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Texas Legislative Redistricting: Proposed Constitutional and Statutory Amendments for an Improved Process

by

Arthur J. Anderson*

At the bottom of all the tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.¹

I. Introduction

A. A Decennial Imbroglio

Every ten years the Texas Legislature faces the task of redistricting boundaries for the state’s congressional and legislative districts.² Four sections of the Texas Constitution set forth the requirements for legislative redistricting.³ Many shortcomings exist in these provisions, and they provide an inadequate guide for the legislature during the redistricting process: The Texas Constitution does not mention congressional redistricting, and it fails to designate a chairman or describe the mechanics of the Legislative Redistricting Board (LRB).⁴ The constitutional sections are anachronistic in that they do not reflect the growth in United States constitutional and statutory law on redistricting. The Texas constitutional provision that no single county shall be entitled to more than one senator⁵ violates the United States Constitution’s version of the one person, one vote principle.⁶ Finally, neither the Texas Constitution nor state statutory law provides

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¹ Speech by Prime Minister Winston Churchill of Great Britain, House of Commons (Oct. 31, 1944).
³ Id. §§ 25-28.
⁴ The LRB, established by the Texas Constitution, consists of five officials elected statewide. In 1981 all LRB members were Democrats. Tex. Const. art. III, § 28 requires only that the LRB meet within 90 days after adjournment of the regular session of the Texas Legislature and complete the reapportionment process within 60 days of assembly.
⁵ See id. art. III, § 25.
⁶ U.S. Const. amend. XIV, § 2.

The torturous paths taken by the redistricting plans for the U.S. House of Representatives, Texas House of Representatives, and Texas Senate following the 1980 census illustrate a need for change in the present apportionment process from that described in the Texas Constitution.\footnote{See TEX. CONST. art. III, §§ 25-26a, 28.} During the special session of the summer of 1981, both houses of the Sixty-seventh Texas Legislature passed a bill redistricting Texas's congressional seats.\footnote{See TEX. REV. CIV. STAT. ANN. art. 197f (Vernon Supp. 1981) (repealed 1983).} After the Governor signed the redistricting bill, minority groups claimed that the new law discriminated against minorities, and they filed suit in the federal district court for the Eastern District of Texas challenging the statute.\footnote{Seamon v. Upham, 536 F. Supp. 931, 936 (E.D. Tex. 1982).} While the suit was pending, the United States Department of Justice\footnote{The Voting Rights Act of 1965 mandates that the Justice Department of the United States screen redistricting plans to prevent discrimination against racial or ethnic minorities. See 42 U.S.C. § 1973c (1982).} rejected the legislative plan and ruled that the Texas Legislature had failed to increase the Mexican-American voting strength in South Texas.\footnote{Upham v. Seamon, 456 U.S. 37 (1982).} The Justice Department's ruling delayed candidate filing deadlines for sixteen of Texas's twenty-seven United States congressional districts, and a panel of three United States district judges redrew the plans, altering districts for South Texas and Dallas County.\footnote{Seamon, 536 F. Supp. at 937, 961-62.}

Upon review of the case\footnote{Id. at 937, 955-60.} the United States Supreme Court held that the lower federal court had erroneously established congressional districts for Dallas County because of a retrogressive effect on minority groups.\footnote{Id. at 43.} The Court, however, left to the panel the decision of whether to implement the erroneous court-ordered plan.\footnote{Id. at 44.} The three-judge panel implemented the plan, and the Supreme Court affirmed the implementation.\footnote{Strake v. Seamon, 469 U.S. 801 (1984).}

The Sixty-seventh Texas Legislature also redrew the Texas House and Senate district boundaries.\footnote{See TEX. REV. CIV. STAT. ANN. art. 195a-7 (Vernon Supp. 1981).} Several members of the legislature brought a class action suit to strike down the redistricting bill. The Texas Supreme Court, in \textit{Clements v. Valles},\footnote{620 S.W.2d 112 (Tex. 1981).} struck down the house plan, holding that the

\begin{footnotesize}
8. See TEX. CONST. art. III, §§ 25-26a, 28.
9. See TEX. REV. CIV. STAT. ANN. art. 197f (Vernon Supp. 1981) (repealed 1983). The senate consists of 31 members representing identified districts of the state, while the house of representatives consists of 150 members who also represent identified districts in the state. See TEX. CONST. art. III, § 2. The state legislature meets in regular session for 120 days in odd-numbered years. See id. § 5; TEX. GOV'T CODE ANN. § 301.001 (Vernon 1988). Each regular legislative session starts on the second Tuesday in January. See id. In addition to regular sessions, the Governor is empowered to call the legislature into one or more special sessions, not to exceed a period of 30 days each session. See TEX. CONST. art. III, §§ 5, 40.
13. Id. at 937, 955-60.
15. Id. at 43.
16. Id. at 44.
\end{footnotesize}
plan violated the Texas constitutional prohibition against excessive cutting across county lines. After the *Valles* decision and Governor Clements's veto of the senate redistricting plan, the LRB redrew the house and senate boundaries. After the LRB redistricted both houses of the Texas Legislature, opponents quickly challenged the plans in federal court. The federal suits charged the senate plan with diluting minority and Republican party voting strength and challenged the house plan with diluting minority voting strength. While these suits were pending, however, the Justice Department rejected the plans because the LRB senate plan for Harris County and Bexar County and the LRB house plan for Dallas, Bexar, and El Paso Counties failed to satisfy Voting Rights Act requirements. A panel consisting of three district judges drew interim plans for the house and senate, leaving the final boundary determination to the Sixty-eighth Texas Legislature. The interim plans differed only slightly from those proposed by the LRB. The United States Supreme Court denied an appeal without comment. In 1983 the Sixty-eighth Texas Legislature approved revised plans that the three-judge panel later upheld.

These legal and administrative challenges to redistricting plans cause uncertainty for candidates and voters. Texas's experience with redistricting in the last twenty years has included prolonged litigation, resulting in considerable cost and voter confusion. Past experience indicates a need for the Texas Legislature to reexamine the Texas constitutional and statutory provisions affecting redistricting in order to determine if improvements can be made to the current system.

20. Id. at 114-15.
21. Governor Clements vetoed the senate redistricting bill on June 18, 1981. The LRB waited until August 30, 1981, the 90th day following adjournment, to convene. Because the supreme court's decision in *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981), was handed down on August 31, 1981, the LRB had sufficient time to redistrict both houses of the legislature.
22. The senate plan was challenged in CA 3-81-1946-R (W.D. Tex. 1981); the house plan was challenged in CA 3-81-2205-R (W.D. Tex. 1981) and CA 3-81-2263-R (W.D. Tex. 1981). All of these cases were then consolidated into a federal district court case. See *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982).
24. Id. at 520.
25. Id. at 517, 521.
26. Id. at 540-47.
30. This Article focuses on legislative redistricting. The pending federal court cases challenging the state's at-large procedure for electing judges will not be discussed in detail. See *Rangel v. Mattox*, No. B-88-053; *LULAC v. Clements*, No. Mo-88-CA-154. *Rangel* challenges the system of electing justices of the 13th Court of Appeals in Corpus Christi. *LULAC* seeks to change the at-large system of electing the district judges in 43 counties. The federal courts may determine that the current method is unconstitutional, and they could either impose an alternative to the at-large procedure of electing state judges or allow the Texas Legislature to decide on an alternative.
B. Examining the Process

This Article suggests changes to the Texas Constitution that are: (1) consistent with federal constitutional, statutory, and administrative requirements; (2) comprehensive enough to cover the entire redistricting process; (3) clear in terms of the criteria that should be satisfied in the process; and (4) easy to read and comprehend. The first step involves examining the Texas redistricting process and determining if it should be altered. The Texas Constitution currently requires the legislature to redraw its own district lines after the release of the decennial census figures. Some groups, such as Common Cause, claim that the ability of state legislators to determine their own political fates represents poor public policy.

In some states, all or part of the redistricting task is assigned to appointed reapportionment committees. Under current Texas law, the LRB is responsible for apportionment if the legislature fails to pass a plan during the first regular session following the publication of the census. The constitution provides for no contingency plan in the event that the LRB fails to draft a plan, or if the courts invalidate the LRB's plan. As pointed out by the court in Terrazas v. Clements, the timing of the LRB's deliberation of the 1980 house and senate plans was fortuitous in light of the Governor's veto of the senate plan and the Texas Supreme Court's rejection of the house plan shortly after adjournment of the regular session.

The United States Constitution vests state legislatures with the authority to redistrict congressional and state legislative boundaries. As experience in other states has shown, the possibility remains for the state legislature to delegate redistricting authority to a nonpartisan commission, secretary of state, state court, or other entity. Careful examination of alternatives to the present system will help determine whether other governmental bodies should replace the Texas Legislature and LRB.

32. For example, in 1971 a group of renegade legislators known as the "Dirty Thirty" threatened Speaker of the House Gus Mutscher's absolute control over the Texas House. Mutscher used redistricting in order to pair off some of his opponents and put others in hostile districts. See Adams, A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 Harv. J. on Legis. 825, 841 (1977).
33. See, e.g., Ala. Const. art. VI, § 10; Ark. Const. art. VIII, § 4; Colo. Const. art. V, § 48; Conn. Const. art. III, § 6 (assignment to committee if legislature fails to act); Ill. Const. art IV, § 2 (assignment to committee if legislature fails to act); Iowa Const. art. III, §§ 34-36 (advisory only); Me. Const. art IV, pt. 3, § 1-A (advisory only); Mich. Const. art. IV, § 2; Mo. Const. art. III, § 2-9 (state and congressional plans); Mont. Const. art. V, § 14; N.J. Const. art. IV, § 3; Ohio Const. art. XI, § 1; Okla. Const. art. V, § 11A (assignment to committee if legislature fails to act); Pa. Const. art. II, § 17; S.D. Const. art. III, § 5 (assignment to committee if legislature fails to act); Vt. Const. ch. 2, § 73 (advisory only).
36. Id. at 537.
C. The Need for Criteria

Although the Texas Constitution establishes the governmental bodies responsible for redistricting, neither the constitution nor statutory law focuses in detail on any useful criteria for the formulation of the redistricting plan. Redistricting is not accomplished in a political or sociological vacuum, and different individuals and groups usually seek to accomplish different ends in this process. As the number of criteria increases, the number of redistricting options decreases. Suppose, for example, that the only criterion in the redistricting process is that each congressional district be equal in population. The redistricting body could easily transfer census data into a computer and draw district lines in a matter of seconds. Over the years, however, many other criteria have been created and justified in order to guide the redistricting process. Because increasing the number of constraints in the redistricting equation necessarily means that a fewer number of eligible plans are available, the redistricting body should exclude from consideration those criteria of marginal importance. For purposes of this Article, redistricting criteria will be divided into quantitative and qualitative elements.

1. Quantitative Criteria

According to the United States Supreme Court, population equality represents the most important criterion in the redistricting process. Since 1964 the Court has required very strict population standards for congressional districts. In Wesberry v. Sanders, for example, the Court determined that one vote in an election is as valuable as the next. Because the equal protection clause embodies the standard for legislative plans, and because states have other interests to consider in state legislative redistricting, the population requirement for state districts is less strict. If equally populated districts rank as the highest criterion in the process, however, state statutory language revisions may allow for more restrictive quantitative criteria than federal courts have mandated. This Article examines the legal, philosophical, and political reasons for and against such a population-restricted proposal.

39. This Article refers to the "means" used toward these "ends" as the criteria or standards used by the redistricting body.
42. The stated standard by the Court was "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 7-8.
44. Several logistical problems concerning the quantitative criteria exist under Texas law. For example, the Texas Constitution expressly provides that senatorial districts are to contain equal numbers of "qualified electors," see TEX. CONST. art. III, § 25, rather than equal numbers of total population. Section 25 of the Texas Constitution served as the focus of some controversy during and after the Sixty-seventh Legislature when Attorney General Mark White issued an opinion stating that dividing the state into districts on the basis of qualified electors was unconstitutional on its face. See Op. Atty. Gen. No. MW-350 (1981). In Upham v. White, No. C-1068 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, Jan. 27, 1982), members of the Republican Party challenged the LRB's senate plan on the ground that it
2. Qualitative Criteria

Although strict population equality serves as the foundation of the redistricting process, legislators may consider other criteria. Specifically, the nondilution of racial or ethnic minority voting rights represents the controlling qualitative criterion. The fifteenth amendment to the United States Constitution states that no state may abridge the right to vote on account of race or color. A redistricting plan purposefully drawn to minimize the voting strength of racial groups violates the fifteenth amendment. On the other hand, a state is not required to maximize minority voting strength.

The Voting Rights Act of 1965 and its subsequent amendments also influence nondilution criteria. Under section 5 of the Act a state is prohibited from making any change in a voting procedure unless the state assures the Justice Department that the change does not interfere with a person's right to vote based on race or color.

A second qualitative criterion, geographical integrity, also influences the redistricting process. Under present Texas law, the legislature is required to avoid cutting across county lines as much as possible in forming districts for the Texas House of Representatives. Senatorial districts, however, are not subject to the same restriction. The criterion of maintaining the integrity of political subdivisions is the only state interest that the United States Supreme Court has found sufficient to justify a 10% deviation in district population. The redistricting process often includes references to geographical criteria. For example, the Texas Constitution requires contiguity of legislative districts.

The Texas Constitution makes no mention of the preservation of either

violated the "qualified electors" requirement. See id. Travis County District Judge Herman Jones denied the request for a permanent injunction, ruling that the LRB should not have to speculate as to the appropriate source of population data. See id. The Texas Supreme Court upheld the LRB plan, which was used in the 1982 state senatorial elections. See Upham v. White, 639 S.W.2d 301, 301 (Tex. 1982). In addition to the "qualified electors" issue, this Article also addresses issues such as the appropriate population base, census data, and intra-state population shifts to determine how each should fit into the proposed redistricting process.

45. Although federal case law mandates in large part the extent of the nondilution criteria, other qualitative criteria include interests such as maintaining the integrity of political subdivisions, preservation of incumbents, and preservation of majority party voting strength.

46. U.S. Const. amend. XV, § 1.
49. 42 U.S.C. § 1973 (1982). If the factors that the Civil Rights Division of the Department of Justice uses to evaluate districting plans are clearly stated, then a change in Texas law to reflect these same factors should be considered.
51. See id. § 25.
incumbent office-holders or majority party voting strength, two of the most politically controversial criteria. Although consciously minimized in legislative debate, these two goals are of fundamental concern to Texas legislators. The United States Supreme Court has held that districts drawn to accommodate incumbents are not invidiously discriminatory and, in fact, may have certain positive features.\textsuperscript{55}

A final qualitative criterion is partisan politics and its influence on redistricting. The LRB is presently composed of five Democrats.\textsuperscript{56} The last LRB senatorial plan was challenged by Republican Party members who feared the plan would decrease their party's representation in the Texas Senate.\textsuperscript{57} The courts have generally tended to shy away from controversies involving political parties and the election process.\textsuperscript{58} In \textit{Davis v. Bandemer},\textsuperscript{59} however, the United States Supreme Court considered the effect on Indiana's democratic party candidates of the 1981 legislative redistricting by the majority Republican Party. The district court used statistical figures and testimony indicating partisan intent to hold that the plan discriminated against Democrats.\textsuperscript{60} The district court further enjoined the state from holding elections pursuant to the plan and ordered the legislature to prepare a new plan.\textsuperscript{61} While the Supreme Court agreed with the district court that political gerrymandering is properly justiciable under the equal protection clause, the Court reversed the district court's holding because it was based on too low a threshold test.\textsuperscript{62}

\textbf{D. Other Issues}

Another consideration involves the types of improvements that can be made to the redistricting system in addition to the designation of a redistricting body and the criteria it should use. The Texas Legislature cannot determine the number of congressional seats Texas will gain or lose every ten years, but a Texas constitutional amendment can change the number of state senators and representatives. With the large population increases Texas has experienced in recent years, an increase in the number of state senators and representatives will perhaps encourage better representation and help ease the pain of redistricting in future years. At least one federal judge has noted that redistricting should be accomplished by the Texas Legislature, and he hopes that the legislature will consider revisions to the redistricting process in order to avoid the 1980 type of litigation in the future.\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{55} See \textit{White v. Weiser}, 412 U.S. 783, 791 (1973); \textit{Burns v. Richardson}, 384 U.S. 73, 89 n.16 (1966).
  \item \textsuperscript{56} Lieutenant Governor William Hobby, Comptroller Bob Bullock, Land Commissioner Gary Mauro, Attorney General Jim Mattox, and Speaker of the House Gib Lewis.
  \item \textsuperscript{57} See \textit{Upham v. White}, 639 S.W.2d 301, 301 (Tex. 1982).
  \item \textsuperscript{58} See \textit{Gaffney v. Cummings}, 412 U.S. 735, 749-51 (1973).
  \item \textsuperscript{59} 478 U.S. 109 (1986).
  \item \textsuperscript{60} \textit{id.} at 127.
  \item \textsuperscript{61} \textit{id.}
  \item \textsuperscript{62} \textit{id.} at 143.
  \item \textsuperscript{63} Judge Jerry Buchmeyer, Daily Texan, Jan. 29, 1982, at A-1.
\end{itemize}
II. ALTERNATIVE REDISTRICTING BODIES

The United States Constitution obligates the state legislatures to reappor-
tion congressional districts.64 These legislative bodies, however, can dele-
gate this authority.65 In all states except Hawaii and Montana, which vest final approval in appointed reapportionment commissions,66 state legisla-
tures are required to vote in enacting a congressional redistricting plan.67
Although the Texas Constitution does not discuss congressional redistrict-
ing, the Texas Legislature has assumed sole responsibility for initially draw-
ing congressional plans.68

Texas has been innovative in redistricting house and senate seats. As
mentioned, the legislature has the first opportunity to reapportion the state
legislative districts.69 According to the Texas Constitution, if the legislature
fails to pass a redistricting bill, then the LRB must act.70 The Texas
Supreme Court has interpreted the appropriate constitutional provisions to
encompass not only the situations where the legislature fails to act, but also
where a plan is invalidated.71 Upon the occurrence of one or more of these
contingencies, the LRB must assemble within ninety days after the adjourn-
ment of the regular session.72 The LRB then has sixty days to redistrict the
Texas House and Senate.73 The Texas Constitution has no provision to turn
to should an adverse court or the Justice Department strike down a plan
after that period.74

Due to the past problems with Texas legislative redistricting, alternatives
to the present practice demand attention. Five requirements are addressed
in analyzing solutions to the redistricting process. First, the process must
produce a plan that will pass review by the Justice Department as well as the
federal and state courts. Second, the process should meet the Voting Rights
Act preclearance and court challenge time constraints. Third, the process
should be inexpensive and economical. Fourth, the process must promote
fairness and equity. Finally, the process should produce a realistic political
alternative in the eyes of the public. In addressing these requirements, this
Article develops a three-pronged procedure that uses the Texas Legislature,
an appointed apportionment commission, and the courts.

64. See U.S. CONST. art. I, § 2.
65. See generally Rudolph & Rudolph, Free Government and the Doctrine of Non-Delega-
tion of Legislative Powers, 19 NEW ENG. L. REV. 551, 551-73 (1987) (traces functions of gov-
ernment, theory of delegation, and arguments for nondelegation).
66. See HAW. CONST. art. IV, § 3; MONT. CONST. art. V, § 14.
67. See supra note 33.
68. See G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED
70. Id. § 28.
71. See Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 574 (Tex. 1971).
72. See TEX. CONST. art. III, § 28.
73. Id.
74. The potential problems with these time constraints are discussed in Terrazas v. Cle-
A. The Computer Alternative

Because computer use is cost-effective and impartial, computer experts, armed with population figures and Texas guidelines, could replace the traditional human element. The machine could draw new district lines using only the stated criteria and ignoring all other considerations. This apolitical approach, which would appear to be an acceptable option, is, however, subject to three potential hazards. First, any criteria established by the legislature and included in computer software programs will surely fall prey to political motivation. Second, the computer's plan would ultimately require approval by the legislature or another body. Finally, the result of a computer's analysis would naturally involve political ramifications because redistricting is inherently political, whether it is carried out with a pencil and a map or with the aid of a computer.

A good example of the fallacy of relying too heavily on computers and similar aids is the 1980 experience in Iowa where the state required that a nonpartisan research bureau prepare an advisory plan for the legislature's approval. In 1981, population figures and certain redistricting criteria required by Iowa law were programmed into a rented computer. One criterion prohibited taking into account voter political affiliation or the addresses of incumbent legislators. At the time, Iowa had three Republicans and three Democrats in the United States Congress. The Iowa Legislature rejected the research bureau's plan because it placed two of the three Republicans in the same district. Because political considerations will continue to play an important part in any redistricting process, computers should maintain their role only as a tool to be used by the appropriate redistricting body.

B. The Courts

The recent history of Texas redistricting is filled with litigation. At least one Texas daily newspaper has supported putting the federal courts in charge of the entire redistricting process. If the courts are eventually going to alter the district boundaries in any event, the argument posits, then the Texas Constitution should assign the task to the courts initially.

Two good reasons, however, militate against assigning total redistricting responsibility to the courts. First, the district lines that are subject to a court challenge can usually be altered without making a wholesale change to the maps. Second, judges usually do not want to take on the political responsi-

75. See IOWA CODE ANN. § 42.2 (West Supp. 1989).
76. Id. § 42.4.
79. If there is no way to get the chore out of the hands of the legislators, they might as well use the same old maps every time and mail them to the nearest federal court. Those courts don't exactly have a lot of idle time on their hands, but it might not be a bad idea to turn them into a redistricting panel every 10 years long enough to set the district lines . . . .
Id.
80. For example, the redistricting maps drawn by the three-judge panels following the
bility of redistricting seats in Congress and in state legislatures. As a result, neither the courts nor the legislatures appear anxious to grant full map-drawing authority to the judicial branch.

C. Impartial Boards or Commissions

Many “good government” groups such as Common Cause have proposed delegating redistricting authority to impartial boards or commissions that would consist of nonelected, nonparty officials. Proponents of this approach base their proposal on two primary points. First, the commissioners presumably would not have the same inherent conflict of interest that state legislators possess. When legislators are preoccupied with protecting their political fates as well as that of their colleagues, public trust in the legislative process erodes. Second, the commission method would eliminate the need for the legislature to wrestle with a time-consuming and expensive problem.

A commission-type redistricting body would not resemble the Texas LRB. Each member of the LRB is an elected official and, at the present time, a member of the Democratic Party. A prohibition on elected officials as members of an independent redistricting board promotes a less partisan board. The LRB, on the other hand, consists of the lieutenant governor, the speaker of the house of representatives, the attorney general, the comptroller of public accounts, and the commissioner of the General Land Office. The LRB acts when a state house or senate plan fails to pass the legislature, is vetoed by the Governor, or is struck down by the courts. Common Cause’s model constitutional amendment would give the independent commission initial authority to redraw the congressional and state districts.

The nonpartisan commission model has several variations. Common Cause proposes that a separate five-member commission be appointed every ten years. The majority and minority leaders of the state house and senate would each appoint one member of the commission. These four members

1981 lawsuit challenges were based in large part on the challenged plans and contained only minor modifications to these plans. See Upham v. Seamon, 456 U.S. 37 (1982); Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982).

81. The United States Supreme Court stated in 1973 that it “repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it.” See Gaffney v. Cummings, 412 U.S. 735, 751 (1973). Furthermore, the Court has warned that “[l]egislative bodies should not leave their reapportionment tasks to the federal courts . . . .” Wise v. Lipscomb, 437 U.S. 535, 540 (1977). See Gaffney v. Cummings, 412 U.S. 735, 751 (1973).

82. Adams, supra note 32, at 854-57.
83. Id. at 854-55.
84. For example, the State of California spent approximately $1 million to redistrict from 1971 to 1973. Id. at 856 n.115.
85. See supra note 56.
86. See TEX. CONST. art. III, § 28.
87. See id. (requiring issuance by the Texas Supreme Court of a writ of mandamus or other writ to compel action by the LRB).
88. Adams, supra note 32, at 867.
89. Id.
90. Id.
would caucus and select a fifth member as chairperson. The five appointed commissioners could not hold public offices.

Instituting the Common Cause model in Texas runs into several problems. First, the Texas Legislature is not structured in the fashion envisioned by Common Cause because Texas Democrats and Republicans do not elect minority and majority leaders. In addition, Texas has not established a party structure similar to that in the United States Congress. Second, because legislators with intense party interests select the commission members, a certain amount of partisanship would still arise during the redistricting negotiations. Third, no system of redistricting can be totally apolitical.

Many states have implemented redistricting commissions similar either to the type advocated by Common Cause or to the LRB to assist at some point in the redistricting process. In Colorado, for example, eleven members constitute the redistricting commission, composed of four legislative members, three executive members appointed by the Governor, and four judicial members appointed by the chief justice of the Colorado Supreme Court. In 1981 this commission unanimously approved redistricting plans. The Colorado Legislature, however, redrew the congressional districts, and the plan landed in the courts following three gubernatorial vetoes.

Hawaii’s reapportionment commission consists of nine members. The president of the senate and the speaker of the house each select two members. Members of the minority party select one representative from their membership in each house, and these two each designate two persons for the commission. None of the eight members on the commission may run for office during either of the two elections following implementation of the redistricting plan.

The Florida Legislature attempted to establish a similar nonpartisan commission in 1978. Although the constitutional amendment failed to receive a sufficient number of votes in the subsequent referendum, the proposal had some interesting features. Seven nonpartisan and nonelected members would have comprised the commission. The Governor would appoint six members from a list composed of sixteen nominees submitted in groups of

91. Id.
92. Id.
93. Legislative elections through the party system have become critical components of the American process of political representation. The United States Supreme Court has recognized that redistricting plans make a distinct impression on the political composition of the Legislature. See Burns v. Richardson, 384 U.S. 73 (1966); Reynolds v. Sims, 377 U.S. 533, 567 (1964).
94. See supra note 33.
97. Id.
99. Id.
100. Id.
101. Id.
103. Id. at 624.
three by the president of the senate, the speaker of the house, the minority leader of the house, the minority leader of the senate, and the chairperson of the party coming in second in the last gubernatorial race. In addition, the list would include one person of the Governor's choosing. These six, by majority vote, would choose a seventh member who would serve as chairperson. If the six could not agree upon a chair, the commission would be automatically discharged and the process begun again. The commission would use specific redistricting criteria in the determinations. Within fifteen days of a plan's approval, the attorney general would petition the Florida Supreme Court for a declaratory judgment, and the court would have to rule on the plan within sixty days. If the court invalidated all or part of the plan, the Governor would reconvene the reapportionment commission, which would have thirty days to adopt a plan to conform with the court's judgment.

D. The Legislature

Although there are some disadvantages to maintaining the legislature as the initial body in the redistricting process, criticisms directed at alternatives to the legislature provide good evidence that the legislature should have at least initial redistricting responsibility. First, redistricting is inherently political. The people of Texas elect legislators to make such political decisions. Furthermore, it is difficult for an appointed commission to maintain a truly bipartisan approach to an issue so basic to political party survival. Second, the United States Supreme Court has held that the state legislature is the appropriate forum for redistricting. Third, legislators possess the ability to draw more equitable lines when clear criteria, such as those described later in this Article, are included in the process.

III. An Alternative Redistricting Procedure

The provisions governing the time frames and governmental bodies responsible for redistricting are contained in article III of the Texas Constitution. In order to make the Texas redistricting process current and comprehensive, this Article recommends several amendments to article III. These amendments should include explicit language giving the legislature the initial opportunity to redistrict the congressional boundaries as well as the Texas Senate and House boundaries and provide uniform treatment for

104. Id.
105. Id.
106. Id.
107. Id.
108. Id. at 625.
109. Id.
110. Id.
111. Interview with William Hobby, Lieutenant Governor of Texas, by Arthur J. Anderson, Texas Capitol (Feb. 7, 1982) [hereinafter Hobby Interview].
all three houses in the redistricting process. Under current law, the LRB becomes responsible for redistricting only if the house and senate plans are left undrawn.\textsuperscript{114} No provision governs the contingency of the legislature's failing to reapportion congressional districts within the required time frame. The first suggested amendment, therefore, tracks similar language found in the Colorado Constitution.\textsuperscript{115}

\textit{A. Time Frame}

According to section 28 of the Texas Constitution, the Texas Legislature must apportion the legislative districts after each United States decennial census.\textsuperscript{116} The Supreme Court of Texas has held that section 28 also applies if publication occurs during the regular session.\textsuperscript{117} The Sixty-seventh Legislature, for example, did not receive final census data until April 1, 1981, and programming the data into the redistricting computer required additional time. If the Census Bureau delays provision of the population tabulations, the legislature would have a very short time in which to devise redistricting plans before adjourning in late May.\textsuperscript{118} If the data arrives after the last date of the regular session, the language of section 28 indicates that the legislature must wait two more years to redistrict all congressional, house, and senate seats.\textsuperscript{119} Lieutenant Governor Bill Hobby suggests that the redistricting plans should be formulated within a specified time, triggered by the publication of the census data.\textsuperscript{120}

The best approach to the time pressure problem would be a special session, called after the regular session, in which the legislature could focus solely on redistricting.\textsuperscript{121} The special session concept allows the legislature to concentrate on this one important issue without also having to consider the state's two-year budget and other significant bills that arise in the relatively short regular session. The primary disadvantage of redistricting during special sessions is the additional expense for salaries, staff, and general operations.\textsuperscript{122}

In order to devise a redistricting plan that can withstand legal challenge

\textsuperscript{114} See \textit{id.} § 28.
\textsuperscript{115} The Legislature shall divide the state into as many congressional districts as there are representatives in Congress apportioned to this state by the Congress of the United States, as many representative districts as the number of members of the State House of Representatives as provided by law and as many Senate districts as the number of members of the State Senate as provided by law.

For the exact language of the source provision, see COLO. \textit{CONST.} art. V, § 44.

\textsuperscript{116} The Texas Constitution states that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the State into senatorial and representative districts . . . ." TEX. \textit{CONST.} art. III, § 28.

\textsuperscript{117} See \textit{Mauzy v. Legislative Redistricting Bd.}, 471 S.W.2d 570, 573 (Tex. 1971).

\textsuperscript{118} A Census Bureau delay might result from federal litigation challenging the accuracy of the census.

\textsuperscript{119} See TEX. \textit{CONST.} art. III, § 28.

\textsuperscript{120} Hobby Interview, \textit{supra} note 111.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} Common Cause, \textit{supra} note 77, at 7. For example, in Virginia during 1980 and 1981 the legislature did not produce an acceptable plan until after twelve special sessions at a cost of more than one million dollars. \textit{Id.}
and deal competently with other important issues facing the state during the short regular session, a constitutional provision should set aside a thirty-day redistricting session every ten years. The early stages of redistricting could still take place during the regular session, while actual consideration and drawing of the district maps would be reserved for the special session. If the legislature receives census data at least two weeks before adjournment of the regular session, the decennial special session should begin one week following adjournment to allow time to program the population figures into the computer before the special session begins. This timetable would reduce start-up costs since experienced employees could continue legislative operations. In the unlikely event that the legislature does not receive the census data until a later time, the Governor would call the legislature into a special session one month after publication. This would allow sufficient time to program the redistricting computer, and legislators could hire additional staff. The second recommended constitutional amendment, therefore, would require the Governor to call a thirty-day special session within a specified time following either the end of the regular session or the publication of the census data by the United States Census Bureau, whichever occurs later.

B. Apportionment Commission

The LRB currently assumes the task of redistricting if the legislature fails to implement a plan. A second link in the redistricting chain must take over the task of redistricting if the first link involving the legislature fails to pass a redistricting bill. The second link must also take over if the Governor vetoes one or more of the three bills after the special session of the legislature has been adjourned. Another contingency to consider is the rejection of a redistricting plan by the Justice Department because of a violation of the mandates of the Voting Rights Act of 1965.

Before a state can implement a redistricting plan, the Justice Department must review the plan to ensure that it does not have a racially discriminatory effect or purpose. The time frame set forth in the Voting Rights Act is very important in terms of its relation to the upcoming elections. Following receipt of the legislature’s proposed plans, the United States Attorney General has sixty days to review and object. If the Attorney General does not object, the new plan goes into effect. The Attorney General may also ask the state for further information, and such a request triggers an additional sixty-day review period. Including mailing delays, a section 5 preclearance submission for the State of Texas can easily take up to five

123. Early stages of redistricting include holding outreach hearings, gathering data, and programming the computer.
124. See Tex. Const. art. III, § 28. According to one of its present members, the LRB resembles a “Sword of Damocles hanging over the neck of the Legislature.” Hobby Interview, supra note 111.
126. Id.
128. Id. § 51.10.
129. Id. § 51.37.
months. Because the primary filing period for legislative seats begins in the first week of January in primary years, the appointment commission must act quickly in order to satisfy the preclearance requirements. If the Justice Department denies a preclearance submittal, the Texas attorney general has a very limited time to bring a declaratory judgment action in the Federal District Court for Washington, D.C. and request that the plan be declared valid in spite of the adverse preclearance decision.

History indicates that the preclearance procedure can wreak havoc on the redistricting process. For example, because the Justice Department rejected the 1981 Texas remapping plans, the federal court had to redraw both the congressional and state legislative lines. Part of the problem involved the lack of necessary communication between the Justice Department and the submitting entity, and the Justice Department provided little guidance on specific proposals.

Another timing problem similar to that posed by the preclearance procedure concerns the potential lawsuits that opponents may file against a redistricting plan. Following 1981 challenges to each redistricting plan, the Texas Supreme Court accelerated its consideration of the house plan passed by the legislature and declared it unconstitutional. The rationale for the court's decision was that the plan violated the Texas Constitution because of "wholesale cutting" of county lines. By quickly handing down its decision, the court avoided the dilemma of drawing legislative lines itself and left the task to the LRB. As with the failure to pass a redistricting bill, a gubernatorial veto, and a Justice Department rejection, nullification by the courts requires a governmental body of some type to review and revise the maps.

The reasons against giving a bipartisan commission the initial authority to draw district lines are not as relevant, however, when the commission is a backup to the legislative effort. The legislature should complete most of the groundwork regarding the statewide map by the end of the legislative session. An apportionment commission can use the basic political structure envisioned by the legislature and make the small changes usually needed to satisfy the Justice Department or the courts. A backup system must be available, however, in the event of an emergency contingency. It would be inefficient for the Governor to call the legislature into special session every time the state has to make a change in the plans. The redistricting procedure must include a governmental body that the state can quickly organize when redistricting plan amendments are needed. If an apportionment commission

132. See supra notes 11-13 and accompanying text.
133. Daily Texan, Feb. 10, 1982, at A-16. The Justice Department’s handling of the 1981 Texas plans angered United States District Judge Sam Johnson: “This court was put in the awkward position of waiting until two days before the deadline for filing for office and then found out via the news media that the congressional redistricting plan had been objected to by the Department of Justice.” Id.
135. Id. at 114; see TEX. CONST. art. III, § 26.
136. See supra notes 93-110 and accompanying text.
is the type of governmental body that the system should use as the legislature's backup, two major issues arise concerning the composition of the commission and the time frame for the commission's operation.

Lieutenant Governor William Hobby has indicated that an apportionment commission similar to the one proposed herein should be composed of elected officials primarily because of their intimate knowledge of politics, of the uniqueness of the individual districts, and of the state as a whole. Although the present members of the LRB may have extensive knowledge about the political climate of the state, many other individuals are equally qualified. In addition, although the LRB members may not have the same conflicts of interest as the legislators themselves, these state officials hold considerable power over individual legislators immediately preceding an election year. As an example, four out of the five LRB members ran for re-election or a higher state office after the 1981 redistricting effort.

In amending the present statute, the state should delete the provisions of section 28 of article III regarding the composition and operation of the LRB. Instead, an apportionment commission composed of five members should take the place of the LRB. The small size of the commission will assure maximum attendance on short notice, keep costs down, and allow for interaction of ideas. The composition of the commission should be as nonpartisan as possible, even though the legislative and executive leaders will appoint the members.

After publication of the census and prior to the end of the special redistricting session, four members would be appointed to the apportionment commission. The speaker of the house and the lieutenant governor would each appoint a nonpartisan, nonelected member. Those senators who are not members of the lieutenant governor's party would then caucus and appoint a member, and those representatives not members of the speaker's party would also select a member.

Within ten days after their designation, the four new commissioners would select a fifth member, who would serve as the chairperson of the commission. If the commissioners do not select a chairperson within the ten-day period, a majority of the Supreme Court of Texas would make the selection. The apportionment commission would dissolve once the courts and the Justice Department approved the redistricting plans. This procedure parallels the Montana, Connecticut, Hawaii, and Pennsylvania redistricting schemes. More detailed language describing the operations of the commission should be governed by statute. The suggested language for the constitutional amendment is as follows:

Prior to adjournment of the redistricting special session, an apportionment commission shall be established. The commission shall con-

137. Hobby Interview, supra note 111.
138. Lieutenant Governor Hobby ran for re-election; Comptroller Bob Bullock ran for re-election; Land Commissioner Bob Armstrong ran for Governor; Attorney General Mark White ran for Governor; and Speaker of the House Billy Clayton retired.
139. See CONN. CONST. art. 3, § 6(b); HAW. CONST. art. IV, § 4; MONT. CONST. art. V, § 14; PA. CONST. art. 2, § 17(b).
sist of five members, none of whom may be public officials. The Lieutenant Governor, the Speaker of the House, the minority members of the Senate, and the minority members of the House shall each select one member. Within ten (10) days of their designation, the four members so selected shall select, by a vote of at least three members, a fifth member who shall serve as the chair. If a chair is not selected within the ten (10) day time period, the chair shall be selected by a majority of the Supreme Court.

The second major factor concerns the time frame that the apportionment commission should follow. In order to avoid the timing problems mentioned in Terrazas v. Clements, the commission should either commence or resume operations upon the occurrence of one or more of four events: (1) the legislature fails to pass a congressional, senate, or house redistricting bill by the end of the mandatory special session; (2) the Governor vetoes one or more of the three redistricting bills following the special session; (3) the Justice Department rejects one or more of the plans; or (4) the state or federal courts declare a plan unconstitutional. The time frames for the commission should be established by statute. If one of the latter two events occurs, the apportionment commission would convene in Austin within seven days of the rejection. The commission would then have fourteen days to approve a new plan by majority vote and file the plan with the secretary of state. If one of the first two events occurs, the apportionment commission would convene within seven days but would have four weeks to devise a new plan. The difference in time is attributable to changes required by the Justice Department or the courts. These changes usually center on specific identified geographical areas and allow a limited alteration of the lines without a wholesale change in the plans. If the legislature and the commission must abide by strict redistricting criteria, the commission should impose few, if any, changes to the developed plans. The commission should have a month for plan review either if the legislature fails to pass a redistricting bill or the bill is subject to a gubernatorial veto. In those instances, the commission will have to do more extensive revising of the redistricting plans, although the commission should use the legislature's plan as the basis for its work.

The time periods currently established in section 28 should be reduced for three reasons. First, in 1981 the LRB effectively used only a fraction of the 150 days the Texas Constitution permits for redistricting. Second, the apportionment commission should use the legislature's maps as the basis for its modifications. Third, the commission is constrained by the same strict criteria as the legislature. Using the apportionment commission as a backup to the legislature should prove to be more efficient and equitable than continual special sessions or waiting two years to allow the legislature to draw new lines.

C. Declaratory Judgment

The courts can still play an important role in the redistricting process.

Prompt review of the redistricting plans is essential because resolution of all court challenges should take place before the next scheduled primary elections. Both the state and federal courts have jurisdiction over congressional and legislative redistricting plans. In *Clements v. Valles*\(^ {141}\) the plaintiffs filed suit challenging the constitutionality of the state legislative redistricting plans in the state court. In *Seamon v. Upham*\(^ {142}\) the plaintiffs filed suit challenging the federal constitutionality of the congressional and state redistricting plans. Several states use the state's supreme court as either a court of original jurisdiction\(^ {143}\) or as a backup to the legislature.\(^ {144}\) A preemptive declaratory judgment procedure would make prompt judicial review of all redistricting plans in the state courts possible.

Colorado, Kansas, and Florida require automatic review by the state supreme court.\(^ {145}\) Section 28 of article III should likewise reflect an amendment to provide for prompt judicial review of all redistricting plans. The Texas attorney general would be required to petition the Supreme Court of Texas for a declaratory judgment of the plan's validity once a redistricting plan passes the legislature and is signed by the Governor or is approved by the apportionment commission. Each plan would require submission within fifteen days after enactment, and the Texas Supreme Court would then have sixty days to make a ruling. If the court invalidates all or part of the plan, the apportionment commission would reconvene and have fourteen days to make revisions in response to the court's comments. The supreme court's declaratory judgment would preclude the filing of lawsuits in lower state courts.

The judicial declaration would be the last stage in the redistricting process. The remainder of this Article describes in detail the quantitative and qualitative criteria that the legislature and apportionment commission should consider during their deliberations. The Supreme Court of Texas would judge whether the plans satisfy the redistricting criteria in its declaratory judgment decision.

### IV. The Quantitative Criteria

Sections 25 through 28 of article III of the Texas Constitution provide little guidance in terms of the criteria that legislators should use to draw state legislative districts.\(^ {146}\) Because the Texas Constitution does not mention congressional redistricting, the only guidelines for drawing congressional boundaries are those provided by the courts, Congress, and the Justice

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\(^{141}\) 620 S.W.2d 112, 113 (Tex. 1981).

\(^{142}\) 536 F. Supp. 931, 936 (E.D. Tex. 1982).

\(^{143}\) See COLO. CONST. art. V, § 48; FLA. CONST. art. III, § 16; ILL. CONST. art. IV, § 3(b); MASS. CONST. arts. of amend. § 247; MICH. CONST. art. IV, § 6; OHIO CONST. art. XI, § 13; OR. CONST. art. IV, § 6.

\(^{144}\) CONN. CONST. art. III, § 6; ME. CONST. art. IV, pt. 1, § 3; MO. CONST. art. III, § 7; MONT. CONST. art. V, § 14; OKLA. CONST. art. V, § 110; PA. CONST. art. II, § 17; VT. CONST. ch. II, § 73; W. VA. CONST. art. VI, § 4.

\(^{145}\) COLO. CONST. art. V, § 48; FLA. CONST. art. III, § 16(c); KAN. CONST. art. 10, § 1(b).

\(^{146}\) See TEX. CONST. art. III, §§ 25-28.
Department. Redistricting may be a political process, but mandatory criteria can also limit legislators' freedom to draw lines with only personal or party interests in mind. The purpose of redistricting is to attain certain ends, and requiring legislators to use specific criteria will assist in meeting those ends.

The United States Supreme Court's decision in *Baker v. Carr*[^147] marked the beginning of judicial intervention in redistricting cases. Since the Court's 1973 decision in *Mahan v. Howell*,[^148] the focus has shifted from mathematical equality to questions concerning the quality of representation. Nevertheless, the criteria upon which a redistricting plan is based must initially address equality of representation because population represents the controlling element in apportionment cases.[^149] Equality of representation raises several issues: the need for identical requirements between the United States and state legislative district population, the effect of population deviations, and the appropriate population base.

### A. Measuring Population Equality

In order to understand the degree of population equality among legislative districts, it is necessary to understand the statistical measures the courts and drafters of redistricting plans use. The starting point is the "ideal" district population, which equals the total state population divided by the total number of districts.[^150] For example, according to the 1980 census, Texas's total population was 14,228,338.[^151] Dividing the number of congressional seats into the total population figure gives an ideal United States House district population of 526,977. Several different measures can be used to compute the extent to which district population varies from the ideal district population.

Perhaps the most commonly used measure of deviation by the courts is "range," a statement of population deviation of the most and least populous districts.[^152] The range can be expressed in either absolute or relative terms. Suppose, for example, that the ideal district population is 100,000, with the most populous district containing 103,000 and the least populous containing 99,000. The range is +3,000 to −1,000. In relative terms, the range is +3% to −1%, or a total variation of 4%. In the example, the overall absolute range is 4,000, while the overall relative range is 4%.

Another statistical measure represents the "average deviation" or "mean deviation," which equals the sum of all the individual district deviations di-

[^147]: 369 U.S. 186 (1962).
[^151]: Id.
vided by the total number of districts. Assume, for example, that a state with twenty congressional seats has fifteen districts with populations of 102,000 and five districts with populations of 94,000. The ideal district population is 100,000, and the sum of the deviations is 60,000. The absolute mean deviation, therefore, is 3,000, and the relative mean deviation is 3%. Mean deviation is often a more useful measure of variance than the range since the range may be deceptively large because of the deviation of only one or two districts.

B. Case Law—Congressional Districts

A review of the Supreme Court's treatment of redistricting population standards indicates two trends. First, the numerical standards for congressional districts are very strict and will probably remain so. Second, population requirements for state legislative districts will remain more flexible than congressional standards, but will probably become more stringent as computer technology makes smaller population deviations possible.

The standard for congressional plans is based on article I, section 2 of the United States Constitution. In 1964 the Supreme Court established the strict equal population standard for congressional districts in Wesberry v. Sanders. Other cases have adopted this standard. The Supreme Court has yet to adopt a de minimis population difference, but two of the Court's decisions provide evidence of constitutionally unacceptable population differences. In 1969 the Court struck down a Missouri congressional plan with a 5.97% overall relative range and a 1.6% relative mean deviation because it failed to satisfy the Wesberry population equality standard. This standard requires justification for a population variance, or proof that the variance is unavoidable. The Court went on to reject the reasons offered by the Missouri Legislature to justify the variance.

In 1978 the United States Supreme Court rejected a Texas congressional plan with a total relative range of 4.13% and a relative mean deviation of .745%. The Court specifically rejected the legislature's argument that the variances were necessary to preserve political subdivision boundaries. If the legislature rejected alternative plans with smaller total deviations during the redistricting process, then the state had the burden of proof when chal-

154. See U.S. CONST. art. I, § 2. United States Representatives will be “apportioned among the Several states . . . according to their respective numbers.” Id.
155. 376 U.S. 1, 18 (1964).
157. Weiser, 412 U.S. at 790; Kirkpatrick, 394 U.S. at 536.
158. Kirkpatrick, 394 U.S. at 536.
159. Id. at 530. The Missouri Legislature's reasons included breakup of political subdivisions, preference for compact districts, and practical consideration. Id.
160. Weiser, 412 U.S. at 785.
161. Id. at 791-93.
lenged in federal court. In *Karcher v. Daggett* the Supreme Court reiterated its position that no level of population inequality is too small to face challenge if the inequality could have been avoided by adoption of another plan. Once the plaintiffs had shown that the population differences could have been reduced, the state had the burden of proving with specificity that the variance was necessary to achieve a legitimate goal. Although the population difference provided for in the plans must be smaller than those in *Weiser, Kirkpatrick, and Karcher*, it is difficult to predict with certainty the outer boundaries of a population variance that would justify rejection of a congressional redistricting plan.

**C. Case Law—State Legislative Districts**

*Reynolds v. Sims* is the leading case concerning population variances between state legislative districts. *Reynolds* established three important requirements for state legislative reapportionment efforts. First, some deviation from the strict equality standard for congressional districts is acceptable in order to accommodate state interests. Second, the equal protection clause requires that a state make a legitimate effort to create state legislative districts as nearly of equal population as practicable. Third, courts should decide the degree of population equality that would meet constitutional standards on a case-by-case basis.

In 1973 the United States Supreme Court reaffirmed the difference between congressional and state legislative districts in applying the equal population standard in *Mahan v. Howell*. The Court based its differentiation on article I, section 2 of the United States Constitution, which lists population as the sole criterion of constitutionality in congressional reapportionment cases, and on the equal protection clause of the fourteenth amendment, which requires states to fashion districts generally equal in population. Under this differentiation courts may give states broader latitude for redistricting state legislative districts.

In cases in which federal scrutiny of population disparity is concerned, a three-level analysis of state legislative districts has evolved. First, a state reapportionment plan containing gross population disparities is unconstitutional per se and cannot be justified. Second, plans with an overall rela-

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162. *Id.* at 797.
164. *Id.* at 734.
165. *Id.* at 740-41. The Court gave as examples of such goals, compactness, respect for municipal boundaries, and avoiding contests between incumbents. *Id.*
167. *Id.* at 579.
168. *Id.* at 577.
169. *Id.* at 578.
173. *Id.* at 329. For example, an overall relative range of 16.5% is clearly unconstitutional. *Id.*; see also *Connor v. Finch*, 431 U.S. 407, 418 (1977).
tive range between 10.0% and 16.4% are prima facie unconstitutional but are not unconstitutional per se.\textsuperscript{174} The state must justify the deviation by showing that the plan is free from discrimination and is based on rational state policy.\textsuperscript{175} In the Texas case of \textit{White v. Regester}\textsuperscript{176} the United States Supreme Court held that a 9.9% range was not a prima facie violation of the Constitution.\textsuperscript{177} The Court went on to note that large variances between districts needed justification grounded in legitimate concern for state policy.\textsuperscript{178} The Court also pointed out that the average deviation of all state house districts from the ideal was only 1.82%.\textsuperscript{179} To date, preservation of county lines represents the only rational state policy that has justified a plan within the 10.0% to 16.4% relative overall range.\textsuperscript{180} Third, when the overall range is de minimis, that is less than 9.9%, the deviation is insufficient to establish a prima facie case of unconstitutionality.\textsuperscript{181} Minor deviations are insufficient to establish a prima facie case because: (1) census data are often inaccurate; (2) districts often experience different population growth rates; (3) “census persons” are not necessarily voters; and (4) attempts at achieving zero deviation would become an impossible, never-ending process.\textsuperscript{182} A plan with an overall range of less than 10%, however, is not necessarily safe from attack. The relative mean deviation in \textit{Gaffney}, for example, was less than 2%.\textsuperscript{183} A large relative mean deviation or a clear lack of good faith effort to minimize population disparity might cause a federal court to reject a plan with an overall relative range of less than 9.9% The only United States Supreme Court legislative redistricting case involving population inequality based on the 1980 census concerned the Wyoming House of Representatives.\textsuperscript{184} Wyoming’s constitutional policy of using counties as representative districts and ensuring that each county had at least one representative was sufficient for the Supreme Court to justify an average deviation of 16% and an overall range of 89%, an aberration from previous Supreme Court decisions.\textsuperscript{185}

\textbf{D. Population Deviations}

The Texas Constitution does not provide guidelines regarding appropriate population deviations for either congressional or state legislative districts.\textsuperscript{186} Although redistricting plans must meet the United States constitutional requirements as interpreted by the United States Supreme Court, nothing in

\begin{itemize}
\item \textsuperscript{174} Gaffney v. Cummings, 412 U.S. 735, 741 (1973).
\item \textsuperscript{175} \textit{Id.} at 743-45.
\item \textsuperscript{176} 412 U.S. 755 (1973).
\item \textsuperscript{177} \textit{Id.} at 763.
\item \textsuperscript{178} \textit{Id.} at 764.
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Mahan}, 410 U.S. at 328.
\item \textsuperscript{181} \textit{Gaffney}, 412 U.S. at 745.
\item \textsuperscript{182} \textit{Id.} at 745-51.
\item \textsuperscript{183} \textit{Id.} at 751.
\item \textsuperscript{184} \textit{See} Brown v. Thompson, 462 U.S. 835 (1983).
\item \textsuperscript{185} \textit{Id.} at 843-46.
\item \textsuperscript{186} \textit{See} \textit{TEX. CONST.} art. III, §§ 25, 26.
\end{itemize}
the United States Constitution or case law prevents imposition of stricter standards of population equality than the federal courts require. Therefore, an issue arises concerning the appropriate strictness of the population criteria. If the most important end in the redistricting process is to ensure districts of equal population, then perhaps redistricting plans should have a zero population variance. This approach, however, raises several problems. First, practical difficulties arise in attempting to achieve zero population deviation among districts. For example, population shifts will prevent districts from having equal populations in the future. Census data are not sufficiently accurate to make perfect district population estimates. In addition, as stated in Gaffney, criteria should not force legislatures and courts to engage in a never-ending search for the perfect redistricting plan. Second, the democratic principle of equal representation has never been considered the sole characteristic of the United States governmental system. Federal and state structures reflect other values. For instance, representation in the United States Senate is by state, not by population. One individual, the President or the elected Governor, can veto a bill that has been enacted by two legislative bodies. Equality of representation, therefore, is not a factor so important in our governmental scheme as to preclude any population deviation among districts. Third, very strict population standards prevent consideration of other interests in state legislative redistricting. Preservation of the integrity of political subdivisions, for example, might justify slight population variances among districts. Requiring all state districts to have an equal population might force the legislature to cut subdivision boundaries frequently. Therefore, any redistricting plan should allow for some population deviations among districts, especially those of the Texas House and Senate.

Common Cause suggests that state legislative district populations should have no more than a 5% overall relative range and that the relative range for congressional districts should be no more than 1%. Colorado has adopted the 5% maximum deviation figure for its legislative districts. Iowa has adopted Common Cause’s 5% and 1% standards. Due to the trends in court interpretation, the Texas Constitution or state statutes should contain amendments that include the maximum 5% overall relative range figure for state legislative districts. This percentage, substantiated by precedent, appears reasonable and ensures that the federal courts will not consider the redistricting plan prima facie unconstitutional.

The overall relative range for congressional districts should be less than 1%. In Seamon v. Upham the 1982 United States district court’s plan for redrawing Texas congressional districts had an overall relative range of

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187. 412 U.S. at 751.
189. Id. art. II, § 7; Tex. Const. art. IV, § 14.
190. Adams, supra note 32, at 857.
.28% and a relative mean deviation of .05%.194 The court justified these small deviations on the basis of the state interest in preserving certain traditional and historical boundaries.195 Because of the judicial trend in setting strict population variance standards, the amended constitution or statutory law should include a maximum overall relative range for Texas congressional districts of .5%. In addition, the Texas Constitution should mention that both legislative and congressional population deviations must meet the requirements of the United States Constitution. If the United States Supreme Court decides eventually to lower the overall relative range for either legislative or congressional districts, Texas redistricting bodies will have to follow the Court’s mandate.

E. Population Base

The federal census is admittedly not a perfect vehicle for counting population. In 1980 and 1981 various states and localities across the country made more than fifty challenges to the 1980 census.196 In Cuomo v. Baldridge197 the District Court for the Southern District of New York acknowledged a net undercount of the national population and held that blacks and Hispanics were disproportionally undercounted in the 1980 census.198 Although a reapportionment population base may exclude some “census persons” under certain circumstances, any plan failing to use census figures only survives under extraordinary circumstances. In Burns v. Richardson,199 for example, the United States Supreme Court held that the population base could exclude Hawaii’s large military population for redistricting purposes.200 States attempting to use alternative population bases, however, bear a heavy burden of proving validity if opponents challenge a reapportionment plan on the basis of specific discrimination.201

Total population represents the traditional base for congressional redistricting. The Texas Constitution requires apportionment of state representatives among the counties according to total population,202 but it also provides that state division of senatorial districts be according to the number of qualified electors.203 A “qualified elector” is a citizen over age eighteen who is not a convicted felon, a ward of the state, an “idiot” or a “lunatic.”204

Chet Upham, executive director of the Texas Republican Party, and six Republican senators challenged the LRB’s 1981 senate redistricting plan on

194. Id. at 950-51. 
195. Id. at 942. 
198. Id. at 1094-95. 
200. Id. at 94-96. 
201. Id. at 92-96. 
203. Id. § 25: “The State shall be divided into Senatorial Districts . . . according to the number of qualified electors, as nearly as may be . . . .” 
204. Id.
the ground that the LRB used total population rather than qualified electors as the base. The court upheld the senate plan and rejected the Republican argument that estimated voting age population should replace official census figures for total population. The court also disregarded population growth projections provided by the Republicans. In *Travis v. King* the district court struck down Hawaii’s legislative districts. The court further held that congressional plans must use the United States census figures pursuant to article I, section 2 of the Constitution.

Texas should therefore amend the redistricting sections of the state constitution to require specifically that apportionment of congressional, Texas Senate, and Texas House districts be on the basis of total population as reflected by the latest census figures. Although the methodology used by the Census Bureau has faults, it does provide more reliable data than estimates calculated by mathematicians. Because total population provides the most solid information for redistricting, the proposed Texas constitutional amendment should continue to use the census as the population base and to use total population for all redistricting plans.

F. *Other Constitutional Revisions*

In addition to revising section 25 to require apportionment of senate districts on the basis of total population, Texas should delete other sections of the Texas Constitution to reflect changes in federal law. An amendment, for example, should omit the clause in section 25 of the constitution prohibiting a single county from electing more than one senator. A federal court has declared that prohibition of a single county from electing more than one senator was unconstitutional. In *Kilgarlin v. Martin* a court invalidated section 26a, which limits the number of state representatives to which a county is entitled. Because the federal court declared these provisions unconstitutional as inappropriate redistricting criteria, an amendment should delete them from the Texas Constitution.

V. *The Qualitative Criteria*

The legislature and the apportionment commission must consider criteria other than population equality to ensure fair and effective representation. Redistricting determinations should include two types of qualitative criteria: (1) a prohibition against dilution of minority voting strength, and (2) a rec-

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205. Upham v. White, No. C-1068 (Dist. Ct. of Travis County, 261st Judicial Dist. of Texas, Jan. 27, 1982).
206. *Id.*
207. *Id.*
209. *Id.* at 556. Hawaii’s districts were based upon the number of “registered voters” and varied from the civilian population. *Id.* at 557.
210. *Id.* at 569-73.
211. A federal court has declared that prohibition of a single county from electing more than one senator was unconstitutional. Kilgarlin v. Martin, No. 63-H-390 (S.D. Tex., Jan. 11, 1965) (summary judgment).
213. *Id.* at 410.
214. *Id.* at 448.
ognition of specified state interests in reapportionment. Although the use of the population criterion limits the flexibility of the redistricting authority to draw districts of any size and composition, skilled mappers can draw boundaries within the prescribed population variances that serve purposes contrary to fair and effective representation. Indeed, many commentators have noted that the Supreme Court’s preoccupation with the one man, one vote principle has actually encouraged partisan gerrymandering by state legislatures.\textsuperscript{215} While the quantitative criteria affect an individual’s voting power, the primary qualitative criterion centers on the issue of diluting or minimizing the voting strength of racial or language groups.

The second category of qualitative criteria recognizes state interests in reapportionment. These state interests include the integrity of present political subdivisions, compactness, contiguousness, and nonpartisanship. Redistricting remains a matter of legislative concern, and constitutional criteria should therefore include legitimate state interests.

\textit{A. Minority Voting Strength}

The United States Supreme Court emphasized in \textit{Reynolds v. Sims}\textsuperscript{216} that the one man, one vote doctrine applied without regard to race or place of residence, and that every person has a right to participate in politics through the legislature.\textsuperscript{217} In \textit{Fortson v. Dorsey}\textsuperscript{218} the court suggested that opponents could challenge a reapportionment plan if it operated to minimize the voting strength of racial groups.\textsuperscript{219} The constitutional and statutory bases for racial discrimination claims are the fifteenth amendment, the equal protection clause of the fourteenth amendment, and sections 2 and 5 of the Voting Rights Act of 1965.

1. \textit{The Fifteenth Amendment and the Equal Protection Clause}\textsuperscript{220}

Dispute permeates the issue of the amount and type of evidence necessary to prove that a plan unconstitutionally dilutes minority voting strength. In \textit{City of Mobile v. Bolden}\textsuperscript{221} a plurality of the United States Supreme Court

\begin{itemize}
\item \textsuperscript{216} 377 \textit{U.S.} 533 (1964).
\item \textsuperscript{217} \textit{Id. at 565}.
\item \textsuperscript{218} 379 \textit{U.S.} 433 (1965).
\item \textsuperscript{219} \textit{Id. at 439}.
\item \textsuperscript{220} Because the courts have not analyzed the fifteenth amendment separately in this context, this Article discusses the fifteenth in conjunction with the fourteenth amendment.
\item \textsuperscript{221} 446 \textit{U.S.} 55 (1980).
\end{itemize}
required a showing of purposeful discrimination to prove a violation of the fourteenth or fifteenth amendments. Five Justices either dissented or found it unnecessary to determine the issue of discriminatory intent.

Several commentators questioned the appropriateness of the court’s holding in *Bolden v. City of Mobile, Alabama*. Reacting to the *Bolden* decision, Congress passed an amendment to section 2 of the Voting Rights Act that required a plaintiff challenging a voting practice to prove only a discriminatory “effect” rather than purpose. Congress rejected proportional representation as the test for determining discriminatory effect, and established a “totality of circumstances” test in evaluating a particular redistricting plan.

In *Thornburg v. Gingles* the Supreme Court interpreted the revised section 2 and held that the North Carolina Legislature had diluted the voting strength of black voters by the use of multimember districts. Justice Brennan, writing for the Court, held that multimember districts cannot satisfy the “totality of circumstances” if an area with a large minority population is geographically compact and yet large enough to constitute a single-member district. In addition, he noted that the white majority votes as a bloc so that the minority group’s preferred candidate usually loses. While interpreting the 1982 congressional amendments, the Court held that the test of a section 2 violation does not require a specific intent to discriminate. A violation is determined instead by reviewing the electoral process to determine if the plaintiffs have an equal opportunity to participate in the process and to elect candidates of their choice. The Court listed several objective factors for reviewing the “totality of circumstances” surrounding an alleged section 2 violation, including racial polarization and the

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222. *Id.* at 66-68.
223. *Id.* at 80-141.
228. *Id.* at 77-79.
229. *Id.*
230. *Id.* at 54-61.
231. *Id.* at 43-46.
232. *Id.*
electoral success of minority candidates.\textsuperscript{233}

In addition to a review of "objective" factors, the Thornburg Court developed a new three-part test that a minority group must meet in order to establish a vote-dilution claim under section 2.\textsuperscript{234} The test requires that a minority group prove that: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.\textsuperscript{235} The Thornburg Court held that all but one of the challenged multimember districts were characterized by racially polarized voting, a history of official discrimination in voting matters, education, housing, employment, and health services, and campaign appeals to racial prejudice.\textsuperscript{236} Those factors, in concert with the use of multimember districts, impaired the ability of geographically insular and political groups of black voters to participate equally in the political process and to elect candidates of their choice.\textsuperscript{237}

With respect to one of the multimember districts, a majority of the Supreme Court voted to reverse the lower court, holding that as a matter of law the lower court had ignored the continued success of black voters in the district.\textsuperscript{238} This success resulted in proportional representation that was inconsistent with the alleged unequal voting power of blacks.\textsuperscript{239} Several commentators have focused on the mathematical and statistical issues generated by the Thornburg ruling.\textsuperscript{240} Because particular groups do not have a constitutional right to proportional representation,\textsuperscript{241} the controlling numerical tests of a district's minority composition cannot determine constitutionality. The constitutionally protected right is one of equal access to the electoral process.\textsuperscript{242} A plaintiff challenging a redistricting plan must prove that the group in question had less opportunity than other residents to participate in the electoral process and elect legislators of its choice.\textsuperscript{243} Therefore, the Texas legislative process should specifically address the various elements that courts consider as corroborative evidence of invidious discrimination while encouraging participation of minority groups.

\begin{thebibliography}{9}
\bibitem{} see generally eichenthal, \textit{equal protection iii: voting rights, political gerrymandering, and proportional representation}, \textit{ann. surv. am. l.} 93 (1988); wildgen, definitions, measurements, and statistics: weeding wildgen's ticket, 20 urb. law. 175 (1988); wildgen, adding thornburg to the ticket: the ecological fallacy and parameter control in vote dilution cases, 20 urb. law. 155 (1988); note, fair and effective voting strength under section 2 of the voting rights act: the impact of thornburg v. gingles on minority vote dilution litigation, 34 wayne l. rev. 303 (1987).
\bibitem{} city of mobile v. bolden, 446 u.s. 55, 75-76 (1980).
\bibitem{} thornburg, 478 u.s. at 63.
\bibitem{} id.
\end{thebibliography}
2. Voting Rights Act of 1965

In general, opponents to redistricting plans initially challenge the plans under the rubric of section 5 of the Voting Rights Act of 1965.\(^\text{244}\) States that fall under section 5\(^\text{245}\) have an affirmative duty to show that changes in voting practices are nondiscriminatory.\(^\text{246}\) The first United States Supreme Court decision focusing on the substantive provisions of the Voting Rights Act is \textit{Beer v. United States}.\(^\text{247}\) Comparing the old and new apportionment schemes for the New Orleans City Council, the Court ruled that the new plan in question would enhance, rather than diminish, the effective exercise of the electoral franchise by New Orleans' blacks.\(^\text{248}\) The Court held that the purpose of section 5 was to ensure that a change in the process would not make it more difficult for minorities to elect a minority representative, a concept known as "nonretrogression."\(^\text{249}\) The Supreme Court made the crucial assumption that racial bloc voting would occur and that the outcome of future elections could be predetermined to an extent.\(^\text{250}\) In addition, the Supreme Court implicitly assumed that only minorities can adequately represent minorities in politics.\(^\text{251}\) The nonretrogression standard was affirmed and expanded by the Supreme Court in \textit{City of Lockhart v. United States}.\(^\text{252}\)

Federal courts enforcing the amended Voting Rights Act have employed guidelines to adjust federal census figures in light of the unique problems of racial minorities. A rule of thumb for the courts and the Justice Department is that a 65\% total population majority in a district is necessary in order to give blacks and Hispanics a reasonable opportunity to control electoral outcome.\(^\text{253}\) The 65\% figure represents an enhancement of roughly 15\%: 5\% accounts for the relatively smaller proportion of the racial minority that is eligible to vote, 5\% for lower minority registration rate, and 5\% for lower minority turnout expectations.\(^\text{254}\)

The panel of federal judges in \textit{Seamon v. Upham} \(^\text{255}\) challenged the bloc voting and "safe" district assumptions. The court recognized the dilemma of avoiding both "packing" a group of minorities into a single congressional district, and "fragmenting" a concentrated minority group, thereby diluting

\[\text{\footnotesize 244. 42 U.S.C. § 1973c (1982).}\]
\[\text{\footnotesize 245. 28 C.F.R. § 51.67 app. (1988).}\]
\[\text{\footnotesize 246. Id. § 51.59.}\]
\[\text{\footnotesize 247. 425 U.S. 130 (1976).}\]
\[\text{\footnotesize 248. Id. at 141-42.}\]
\[\text{\footnotesize 249. Id. at 141.}\]
\[\text{\footnotesize 250. See id.}\]
\[\text{\footnotesize 251. See id.}\]
\[\text{\footnotesize 252. 460 U.S. 125 (1983).}\]
\[\text{\footnotesize 254. Ketchum, 740 F.2d at 1415.}\]
\[\text{\footnotesize 255. 536 F. Supp. 931 (E.D. Tex 1981).}\]
minority voting strength. The court dealt with this issue by comparing the existing redistricting plan and the proposed plan to determine any retrogression in voting strength. United States District Court Judge Sam Johnson argued that no plan could guarantee that a “safe” district, one composed of a 65% minority population, would elect a minority candidate. Both the nonminority incumbents in the challenged districts had won the black vote by an overwhelming margin in the two previous elections but lost the vote of conservative whites by a substantial margin. The two representatives, who were greatly interested in the minority vote, apparently strengthened the minority influence on the electoral process.

The most recent decision regarding “safe” districts is the judicial redistricting case of Martin v. Mabus. Reviewing several Mississippi election results, the court found that blacks in Mississippi have enjoyed great election success in districts with black majorities of less than 65%. Because packing minority interests into judicial subdistricts would leave them without influence in other subdistricts and would further racially polarize judicial elections, the court established a 60% threshold figure.

3. Justice Department Standards

If the Justice Department had concrete guidelines for evaluating redistricting plans, the legislature and the apportionment commission could use such guidelines when drawing new district lines. The Justice Department uses the following factors to determine whether a submitted redistricting plan has a prohibited purpose or effect: (a) the extent to which malapportioned districts deny or abridge the right to vote of minority citizens; (b) the extent to which minority voting strength is reduced by the proposed redistricting; (c) the extent to which minority concentrations are fragmented among different districts; (d) the extent to which minorities are overconcentrated in one or more districts; (e) the extent to which available alternative plans satisfying the jurisdiction’s legitimate governmental interests were considered; (f) the extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and (g) the extent to which the plan is inconsistent with the jurisdiction’s stated redistricting

256. Id. at 949 n.27.
257. Id. at 954-58.
258. Id. at 949.
259. Id. at 953.
260. See id. Judge Johnson seemed to agree with the statement of Texas Senator Craig Washington: “We are sophisticated enough that we have arrived at the point where black people can represent white people and white people can represent black people and brown people can represent either or both. Anything less than that is patronizing.” Lenz, The 67th Stalls Out, GOP Woos Minorities, The Tex. Observer, June 12, 1981, at 7.
262. Id. at 333-34.
263. Id.
These factors are not fact specific or detailed. Nevertheless, addressing the Justice Department's elements of a valid plan, plus those in *Thornburg*, will significantly assist a state in complying with both section 2 and section 5 requirements. The Justice Department's preclearance procedure does not provide for extensive communication between the submitting agency and the Department during preclearance. As a result, it is difficult to draw a legally conforming plan. During the 1980 redistricting effort in Texas, United States District Court Judge Sam Johnson was greatly disturbed by the Justice Department's delay in ruling on the congressional redistricting plan. Because the standards used by the Justice Department and the courts when evaluating redistricting plans are still unclear, redistricting criteria should not include them. The legislature and apportionment commission, however, must remain sensitive to the Justice Department's guidelines.

4. Affirmative Representation

Judicial decisions indicate that no racial or partisan group has an absolute right to representation in proportion to its voting strength. The United States Supreme Court recognizes that a state legislature may draw districts with proportional representation if it desires. New York's 1977 redistricting plan was based on the Justice Department's representations that a 65% nonwhite assembly district would satisfy Department objections to the previous plan. New York submitted a plan that split the Hasidic Jewish community in New York City into two state assembly and senate districts. In response to a suit brought by Hasidic Jews, the United States Supreme Court held in *United Jewish Organizations of Williamsburg, Inc. v. Carey* that the deliberate use of race to reapportion is constitutional, provided no racial slur or stigma results. The use of racial criteria is not limited to efforts to overcome past discriminatory districting.

The legislature or apportionment commission should not use a criterion requiring safe districts. First, this criterion requires a belief in racial bloc voting. A more logical approach is Judge Johnson's theory that minorities can have a significant impact on the electoral process even though they do not constitute 65% of a district or have a minority representative. Second, the 65% threshold figure does not have a sound scientific or statistical basis, and it is subject to change. Third, the United States Supreme Court

266. For Judge Sam Johnson’s comment, see *supra* note 133.
270. *Id.*
271. *Id.*
272. *Id.* at 165.
273. *Id.* at 161.
274. See *supra* notes 255-266 and accompanying text.
has already established the requirement prohibiting retrogression of minority voting strength.\textsuperscript{276} Fourth, the process should limit the number of criteria to the most important elements and thereby ensure sufficient flexibility and allow formulation of a final plan without violating civil rights.

5. Proposed Constitutional Revisions

The present Texas constitutional sections concerning redistricting do not include specific qualitative criteria about minority representation. The Texas Constitution should therefore specifically state that redistricting is not to have the purpose or effect of diluting the voting strength of a language or racial minority group. This provision would satisfy the fourteenth and fifteenth amendment prohibitions against minority discrimination. Common Cause also recommends this provision in its model constitutional amendment.\textsuperscript{277} The provisions should not include specific standards set forth by the Justice Department because the standards are unclear and may change with shifts in the political climate. Based on the State of Iowa's experience,\textsuperscript{278} the following constitutional amendment is recommended: "No district shall, insofar as is possible, be created for the purpose, or result in the effect, of diluting the voting strength of a language or racial minority group."

B. Integrity of Political Subdivisions

In addition to the qualitative criteria prohibiting dilution of minority voting strength, other criteria, known as state interests in apportionment, are important. For example, preservation of county lines is a state interest that is recognized by the United States Supreme Court as a justification for an overall range of greater than 10\%.\textsuperscript{279} This state interest deters dilution of minority voting strength in that a plan that adheres to political subdivision lines presents fewer gerrymandering opportunities.\textsuperscript{280} The Texas Constitution requires that the drafters follow county lines as closely as possible when they draw Texas House district lines.\textsuperscript{281} In \textit{White v. Regester}\textsuperscript{282} the United States Supreme Court indicated that preservation of county lines in Texas would have justified the population variances in that case.\textsuperscript{283}

Two recent federal court opinions reveal the significance of honoring the integrity of political subdivision boundaries in the redistricting process. Justice Powell, in his concurring opinion in \textit{Davis v. Bandemer},\textsuperscript{284} discussed the Indiana Legislature's ignoring of traditional political subdivision lines in its

\begin{thebibliography}{9}
\bibitem{276} Beer v. United States, 425 U.S. 130, 141 (1976); see \textit{supra} text accompanying notes 249-252.
\bibitem{277} Adams, \textit{supra} note 32, at 877.
\bibitem{278} \textit{IOWA CODE ANN.} § 42.4.5 (West Supp. 1988).
\bibitem{280} \textit{Id.} at 581.
\bibitem{281} \textit{TEX. CONST.} art. III, § 26.
\bibitem{282} 412 U.S. 755 (1973).
\bibitem{283} \textit{Id.} at 764.
\bibitem{284} 478 U.S. 109, 176 (1986).
\end{thebibliography}
1981 redistricting.\textsuperscript{285} In \textit{Davis} the legislative members carved up counties and cities in an effort to achieve the best lines for the majority party.\textsuperscript{286} According to Justice Powell, the division of established communities tended to split those with similar interests and caused nonparticipation by voters.\textsuperscript{287}

In \textit{Martin v. Mabus},\textsuperscript{288} the first court-imposed redistricting of judicial districts, the court pointed out the importance of protecting communities of interest and used factors of contiguity, compactness, natural boundaries, and preservation of existing precinct lines in redistricting.\textsuperscript{289} Many courts have held that the legislature must respect the boundaries of political subdivisions.\textsuperscript{290} In addition, several states use the redistricting criterion of protection of political subdivision boundaries.\textsuperscript{291}

The preservation of political subdivisions requirement should be included as a qualitative criterion for at least two reasons. First, use of political boundaries limits the redistricting authority's discretion to gerrymander. Second, because much legislation affects local governments, cities and counties should have their own identifiable representation in the legislature. Unnecessary fragmentation of political subdivisions undermines the ability of constituencies to organize and increases voter confusion regarding district concerns.\textsuperscript{292} Protecting the integrity of political subdivisions, on the other hand, greatly limits the flexibility of the redistricting body. Texas House districts are much more difficult to draw than the Texas Senate districts because of the constitutional prohibition against cutting county lines.\textsuperscript{293} The redistricting body has more leeway in forming senate districts because the senate is not constrained by the restriction of following county boundaries. The Supreme Court of Texas declared the Texas Legislature's 1981 house plan invalid for the "wholesale cutting" of county lines in violation of section 26.\textsuperscript{294}

The benefits of preserving the integrity of political subdivisions, however, outweigh the loss of flexibility. Subject to the quantitative criteria and the nondilution of minority voting strength criterion, the Texas House and Senate and United States House redistricting plans should retain the current protections of county lines. In addition, they should to an extent preserve

\textsuperscript{285} Id.
\textsuperscript{286} Id. at 176-77.
\textsuperscript{287} Id. at 176-79.
\textsuperscript{288} 700 F. Supp. 327 (S.D. Miss. 1988).
\textsuperscript{289} Id. at 334-36.
\textsuperscript{291} ALA. CONST. art. IX, § 198; ALASKA CONST. art. VI, § 6; CAL. CONST. art. XXI, § 1; COLO. CONST. art. V, § 47; MD. CONST. art. III, §§ 3, 4; MASS. CONST. art. of amend. CL, §§ 2, 3; MICH. CONST. art. IV, § 2; NEB. CONST. art. III, § 5; OHIO CONST. art. XI, § 6; W. VA. CONST. art. VI, § 4; HAW. REV. STAT. § 25-2 (1985); IOWA CODE ANN. § 42.4.2 (West Supp. 1988); N.C. GEN. STAT. § 163-132.2 (1988); WIS. STAT. ANN. § 4.001(3) (West 1986).
\textsuperscript{293} See TEX. CONST. art. III, § 26.
boundaries of other political subdivisions. The models for the proposed amendment to the Texas Constitution are found in the Colorado Constitution and Common Cause's model constitutional amendment:

To the extent consistent with the stated criteria, district lines shall be drawn so as to coincide with the boundaries of local political subdivisions. Within counties whose territory is contained in more than one district, the number of cities and towns whose territory is contained in more than one district shall be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions shall be divided before the less populous.295

C. Geographical Criteria

The Texas Constitution does not include specific geographical criteria for state or congressional districts. The courts, however, view satisfaction of geographical criteria as a desirable goal.296 A district is compact if it is square or rectangular in shape, to the extent such a shape is permitted by natural or political boundaries. The requirement of compact districts reduces the possibility of gerrymandering. Nineteen states require compact districts.297

Contiguosity means that parts of a district may not be geographically isolated. One federal court has required that districts be contiguous despite an absence of statutory authority.298 Twenty-five states require that some or all of their state or congressional districts be contiguous.299

The Texas Constitution requires contiguous territory in state senate and house districts.300 The Texas Constitution, however, does not provide geographical criteria for congressional districts. Because of the benefits of reducing gerrymandering and grouping constituents, both congressional and state legislative districts should be contiguous and compact.

The Texas Constitution should include a provision that requires the legis-

295. Adams, supra note 32, at 899-900; see COLO. CONST. art. V, § 47(2).
297. See, e.g., ALASKA CONST. art. VI, § 6; COLO. CONST. art V, § 47; ILL. CONST. art. III, §§ 3, 4; MD. CONST. art. III, § 4; MICH. CONST. art. IV, § 2; MO. CONST. art. III, § 45; MONT. CONST. art. V, § 14; N.J. CONST. art. IV, § 2; N.Y. ELEC. LAW § 4-100 (1986); Okla. CONST. art. V, § 9A; PA. CONST. art. II, § 16; R.I. CONST. art. VII, § 1, art. VIII, § 1; VT. CONST. ch. II, § 13; VA. CONST. art. II, § 6; W. VA. CONST. art. VI, § 4; W. Va. CONST. art. VI, § 1; WASH. STAT. ANN. § 4.001 (West 1986); Wis. STAT. ANN. § 4.001 (West 1986).
299. See, e.g., ALA. CONST. art. IX, § 200; ALASKA CONST. art. VI, § 6; CAL. CONST. art. XXI, § 1; COLO. CONST. art. V, § 47; CONN. CONST. art. III, §§ 3, 4; DEL. CONST. art. II, § 2A; ILL. CONST. art. IV, § 3; IOWA CONST. art. III, § 34; MD. CONST. art. III, § 4; MASS. CONST. art. of amend. CI, § 247; MICH. CONST. art. IV, § 2; MINN. CONST. art. IV, § 3; MO. CONST. art. III, § 45; MONT. CONST. art. V, § 14; N.J. CONST. art. IV, § 2; N.Y. ELEC. LAW § 4-100 (1986); Okla. CONST. art. V, § 9A; PA. CONST. art. II, § 16; VT. CONST. ch. II, § 13; VA. CONST. art. II, § 6; W. VA. CONST. art. VI, § 4; WASH. STAT. ANN. § 4.001 (West 1986); Wis. STAT. ANN. § 4.001 (West 1986).
lature and apportionment commission to draw districts consisting of "convenient contiguous territory." In addition to the literal requirement of physical contiguity, this term implies public transportation and communication in the applicable standard. Three state constitutions include the "convenient contiguous territory" requirement. Iowa's compactness criterion consists of detailed statistical formulas. In order to assist the legislature and the commission, the Texas compactness standard should avoid unnecessary mathematical complexity. The standard should refer to the Common Cause definition of compactness as a qualitative criterion in the Texas redistricting process:

Districts shall be compact in form. The aggregate length of all districts shall be as short as practicable consistent with the criteria of equal population, nondilution of minority voting strength, integrity of political subdivisions, and convenient contiguous territory.

D. Protection of Political Parties

That politics plays a role in redistricting has historically been recognized by the United States Supreme Court. As a result, the Court has kept a "hands off" approach to the partisan gerrymandering issue. The Court, however, recently found the issue of political gerrymandering to be justiciable in *Davis v. Bandemer*. A plurality of the Court agreed with the lower court that both intentional discrimination and actual discriminatory effect are necessary to prove an equal protection clause violation. To prove a prima facie case, a plaintiff must show that the plan will have a sufficiently serious effect to require intervention by the federal courts.

In *Badham v. Eu* a three-judge panel, interpreting the *Davis* holding, ruled that California's congressional plan was justiciable, but dismissed the claim because the plaintiffs could not prove that the Republican Party's interests had been ignored in the process. On appeal, the Supreme Court dismissed the case for lack of jurisdiction.

Despite the effect of partisan discrimination, the discussion in *Davis* regarding the problems of intentional discrimination against a political party is logical and valid. As Texas becomes a true two-party state, constitutional criteria should include a prohibition against intentional partisan discrimination. The following constitutional amendment language is therefore suggested: "No district shall, insofar as is possible, be created for the purpose of

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307. *Id.* at 129.
308. *Id.* at 134.
310. *Id.* at 670.
diluting the voting strength of a political party."

E. Preservation of Incumbents

One of the more controversial issues in redistricting involves the preservation of incumbents. This issue is of foremost concern to the legislators who draw the district lines. The United States Supreme Court has indicated that invidious discrimination is not established solely by showing that a redistricting plan is drawn to minimize or avoid contests among incumbents.\(^{313}\) One policy rationale for protecting incumbents is the desire to maintain “constituency” or “representative” relations.\(^{314}\) In addition, a state may regard preservation of congressional seniority as important.\(^{315}\) The United States Supreme Court has held that avoiding election contests between incumbents can justify population deviations.\(^{316}\)

On the other hand, Delaware and Hawaii have antigerrymandering statutes that forbid legislators to favor any incumbent legislator.\(^{317}\) The use of political data such as the political affiliations of registered voters and the addresses of incumbent legislators invites political gerrymandering. The redistricting process should not necessarily encourage or discourage preservation of incumbents. The Texas Constitution should, therefore, not include criteria concerning the preservation of incumbents.

F. Preserving Socio-Economic Communities of Interest

Five states have provisions designed to protect socio-economic communities of interest in redistricting.\(^{318}\) In addition, several courts have suggested that they regard this criterion as important in establishing the legality of a redistricting plan.\(^{319}\) The policy behind this criterion is that one socio-economic group should not be disadvantaged by being placed in a district where it will be dominated by another socio-economic group.

The Texas Constitution should not include the preservation of socio-economic communities of interest as a redistricting criterion for three reasons. First, these interests are difficult to define. Second, the qualitative criteria provisions already include the specific communities of interest that are most in need of protection. Third, the idea of “socio-economic communities of interest” is so broad that it could grant the apportionment commission too much discretion.\(^{320}\)

\(^{312}\) See IOWA CODE ANN. § 42.4.5 (West Supp. 1988).

\(^{313}\) White v. Weiser, 412 U.S. 783, 791 (1978); Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966).

\(^{314}\) Weiser, 412 U.S. at 791.

\(^{315}\) Id.


\(^{317}\) DEL. CODE ANN. tit. 29, § 806 (1983); HAW. CONST. art. III, §§ 2, 3.


\(^{320}\) Adams, supra note 32, at 879.
VI. Other Redistricting Concerns

The revisions discussed so far concern the redistricting provisions in sections 25 through 28 of article III of the Texas Constitution. Texas can make two improvements without affecting those sections. First, the state should improve the outreach hearing format. Second, the state should increase the number of state senate seats to equal the number of congressional seats allocated to the state.

Justice Powell, in his concurring opinion in *Davis v. Bandemer*, focused on how a challenged plan was adopted. In *Davis* the Indiana General Assembly Conference Committee drew the redistricting maps with the use of a computer firm engaged by the Republican State Committee. Members of the Democratic Party and public were not provided any information about the computer program. In addition, no public hearings were held at the time of the map-making. Two days before the end of the regular session the conference committee released its plan, which both houses of the general assembly adopted by party line vote.

Although Justice O'Connor's plurality opinion did not discuss this issue in great detail, the lack of an opportunity for public input seems to have had an effect on the Court. Because apprising the public of the manner in which a redistricting plan is put together will not greatly disadvantage the political actors involved, legislative procedures should encourage public hearings. The Texas Legislature should establish the procedures by statute and by senate and house rules.

A. Outreach

A state's submission to the Justice Department must include information about citizen input. During the 1981 regular session of the Texas Legislature, the state held public outreach hearings in eight cities across the state. Only after the outreach hearings concluded did those in charge of redistricting begin drawing district lines. The congressional and senate redistricting plans initially proposed in the Texas Senate were based primarily on the data gathered from the outreach hearings. Outreach could be improved in three ways. First, the drafters of the redistricting plan should seek citizen input early in the session, even though the United States Census Bureau does not usually release the census figures until April. Second, the outreach hearings should encourage more discussion of the necessary addition or removal of specific areas from the districts at issue in the hearings. Population shifts within the state are evident before the Census Bureau releases the census figures. The public hearings should therefore direct attention to specific counties and communities that the redistrict-

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322. See id. at 144-61.
323. 28 C.F.R. § 51.28 (1980).
325. Id. at 531.
326. Id. at 531-35.
ing body will have to add to or remove from the districts at issue. Third, those organizing the outreach hearings should attempt to obtain a wider variety of input. Most of the individuals testifying at the April 1981 hearings were party officials, elected officials, and representatives of special interest groups. Although few people who are not intimately connected with politics have the knowledge or time to testify, every effort should be made to encourage input from other members of the public.

B. Increased Number of Senate Seats

Because of the large population growth Texas has experienced in recent years, an increase in the number of state senators is appropriate. Following the 1980 census, the average population per Texas Senate district rose from 361,185 to 458,987, the second highest in the nation at that time. Texas also had the sixth highest average population per house district in the nation in 1980. Following the 1980 census, the average grew from 74,645 to 94,854.

An increase in the number of senate districts would result in more effective representation and easier redistricting in the future. A large district population makes effective communication between the legislator and his or her constituents difficult. In addition, a large district usually contains diverse constituents whose goals may conflict. Texas will continue to experience population growth in the Dallas—Fort Worth, San Antonio, Houston, and Rio Grande Valley areas of the state. Those incumbents from districts with a lower growth rate will continue to protect personal and constituent interests during any redistricting. Increasing the number of districts will enlarge the pie that can be shared.

An increase in the number of districts, however, would result in greater cost and possibly greater disorder in the legislature. In addition to paying the salaries of additional legislators, the taxpayer must pay for a larger support staff and higher office expenses. At a time when taxpayers are reluctant to support existing governmental services, they may not favor a proposition requiring an additional expenditure of public funds. Also to be considered is that the fewer the legislators, the more easily a legislative consensus arises. According to one elected official, “the quality of the work product is inversely proportional to the size of the legislative body.”

Article III, section 2 of the Texas Constitution establishes a senate membership of 31 and a current house membership of 150. Texas should amend the section to specify that the number of state senators is to equal the state’s allocation of congressional representatives. Such an amendment

327. Id.
329. Id.
330. Hobby Interview, supra note 111.
331. TEX. CONST. art. III, § 2. The Texas Constitution provides for the house of representatives to consist of 93 members until the first apportionment. At any time after the first apportionment, the legislature may increase the ratio by not more than one representative for every 15,000 inhabitants with today’s upper limit of 150 representatives.
would give each of the major Texas cities an additional member and would reflect the probable population growth in the next census. Because each of the major metropolitan areas would gain additional representation, chances for approval of a constitutional amendment would be greater. In addition, an increase in senators will provide an easier means of satisfying the prescribed criteria, especially preservation of political subdivisions, compactness, and contiguousness.

VII. Conclusion

The problems in Texas's past redistricting sagas illustrate the need for change. Like any aging machine, Texas's redistricting procedures are in need of an overhaul. Many changes have taken place since 1869 when the state instituted its system of redistricting, and the guidelines established at that time are not appropriate today.

The proposal in this Article attempts to accomplish three things. First, it takes some of the "politics" out of an inherently political process by replacing the LRB with a more independent commission and requires the use of criteria for United States congressional, and Texas Senate and House districts. Second, it links the various chains in the process—the Texas Legislature, the apportionment commission, the United States Department of Justice, and the courts. Third, it anticipates problems (such as rejection by the Justice Department) and provides for solutions (action by the apportionment commission).

Initial redistricting authority will remain with the Texas Legislature and will take place in a summer special session following the release of the census data. Strict criteria will have to be followed: (1) congressional districts must be within .5% of the "ideal" population, while state legislative districts must be within 5% of the "ideal"; (2) statistical calculations will be based on total population for all districts; (3) dilution of minority voting strength and retrogression is prohibited; and (4) the redistricting body must consider the state interests of preserving the integrity of political subdivisions, geographical criteria, and nonpartisanship.

The backup in the redistricting system is the apportionment commission composed of five members, none of whom may be an elected or party official. If the legislature fails to pass a congressional bill, the Governor vetoes the bill, the Justice Department rejects the plan, or the courts strike down the plan, the system triggers action by the apportionment commission. Subject to strict time constraints, the commission is responsible for altering the plan to satisfy congressional, statutory, or administrative requirements while using the legislature's plan as a base.

Although apportionment is an inherently political process, one hopes that the fiasco following the approval of the 1981 redistricting plans will not be repeated in 1991. If history is repeated, however, the legislature and the public should carefully consider a wholesale change to the existing Texas redistricting system as our state enters the twenty-first century.