notes 39–43.

73. 364 U.S. 339, 347–48 (1960).

74. *Id.* at 340.

75. *Id.* at 346–47.

76. An at-large voting system is one in which all the residents of a town, county, or other jurisdiction vote for all the members of governmental body. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1257 (1989). As a result, "the majority, if it votes as a bloc, can choose all the office holders, thereby denying a discrete minority an effective opportunity to elect any representatives of its choice." *Id.*

77. 446 U.S. 55, 65 (1980).

78. *Id.* at 58.

79. *Id.* at 71.

the at-large system on both Equal Protection and VRA grounds.⁸⁰ The Court denied the attack, holding that the Equal Protection Clause was not designed for the protection of any one political group in the electoral process — elections that produce proportional representation are not required.⁸¹ Additionally, the Court held that the VRA required proof of racially-motivated intent, and the evidence in the case was insufficient to show that the City of Mobile operated a voting system with the intent to racially discriminate.⁸²

Congress felt that the holding in *Bolden* misinterpreted the VRA, and it responded by making significant changes to § 2,⁸³ instructing courts to focus on results instead of employing *Bolden*'s intent inquiry.⁸⁴ The amended § 2(a) states, "No voting qualification or prerequisite to voting or standard, practice, or procedure . . . shall be applied . . . in a manner which *results* in a denial or abridgement of the right of any citizen."⁸⁵ As such, the revised

80. *Id.* at 58. At the time of *Bolden*, § 2 of the VRA only prohibited voting standards or practices that "den[ie]d] or abridge[d] the right of any citizen . . . to vote . . ." Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, § 2, 79 Stat. 437 (1965) (amended 1982). The full text of the unamended § 2 stated, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.*

81. *Bolden*, 446 U.S. at 75–76 ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

82. *Id.* at 62. In his concurrence, Justice Stevens asserted that otherwise-legitimate political choices (such as operating an at-large voting system) should not be invalidated simply because an irrational or invidious purpose played some part in the decision-making process. *Id.* at 91–92 (Stevens, J., concurring).

83. The Senate Report observed that "the impact of *Bolden* upon voting dilution litigation became apparent almost immediately after the Court's decision was handed down on April 22, 1980. As the subcommittee heard throughout its hearings, after *Bolden* litigators virtually stopped filing new voting dilution cases. Moreover, the decision had a direct impact on voting dilution cases that were making their way through the federal judicial system." S. REP. NO. 97-417, at 26 (1982).

84. S. REP. NO. 97-417, at 205 ("The amendment to the language of section 2 is designed to make clear that the plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process. . . . The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution or the minority vote.").

85. 42 U.S.C. § 1973(a) (2006) (emphasis added).

statute applies to at-large districting schemes.⁸⁶ Additionally, under § 2(b), voting power is diluted "if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation" by members of a class defined by race or color.⁸⁷ In another departure from the holding in *Bolden*, revised § 2 states that prior electoral success (or lack thereof) of minority populations is one circumstance that may be considered in § 2 analysis.⁸⁸

The Court revisited the issue of vote dilution under the amended § 2 in *Thornburg v. Gingles*.⁸⁹ The North Carolina General Assembly had passed a redistricting plan for the state's Senate and House of Representatives.⁹⁰ African-American citizens of North Carolina challenged seven districts, "alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice."⁹¹ In holding that North Carolina impermissibly diluted the voting strength of black residents, Justice Brennan outlined three elements necessary to prove a violation of § 2: (1) the minority population must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) there must be evidence of racially polarized voting — in essence, it must be demonstrable that white voters consistently defeat the minority's preferred candidate.⁹²

Under the *Gingles* interpretation of § 2, a new issue emerged: gerrymandering in order to ensure, rather than depress, minority representation. After the 1990 census, the U.S. Attorney General rejected a North Carolina congressional reapportionment plan under § 5 because the plan created only one majority-black dis-

86. See *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (noting that though § 2 now applies to at-large electoral structures, the existence of such a scheme is not a *per se* violation); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d. 1382, 1385 (8th Cir. 1995); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984).

87. 42 U.S.C. § 1973(b) (2006).

88. S. REP. NO. 97-417, at 206 ("To establish a violation, Plaintiffs could show a variety of factors, depending on the kind of rule, practice, or procedure called into question. Typical Factors Include: . . . 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.").

89. 478 U.S. 30 (1986).

90. *Id.* at 34–35.

91. *Id.* at 35.

92. *Id.* at 50–51.

trict.⁹³ North Carolina responded by submitting a second plan creating two majority-black districts,⁹⁴ one of which had an incredibly unusual shape.⁹⁵ In *Shaw v. Reno*, five North Carolina residents challenged the constitutionality of this plan, alleging that the strangely shaped district proved that its only purpose was to secure the election of additional African-American representatives.⁹⁶ The Supreme Court described:

It is approximately 160 miles long, and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas “until it gobbles in enough enclaves of black neighborhoods.” . . . One state legislator has remarked that “[i]f you drove down the interstate with both car doors open, you’d kill most of the people in the district.” The district even has inspired poetry: “Ask not for whom the line is drawn; it is drawn to avoid thee.”⁹⁷

In the majority opinion, Justice O’Connor observed that, although North Carolina’s reapportionment plan was racially neutral on its face, the resulting district shape was bizarre enough to suggest that it constituted an effort to separate voters into different districts based on race.⁹⁸ The unusual district, while perhaps created by noble intentions, exceeded what was reasonably necessary to avoid racial imbalances.⁹⁹ Justice O’Connor acknowledged the necessity of using race as a consideration in redistricting, but held that a redistricting plan that elevates race over traditional districting principles¹⁰⁰ is unconstitutional.¹⁰¹ Under *Shaw v. Re-*

93. *Shaw v. Reno*, 509 U.S. 630, 633 (1993).

94. *Id.*

95. *Id.* at 635.

96. *Id.* at 633–34.

97. *Id.* at 635–36 (citations omitted).

98. *Id.* at 644 (citations omitted) (“Appellants contend that redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race,’ demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.”).

99. *Id.* at 655.

100. Traditional districting principles include compliance with “one person, one vote,” achiever of compactness and contiguity of political subdivisions, preservation of communities of interest, and protection of incumbents. *Traditional Redistricting Principles*, NAACP LEGAL DEFENSE FUND, <http://www.redrawingthelines.org/traditionalredistrictingprinciples> (last visited Oct. 16, 2012); see also *Shaw*, 509 U.S. at 647 (listing “com-

no, states cannot draw districts that “rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.”¹⁰² If a district is so “extremely irregular” on its face as to indicate that racial gerrymandering took place, it will be subject to strict scrutiny under the Equal Protection Clause.¹⁰³

Ten years later, in *Georgia v. Ashcroft*, the Supreme Court held that “coalition districts” — districts in which a minority group does not hold a majority, but still constitutes a significant enough proportion of the population to exert influence in elections¹⁰⁴ — may satisfy the requirements of § 2¹⁰⁵. Following the 2000 census, the Democrat-controlled Georgia legislature passed a redistricting plan that was backed by many black leaders because it would have spread black voters and influence across several districts rather than concentrating them in a select few.¹⁰⁶ The majority opinion acknowledged that times had changed since the VRA was originally enacted. The Court held that states were permitted to focus on the end product of redistricting (effective public policy) rather than descriptive representation.¹⁰⁷ The

pactness, contiguity, and respect for political subdivisions” as traditional districting principles).

101. *Shaw*, 509 U.S. at 657–58 (“Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters — a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.”).

102. *Id.* at 642.

103. *Id.* at 653. In his dissent, Justice Stevens asserted, “If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the US gave birth to the equal protection clause. A contrary conclusion could only be described as perverse.” *Id.* at 679 (Stevens, J., dissenting).

104. 539 U.S. 461, 482 (2003).

105. *Id.* at 483.

106. *Id.* at 461.

107. *Id.* at 483–84 (“Section 5 leaves room for states to use these types of influence and coalitional districts. Indeed, a state’s choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable”).

Court accepted that coalition districts can offer minority groups a meaningful opportunity to be part of the process.¹⁰⁸

However, in *Bartlett v. Strickland*, the Supreme Court held that the VRA does not *require* states to draw such coalition districts in areas where the minority group does not comprise more than 50% of the voting population.¹⁰⁹ In the district in question, African-Americans comprised approximately 39% of the voting population — the North Carolina legislature had aimed to create a district where minorities could join with “crossover voters” to comprise a majority.¹¹⁰ Though the North Carolina Constitution prohibits divided counties in its legislative maps, the state legislature elected to split Pender County in order to satisfy § 2.¹¹¹ The Court found that such action was not required by the VRA — in fact, the minority must constitute a “numerical majority” before the VRA requires the drawing of districts to prevent dilution.¹¹²

In a subsequent § 2 case, the Supreme Court refused to recognize vote dilution where minority voters formed effective majorities in a number of districts “roughly proportional” to the minority voters’ share of the voting-age population.¹¹³ A group of Hispanic and African-American voters challenged Florida’s state legislative maps in *Johnson v. De Grandy*, asserting that the new districts unlawfully diluted minority voting strength in the Dade County area.¹¹⁴ The plaintiffs pointed to “areas around the State where black or Hispanic populations could have formed a voting majority in a political cohesive, reasonably compact district . . . if

108. *Id.* at 482 (“In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.”).

109. 556 U.S. 1, 26 (2009) (“Only when a geographically compact group of minority voters could form a majority in a single-member district has the first Gingles requirement been met.”).

110. *Id.* at 7–8.

111. *Id.* at 8 (citations omitted) (“Rather than draw District 18 to keep Pender County whole, however, the General Assembly drew it by splitting portions of Pender and New Hanover counties. District 18 has an African-American voting-age population of 39.36 percent. . . . The General Assembly’s reason for splitting Pender County was to give African-American voters the potential to join with majority voters to elect the minority group’s candidate of its choice. Failure to do so, state officials now submit, would have diluted the minority group’s voting strength in violation of § 2.”).

112. *Id.* at 15–16.

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

114. *Id.* at 1000–01.

[the map in question] had not fragmented each group among several districts.”¹¹⁵ Ultimately, the Court found that the plaintiffs’ evidence was not sufficient to establish a § 2 violation because the plan provided “rough proportionality” for minority voters in Dade County.¹¹⁶ The majority came to this conclusion by examining the proportion of minority voters in the overall voting-age population. Justice Souter explained that § 2(b)’s “totality of circumstances” does not merely include the *Gingles* factors — proportionality is also relevant.¹¹⁷

VRA case law has established a “totality of the circumstances” analysis that has become incredibly complicated in application. Texas redistricting case law only increases this confusion by adding a level of complexity — the issue of citizenship.

C. REDISTRICTING LITIGATION IN TEXAS UNDER THE VRA

Having examined the development of redistricting law under the VRA in the preceding Part, Part II.C will now analyze the case law regarding redistricting controversies in Texas. These cases follow the trajectory of VRA holdings discussed above,¹¹⁸ but they also highlight some issues that are specific to Texas and other border states with large non-citizen populations.

The 1990 census revealed significant population growth in Texas.¹¹⁹ As a result, Texas was allocated an additional three congressional seats, bringing its congressional delegation to thirty.¹²⁰ At the time, the Democratic Party controlled nineteen of the twenty-seven existing seats.¹²¹ However, the Party realized that “change was in the air: The Republican Party had received 47% of

115. *Id.* at 1001.

116. *Id.* at 1000.

117. *Id.* at 1025 (“Thus, in evaluating the *Gingles* preconditions and the totality of the circumstances a court must always consider the relationship between the number of majority-minority voting districts and the minority group’s share of the population.”).

118. *See supra* Part II.B.

119. *Texas: Population of Counties by Decennial Census: 1900 to 1990*, U.S. CENSUS BUREAU, <http://www.census.gov/population/cencounts/tx190090.txt> (last visited Oct. 26, 2012).

120. *LULAC v. Perry*, 548 U.S. 399, 410 (2006) (“The 1990 census resulted in a 30-seat congressional delegation for Texas, an increase of 3 seats over the 27 representatives allotted to the State in the decade before.”); *Table A. Apportionment and Apportionment Population Based on the 1990 Census*, U.S. CENSUS BUREAU 1 (1991), <http://www.census.gov/population/apportionment/files/table-a.pdf>.

121. *LULAC*, 548 U.S. at 399.

the 1990 statewide vote, while the Democrats had received only 51%.¹²² Responding to the threat of future losses, the Democratic Party used the redistricting process to secure their majority while simultaneously complying with the VRA.¹²³ Thanks to technological advances, Texas lawmakers were able to use “then-emerging computer technology to draw district lines with artful precision.”¹²⁴ In a plan that was later described as the “shrewdest gerrymander of the 1990’s,”¹²⁵ the legislature created District 30, a new majority-black district in Dallas County; District 29, a new majority-Hispanic district in and around Houston; and reconfigured District 18, adjacent to District 29, to make it a majority-black district.¹²⁶

This plan was eventually struck down in *Bush v. Vera*.¹²⁷ In that case, the Supreme Court held that the plan was unconstitutional under *Shaw*, finding that the proposed districts were irregular enough to indicate that race was the predominant factor used in their construction.¹²⁸ The Court came to this conclusion because the “computerized design” of the district was sensitive to racial data specifically, and the new districts did not even remotely resemble the preexisting race-neutral districts.¹²⁹ Texas legislators had “substantially neglected traditional districting criteria,” and had “committed from the outset” to creating majority-minority districts, even if they had to manipulate district lines extensively.¹³⁰ As a result of this decision, Texas was required to redraw the three districts.¹³¹

122. *Id.*

123. *Bush v. Vera*, 517 U.S. 952, 956–57 (1996) (citations omitted).

124. *LULAC*, 548 U.S. at 410–11.

125. *Id.*

126. *Vera*, 517 U.S. at 956–57 (citations omitted).

127. *Id.* at 957.

128. *Id.* at 959.

129. *Id.*

130. *Id.* at 962.

131. Upon issuance of the decision, the Texas legislature did not enact a new map in a timely manner. *Vera v. Bush*, 933 F. Supp. 1341, 1346 (S.D. Tex. 1996). As a result, the Texas district court imposed an interim plan. *Id.* at 1352. By 1997, the Texas legislature still had not enacted a map, and so the court ordered the 1996 interim plan to remain in place. *Vera v. Bush*, 980 F. Supp. 251, 253 (S.D. Tex. 1997). The court explained its reasoning:

This Court’s 1996 interim congressional redistricting plan (Plan C745) corrected the basic constitutional infirmities found in Districts 18, 29, and 30. Considering that Texas is but two election cycles away from redistricting the state following the year 2000 census, it is not prudent to once again redraw Texas’s congress-

After the 2000 census, partisan division within the Texas government prevented it from passing a redistricting plan in time for the upcoming elections — both the governorship and the Senate were controlled by Republicans, while the Democrats held the House of Representatives.¹³² Therefore, a court-ordered redistricting plan was put into place.¹³³ Hesitant to make sweeping changes to the map already in place, the three-judge federal district court “sought to apply only ‘neutral’ redistricting principles” to the court-ordered map — they placed two new seats (allocated based on population growth revealed by the 2000 census) in high-growth areas, followed county lines as much as possible, and avoided unseating incumbents.¹³⁴ The 2002 elections (using the court drawn map) “resulted in a 17-to-15 Democratic majority in the Texas delegation, compared to a 59% to 40% Republican majority in votes for statewide office in 2000.”¹³⁵ Thus, as these results demonstrate, the court-drawn map left the 1991 Democratic political gerrymander largely in place.¹³⁶

In 2003, the newly elected Republican-controlled legislature wanted to redistrict to entrench the Republican majority, using the same 2000 census data.¹³⁷ After a protracted partisan struggle, including a period during which Democratic legislators left the state to “frustrate quorum requirements,” the legislature adopted a map to replace the court-ordered map.¹³⁸ Soon after the plan was enacted, the League of United Latin American Citizens (LULAC) and other parties challenged the newly enacted maps in federal court, alleging a host of injuries, including that the map was an unconstitutional partisan gerrymander and that it violated § 2 of the VRA.

sional districts. Stability and continuity in the electoral process as well as the potential for voter confusion all weigh against any further tinkering with Texas’s congressional districts. While this Court’s 1996 interim plan is not a perfect model of redistricting, because of the intense time constraints imposed upon this Court in crafting the plan, the interim plan must suffice at this late date and without legislative action.

Id.

132. LULAC v. Perry, 548 U.S. 399, 399 (2006).

133. *Id.*

134. *Id.* at 412.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 413.

After a series of appeals, remands, and dismissals,¹³⁹ the Supreme Court addressed the merits of the case and held that portions of the new Texas map did indeed violate § 2.¹⁴⁰ In a five-to-four majority opinion, Justice Kennedy explained that District 23 had been drawn to keep a Republican incumbent in office, while also diluting Hispanic representation.¹⁴¹ Justice Kennedy outlined the process by which redistricters had shifted over half of a 94%-Hispanic county into a neighboring district, replacing the population with Anglo voters in central Texas.¹⁴² Though Hispanics were a “bare majority” of the voting-age population of District 23, the Court held that it was “unquestionably not a Latino opportunity district” because enough Hispanics in the district were ineligible to vote to render the majority ineffective.¹⁴³ In order to measure adequate representation under § 2, the Court held that the relevant data is the proportion of the citizen voting-age population.¹⁴⁴ The Court reasoned this approach “fits the language of § 2 because only eligible voters affect a group’s opportunity to elect candidates.”¹⁴⁵ The plaintiffs established that Hispanics *could have had* a majority-minority district in District 23, had the lines not been altered to instead create a Hispanic majority “in

139. The district court initially ruled against the plaintiffs, who then appealed. *Id.* at 409. However, before the appeal could be heard, the Supreme Court issued its decision in *Vieth v. Jubelirer*, which held cases of political gerrymandering nonjusticiable under the political-question doctrine. 541 U.S. 267, 281 (2004). Therefore, the Supreme Court vacated the district court judgment and remanded with instructions to decide the case in light of *Vieth*. *LULAC*, 548 U.S. at 409. On remand, the district court, “believing the scope of its mandate was limited to questions of political gerrymandering,” again rejected the plaintiffs’ claims. *Id.* at 413. The plaintiffs appealed again. *Id.* at 409.

140. *Id.* at 447.

141. *Id.* at 440–41 (citations omitted) (“Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. The Court has noted that incumbency protection can be a legitimate factor in districting, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. . . . This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters.”).

142. *Id.* at 423–424. Texas legislators made the decision to switch out Hispanic voters for white voters because “[a]fter the 2002 election, it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican, Henry Bonilla. Before the 2003 redistricting, the Latino share of the citizen voting-age population was 57.5%, and Bonilla’s support among Latinos had dropped with each successive election since 1996. In 2002, Bonilla captured only 8% of the Latino vote, and 51.5% of the overall vote.” *Id.*

143. *Id.* at 429 (internal quotation marks omitted).

144. *Id.*

145. *Id.* (internal quotation marks omitted).

name only” — the district may have had a bare numerical “majority” of Hispanics, but given the citizenship data, it was clear that Hispanics would not be able to elect their candidate of choice.¹⁴⁶ This was an important moment in which the Supreme Court explicitly acknowledged the dichotomy between voting-age population and citizen voting-age population. Though the Court said that the citizen voting-age population is the best data to measure whether a minority group has the opportunity to elect the candidate of their choice,¹⁴⁷ the Court did not speak to whether Texas should strive to represent only citizens in their majority-minority districts.

D. PENDING TEXAS REDISTRICTING LITIGATION: *PEREZ V. PERRY*

The congressional maps based on the 2010 census data have been embroiled in litigation as well. After the new redistricting plan was enacted, it was challenged under the § 2 of the VRA by voting-rights groups,¹⁴⁸ and Texas simultaneously sued for a declaratory judgment that it had complied with § 5.¹⁴⁹ Plaintiffs in Texas federal court allege that the state racially gerrymandered districts and failed to provide adequate representation for the minority populations in Dallas-Fort Worth, Houston, and western and southern Texas, substantially larger since the 2000 census.¹⁵⁰ Additionally, the plaintiffs asserted that the State “intentionally weakened district 23, a minority opportunity district, to protect a Republican incumbent, and that the new configuration of district 27 dilute[d] Hispanic voting strength.”¹⁵¹ Since new congressional maps were necessary for the 2012 election cycle, and it was likely that the litigation would not conclude in time, the Texas federal district court adopted an interim map, Plan C220.¹⁵²

146. *Id.*

147. *Id.*

148. *Perez* Complaint, *supra* note 23.

149. Complaint for Declaratory Judgment, *supra* note 20.

150. *Perez* Complaint, *supra* note 23, at 2–6.

151. *Perez* Nov. 26 Order, *supra* note 28, at 3.

152. *Id.* The district court explained its method for creating the map:

The Court sought to create a plan that maintains the status quo pending resolution of the preclearance litigation to the extent possible, complies with the United States Constitution and the Voting Rights Act, and embraces neutral prin-

The State challenged the interim map, asserting that the court-drawn map was too different from both the plan in place before 2010 and the enacted plan.¹⁵³ The State argued that the court should have deferred to the enacted plan when drawing any interim plan, altering only the portions that had been challenged by the plaintiffs.¹⁵⁴ The Supreme Court agreed to hear the challenge on this discrete issue (i.e., how much discretion the court should have in drawing a new plan), and in *Perry v. Perez* the Court held that the district court should have deferred more to the State's recently enacted plan, but that, in deferring to the State plan, the court must be careful not to incorporate any potential legal defects.¹⁵⁵ The district court released new interim maps in February of 2012,¹⁵⁶ and these maps will be used to conduct the 2012 primaries and elections.¹⁵⁷

As for the § 5 litigation, the D.C. federal district court issued its decision in August 2012, declining to “preclear” the maps drawn by the Texas legislature.¹⁵⁸ The court found that Texas did not satisfy its burden of showing that the enacted plans did not have a retrogressive effect on minority voting strength and were not drawn with a discriminatory purpose.¹⁵⁹ Specifically, the court found that the map-drawers manipulated District 23 so as to replace “many of the district’s active Hispanic voters with low-turnout Hispanic voters” without making it appear as if the de-

principles such as compactness, contiguity, respecting county and municipal boundaries, and preserving whole VTD’s. The Court also sought to balance these considerations with the goals of state political policy.

Id. VTDs, or voter tabulation districts, are “geographic entit[ies] — such as an election district, precinct, or ward — established by state, local, and tribal governments for the purpose of conducting elections.” *Geographic Changes for Census 2000 & Glossary*, CENSUS.GOV, <http://www.census.gov/geo/www/tiger/glossary.html> (last visited Nov. 10, 2012).

153. *Perry v. Perez*, 132 S. Ct. 934, 940 (2012).

154. *Id.*

155. *Id.* at 941–42 (“A district court making such use of a State’s plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan. Where a State’s plan faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.”).

156. See Order at 1, *Perez v. Perry*, No. SA-11-CV-360 (W.D. Tex. Mar. 19, 2012), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/orderc235_000.pdf.

157. *Id.* at 2.

158. See *Texas v. United States*, Civil Action No. 11-1303(TBG-RMC-BAH), 2012 WL 3671924, at *37 (D.D.C. Aug. 28, 2012).

159. *Id.*

mographics of the district had changed.¹⁶⁰ Since the Texas district court already put interim maps place, this ruling has little practical effect on the 2012 elections.¹⁶¹ The State of Texas has, however, appealed the D.C. court’s ruling to the Supreme Court, alleging that § 5 is unconstitutional.¹⁶²

In light of the D.C. district court’s ruling, the Texas district court held a status conference with the parties to the § 2 litigation.¹⁶³ After the conference, the court elected to keep the interim maps in place for the time being, and asked the parties to submit proposals for how to move forward after the November election.¹⁶⁴

III. DIFFERING CONCEPTIONS OF MINORITY REPRESENTATION IN VRA CASES

Texas redistricting plans have reached the Supreme Court three times in the past thirty years. The reason for this issue is twofold. First, courts have failed to consistently evaluate § 2 compliance with a standard set of data; instead, in order to determine whether a minority group states a vote-dilution claim, they have vacillated between relying on the total number of minority citizens of voting age in a given district (citizen voting-age population, or CVAP), and on the group’s absolute voting-age population (VAP, regardless of citizenship figures).¹⁶⁵ While it is not necessary to use one data set to the exclusion of another, courts have not been consistent in, and have not articulated reasons for, using one over data set over another. These two sets of data are linked to two different ideological viewpoints regarding who should be represented in the apportionment process — some

160. *Id.* at *16.

161. Manny Fernandez, *Federal Court Finds Texas Voting Maps Discriminatory*, N.Y. TIMES, Aug. 28, 2012, at A13.

162. See Appellant’s Jurisdictional Statement, *Texas v. United States* (Oct. 19, 2012) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/AppellantsJurisdictionalStatement.pdf>.

163. Michael Li, *San Antonio Court Keeps Interim Maps in Place*, TEX. REDISTRICTING (Aug. 31, 2012, 7:32 PM), <http://txredistricting.org/post/30619507713/san-antonio-court-keeps-interim-maps-in-place>.

164. *Id.*

165. Compare *LULAC v. Perry*, 548 U.S. 399, 427–35 (2006) (using CVAP to measure electoral effectiveness of District 23), with *Johnson v. De Grandy*, 512 U.S. 997, 1013–16 (1994) (using Hispanic proportion of voting-age population to determine whether an additional district should be created).

assert that only minority citizens should be represented,¹⁶⁶ while others believe that the entire minority population is entitled to congressional representation.¹⁶⁷

Second, courts have not explicitly recognized that there are two distinct “moments” in which a district must be evaluated using minority population data — once before a district is created, when evaluating the size of a minority population group under *Gingles* and *De Grandy*, and again after a majority-minority district has been created, to determine whether the minority population in the district will be able to elect the candidate of their choice.

These two problems are sources of significant confusion in redistricting law. While the Supreme Court’s unwillingness to articulate clear data standards applies to all VRA cases in all states, the hesitance has significant ramifications for Texas specifically. Part III.A will discuss the reasons for the consistently contentious nature of Texas redistricting, Part III.B will discuss the Court’s failure to articulate clear standards as to which population measure should be used, and Part III.C will examine two distinct moments in § 2 analysis that may require use of different data sets.

A. SOURCES OF REDISTRICTING CONTROVERSY IN TEXAS

One of the main reasons that Texas redistricting is so contentious is that the state’s population is extremely fluid. Over the past ten years, the population has increased by 20.6%.¹⁶⁸ In the preceding ten years, from 1990 to 2000, it increased by 22.8%, passing New York to become the second most populous state, after California.¹⁶⁹ Much of this explosive population growth has been fueled by the expansion of the Hispanic population: the 2010 census data revealed that Hispanic population growth accounted

166. See Slattery & Bauleke, *supra* note 34, at 228; Murphy, *supra* note 34, at 969.

167. See Persily, *supra* note 33, at 969; Cabeza, *supra* note 35, at 78; Rosenberg, *supra* note 35, at 720.

168. Mackun & Wilson, *supra* note 2, at 2 tbl.1 (2011).

169. Marc J. Perry & Paul J. Mackun, *Population Distribution and Change: 1990 to 2000*, U.S. CENSUS BUREAU, 2 tbl.1 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

for 65% of the overall population growth.¹⁷⁰ Seventeen counties experienced a Hispanic population increase of 100% or more.¹⁷¹ Since Texas’s population has grown very rapidly, the state must overhaul their congressional maps following every census while other states may only have to make minor changes. Texas legislators repeatedly attempt to maximize the voting strength of whatever party is in power,¹⁷² and this often results in a minimizing of Hispanic voting impact.¹⁷³ As a result, these new maps are consistently challenged in court.¹⁷⁴ Given that Texas’s population has continued on the same trajectory for the past twenty years,¹⁷⁵ this problem of minority underrepresentation in redistricting is not going to go away on its own. It is safe to predict that, every ten years, Texas will have to make extensive changes to its congressional-district map based on population growth. Unless courts begin to articulate clear standards regarding what constitutes effective minority representation, redistricters in Texas will continue to undermine minority voting strength and their maps will continue to be challenged under the VRA.

B. THE COURT’S FAILURE TO DETERMINE A CONSISTENT POPULATION MEASURE

One reason that confusion continues to shroud Texas redistricting is that courts have not articulated a standard measure

170. Ross Ramsey et al., *Minorities Drove Texas Growth, Census Figures Show*, TEX. TRIB. (Feb. 8, 2011), <http://www.texastribune.org/texas-counties-and-demographics/census/minorities-drove-texas-growth-census-figures-show/>.

171. *Id.*

172. *LULAC v. Perry*, 548 U.S. 399, 441 (2006).

173. *Id.*

174. *See Perry v. Perez*, 132 S. Ct. 934 (2012); *LULAC*, 548 U.S. 399; *Bush v. Vera*, 517 U.S. 952 (1996).

175. Press Release, Census Estimates Show New Patterns of Growth Nationwide, U.S. Census Bureau (Apr. 5, 2012), *available at* <http://www.census.gov/newsroom/releases/archives/population/cb12-55.html> (observing that although “new patterns of growth have emerged since the 2010 Census, some trends persist from the last decade. One such example is the growth in Texas. There were five large metro areas (2011 populations of at least 1 million) among the 20 fastest growing from 2010 to 2011. Four of them were in Texas: Austin (second), San Antonio (16th), Dallas-Fort Worth (17th) and Houston (18th). (Raleigh-Cary, N.C., was the fifth such area). . . . Looking at numeric growth, Dallas-Fort Worth and Houston added more people between 2010 and 2011 than any other metro area (155,000 and 140,000, respectively). These two metro areas were the biggest numeric gainers during the 2000 to 2010 period (with Houston gaining more than Dallas-Fort Worth over the decade).”).

of population to determine an minority group's size in VRA cases. Instead, each individual court evaluates VRA compliance on a case-by-case basis.¹⁷⁶ Courts are in conflict regarding what data to use when establishing a § 2 violation and when evaluating the effectiveness of preexisting majority-minority districts. Under *Gingles*, in order to establish a VRA § 2 violation, the minority group must be sufficiently large so as to constitute a majority in a single-member district.¹⁷⁷ But exactly which group must be “sufficiently large”? The minority VAP? Or the minority CVAP?

Courts have held that a majority in a single-member district “could be defined as a majority of the citizens of voting age, as 65 percent of the total population, and in other appropriate ways.”¹⁷⁸ Even the Supreme Court's most recent § 2 decisions have used contradictory standards. In *LULAC v. Perry*, the Court found a § 2 violation where Hispanics failed to comprise the majority of the citizen voting-age population of a district, even though they made up the majority of the total voting-age population.¹⁷⁹ Such a holding indicates that citizenship data is the operative measure of representation. But in *Bartlett v. Strickland*, just three years later, the Court “sounded a different tune with respect to the citizenship issue.”¹⁸⁰ The lower court had used CVAP to evaluate the first *Gingles* requirement — whether the minority group was sufficiently large to comprise a majority in a single-member district — but the Supreme Court used VAP.¹⁸¹ To further confuse the issue, the *Bartlett* majority referred to both “voting population” and “total population” at other points throughout its opinion.¹⁸²

In its *De Grandy* decision, the Court both acknowledged and exacerbated the uncertainty surrounding which population

176. See, e.g., *LULAC*, 548 U.S. at 436 (using “totality of circumstances” analysis to determine existence of vote dilution under § 2); *Thornburg v. Gingles*, 478 U.S. 30, 48–49 (1986) (same); *Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994) (same).

177. *Gingles*, 478 U.S. at 50–51.

178. Jacob S. Siegel, *Geographic Compactness vs. Race/Ethnic Compactness and Other Criteria in the Delineation of Legislative Districts*, 15 *POPULATION RES. & POL'Y REV.* 147, 152–53 (1996).

179. *LULAC v. Perry*, 548 U.S. 399, 441 (2006) (“The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons.”).

180. Persily, *supra* note 33, at 778–79.

181. *Bartlett v. Strickland*, 556 U.S. 1, 9 (2009).

182. Persily, *supra* note 33, at 779 (quoting *Strickland*, 556 U.S. at 17–18).

measure to use when evaluating § 2 claims. In evaluating whether the minority population was proportional to the number of majority-minority districts, the Court limited its analysis to proportionality within the voting-age population; the Court ultimately found that there was no § 2 violation because “minority voters form[ed] effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population.”¹⁸³ But the Court also acknowledged that there is an unsettled question of law regarding which subset of the minority population “ought to be the touchstone” for proving a § 2 violation.¹⁸⁴ However, since the case could be resolved without answering this question, the Court declined to issue a holding.¹⁸⁵

This inconsistency stems, in part, from the inadequacy of the available data. The Constitution requires that the census count all people living in a given jurisdiction, regardless of citizenship status.¹⁸⁶ In fact, the most common census form does not even collect citizenship data, “for fear that doing so would chill participation by noncitizens and citizens alike.”¹⁸⁷ Questions regarding citizenship were originally asked on the long-form census,¹⁸⁸ but the long form has been replaced by the American Community Survey (ACS), which collects information from approximately 2.5% of American households over the course of each year.¹⁸⁹ Therefore, most of the citizenship data used by courts is merely an estimate based on ACS data. The Supreme Court’s willingness to use estimated citizenship numbers in *LULAC* appears

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

184. *Id.* at 1009. In order to prevent the transformation of the VRA into a guarantee of proportional representation, the Court stated that the proportionality inquiry was relevant to § 2(b)’s totality of circumstances analysis, but not dispositive. *Id.* at 1009–10.

185. *Id.*

186. U.S. CONST. art. I, § 2, cl. 3; *see also* Persily, *supra* note 33, at 773–774 (“Consistent with the constitutional command to conduct an ‘actual Enumeration,’ counting the whole number of persons in each State, the census counts citizens and noncitizens alike.”).

187. Persily, *supra* note 33, at 773–74.

188. *American Community Survey: Questions and Answers*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/lau/acsqa.htm> (last visited Nov. 11, 2012) (“Topics covered by the ACS are virtually the same as those covered by the census long-form sample data. Estimates are produced for . . . social characteristics ([including] . . . U.S. citizenship status . . .).”).

189. *See id.*

inconsistent with their prior hesitance to use statistical estimates to remedy undercounting, as discussed above in Part II.A.¹⁹⁰

In addition to the fact that the government does not collect citizenship information along with official census data, *estimating* the size of the citizen population is also a difficult undertaking. As one commentator has explained:

Determination of the share of the voting-age citizens among the racial/ethnic groups for a current date has to take into account the differences in age distribution and citizenship status of the groups in the area, and may have to take into account further the differences in registration and voting rates. Racial/ethnic minority groups tend to have larger proportions of children and aliens, who are ineligible to vote, and larger shares of citizens of voting age who do not register and vote.¹⁹¹

Ultimately, it is not surprising that courts have not used CVAP as the standard measure of population — relying on inaccurate data is not particularly appealing.

The deficient data set is not the only reason that courts have not articulated a standard. At the most basic level, Texas redistricting plans are plagued by a disconnect between who needs to be represented and who can actually vote. In order for a district in Texas to be considered a Hispanic majority-minority district, Hispanic citizens of voting age must constitute a majority of the overall citizen voting-age population. In contrast, a white majority district only needs a majority of the overall population, or at most a majority of the voting-age population. While this distinction may seem unfair,¹⁹² it is a practical necessity — if courts were to exclusively rely on Hispanic VAP as a measure, some majority-minority districts would not be able to elect the minority's preferred candidate because of a potential lack of citizen-voters.

190. See *supra* Part II.A.

191. Siegel, *supra* note 178, at 152–53.

192. The goal of redistricting, as outlined by the Constitution, the VRA, and relevant case law is fair and effective representation. Siegel, *supra* note 178, at 149. In the realm of politics, fairness is understood to mean “evenhanded treatment of political parties, racial groups, and other interest groups.” Siegel, *supra* note 178, at 149. From that basic premise, it follows that the courts’ answer to the question of “who counts?” should be the same, regardless of race or other distinction. Siegel, *supra* note 178, at 149.

Based on the requirements of the VRA, one scholar has outlined the process by which Texas must create a map:

Republicans in the Texas legislature face[] several challenges in coming up with a districting plan that would meet their political goals and survive legal attack. First, they would have to design districts with equal populations. Second, because Texas is a jurisdiction subject to VRA § 5, to receive preclearance they would have to take care that their new plan did not reflect the purpose or produce the effect of diluting the voting power of racial/language minority groups from what they had achieved under Texas' last valid congressional districting plan. Third, they would have to make sure that their new plan provided all minority groups covered by VRA § 2 with majority-minority districts commensurate with their current cohesive voting power as limited by whatever proportionality rule might be imposed. Fourth, they would have to take care not to do more for minority groups than what is required by VRA §§ 2 and 5 lest they provoke a white voter to charge them with segregating voters by race in violation of the Equal Protection Clause.¹⁹³

This already Byzantine process is complicated by the fact that Texas legislators must follow all of these steps without knowing what data the court will use to measure minority representation. Far from providing clarity, § 2 case law has only confused the issue of "how to provide minority groups with the opportunity to elect representatives of their choice without violating the Fourteenth Amendment's guarantee of equal protection under the law for all persons and without resort to a system of proportional representation."¹⁹⁴

193. Allison, *supra* note 29, at 628.

194. E. Walter Terrie, *Several Supreme Court Decisions and Their Implications for Political Redistricting in Voting Rights Act Context*, 15 POPULATION RES. & POL'Y REV. 565, 569 (1996).

C. THE COURT'S FAILURE TO USE APPROPRIATE POPULATION MEASURES FOR DISTINCT MOMENTS IN THE EVALUATION OF § 2 CLAIMS

The second reason for persistent confusion regarding Texas redistricting is that courts have never explicitly acknowledged that there are at least two separate inquiries under § 2. Courts must engage in a population-based analysis in two instances: first, when determining whether a majority-minority district needs to be created under *Gingles* and *De Grandy*, and second, when evaluating the electoral efficacy of an existing majority-minority district, as in *LULAC*. While the two inquiries may look similar on the surface — as both deal with the voting power of a minority group — in fact, they have very different aims,¹⁹⁵ and may even require different measures of population size. In the first situation, the primary concern is ensuring that newly created districts accurately reflect the racial composition of the region.¹⁹⁶ In the second instance, the court's analysis is necessary to confirm that districts are not majority-minority in name only — the district cannot merely have a bare majority of minority voters, it must also be able to function to elect a minority group's candidate of choice.¹⁹⁷

Courts do not acknowledge the difference between the two points, and therefore miss an integral component of § 2 analysis — minorities are not guaranteed effective representation, and the mandate of § 2 is not fulfilled, if courts conflate the issues of “who *should* be represented” and “who *can actually* vote.” Without recognizing the distinction, courts will not be able to create an appropriate framework for VRA § 2 cases. Instead, they will continue to evaluate challenges on a case-by-case basis.

Eventually, such an approach will become untenable. Without a manageable standard by which to measure minority repre-

195. For example, in *Gingles*, the Court assessed whether majority-minority districts were necessary in order to ensure representation under § 2. 478 U.S. 30, 46 (1986). In contrast, the *LULAC* Court evaluated the electoral efficacy of the alleged majority-minority District 23, and held that it did not contain enough Hispanic citizen voters for it to count as majority-minority. 548 U.S. 399, 440–41 (2006).

196. For example, the *De Grandy* Court restricted its inquiry to the Dade County and Escambia County areas. 512 U.S. 997, 1022 (1994).

197. *LULAC*, 548 U.S. at 429.

sentation, it is incredibly likely that every subsequent redistricting plan in Texas will be challenged, resulting in delays in election procedure and requiring courts to draw interim maps. The reason for this problem is twofold. First, the data necessary to measure CVAP is inadequate — “precise numbers of eligible voters do not exist and even the best estimates are not available at the geographic units necessary for redistricting.”¹⁹⁸ Because of this, courts have failed to consistently evaluate district maps with one data set. Second, courts may have to use different data sets to evaluate § 2 compliance at different stages in the process. These two problems need a definitive solution in order to make the VRA more functional and less reliant on litigation.

IV. A PROPOSED STANDARD FOR MEASURING MINORITY POPULATION SIZE IN VRA § 2 CLAIMS

The analysis currently required by § 2 case law does not adequately address the dichotomy between representing the total minority population and the citizen voting-age population. Under § 2 case law, courts are only required to evaluate the *Gingles* factors. In recent years, courts have relied on case-by-case analysis rather than creating clear and concise rules, vacillating between using minority VAP and minority CVAP, without explicitly justifying (or perhaps even recognizing) the choice.¹⁹⁹ This case-by-case approach fails to address the modern realities of redistricting, as it leaves redistricters and potential litigants without concrete requirements for population metrics. Courts need to recognize the two “moments” in which population-based analysis is necessary and articulate a standard operative measure of population for each moment. Requiring a different measure of population depending on the purpose of the inquiry will advance the interests of clarity, consistency, and fairness.

A purpose-based distinction in § 2 analysis is preferable for various reasons. First, using a single measure of population in all instances is undesirable because such an inflexible standard is easily manipulable by state legislators attempting to minimize minority voting impact. For example, state legislators could

198. Persily, *supra* note 33, at 780.

199. *See supra* notes 37, 176.

create a district in which 52% of the voting-age population is Hispanic, but only 39% of the population are Hispanic citizens. If courts were to use the VAP measure exclusively, this district would be acceptable under § 2, even though Hispanics would not realistically be able to elect a candidate of their choice.

In contrast, using a purpose-based distinction between the two “moments” in § 2 analysis avoids the problems inherent in using a single data set exclusively. As discussed above, there are two instances in which courts need minority population data in order to evaluate § 2 claims — once to evaluate whether a majority-minority district should be created and again after the majority-minority district has been created. The problem is that these two moments are often subsumed as one under the umbrella of VRA analysis.²⁰⁰ This creates a problematic set of incentives, as courts are disinclined to hold that a certain data set applies in all cases,²⁰¹ potentially for fear that the measure will be applied “across the board” in all instances of § 2 evaluation. For example, courts are often unwilling to use VAP as the operative measure because they fear that redistricters will create minority opportunity districts in name only, so as to subvert the electoral power of the minority group.²⁰² Conversely, if courts were only to use CVAP data when measuring compliance under the *Gingles* factors (principally factor one), the result would be a “lost population” of minority non-citizens who are counted by the census for purposes of congressional apportionment but are not accorded representation under redistricting plans.²⁰³

200. See, e.g., *LULAC*, 548 U.S. at 436 (using “totality of circumstances” analysis to determine whether district constituted vote dilution under § 2); *De Grandy*, 512 U.S. at 1019 (using “totality of circumstances” analysis to determine whether minorities in Dade County area were entitled to an additional congressional district); *Gingles*, 478 U.S. at 48–49 (using “totality of circumstances” analysis to determine whether a multimember district violated § 2).

201. Rosenberg, *supra* note 35, at 711; see also *Burns v. Richardson*, 384 U.S. 73, 91–92 (1966) (stating that the question of which population to use in “one person, one vote” analysis was “carefully left open”).

202. As discussed in Part II.C *supra*, it is possible to draw a district in which a minority group is a majority of the voting-age population but not the citizen voting-age population.

203. For example, the *LULAC* Court used CVAP data (rather than VAP data, as this Part suggests) to evaluate *De Grandy* proportionality under § 2(b). 548 U.S. at 438. However, in the end, the Court determined that this analysis was not dispositive of a § 2 violation because even if the plan’s disproportionality “was deemed insubstantial, that consideration would not overcome the other evidence of vote dilution for Latinos.” *Id.*

Because of this conflicting set of interests, it is necessary to use different measures of population at different steps in the process. Courts should use VAP as the operative measure of a minority group’s size, as necessary in part one of the *Gingles* analysis and *De Grandy*’s proportionality inquiry. However, if a court is evaluating the electoral effectiveness of an existing majority-minority district, they should use CVAP. On a basic level, such a solution would create a better definition of what constitutes adequate minority representation.

In the first moment of § 2 analysis, redistricters need an answer to the question of which group needs to be “sufficiently large” under *Gingles* step one. In this instance, courts should use the minority VAP as the operative measure of group size. *Bartlett v. Strickland* aptly explained why this is a preferable measure:

[T]he majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2. . . . Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance.²⁰⁴

Such a measure of representation has a host of benefits. First, using VAP rather than CVAP as the basis for § 2 “avoids all the data problems inherent in employing ambiguous and contestable

There are a variety of reasons why the Court would elect to use CVAP data in this instance, even though *De Grandy* uses VAP as the relevant measure of proportionality. It is likely that this was one instance of conflating the two “moments” in § 2 analysis. Another possible reason for this choice is the fact that, even using the under-inclusive CVAP data, the disproportionality is striking. Under the State-drawn plan, the Hispanic opportunity districts made up approximately 16% of the total number of districts, while Hispanic citizens of voting age made up 22% of the citizen population. Therefore, under a system of proportional representation, Hispanic voters would have been entitled to at least two additional districts. *Id.*

204. *Bartlett v. Strickland*, 556 U.S. 1, 18–19 (2009). Additionally, the majority noted that “[t]he special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.” *Id.* at 19.

citizenship estimates.”²⁰⁵ Using VAP as the operative measure of representation is easier for courts to enforce because the available data is less reliant on estimates.²⁰⁶ In addition to the practical advantages of such a standard, there are philosophical advantages as well. By adopting such a standard, courts would send a message that both citizens and non-citizens should be counted in the VRA § 2 analysis, and that both groups deserve meaningful representation.

A point that is often lost in the debate over representation of non-citizens is the fact that additional congressional seats are apportioned based on general population growth. Texas picked up four additional congressional seats²⁰⁷ not because its citizen voting-age population increased, but simply because its overall population increased.²⁰⁸ Since the Constitution has been interpreted to require exact population equality among districts in a state,²⁰⁹ minority representation should not be determined by a different (and significantly less inclusive) measure of population.

In the second “moment” of § 2 analysis, courts examine the electoral power of an existing majority-minority district. In these cases, CVAP is a more realistic measure, as it recognizes that a district that has a high number of Hispanics, for example, but a low number of naturalized Hispanics, does not contain a high proportion of eligible voters and therefore does not function to elect Hispanics’ candidate of choice. If CVAP is not used in this analysis, the VRA is unable to prevent the drawing of districts at issue in *LULAC*, in which Hispanics were a majority of the voting-age population, but not a majority of the citizen voting-age population, and so were not functionally able to elect the candidate of their choice.²¹⁰ Requiring the use of CVAP data in these instances would prevent redistricters from manipulating the system, creating districts that are Hispanic “in everything but their voting patterns.”²¹¹

205. Persily, *supra* note 33, at 780–81.

206. *See supra* Part III.B.

207. Tavernise and Zeleny, *supra* note 5, at A1.

208. *Congressional Apportionment — Frequently Asked Questions*, U.S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/about/faq.html> (last visited Oct. 26, 2012).

209. *See supra* note 53.

210. *LULAC v. Perry*, 548 U.S. 399, 429 (2006).

211. Ramsey, *supra* note 17.

If courts were to articulate these standards, state legislators would be more likely to create a VRA-compliant redistricting plan *before* litigation, because they would know what was expected of them. However, this proposed standard has its limitations, as well. Some may worry that using VAP as a measure of minority population size will create a flood of VRA § 2 claims because it will be easier to satisfy the *Gingles* factors. But it is important to remember that, in order to successfully challenge a redistricting plan under § 2, plaintiffs still need to satisfy the third prong of the *Gingles* test: the group must be unable to elect their preferred candidates *due to* racially polarized voting.²¹² If a minority group constitutes a majority of the voting-age population in a single-member district (thus satisfying part one of the inquiry) but its citizen population is small, it is not polarized voting that is the reason for a lack of electoral success.²¹³ Additionally, there are still a variety of considerations under the “totality of circumstances” analysis to contend with.²¹⁴ It is unlikely that frivolous claims will prevail merely because the court looks to one measure of population instead of another.

This solution will be especially beneficial to Texas. Both *LULAC* and *Perez* are convoluted, data-heavy cases where the § 2 analysis lacked any real starting point because courts used different sets of data, often interchangeably. In *LULAC*, the Supreme Court vacillated between evaluating § 2 claims on an individual district basis and a statewide basis. Additionally, the *LULAC* Court was reluctant to use VAP data to determine whether an additional opportunity district was necessary, for fear of creating a precedent that could later be manipulated by redistricters. Without a presumption to anchor courts’ analyses, Texas redistricting decisions lack holdings that future legislators can follow.

212. Persily, *supra* note 33, at 780–81 (“If the low level of citizenship and voting eligibility among the minority community is the reason its preferred candidates cannot be elected, then that community will not have a viable vote dilution claim in any event.”).

213. *Id.*

214. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citations omitted) (“As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the ‘totality of the circumstances’ and to determine, based upon a searching practical evaluation of the ‘past and present reality, whether the political process is equally open to minority voters.’”).

V. CONCLUSION

For the past three census and redistricting cycles, Texas has found itself in court, defending its new congressional maps. Currently, Texas lawmakers argue that their enacted map reflects the demographic realities of Texas, since 24.7% percent of the citizen voting-age population of Texas is Hispanic, and eight of their thirty-six congressional districts (or 22%) are Hispanic opportunity districts.²¹⁵ However, this is an inappropriate formulation of what § 2 of the VRA requires, as creating districts that are “Hispanic in everything but its voting patterns” subverts the VRA’s intent to provide for adequate and meaningful political representation to minority groups.²¹⁶ This dispute is the product of conflicting standards regarding population data. If Texas has to go to court after every census, is clear that there is a problem with the way in which § 2 cases are evaluated.

Texas’s redistricting plans are continually challenged under the VRA because there is no clear standard regarding how minority representation should be measured. If Congress or the courts create a clear standard — stating under which circumstances VAP or CVAP will govern — the problems of inadequate or mismatched representation can be solved.

215. Ramsey, *supra* note 17.

216. *Id.*