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I. INTRODUCTION

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.1

With these words in 1964, Earl Warren, Chief Justice of the United States Supreme Court, explained the basic principle underlying the Court's landmark decision in Reynolds v. Sims,2 which declared the apportionment3 of the Alabama Legislature invalid as invidiously discriminatory under the fourteenth amendment to the United States Constitution.4 Only two years earlier in Baker v. Carr5 the Supreme Court for the first time had clearly established that federal courts can consider whether state legislative apportionments are violative of the United States Constitution. By providing access to federal courts for persons who believe that the apportionment of their state and local legislative bodies deprives them of equal participation in the political process and fair representation of their interests, the Supreme Court departed sharply from prior practice by venturing into an area that was described by some as a political thicket and a mathematical quagmire.6 Yet, despite the warnings that preceded these decisions and the outcries that accompanied them,7 Chief Justice Earl Warren emphasized, on his retirement from the Court, that these decisions and their progeny were the most significant of any rendered during his tenure as Chief Justice.8

3. Throughout this Article the terms “apportionment,” “reapportionment,” and “redistricting” often are used interchangeably. In the technical sense the terms are not synonymous, as “apportionment” and “reapportionment” more properly refer to the result of the process of allocating members of the legislative body among areas or political subdivisions, while “redistricting” entails the actual drawing of district lines. As noted by the district court in Kilgarlin v. Martin, 252 F. Supp. 404, 410 n.1 (S.D. Tex. 1966), rev’d in part and remanded sub nom. Kilgarlin v. Hill, 386 U.S. 120 (1967), Congress “apportions” United States Representatives among the states, and a state actually “districts.” The Supreme Court, however, has not utilized the technical meaning of the terms. See, e.g., Mahan v. Howell, 410 U.S. 315, 320 (1973), in which Mr. Justice Rehnquist refers to “state reapportionment statutes for federal congressional districts.” Some effort is made in this Article to employ the terms in the technical sense, but on occasion, for purposes of simplicity, the terms are used interchangeably.
4. U.S. CONST. amend. XIV.
5. 369 U.S. 186 (1962).
6. See id. at 268 (Frankfurter, J., dissenting); Colegrove v. Green, 328 U.S. 549, 556 (1946).
8. N.Y. Times, June 27, 1969, at 17, col. 6; see Chu, Political Efficacy: The Problems of Money, Race, and Control in the Schools, 1977 Wis. L. Rev. 989, 992 n.16.
By virtue of these decisions and the Federal Voting Rights Act of 1965,9 state and local governments today confront the prospect of significant federal scrutiny of legislative and political processes that, under more traditional standards of judicial review, would be immune from challenge. Persons representing a variety of racial, economic, or political interests within the several states have evidenced dissatisfaction with existing or proposed districting plans and have made use of the availability of this federal intervention in attempts to change their state legislative bodies or congressional delegations. Almost every state has been affected.10

In most states, responsibility for reapportionment resides with the state legislature.11 The purpose of this Article is to provide some guidance to members of these legislatures to aid them in enacting reapportionment plans that comply fully with the requirements of the United States Constitution and federal law and that will withstand federal or state court review. With the litigious experience of the State of Texas serving as background, this Article seeks to assist in the identification of reapportionment factors that characterize plans that are genuinely representative and that embody legitimate federal, state, and local goals. The United States Supreme Court has stated on many occasions that reapportionment is primarily a matter for legislative consideration and determination.12 This Article is intended to assist state legislatures in retaining this authority.

II. REAPPORTIONMENT: AN HISTORICAL PERSPECTIVE

A. Limited Federal Intervention

Until two decades ago, the focus of federal involvement in state elections was on the impact of federal legislation on the state's power to prescribe qualifications for federal officials and to regulate state elections for federal offices.13 In the late nineteenth century, the United States Supreme

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10. By the end of the 1960's, at least one house in every state had been reapportioned based on the decision in Baker v. Carr. 18 THE BOOK OF THE STATES 1970-1971, at 57-58, 82-83 (1970). As discussed later in Part II, see notes 82-116 infra and accompanying text, this process of reapportioning through state court or federal intervention continued actively through the 1970's. The mere redrawing of districts, with resulting decreases in the disparity of population among the districts, however, does not necessarily result in more equal representation. Many writers suggest that the effect of federal intervention in the reapportionment process has not been as great as first expected. See, e.g., W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY (1974); Elliott, Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment, 37 U. CHI. L. REV. 474, 481 (1970); Smith, The Failure of Reapportionment: The Effect of Reapportionment on the Election of Blacks to Legislative Bodies, 18 HOW. L.J. 639 (1975).
11. Forty states entrust at least initial authority for reapportionment to the state legislature. Eleven of these provide for some other state officer or officers to reappoartment if the legislature fails. Nine other states give the authority initially to the governor or to a board or commission. Two other states have the reapportionment prepared initially by a board and then submitted to the legislature. 22 THE BOOK OF THE STATES 1978-1979, at 15-16 (1978); see Adams, A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 HARV. J. LEGIS. 825, 846-49 (1977).
13. During this period the United States Supreme Court generally viewed the power to
Court established that, under article I of the United States Constitution, Congress has broad authority to supervise such elections through appointment of election officers, enforcement of regulations, and imposition of sanctions. The Court further determined that state enactments in conflict with federal law are void. For approximately seventy years after the establishment of this broad congressional power over elections of federal officials, however, the Court did little to augment federal involvement in this area of state conduct.

During this period of restraint by the Supreme Court, major changes occurred in the population of the country. Not only did the population of the country grow, but the distribution of the population changed significantly. Migration altered the relative population among the states as well as between the rural and metropolitan areas within each state. These changes caused increasingly difficult decisions for those state authorities required by law periodically to redraw state legislative and congressional districts on the basis of population. In many instances, the members of state legislative bodies were in essence mandated through reapportionment to redraw districts in a manner that would significantly reduce the legislative influence of their constituency and endanger their own chances for reelection. Consequently, many state legislatures failed to comply with applicable mandates for periodic reapportionment. With each decade of inaction, the malapportionment among districts became more severe.

Congress, which in 1842 had mandated that congressional districts be contiguous and in 1872 had directed that they contain "as nearly as practicable an equal number of inhabitants," was also aware of the pressures of demographic change. Although Congress passed reapportionment acts incorporating these principles following each census through the Re-regulate elections for federal offices as concurrent with the states' power to set qualifications and regulate the elections within their boundaries. See, e.g., Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900).

15. See Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Gale, 109 U.S. 65 (1883); Ex parte Clark, 100 U.S. 399 (1879); Ex parte Siebold, 100 U.S. 371 (1879).
19. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491. This requirement was dropped in the Act of May 23, 1850, ch. 11, § 25, 9 Stat. 428, but then reinstated in the Act of July 14, 1862, 12 Stat. 572.
apportionment Act of 1911, it failed to pass an act immediately following the 1920 census. When the federal Reapportionment Act of 1929 finally passed, it dropped the requirements of compactness, contiguity, and equality in population for congressional districts. The prevalent attitude in Congress was that districting was a matter largely or even exclusively for the states. This attitude persisted through the next two decades.

The reapportionment conflict did not reach the United States Supreme Court until 1932. In that year the Court held that a state congressional redistricting bill is ordinary legislation requiring a governor's signature in order to become law. The Court also upheld congressional legislation prescribing remedies, including at-large elections, for state failure to redistrict its congressional delegation. In the same year the Supreme Court held that the provisions of the federal Reapportionment Act of 1911 requiring compactness, contiguity, and population equality among congressional districts had expired and had been superseded by the Reapportionment Act of 1929. Limiting its decision to the question of congressional intent, the Court did not determine the broader issue of the impact of these requirements under the Constitution.

The Supreme Court decided the watershed reapportionment case, Colegrove v. Green, in 1946. In Colegrove a sharply divided Court dismissed a suit complaining of malapportionment among Illinois' congressional districts due to the state's failure to reappropriate. Writing for the Court, Justice Frankfurter warned that scrutiny of state apportionment and districting decisions would involve the courts in a "political thicket" of party interests, party contests, and political questions that are not justiciable. Justice Rutledge, concurring in the result, cast the deciding vote for dismissal, reasoning that while the review of apportionment was within the subject matter jurisdiction of the federal courts, it was an issue of equity so delicate that the courts should exercise their power only in the most compelling circumstances.

During the sixteen years following the decision in...
Colegrove, the Supreme Court was presented with numerous opportunities to consider the merits of challenges to congressional districting plans as well as to allegedly malapportioned local governments and state legislatures. On each occasion, however, the Court dismissed the challenges on narrow, equitable grounds.32

The period extending from the latter part of the nineteenth century to the time of the landmark decisions of the Warren Court in the 1960's generally can be viewed as an era of federal restraint from involvement in state election matters. In several instances, however, the Supreme Court broadened the definition of the personal right to vote under federal law in such a way as to begin to intertwine this personal right with the right of a group to be protected from a state's illegal activity.33 These cases, in conjunction with the earlier ones that had established the broad supervisory power of Congress,34 provided a foundation from which the Supreme Court could enter the area of legislative apportionment.

B. The 1960's

In 1962 the issue of malapportioned state legislatures again came before the United States Supreme Court in Baker v. Carr.35 The State of Tennessee had not reapportioned its state legislature since 1901, even though its

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32. Matthews v. Handley, 361 U.S. 127 (1959) (per curiam) (Court affirmed refusal to strike down state income tax on basis that legislature malapportioned); Hartsfield v. Sloan, 357 U.S. 916 (1958) (Court refused to exercise powers of equity); Radford v. Gary, 352 U.S. 991 (1957) (per curiam) (Court affirmed district court refusal to mandamus the Governor to call a special session and legislature or state court to apportion); Kidd v. McCanless, 352 U.S. 920 (1956) (per curiam) (Court dismissed appeal from Tennessee Supreme Court decision in which state court refused to invalidate the Tennessee reapportionment based on the state law of remedies, i.e., "de facto" officers); Cox v. Peters, 342 U.S. 936 (1952) (per curiam) (Court dismissed challenge to state primary elections because not "state action"); Remmey v. Smith, 342 U.S. 916 (1952) (per curiam) (Court dismissed as premature); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950) (per curiam) (Court found no substantial federal question where state court refused to upset city council seats and there was a rational justification urged for the challenged districting); South v. Peters, 339 U.S. 276 (1950) (Court refused to exercise powers of equity); MacDougall v. Green, 335 U.S. 281 (1948) (per curiam) (Court in equity would not act to void state's requirement that there be at least minimum support for nominees for state-wide office); Colegrove v. Barrett, 330 U.S. 804 (1947) (per curiam) (Court affirmed appeal for want of equity as exercise of discretionary power of district court); Cook v. Fortson, 329 U.S. 675 (1946) (per curiam) (Court dismissed as moot). Several federal district courts, however, assumed jurisdiction during this period, but found the issues mooted by intervening events. See Magraw v. Donovan, 159 F. Supp. 901 (D. Minn. 1958); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956); Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956), rev'd, 256 F.2d 728 (9th Cir. 1958). While most state courts also adopted a posture of nonintervention, there were several exceptions. See Stiglitz v. Schardien, 239 Ky. 751, 40 S.W.2d 715 (1931); Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705 (1960); State ex rel. Attorney Gen. v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892).


34. See note 15 supra and accompanying text.

35. 369 U.S. 186 (1962).
state constitution required reapportionment every ten years. The disparity in population among the state legislative districts had reached gross proportions, causing significant underrepresentation for the state metropolitan areas. The Supreme Court abstained no longer. It found that Charles Baker, as a citizen of Tennessee, had standing to complain that the apportionment of the state legislature invidiously discriminated against him in violation of the United States Constitution, that the federal courts had jurisdiction to consider such a claim, and that the claim was justicia-
ble. In his lengthy opinion for the majority of the Court, Justice Brennan considered the many cases in which the Court previously had followed the policy of nonintervention in apportionment or political matters and decided that the cases were either inapposite or generally involved issues of equity calling for the exercise of the Court's discretion. Justice Brennan explained that the holdings in the previous cases did not mean that the issue of malapportionment was beyond the reach of the federal courts or the scope of the United States Constitution. Justice Clark's concurrence suggested the policy behind the Court's departure from past practice when he concluded that the voters of the state were caught in a "legislative strait jacket" and that the federal courts had become the only recourse for a majority of persons because the legislative policy of the members of the Tennessee Legislature had been to rivet the present seats in the legislative body to their own respective constituencies, even in the face of a state constitutional mandate to the contrary. In this landmark decision the Supreme Court swept past the issue of malapportioned congressional districts posed in Colegrove v. Green and opened the doors of the federal courts to persons prepared to challenge the existing apportionment of their own state legislative bodies. Within nine months, suits were pending in at least thirty-four states.

Although Baker v. Carr had established the right of a plaintiff to have his complaint heard, it did not establish a standard for courts to follow

36. TENN. CONST. art. II, §§ 5-6.
37. 369 U.S. at 237. The Court was not unanimous in its decision to venture into the political thicket. In a dissenting opinion, joined by Justice Harlan, Justice Frankfurter accused the Court's majority of a "massive repudiation of the experience of our whole past in asserting destructively novel judicial power." Id. at 267 (Frankfurter, J., dissenting).
38. 369 U.S. at 208-37.
39. Id. at 209-10.
40. Id. at 259 (Clark, J., concurring).
41. Id. at 258.
43. Reynolds v. Sims, 377 U.S. 533, 536 n.30 (1964). By May 1964 there were suits pending in 39 states. Actions had been consummated in three additional states. Rhine, State-by-State Summary of Legislative Apportionment [As of May, 1964], in LEGISLATIVE APPORTIONMENT: KEY TO POWER 155-69 (H. Hamilton ed. 1964). For a survey of state reapportionment actions and suits filed during this period to require reapportionment of state legislative or congressional districts, see COUNCIL OF STATE GOVERNMENTS, LEGISLATIVE REAPPOR-TIONMENT IN THE STATES (1964) [hereinafter cited as LEGISLATIVE REAPPOR-TIONMENT].
when determining these cases on their merits. Federal district courts across the nation struggled with their new-found power. In 1963 the Supreme Court provided the lower courts with some guidance when it reached the merits of a case involving a county unit system for statewide elections that on its face weighted the votes of certain areas of the state and certain counties more heavily than others. The Court found that all such weighted voting systems were unconstitutional per se. Justice Douglas, in a dictum at the close of the majority opinion, concluded: "[T]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments could mean only one thing—*one person, one vote.*" This phrase was to become the popular and familiar banner for the myriad of federal court redistricting opinions that were to follow over the next fifteen years.

In 1964 the Supreme Court for the first time considered the merits of the apportionment of congressional districts. In *Wesberry v. Sanders* the Court found that the population disparities among congressional districts in the State of Georgia were so great that they invidiously discriminated against voters in the larger districts by diluting their votes in the same manner as if a weighted system had been in effect. The Court enunciated the constitutional principle for congressional redistricting that "making equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives" and "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Shortly after *Wesberry*, the Court addressed the issue of state legislative malapportionment in a series of cases that had been filed in the wake of *Baker v. Carr*. The cases were argued in November and December of that year. On June 15, 1964, a sharply divided Court concluded that "as a basic constitutional standard, the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned on a population basis." Through a series of opinions, led by *Reynolds v.*

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46. Id. at 376-81. The Court, however, expressly pretermitted the issue of the degree to which the equal protection clause limits the authority of the state legislature in designing geographical congressional or legislative districts. Id. at 376.
47. Id. at 381 (emphasis added).
49. Id. at 7.
50. The Court based its holding on the command of U.S. Const. art. I, § 2 that United States Representatives be chosen "by the People of the several States." 376 U.S. at 17.
51. 376 U.S. at 18.
52. Id. at 7-8.
54. Reynolds v. Sims, 377 U.S. 533, 568 (1964); see Auerbach, The Reapportionment Cases: One Person, One Vote, One Value, 1964 Sup. Ct. Rev. 1; Comments on the Reappr-
Sims, the Court directly invalidated the legislative apportionments present in fifteen states and indirectly affected virtually all of the states. In arriving at its far-reaching conclusion, the majority of the Court systematically set aside various rationales offered by the affected states as the basis for the existing gross malapportionment of their state legislatures.

In one of these opinions, Lucas v. Forty-Fourth General Assembly, two dissenting Justices, Justices Stewart and Clark, challenged the result insofar as it ignored the "federal analogy" and required population-based apportionment in both houses of a state legislature. Justice Stewart's dissent emphasized: "The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union." Although the Reynolds Court had also rejected the federal analogy argument, it did distinguish between the drawing of congressional and state legislative districts, and acknowledged that some divergence from a strict population standard among state legislative districts was constitutionally permissible when based on legitimate considerations incident to the effectuation of a rational state policy. In so doing, however, the Court left to a case-by-case determination both the degree of disparity in population permissible in a state apportionment and the type of state interest that would allow such disparity.

The Supreme Court's sudden intervention in the reapportionment process prompted efforts in Congress to provide specific population guidelines for use in congressional redistricting, to stay court proceedings, and to re-
lieve the federal courts entirely of jurisdiction to review reapportionment enactments. Efforts were made to amend the United States Constitution to remove population equality as a factor in congressional redistricting. None of these proposals was successful.

Instead of reversing the trend of federal intervention in state election matters set by the Supreme Court, Congress passed the Voting Rights Act of 1965. Section 5 of the Act places on states subject to the Act the burden of showing that changes in a standard, practice, or procedure with respect to voting have neither the purpose nor the effect of denying the right to vote on account of race or color. By 1966 the Supreme Court was required to rule on the Act's constitutionality. While acknowledging that it was "an uncommon exercise of congressional power," the Court upheld the Act. Later in the decade, the Court found that private plaintiffs had standing under the Act to enjoin implementation of election changes that had not been submitted for federal approval. The applicability of the Act to reapportionment plans, however, remained uncertain until the 1970's.

Cases reaching the United States Supreme Court in the latter part of the 1960's required the Court to refine its view of the scope and application of the equal population principle. The Court found that the principle applied not only to state governments but also to local governments with legislative functions. The Supreme Court suggested, but did not firmly establish, that a different and more rigid standard existed for determining the constitutionality of congressional districts than for state legislative districts and overturned congressional districting plans in four states. Despite the ap-

62. R. MCKAY, supra note 21, at 204-05.
63. Id. at 209.
64. See R. MCKAY, REAPPORTIONMENT REAPPRAISED 1-12 (1968); T. O'ROURKE, RE-
APPORTIONMENT: LAW, POLITICS, COMPUTERS 52-57 (1969); Representation and Reappor-
tionment, CONG. Q., Aug. 1966, at 27-37. The climax in Congress came in August 1965, when Senate Minority Leader Everett Dirksen failed to obtain the constitutionally required vote of two-thirds of the United States Senate in favor of his resolution proposing a constitutional amendment allowing states to reapportion one house on a basis other than population. Meanwhile, among the states, the movement to call a constitutional convention came surprisingly close to success. By March 1967, 32 of the required 34 states had passed resolutions memorializing Congress to call a convention. The State of Texas passed such a resolution, S. Con. Res. 24, on Feb. 4, 1965.
66. Id. § 1973(c).
68. Id. at 334.
69. Id. at 337. The Court again upheld the Act in City of Rome v. United States, 48 U.S.L.W. 4463 (Apr. 22, 1980).
71. See notes 276-83 infra and accompanying text.
73. E.g., Wells v. Rockefeller, 394 U.S. 542 (1969) (New York congressional districting statute with 13.09% maximum deviation); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (Missouri congressional redistricting statute with 5.7% maximum deviation); Lucas v. Rhodes,
REAPPORPTIONMENT

parently less rigid standard applicable to state districts, the Court struck down post-Reynolds legislative reapportionments in two states,\(^\text{74}\) emphasizing that the Constitution permitted only minor population variances free of any taint of arbitrariness or discrimination.\(^\text{75}\)

During the 1960's the Supreme Court suggested an additional means of challenging apportionment. Under a challenge based on a failure to adhere to the equal population requirement, a state apportionment is attacked as diminishing the value of individual votes. The Court suggested, however, that reapportionments also may be unconstitutional if they invidiously dilute, minimize, or cancel the voting strength of racial or political groups. Challenges on this basis in the 1960's generally arose in the context of either alleged racial gerrymandering or the use of multimember districts. Although such challenges could be based on the fifteenth amendment if they alleged dilution of a racial voting franchise, they generally also invoked the same fourteenth amendment right of equal protection that serves as a constitutional foundation for the requirement of equal population.

The seminal case concerning the dilution or cancellation of group voting strength, Gomillion v. Lightfoot,\(^\text{76}\) actually preceded Baker and Reynolds. In Gomillion the Supreme Court held that federal courts have jurisdiction to consider whether a redrawing of municipal boundaries to disenfranchise black voters was invalid under the fifteenth amendment. While not a reapportionment case, Gomillion is generally viewed as establishing the invalidity of racial gerrymanders. The majority of cases alleging dilution of group voting rights during the 1960's, however, focused on the use of multimember districts. The Supreme Court repeatedly stated that multimember districting is not unconstitutional per se,\(^\text{77}\) but suggested that it would invalidate multimember districts when they operate to minimize or cancel the voting strength of racial or political elements of the population.\(^\text{78}\)

Plaintiffs challenging multimember districts during the 1960's uniformly failed to present sufficient evidence of the invidious nature of such districting schemes.\(^\text{79}\) Nevertheless, the Supreme Court refused to foreclose the possibility that such a challenge might be successful under different cir-

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\(^{74}\) Swann v. Adams, 385 U.S. 440 (1967) (State of Florida with total maximum deviations of 25.65% among senatorial districts and 33.55% among house districts); Kilgarlin v. Hill, 386 U.S. 120 (1967) (Texas House of Representatives with total maximum deviation of 26.48%).


\(^{76}\) 364 U.S. 339 (1960).


\(^{78}\) See Burns v. Richardson, 384 U.S. 73, 88 (1966).

The decade of the 1960's ended with most states confronting the prospect of once again redrawing legislative and congressional districts. As a result of the Supreme Court's decisions over the decade, no state could escape its periodic obligation to reapportion. Furthermore, no state could redraw districts in a manner that produced gross disparities in population among legislative districts or even moderate disparities among congressional districts. The Court's decisions, however, left many questions unanswered concerning the degree of discretion remaining with the state legislature. Although acknowledging that some state discretion existed, the Supreme Court had not directly upheld any state legislative reapportionment or congressional redistricting as sufficient under the equal population requirement, so the question of the allowable degree of deviation remained unresolved. While rejecting most claims of dilution of group voting strength, the Court continued to hold open this avenue of attack. Therefore, no state could utilize multimember districts with absolute security. For those states subject to the Voting Rights Act, there were even more unanswered questions regarding the impact of the Act on the reapportionment process.

C. The 1970's

Virtually every state had been required to redraw state legislative and congressional districts during the 1960's. Following the 1970 census, however, most renewed the redistricting process. These new districting schemes, which had been enacted in forty-five states by the end of 1972, embodied significantly lower population disparities than the schemes in use at the beginning of the preceding decade, but they still encountered opposition. The United States Attorney General, pursuant to the Voting Rights Act, prevented several of the new enactments from taking effect. In Maine and Minnesota, the governors vetoed the legislatures' legislative reapportionment plans, causing the state supreme courts to draw the districts. In several states, executive officers or state boards performed the

80. See notes 341-88 infra and accompanying text for discussion of multimember districts and gerrymandering.
82. Id.
83. THE COUNCIL OF STATE GOVERNMENTS, REAPPORTIONMENT IN THE SEVENTIES 3 (1973) [hereinafter cited as REAPPORTIONMENT IN THE SEVENTIES]. In 18 states the number of legislators elected to one or both houses was altered. In six the change was occasioned by a court. Several of the states made the change voluntarily to provide for a ratio of districts in one house to those in the other and to establish districts with common boundaries between the two state legislative chambers. Id. at 9-10. See also Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 198 n.10 (1972) (cases during the 1960's dealing with changes in the number of legislators).
85. See note 109 infra.
86. REAPPORTIONMENT IN THE SEVENTIES, supra note 83, at 3, 26.
function when the legislature was unsuccessful.\textsuperscript{87} Once in effect, state plans again were challenged in state and federal court. Even as late as 1978, at least two states remained in federal court seeking approval of state legislative reapportionment plans.\textsuperscript{88}

Although the United States Supreme Court decided no apportionment cases during the 1970's comparable in impact to the landmark decisions of \textit{Baker v. Carr}\textsuperscript{89} and \textit{Reynolds v. Sims},\textsuperscript{90} it did answer some of the questions posed at the end of the previous decade regarding the principles of equal population and nondilution of group voting strength. The Supreme Court refined the Constitution's equal population requirement. Through the decisions of the 1970's differing equal population standards emerged for at least four circumstances: congressional redistricting, state legislative reapportionment enactments, local government reapportionment, and court-drawn districts. The Court affirmed that a broader latitude exists for state legislative redistricting than for congressional redistricting.\textsuperscript{91} In drawing congressional districts the state legislature must "make a good faith effort to achieve precise mathematical equality [and] [u]nless population variances . . . are shown to have resulted despite such effort, the State must justify each variance, no matter how small."\textsuperscript{92} In regard to state legislative redistricting, however, the Court held that not all minor deviations require state justification\textsuperscript{93} and that the presence alone of a total maximum deviation\textsuperscript{94} near 10\% does not constitute a prima facie equal protection violation.\textsuperscript{95} For the first time the Court found adequate justification for a total maximum deviation above 10\% in one state legislative reapportionment,\textsuperscript{96} but also struck down state legislative redistricting plans in two states.\textsuperscript{97} With regard to local governments,\textsuperscript{98} several opinions of the Court suggested that the smaller the total population affected by the reapportion-

\begin{itemize}
\item \textsuperscript{87} The states included Oregon (Secretary of State), Texas (State Legislative Redistricting Board), Connecticut (Board), and Alaska (Governor and Advisory Reapportionment Board). In at least two states, Michigan and Missouri, redistricting boards were unsuccessful and the state supreme court ultimately drew the districts. \textit{Id.} at 11.
\item \textsuperscript{88} The states were Mississippi, Mississippi v. United States, 100 S. Ct. 994 (1980), and Texas, Graves v. Barnes (Graves IV), 446 F. Supp. 560 (W.D. Tex. 1977).
\item \textsuperscript{89} 369 U.S. 186 (1962).
\item \textsuperscript{90} 377 U.S. 533 (1964).
\item \textsuperscript{92} Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).
\item \textsuperscript{93} White v. Regester, 412 U.S. 755, 763 (1973); Gaffney v. Cummings, 412 U.S. 735, 743 (1973).
\item \textsuperscript{94} \textit{See} text following note 242 \textit{infra} for discussion of the term "total maximum deviation."
\item \textsuperscript{95} White v. Regester, 412 U.S. 755, 763 (1973).
\item \textsuperscript{96} Mahan v. Howell, 410 U.S. 315 (1973) (upholding Virginia house districts with 16\% maximum deviation because the districts served to preserve political subdivision boundaries).
\item \textsuperscript{97} \textit{See} Connor v. Finch, 431 U.S. 407 (1977) (court apportionment of state senate with 16.5\% total maximum deviation and house of representatives with 19.3\% total maximum deviation in Mississippi found unacceptable); Chapman v. Meier, 420 U.S. 1 (1975) (court-ordered apportionment of North Dakota Legislative Assembly, with 20\% maximum deviation, found unacceptable).
\item \textsuperscript{98} The Court continued to identify those local governments to which the doctrine of
ment, the higher might be the permissible percentage of deviation among the districts. By the end of the decade, the Supreme Court also had made clear that once a federal court declares an existing apportionment scheme unconstitutional and is required to devise and impose a plan, the court will be "held to stricter standards . . . than a state legislature." As a result, the courts "must ordinarily achieve the goal of population equality with little more than de minimis variation."

Early in the decade the Court issued its first decision declaring a multimember district invalid. In the 1960's, and on two occasions earlier in the 1970's, the Court had rejected challenges to legislatively drawn multimember districts, reaffirming that such devices are not unconstitutional per se. In 1973, however, the Supreme Court upheld a lower court decision requiring the use of single-member districts in lieu of multimember districts where it was shown that the multimember districts invidiously discriminated against black and Hispanic voting populations. As the decade progressed, the Court distinguished multimember districts drawn by state or local governments from those drawn as part of a federal court order. While upholding the principle established in the 1960's that legislatively drawn multimember districts were not unconstitutional per se, the Court enunciated the additional general principle that, absent persuasive justification to the contrary, a court-drawn plan should prefer single-member districts over multimember districts.

During the 1970's, section 5 of the Voting Rights Act of 1965 had significant impact on state reapportionments. Not only did the United States Attorney General lodge objections under the Act to several state reapportionment enactments, but the Supreme Court interpreted the one man, one vote applied. E.g., Hadley v. Junior College Dist., 397 U.S. 50 (1970); see Burton v. Whittier Regional Vo-Tech. School, 587 F.2d 66 (1st Cir. 1978).

99. E.g., Abate v. Mundt, 403 U.S. 182, 185 (1971) (11.9% deviation among county supervisors districts found permissible); see White v. Weiser, 412 U.S. 783, 793 (1973). But see Chapman v. Meier, 420 U.S. 1, 25 (1973) (in small populations "each individual vote may be more important to the result of an election").

103. See notes 76 & 78 supra and accompanying text.
106. Whitcomb v. Chavis, 403 U.S. 124, 143 (1971); see notes 77-78 supra and accompanying text.
109. The Attorney General objected to reapportionments in these four states: Georgia (an objection was made on the basis of multimember districts and racial gerrymanders; the state drew another plan, which also was found objectionable; the Attorney General then filed suit to prevent enforcement of the plan, resulting in Georgia v. United States, 411 U.S.
breadth of the Act in several decisions. In Georgia v. United States110 the Court affirmed that reapportionment plans were election changes that must be submitted for federal approval before taking effect. Distinguishing between plans ordered by a court and those enacted by a state or local legislative body, the Supreme Court found that plans imposed by court order are not subject to the Voting Rights Act.111 In 1977 the Court rebuked an effort by the State of Texas for review of the determination by federal officials that the Act applied to the state.112 The decision left states and other jurisdictions solely to the Act's "bail-out" provisions for exemption.113 The Court also established that the Act did not permit reapportionments that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."114 In a decision with great potential significance for reapportionment in the 1980's, the Court in 1977 recognized that the Constitution does not prevent state legislatures from deliberately creating or preserving racial majorities in particular districts in order to ensure that its reapportionment complies with the Voting Rights Act.115

Despite the extensive litigation of the 1960's and the efforts of state legislatures to enact constitutional reapportionments at the beginning of the 1970's, all or part of the state legislative districts in use in 1978 in twenty states were the product of court-ordered redistricting plans.116 Now, as the final clashes of the reapportionment battles of the 1970's are ending, state and local governments are awakening to the realization that within one year the federal decennial census will provide new evidence of the need to

526 (1973)); Louisiana (an objection was made on the basis of multimember districts and racial gerrymanders, but the district lines subsequently were drawn by federal courts; see Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974)); South Carolina (an objection was made to the senatorial districts on the basis of multimember districts; the state plan shortly thereafter was struck down by a federal district court as violative of the Constitution; Twiggs v. West, No. 70-1106 (D.S.C. Apr. 7, 1972)); Virginia (an initial objection on the basis of multimember districts was withdrawn, but the state plan subsequently was struck down by a federal district court, which then was reversed in part by the Supreme Court in Mahan v. Howell, 410 U.S. 315 (1973)). Two states, Mississippi and Alabama, covered by § 5 in 1971, escaped review by the Attorney General because they were under an order of a federal district court. Halpin & Engstrom, Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act, 22 J. PUB. L. 37 (1973).

113. See text accompanying note 440 infra.
115. United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977); see notes 380-88 infra and accompanying text.
116. In several of the states, the courts only drew the districts for one house of the legislature or a portion of the districts in one house. Some state courts drew the plans pursuant to state law as the agency authorized to reapportion when the state legislature failed to act. The states with redistricting plans at least partially drawn by a state or federal court are Alabama, Alaska, Arizona, California, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Dakota, Oregon, Texas, Virginia, and Washington. 22 THE BOOK OF THE STATES 1978-1979, at 15-16 (1978).
reapportion again. Undoubtedly, some are optimistic that the real controversies and legal battles already have been fought and that most states will escape significant or prolonged legal battles in the next decade. Yet, in view of the increased level of organization, political awareness, and litigiousness of individuals and groups throughout our society, every effort at congressional, state, or local reapportionment must be predicated upon an awareness of the near inevitability of state court or federal scrutiny of any redistricting plan that the political process produces.

III. REAPPORTIONMENT IN TEXAS: AN HISTORICAL PERSPECTIVE

A. 1836-1961: Apportionment and the Texas Constitution

The requirements of state law governing apportionment of the Texas Senate and House of Representatives always have been embodied in the Texas Constitution. Four general themes have persisted through each of Texas's six constitutions: required periodic reapportionment, utilization of counties as the basic building blocks for districts, districts of contiguous territory, and apportionment according to population or electors. No Texas constitution, however, has prescribed either standards or procedures for drawing congressional districts.

The Constitution of the Republic of Texas required that senators be elected from districts as nearly equal in "free population" as practical and that representatives be apportioned among the counties roughly according to population, with each county entitled to at least one representative. The State of Texas Constitution of 1845 for the first time provided for periodic reapportionment when it required reapportionment every eight years following an enumeration by the state of all free inhabitants. The 1845 Constitution also instituted the requirement of contiguity in senatorial districts and changed the basis for apportionment of the senate from population to the number of qualified electors. The Constitution of 1866 required a census every ten years. The Constitution of 1869 provided for two to four representatives to be elected from each district.

The present Texas Constitution, adopted in 1876, requires the Texas Legislature to reapportion after each federal decennial census. The state is to be divided into thirty-one senatorial districts of contiguous territory according to the number of qualified voters, with no single county


120. Tex. Const. art. III, §§ 10, 13 (1845); Texas Constitution Annotated, supra note 117, at 147.

121. Tex. Const. art. III, § 28 (1866); Texas Constitution Annotated, supra note 117, at 157.

122. Tex. Const. art. III, § 40 (1869); Texas Constitution Annotated, supra note 117, at 149.

entitled to more than one senator. The constitution further requires that the 150 members of the house of representatives must be apportioned among the several counties according to population. Each county that has sufficient population is entitled to be formed into a separate district and to elect a representative. Two or more whole contiguous counties may be combined to form a representative district but only when necessary to achieve a district with sufficient population. Surplus population from a county already entitled to one or more representatives may be joined with any other contiguous county or counties to provide a district of sufficient population.

The Texas Legislature apportioned itself in accordance with these state constitutional provisions after each decennial census through 1921. Then in 1931, the legislature found itself unable to agree on an enactment redrawing existing legislative districts. Legislators, the great majority of whom were elected from districts composed essentially of rural counties in the central and eastern portions of the state, were unable to agree on a new apportionment based on population or electors. In part, the conflict was regional. Primarily, however, it was urban-rural. The unavoidable result of redistricting in accordance with these constitutional requirements would have been to combine these rural counties into fewer representative districts, while increasing the number of legislators elected from the state's

124. Id. § 25.
125. Id. § 26.
126. Id.
127. Id.
128. Id.
129. The Texas Legislature failed to redraw senatorial districts in 1901, but drew new ones in 1911 and 1921. An examination of the 1921 apportionment of the senate fails to disclose whether the legislature relied on population or numbers of electors as its base, or perhaps “no formula at all except the wishes of the senators.” W. Chumlea, The Politics of Legislative Apportionment in Texas—1921-1957 (1959) [hereinafter cited as Apportionment in Texas] (dissertation available through Texas Legislative Reference Library, Texas Capitol). The San Antonio Express described the apportionments as “political and geographical freaks” and the product of “selfishness and prejudices.” Id. at 71. Reapportionments in 1911 and 1921 did not come easily. In each instance the governor called the Texas Legislature into at least one special session to pass the necessary legislation. The rearrangement of legislative districts in 1921 was particularly protracted and acrimonious. See generally Apportionment in Texas, supra. The 1921 bill apportioning the Texas Senate is noteworthy for its delayed effective date, 1924, to allow incumbent senators to serve out their terms without effect. The bill apportioning the Texas House of Representatives in 1921 (1921 Tex. Laws, 37th Leg., 2d C.S., ch. 6) inadvertently left Swisher County out of any district. The Texas Supreme Court on certified questions ruled that the legislature had intended to include it in the 120th legislative district. Smith v. Patterson, 111 Tex. 525, 242 S.W. 749 (1922). The court agreed, however, that if the 1921 act had indeed deprived the citizens of Swisher County of their right of suffrage, the act would have been unconstitutional and invalid.
130. See generally Apportionment in Texas, supra note 129, at 82-126.
131. As the western and southern portions of Texas were settled and grew in population, they struggled with east and central Texas for legislative seats. For example, the population of Cameron and Hidalgo Counties in south Texas almost tripled between 1910 and 1920. Apportionment in Texas, supra note 129, at 36. The counties of the high-planes in west Texas increased almost fivefold during this same period. Id. at 37. In contrast, some counties in the northeastern and central portions of the state showed only slight population increases or even lost population. Id. at 37-38.
western, southern, and metropolitan areas. In 1936 an amendment to the state constitution was proposed and adopted, adding section 26a to article III and thus restricting the number of state representatives possible for any one county. Section 26a represented an active retreat from the mandate of apportionment on the basis of population that had existed for the house since the Constitution of the Republic. Despite the adoption of section 26a, which guaranteed that the state metropolitan areas would be underrepresented in any subsequent apportionment of the house of representatives, the Texas Legislature remained unable to agree on a bill redrawing either house or senatorial districts.

In 1948 the legislature amended section 28 of article III of the Texas Constitution to provide that if the Texas Legislature failed to reapportion the state legislative districts in its first regular session after a federal decennial census, a State Legislative Redistricting Board, composed of five state officers, would convene to district the state according to the applicable provisions of the state constitution. Furthermore, the supreme court could mandamus this board to carry out its function. Following adoption of this constitutional amendment, the Texas Legislature, in 1951, enacted its first state legislative reapportionment bills in twenty-nine years. Ten years later, it again enacted state legislative apportionment bills in the regular session following the decennial census.

The Texas Legislature encountered similar difficulties during the first half of this century in redrawing congressional districts. The legislature failed to pass any congressional redistricting legislation between 1917 and

132. See generally APPORTIONMENT IN TEXAS, supra note 129.
133. TEX. CONST. art. III, § 26a.
134. Section 25 of art. III, however, had limited counties to no more than one senator since the constitution was adopted in 1876.
135. APPORTIONMENT IN TEXAS, supra note 129, at 82-165. In 1947 Mr. Philip A. Schraub was certified by the county judge of Nueces County as that county’s duly elected state representative, but there was no legislative district prescribed by statute encompassing only Nueces County. Instead, the 1921 apportionment had combined the county with two other counties in a single district from which a person other than Schraub had been elected. Schraub protested that the Texas Constitution provided that each county with sufficient population should elect a representative and that Nueces County now had sufficient population, but was denied a representative because the legislature refused to reapportion. The attorney general ruled that Schraub could not be seated. TEX. ATTY GEN. OP. NO. V-53 (1952).
136. In Texas the legislature is charged with proposing amendments to the state constitution. TEX. CONST. art. XVII, § 1. This amendment, proposed in S.J. Res. 2, 50th Legis., Reg. Sess. (1947), was approved by the legislature by the narrowest of margins. Requiring approval by two-thirds of the membership of each house of the legislature, it passed the senate 23-7. TEX. S.J. 1246 (1947). In the house it initially fell one vote short when it was engrossed by a vote of 99-35. Following an intensive campaign by Governor Beauford Jester, W.O. Reed, the Speaker of the House of Representatives, cast the deciding vote in favor of passage. APPORTIONMENT IN TEXAS, supra note 129, at 160-61.
137. The officers are the Lieutenant Governor, Speaker of the House of Representatives, Comptroller of Public Accounts, Attorney General, and Commissioner of the General Land Office. TEX. CONST. art. III, § 28.
138. Id.
1933. The bill enacted in 1933 remained in effect until 1957, when only one significant change was made. Efforts to pass legislation after the 1960 census were unsuccessful.

B. 1962-1979: The Years of Turmoil

Although the Texas Legislature modified its congressional districts in 1957 and redrew its state legislative districts in 1951 and 1961 roughly on the basis of population, a significant disparity in population existed among the districts. In 1962 Texas's legislative and congressional districting schemes, like those of many states, embodied significant underrepresentation for metropolitan areas. An effort in state court to withhold the salaries of the Legislative Redistricting Board because it did not act to correct the imbalance in the 1961 reapportionment was unsuccessful. A subsequent suit filed in state court challenged the use of multimember districts as a denial of black voting rights. The petitioner emphasized that no black had served in the Texas Legislature since the 1880's. The Texas court held that neither the Texas Constitution nor the United States Constitution prevents the use of multimember districts by requiring that counties with two or more representatives be divided into single-member districts. On appeal, the United States Supreme Court vacated the decision of the Texas court because of suits filed in federal court and subsequent legislation.

The 1962 Supreme Court decision in Baker v. Carr provided Texans with the opportunity to challenge state apportionment plans in federal court. Although aware of the decision, the Governor of Texas did not call a special session of the Texas Legislature to consider redistricting. Litigants, therefore, filed suits in federal court to declare the existing state legislative and congressional districts invalid. In 1963 a three-judge federal district court in Bush v. Martin struck down the state congressional dis-

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142. 224 F. Supp. at 507. The sole significant change of the 1957 act was the division of Harris County into two districts. Id.
143. Id.
144. Miller v. James, 366 S.W.2d 118 (Tex. Civ. App.—Austin 1963, no writ). The petitioner, Giles E. Miller, a resident of Dallas, alleged that the legislature had failed to apportion on the basis of qualified electors or population "as nearly as may be practicable." Id. at 120. The court avoided the merits of the charge by finding that even if the allegations were proven and the board was under a duty to act, the court could not withhold the board members' salaries because the legislature had failed to provide a means for making such deductions. Id. at 121.
146. 386 S.W.2d at 204.
147. Id. at 205.
149. 369 U.S. 186 (1962); see notes 35-43 supra and accompanying text.
stricting plan, which had been enacted in 1957, because of "spectacular" disparities in population. The ratio between the districts of highest and lowest population was 4.4 to 1, with the districts of excessive population primarily located in the metropolitan areas. The district court order invalidating the legislation and requiring an at-large election of all twenty-three congressmen unless the legislature enacted an acceptable plan, was stayed by the circuit justice, pending the resolution of *Wesberry v. Sanders*.

In 1964 the Supreme Court affirmed the district court's decision, but subsequently, in view of the exigencies of time, the district court modified its order to permit the 1964 congressional election to be carried out on the basis of the 1957 legislation.

In 1965 the same three-judge federal court that earlier had struck down Texas's congressional districts declared sections 25 and 26a of the Texas Constitution violative of the equal protection clause of the fourteenth amendment to the United States Constitution and invalidated the 1961 legislation apportioning state senatorial and representative districts. The ratio among the senatorial districts was 8 to 1, while it was 2 to 1 among districts in the house of representatives. The state did not appeal.

Confronted with invalid state legislative and congressional districts, the legislature in 1965 passed new districting legislation. Litigants again challenged the reapportionment bills before the three-judge federal court, alleging that the congressional districting plan not only contained excessive population disparities, but also discriminated against cities, the Gulf Coast, and the Republican Party. In January 1966 the court upheld the congressional districts as a "substantial good faith effort [by

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152. 224 F. Supp. at 505.

153. This ratio was over twice that present at any time prior to 1940. The district with the highest population in the United States was district 5 in the Dallas metropolitan area, with 951,527 citizens. *See id.* at 506-07.

154. *See Bush v. Martin* (Bush II), 251 F. Supp. 484, 489 (S.D. Tex. 1966). As a result, in 1963 there were 22 congressmen elected from districts and one at-large.

155. 376 U.S. 1 (1964); *see notes 48-52 supra* and accompanying text.


159. 1965 Tex. Gen. Laws, ch. 342 (state senate); 1965 Tex. Gen. Laws, ch. 349 (congressional); 1965 Tex. Gen. Laws, ch. 351 (state representative). In Texas the first reapportionment bills contained both house and senatorial districts together. Since 1892, however, the legislature has passed separate bills. *See TEX. ATT'Y GEN. OP. NO. 0-4899 (1943).*


161. *Id.* at 498-500.

162. *Id.* at 500-02.

163. *Id.* at 503-06.

164. *Id.* at 513-15. The Republican complaint centered on the disposition of portions of Dallas and Bexar Counties that were not included in the primary congressional districts for those counties. The remnants of Dallas County, which were described by the Republican plaintiffs as a "vigorous Republican stronghold of demonstrated outspoken, effective, militant, articulate conservatives," had been joined with other, more rural, counties in an alleged attempt to submerge the Republican minority when it could have been combined with other, more kindred areas, to form a different district. *Id.* at 513-14. The allegation concerning Bexar County was essentially the same. *Id.*
Texas toward the constitutional goal of population equality,"165 but was highly critical of the 19.4% total maximum deviation existing among the districts.166 The court was unwilling to find that the division and shifting of counties shown by plaintiffs was sufficient to constitute invidious discrimination in the form of political or regional gerrymandering.167 As a result of its concern over whether the plan was the best possible one, however, the court retained jurisdiction to review subsequent legislation.168

One month later, the three-judge court in Kilgarlin v. Martin169 upheld a large part of the new state legislative reapportionment plan. Plaintiffs had not challenged the senate districting, but attacked the house districting on the grounds that it violated the requirements of equal population, diluted the voting strength of racial and political elements through the use of multimember and flotorial districts170 and constituted an arbitrary and capricious "crazy-quilt" apportionment.171 The court found the plan constitutional except for the flotorial districts, which were violative of the requirement for equal population. On appeal, the United States Supreme Court not only agreed with the district court that the flotorial districts were unconstitutional but went a step further and found that the remaining state representative districts were invalid as well.172 The Court expressed doubt that the 25% total maximum deviation in population among the districts was within the range of "minor" deviations that the Court earlier had suggested might be justified by local policies of maintaining established political subdivision boundaries.173 The Supreme Court, however, affirmed that portion of the decision of the district court denying the claims of dilution and gerrymandering.174

Because the district court in Kilgarlin had allowed the Texas Legislature

165. Id. at 488.
166. Id. at 506-13.
167. Id. at 500-06, 513-15. State Representative Neil Caldwell of Brazoria County impressed the court with his argument that on the basis of history and community interests, his county should not have been split. The court did not feel, however, that the complaint was of constitutional significance. Id. at 514.
168. Id. at 517.
170. The Kilgarlin court explained that:

Provision for flotorial districts is contained in Art. 3, Sec. 26 of the Texas Constitution. As used in Texas, a flotorial district is a voting district entitled to one Representative, but is composed of more than one county, one of which has additional representation in another district. As an example, in H.B. 195 Smith County and Rusk County receive one Representative as District 15F, while Smith County alone receives another Representative as District 14. By contrast, a multi-member district consists of one county only, and elects more than one Representative from that district. The United States Supreme Court utilized the spelling "floterial" in Davis v. Mann, 377 U.S. at 686, 84 S. Ct. at 1445.
171. Id. at 418 n.19.
173. Id. at 123; Reynolds v. Sims, 377 U.S. 533, 578-79 (1964). The Court stated that since Texas policy allowed the violation of county lines in order to surmount undue population variances, it was unnecessary to reach the issue presented by Reynolds. 386 U.S. at 123.
174. 386 U.S. at 121.
until 1967 to equalize the votes of citizens living in flotorial districts,175 the 1966 elections were carried out according to the 1965 legislation. The legislature drew new districts in 1967,176 and the elections of 1968 were carried out according to the new legislation. In 1969 the Texas Legislature acted to eliminate the more egregious population disparities,177 and the 1970 elections were conducted under the amended plan.

The State of Texas had spent most of the 1960's in federal court litigating the validity of its state legislative and congressional districts. Yet, the turmoil of the 1960's served only to set the stage for the battle that was to occur after the 1970 census. The growth and shift in location of the population in Texas evidenced by the 1970 census required the Texas Legislature to redraw house, senatorial, and congressional seats in 1971. Various interests competed throughout the regular session of the legislature that year. Charges of unfairness and vindictiveness were directed at the presiding officer of the Texas House of Representatives.178 When the legislature on June 1, 1971, was forced by state law to adjourn, it had succeeded only in passing a bill apportioning the house of representatives.179 Senatorial and congressional districts remained unchanged.

Since the legislature had failed to act during its regular session to reapportion the senate, the task passed to the State Legislative Redistricting Board under article III, section 28 of the Texas Constitution. The board does not have jurisdiction to draw congressional districts, however, so the Governor of Texas immediately reconvened the legislators in special session. Legislation drawing the twenty-four congressional districts was adopted on June 4, 1971, and signed by the governor on June 17, 1971.180

The battle that had been waged in the legislature over state legislative districts immediately shifted to the State Legislative Redistricting Board and to court. Republican officials181 filed suit in state court challenging the constitutionality of the bill apportioning the house of representatives. The state district court declared the bill invalid as violative of the Texas Constitution because it failed to adhere closely enough to the requirement

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180. State Representative Tom Craddick of Midland County led the Republicans. The state district court was in Midland County.
for preserving counties intact. The Texas Supreme Court affirmed the decision in August 1971. Meanwhile, the Legislative Redistricting Board had convened to apportion the Texas Senate, but refused to redraw representative districts even after the Texas Supreme Court had invalidated the bill passed by the legislature. The board's refusal prompted a Texas state senator to bring an original action in the Texas Supreme Court to compel the board to apportion both the house and the senate. The senator also asked the court to declare the state's 1967 apportionment and its 1969 amendments unconstitutional, to enjoin elections, to declare that multimember districts could not be used, and to retain jurisdiction until a valid apportionment scheme had been enacted. The Texas Supreme Court rejected such a broad reaching remedy, but declared that the State Legislative Redistricting Board had a duty to apportion not only the Texas Senate but also the Texas House of Representatives, once the legislative enactment had been declared invalid. Pursuant to the order of the court, the Legislative Redistricting Board met and accomplished a reapportionment of the senate by October 15, 1971, and of the house by October 21, 1971. The redistricting plan for the house of representatives divided the state into ninety single-member districts and eleven multimember districts, with the multimember districts located in all of the metropolitan counties in the state except Harris County.

As the clashes in state court came to an end in late 1971, the battle shifted to the federal courts. The first challenge in federal court was directed at Senate Bill 1 (S.B. 1), which prescribed congressional districts. The districts had a maximum deviation of 2.43% above and 1.7% below the ideal of 466,530 persons. A three-judge federal district court struck down the state enactment as containing excessive deviation in population and immediately adopted one of several alternative reapportionment plans.
offered by the parties to the suit. The court also invited the possibility of a special legislative session to redraw the districts before the impending primary elections, but the Governor refused. Instead, the state appealed the district court decision, with the result that the court's plan was stayed by the Supreme Court and the 1972 congressional elections were carried out under the plan in S.B. 1. Within a year, however, the Supreme Court had heard the merits of the case and decided that the plan embodied in S.B. 1 was indeed violative of the United States Constitution. The Court found, however, that the district court had erred by adopting the wrong plan from among those alternatives offered to it by the parties. On remand, the district court adopted a second plan consistent with the Supreme Court's opinion. In 1975 the legislature essentially codified the court's plan and congressional elections during the remainder of the decade were carried out pursuant to that plan.

The first federal suit challenging state legislative districts was filed on October 22, 1971, only seven days after the Legislative Redistricting Board had adopted the plan apportioning the Texas Senate. By December 1971, four separate suits, one in each federal district in the state, were pending, challenging all state representative districts and the senatorial districts in Bexar County and Harris County. The cases were consolidated and a three-judge court was constituted. The suits alleged excessive population deviation and dilution of racial, Republican party, and other political elements' voting strength through the use of multimember districts and racial and political gerrymandering.

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193. Id. at 788-89.
194. Id. at 789 n.7.
197. Including the plan present in S.B. 1, the court had four alternatives. One of these, offered by the chairman of the Republican Party in Bexar County, was not pressed on appeal. The Supreme Court held that the district court had erred in adopting plan "C," which was based purely on population, instead of plan "B," which struck a balance between the desires of the legislature and the demand for equal population. Id. at 793-97.
198. See Weiser v. White, 505 F.2d 912, 914 (5th Cir. 1975).
201. Id.
202. Ordered on Dec. 13, 1971, by John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit. Judge Brown had been presiding judge of the three-judge court that had struck down the state’s redistricting plans in the 1960's. The judges composing the three-judge district court were not ecstatic about the prospect of undertaking a review of the state districting efforts. The court observed:

We are once again in the Texas sector of the political thicket of legislative redistricting and required to contour the condition of the individual trees as well as the physiography of the forest as we explore for "crazy quilts," "groves," contiguity, compactness, specie, motivation in planting, and other possible impedimenta to constitutionality in redistricting. In ten years of wandering about this political thicket, we have not yet found the burning bush of final explanation.

343 F. Supp. at 708.
203. Id. at 709-10.
the court upheld the senatorial districting plans, but invalidated the house districting plan as containing an unconstitutionally high variance in population among its districts. In addition, the court ordered implementation of single-member districts in Bexar and Dallas Counties because the court found that the multimember districts in these two counties diluted black and Hispanic voting strength. Challenges to the nine remaining multimember districts in the house were not pressed at the hearing in 1972, but remained pending. The district court gave the Texas Legislature until 1973 to reapportion the house of representatives, but immediately adopted a plan for single-member districts in Bexar and Dallas Counties. The state appealed, but the United States Supreme Court refused to stay the district court order for immediate implementation of single-member districts in Bexar and Dallas Counties. As a result, the state representative elections in 1972 were carried out under the redistricting plan of the Legislative Redistricting Board modified by the court’s reapportionment of Dallas and Bexar Counties.

In 1973 the United States Supreme Court in White v. Regester reversed the district court with regard to excessive population deviation among Texas’s house districts. Thus the configuration of most of these primarily nonmetropolitan districts was established for the remainder of the decade. The Supreme Court had earlier upheld the district court’s ruling regarding the constitutionality of the senatorial districts, thereby allowing the senatorial districts drawn by the Legislative Redistricting Board to stand. In Regester the Supreme Court also upheld the district court’s finding that the multimember districts in Dallas and Bexar Counties unconstitutionally diluted the voting strength of minorities and should be replaced by single-member districts. The plans drawn by the district court for these districts and used for the elections in 1972 were enacted into law in 1975 and continued to be used for the remainder of the decade. The question remaining was whether the other nine metropolitan multimember districts also were unconstitutional and needed to be replaced.

In 1974 the three-judge district court reconvened and considered the constitutionality of the nine remaining multimember districts in Texas. The court required seven of the counties to be divided into single-member districts. The multimember districts in Hildalgo and Galveston Coun-

205. 343 F. Supp. at 737.
207. See note 190 supra and accompanying text.
209. These single-member state representative districts drawn in 1971 by the State Legislative Redistricting Board later were codified, with some boundary adjustments, along with the districts drawn by the federal court for Bexar and Dallas Counties. 1975 Tex. Gen. Laws, ch. 727, § 1, at 2358.
ties were left undisturbed. Once again, the state appealed to the Supreme Court. The Supreme Court issued a stay of the district court order, so again elections were carried out on the basis of the legislatively drawn multimember districts. Shortly after the case was argued before the United States Supreme Court in 1975, the Texas Legislature, in regular session, enacted H.B. 1097 which provided for single-member districts for all 150 state representative seats, thereby eliminating the last of the state's multimember districts. The Supreme Court responded by remanding the case to the district court for reconsideration and dismissal if moot.

By this time, however, a new element had been added to the redistricting process. Texas was subject to the Voting Rights Act and, pursuant to section 5 of that Act, was required to submit the new reapportionment legislation to the United States Attorney General for clearance. The Attorney General approved the new single-member districts for all of the counties except Tarrant, Nueces, and Jefferson. The Attorney General's objections to the districts in these counties did not come until January 1976, shortly before the state primary elections scheduled for that spring. Because of these objections, the single-member districts drawn by the legislature for these three counties could not go into effect. Rather than initiating a declaratory judgment action in the District of Columbia, the State of Texas resorted to a hearing before the three-judge district court to determine which districts should be used for the upcoming primary and general elections. The parties resolved their differences with respect to Nueces and Jefferson Counties, and the court adopted a compromise permanent plan embodying districts for these counties. The court considered alternative single-member district plans for the state representatives to be elected from Tarrant County and adopted one offered by the Texas attorney general on behalf of the state. Efforts by Tarrant County plaintiffs to stay the district court order were denied. In 1977 the plaintiffs from Tarrant County petitioned the district court to adopt their plan in lieu of the state plan used for the 1976 elections. In October of 1977, the

214. The challenge to Galveston County was not based on the dilution of minority voting strength through its multimember district but on an alleged racial gerrymander. The court held the districting scheme unconstitutional, but did not require a division of the multimember districts. 378 F. Supp. at 661-63.
218. Id. § 1973(c).
219. See text accompanying notes 441-53 infra.
220. The first elections were municipal and school district elections scheduled for Apr. 3, 1979, in Tarrant County.
221. For discussion of the declaratory judgment action before the District of Columbia court, see notes 435-36 infra and accompanying text.
223. Id. at 1054.
court adopted the plaintiffs' plan and ordered its use for 1978 elections.\textsuperscript{225} The Supreme Court initially stayed the district court order, but subsequently affirmed the district court decision shortly before primary elections. Therefore, by the spring of 1978, the configuration of house districts was finally established.

C. Observations

As a result of litigation in the 1970's, Texas evidences an unusual composite of districts for its house of representatives. Ninety districts initially created pursuant to an order of the State Legislative Redistricting Board now are prescribed, with some changes, by a 1975 statute;\textsuperscript{226} twenty-nine districts initially created by federal court order are now prescribed by the same statute; sixteen districts were created from multimember districts by the statute in 1975;\textsuperscript{227} thirteen districts were created and now exist only by court order; and two districts, initially created by court order, were subsequently modified by statute in 1979.\textsuperscript{228} Among the existing house districts initially prescribed by the redistricting board, the deviation from the ideal district in population ranges from a +5.8% to a —4.1%, for a total maximum deviation of 9.9%.\textsuperscript{229} The current legislative district with the smallest population according to 1970 census data was created later by court order, thereby causing a maximum statewide deviation of 11.6% among house districts.\textsuperscript{230} The senatorial districts, which have remained unchanged since drawn by the Legislative Redistricting Board in 1971, contain a total maximum deviation from the ideal of 5.5%.\textsuperscript{231} The state congressional districts, which initially were drawn by court order and later enacted into law have a total maximum deviation of only .15%.\textsuperscript{232} These current deviations may provide a standard against which both the Texas Legislature and the federal courts will judge future districting plans.

The political party and racial composition of the Texas Legislature and the state congressional delegation have changed significantly over the past two decades. The most dramatic change has occurred in the Texas House of Representatives where, in 1963, there were only eight Republican, six Hispanic, and no black members. By 1980 there were twenty-five Republican,\textsuperscript{233} fourteen black, and fifteen Hispanic house members. In 1961 there

\begin{itemize}
  \item \textsuperscript{225} 446 F. Supp. at 571.
  \item \textsuperscript{226} 1975 Tex. Gen. Laws, ch. 727, § 1, at 2358.
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} 1979 Tex. Gen. Laws, ch. 774, § 1, at 1961.
  \item \textsuperscript{229} White v. Regester, 412 U.S. 755, 770-72 (1973).
  \item \textsuperscript{230} District 48B, with a deviation of —5.8% from the ideal district, was ordered in Nueces County. Graves v. Barnes (Graves III), 408 F. Supp. 1050, 1052 (W.D. Tex. 1976).
  \item \textsuperscript{231} Texas Senate, The 1981 Redistricting Process; Report Number 1, Preliminary Report on Redistricting (Senate) (1980).
  \item \textsuperscript{232} Texas Senate, The 1981 Redistricting Process; Report Number 3, Preliminary Report on Redistricting (Congress) 1 (1980).
  \item \textsuperscript{233} The number of Republicans in the house of representatives increased to 25 recently when two members, earlier elected as Democrats, announced that they would run in the future as Republicans.
\end{itemize}
were no Republican senators, but by 1980 there were five. Other changes in the senatorial and the congressional delegation have been less dramatic, but still discernible. In addition, the number of members in the house of representatives elected from essentially metropolitan counties has increased significantly. In 1961 the number of such representatives was thirty-one. This number increased to sixty-nine by the end of the 1970's. This same period also saw a significant increase in the number of female members of the Texas House of Representatives.

The litigious experience of the State of Texas over the past two decades offers several lessons. First, prolonged litigation affecting the validity of the apportionment of the state legislative or congressional districts does not serve the interests of the state or its citizens. Such litigation is costly and can lead to considerable voter confusion. Therefore, in anticipation of the possibility of litigation, each state legislature should act, even before it convenes after the 1980 census, to devise a legislative process void of even the taint of arbitrariness through which competing interests are afforded the opportunity to exercise their right of access to the political process. Part VIII of this Article contains some specific recommendations. Second, no state legislature may assume that the potential for future court challenges exists only in one political party or racial or interest group. Over the past two decades, officials of both the Republican and Democratic parties, as well as black, Hispanic, and anglo citizens at various times have been movants in redistricting litigation. Potential sources for litigation and litigants in the 1980's exist among a much broader spectrum of political interests than in the 1970's. The legislature must be sensitive to this range of interests during the reapportionment process. Third, the legislature, by resolution or statute, should designate individual persons or a joint com-

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234. The number of Republicans in the senate increased recently when one senator elected as a Democrat announced that he would seek reelection as a Republican.

235. The growth of urban representation is shown below:

<table>
<thead>
<tr>
<th>County</th>
<th>1961</th>
<th>1963</th>
<th>1971</th>
<th>1979</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harris</td>
<td>8</td>
<td>12</td>
<td>19</td>
<td>24</td>
</tr>
<tr>
<td>Dallas</td>
<td>7</td>
<td>7</td>
<td>15</td>
<td>23</td>
</tr>
<tr>
<td>Tarrant</td>
<td>7</td>
<td>7</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>Bexar</td>
<td>9</td>
<td>7</td>
<td>10</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>31</td>
<td>33</td>
<td>52</td>
<td>70</td>
</tr>
</tbody>
</table>

236. The first woman was elected to the 38th Texas Legislature in 1922. The first female state senator was elected four years later. Over the period from 1923-1973, the number of female members of the house of representatives varied from zero or one to a high of four elected during World War II and again during the 53rd Legislature (1953-1955). Beginning in 1973, the number of female members serving in the house increased steadily until during the 1979 legislative session there were 11. During most of this century there has been one female senator elected to each legislature.
committee with responsibility for consulting with the attorney general of Texas and the secretary of state on reapportionment matters when the legislature is not in session. If litigation occurs, the persons or committee could provide the attorney general with guidance regarding legislative policy, act as an official body for discussion of tactical and legal issues affecting the litigation, and provide planning for any necessary future legislative action. Such a committee would be of invaluable assistance to the attorney general throughout any litigation, regardless of whether the legislatively enacted plans withstand challenge.

IV. Principles of Reapportionment Under the United States Constitution

The premise of this Article is that under the fourteenth and fifteenth amendments to the United States Constitution, state enacted reapportionment plans are valid unless shown to be invidiously discriminatory. The Supreme Court first applied the standard of invidiousness to the reapportionment process in Baker v. Carr\(^2\) and this standard has been consistently applied by a majority of the Supreme Court throughout the intervening two decades. Invidious discrimination is not a term susceptible to precise definition. In determining the constitutionality of any legislatively enacted plan, however, invidiousness is the single objective to which the judicial concepts of equality in population and nondilution of minority or political element voting strength are directed. The Court has developed several tests and identified certain evidentiary guideposts to aid in the assessment of the constitutionality of a reapportionment plan.

Through its decisions involving reapportionment over the past two decades, the Supreme Court has established that certain extremes exist in legislative action for which there can be no rational explanation. Such actions on their face are invidiously discriminatory per se and invalid. The Court has discerned a secondary level of actions that are sufficiently questionable on their face to establish a prima facie case for invidiousness, which the state or local government may overcome by showing a rational and legitimate justification. A third level of actions exists for which the Court has not yet established specific, clearly identifiable guideposts for determining invidiousness. In such cases, the person complaining of the plan's illegality must utilize a combination of factors to show that the legislature's decision, while not on its face invidious, is nevertheless violative of the Constitution. This Article examines reapportionment cases dealing with equality in population and dilution of voting strength to illustrate the Court's application of this tripartite approach.

A. The Constitutional Requirement for Equal Population

In its first venture into the thicket of state legislative and congressional

\(^2\) 369 U.S. 186, 244-46 (1962) (Douglas, J., concurring).
districting, the United States Supreme Court in *Reynolds v. Sims*\(^{238}\) emphasized that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people."\(^{239}\) The most specific evidentiary tests of constitutionality apply to this requirement for equal population. Even as to this requirement, however, there remain issues for each state to ponder in the reapportionment process. In refining and applying the principle of equal representation through equal population over the past two decades, the Supreme Court has distinguished among four circumstances.\(^{240}\) Two of these, the reapportionment of local government\(^{241}\) and court-drawn reapportionment plans\(^{242}\) are discussed in Part II. The application of the principle to the drawing of state legislative and congressional districts is the focus of the following discussion.

In considering whether the constitutional requirement of equal population has been met, the courts have used several numerical tools. Most judicial evaluations begin with a calculation of the population of the ideal district in the plan as computed by dividing the total population by the number of members in the legislative body. A district drawn so as to have a population greater than the ideal district is said to cause its voters to be "underrepresented" because the vote of a person in the district for his representative in the legislative body is worth less than the vote of a person in a district with a smaller population. In the same sense, a district with a population smaller than the ideal district may be said to cause its voters to be "overrepresented." The degree or impact of the disparity in population and/or voting strength may be shown through: (1) the ratio of the population of the district with the largest number of persons to the population of the ideal district or the one with the smallest number of persons (e.g., 4 to 1); (2) the total number of persons constituting the difference between the population of the largest, smallest, and/or ideal district; (3) the minimum number of persons required to elect a majority in the legislative body; (4) the number of districts with significant amounts of underrepresentation or overrepresentation; or (5) the percentage by which the districts of largest and smallest population vary from the ideal district. The most common numerical tool is the use of the percentage of variation from the ideal district to show the "average deviation" or "median deviation" of all of the districts from the ideal, and the "total maximum deviation" which is the aggregate total of the percentage of variation from the ideal of the districts with the largest and smallest population. For example, if the variation of the district with the largest population is +5% from the ideal dis-

\(^{238}\) 377 U.S. 533 (1964).

\(^{239}\) Id. at 560-61.

\(^{240}\) In addition, the Supreme Court recently has affirmed that the one-man, one-vote principle does not apply to the selection of judges. Concerned Citizens of Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651 (1977); see Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973).

\(^{241}\) See notes 26, 98-99 *supra* and accompanying text.

\(^{242}\) See notes 106-07 *supra* and accompanying text.
district and the variation of the district with the smallest population is -4%,
the total maximum variation or deviation is 9%.

The Supreme Court has established a rigid numerical standard for de-
termining the constitutionality of congressional districting plans.243 The
only permissible deviations from the ideal district are those population
variances that are unavoidable despite a good faith effort to achieve abso-
late equality, or for which justification is shown.244 As recently as 1973,
the Court expressly rejected the possibility of a de minimis standard for
congressional redistricting similar to one adopted that same year for state
legislative reapportionment.245 In reaching this result the Court noted
that, as compared to state legislative districts, congressional districts con-
tain relatively enormous populations and are not so intertwined and
freighted with strictly local interests.246 The Court has left open the pos-
sibility that under certain circumstances a state may be able to show a basis
sufficient to justify some deviation from optimum equality in population
among congressional districts in a state,247 but in its yet unrewarded search
for such a basis, the Court has directly disapproved plans with total maxi-
num deviations of only 4.13%248 and 5.97%.249 In each of these two cases,
however, an alternative congressional redistricting plan with smaller total
deviation had been rejected during the political process or was clearly pos-
sible, and the state was unable to show that the plans under scrutiny actu-
ally effectuated the state interests offered as justifications for the
deviations.250 Rejecting Missouri's argument that its 1967 attempt at con-
gressional redistricting represented the best and most equitable compro-
mise possible among Missouri's legislators, the Court stressed that "the
rule is one of 'practicability' rather than political 'practicality'."251

In 1964 the United States Supreme Court established the following re-
quirements for state legislative reapportionment efforts:

1. By holding that as a federal constitutional requisite both houses
of a state legislature must be apportioned on a population basis,
we mean that the Equal Protection Clause requires that a State
make an honest and good faith effort to construct districts, in both
houses of its legislature, as nearly of equal population as is practica-
ble.252

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243. *E.g.*, White v. Weiser, 412 U.S. 783 (1973); Wells v. Rockefeller, 394 U.S. 542
(1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wesberry v. Sanders, 376 U.S. 1 (1964);

244. White v. Weiser, 412 U.S. 783, 790 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 527-

245. White v. Weiser, 412 U.S. 783, 792-93 (1973); *see* Wesberry v. Sanders, 376 U.S. 1,
7-8 (1963), in which the Court held that U.S. CONST. art. I, § 2 mandates the use of a strict
"one-man, one-vote" approach to congressional districting.


250. White v. Weiser, 412 U.S. 783, 784 n.1, 790 n.9 (1973); Kirkpatrick v. Preisler, 394


2. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.253

3. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible...254

4. [T]he proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population based representation, with such minor deviations only as may occur in recognizing factors that are free from any taint of arbitrariness or discrimination.255

After almost two decades, these remain the basic requirements.

While it may be possible to list the myriad of cases decided over the past two decades approving or disapproving reapportionments with particular deviations, the Supreme Court has noted that such lists are of limited use, with one Justice observing: “Since every reapportionment case presents as its factual predicate a unique combination of circumstances, decisions upholding or invalidating a legislative plan cannot normally have great precedential significance.”256 What is tolerable in one state, under one set of circumstances, or on the basis of one record, may not be tolerable in another state.

When considering the constitutionality of particular state reapportionments, the Supreme Court over the past two decades has developed several guidelines. First, any reapportionment containing gross disparities in population is unconstitutional per se and cannot be justified. In reaching its conclusion in Reynolds and the other cases decided on the same day,257 the Court rejected the following justifications, among others, for the existing gross malapportionments: (1) that the provision for apportioning the state on a basis other than population had been recently adopted by the state's voters as an amendment to the state constitution;258 (2) that the state had a history or tradition of apportionment of at least one house of the state legislature on a basis other than population;259 (3) that a state's apportionment of its senators among its counties is analogous to the apportionment of United States Senators among the states;260 (4) that the existence of the

253. Id. at 567 (emphasis added).
254. Id. at 579 (emphasis added).
257. See note 56 supra.
apportionment scheme in question at the time of the state's admission to the Union constituted congressional approval; and (5) that the disparity was less than existed among the states in the electoral college.

The Court takes a second approach when a plan produces deviation which, although not unconstitutional per se, is nevertheless sufficiently large to establish prima facie that the reapportionment is unconstitutional. In this instance, the state must justify the deviation by showing that it has utilized factors "free from any taint of arbitrariness or discrimination" and that the divergence from the strict standard is based on considerations incident to the effectuation of a rational state policy. Recent Supreme Court decisions suggest that any reapportionment with a total maximum deviation among its districts of 10% or above is within this category and requires justification. In Mahan v. Howell the Supreme Court upheld a deviation of 16.4% among the districts of the Virginia General Assembly because the reapportionment was shown by "uncontradicted" evidence to produce the minimum deviation possible while keeping political subdivisions intact. Even with this showing, Justice Rehnquist's majority opinion acknowledged that the 16.4% deviation "may well approach tolerable limits." Therefore, even if all divergences may be shown to have been unavoidably caused by conditions incident to a rational state policy, a total maximum deviation above approximately 16.5% may be intolerable and unconstitutional per se.

When the percentage of deviation is considered de minimus and thus insufficient by itself to establish a prima facie case of invidiousness, the Court takes a third approach to attempts at state legislative districting. The Court considers minor deviations alone insufficient to show the unconstitutionality of state legislative reapportionments because: (1) basic statistical materials are not sufficiently accurate to make the population of a district known; (2) differentials in population growth rates are striking and well-known phenomena; (3) "census persons" are not necessarily the body of voters who must be counted; (4) the goal of fair representation is not served when the reapportionment task is recurring removed to the federal courts; and, (5) if courts are required to adopt plans in lieu of legislative enactments whenever there is a plan with smaller deviations, they will become "bogged down in a vast, intractable apportionment slough" in a never-ending search for the constantly receding point of perfection. In

264. E.g., White v. Regester, 412 U.S. 755, 764 (1973) ("Very likely, larger differences [than 9.9%] between districts would not be tolerable without justification.").
266. Id. at 326.
267. Id. at 329. But see Goines v. Heiskell, 362 F. Supp. 313 (S.D. W. Va. 1973) (upholding state legislative reapportionment with total maximum deviation of 16.179% without specific showing that the deviation was necessary to preserve county lines).
269. Gaffney v. Cummings, 412 U.S. 735, 745-51 (1973). In Gaffney, however, the Court
view of the Supreme Court decisions in *White v. Regester* and *Gaffney v. Cummings*, it would appear that a total maximum deviation of approximately 10% constitutes the threshold of such minor deviation for state legislative reapportionments. Indeed, at least one district court has concluded that a state legislative reapportionment enactment containing a deviation of less than 10% is of prima facie constitutional.272

Too much reliance, however, by a state legislature on the 10% deviation figure in drawing state legislative districts for the next decade may jeopardize the state's reapportionment for several reasons. First, the 10% figure is an evidentiary guidepost for determining constitutionality and does not relieve a state of its primary obligation to strive for districts "as nearly of equal population as is practicable."273 Second, in both *White v. Regester* and *Gaffney v. Cummings* the Supreme Court carefully emphasized that minor total maximum deviations alone were not sufficient to establish prima facie unconstitutionality, suggesting by negative inference that such deviations in conjunction with other evidence of invidious discrimination might establish a case of prima facie unconstitutionality.274 Third, the state plans in both *Regester* and *Gaffney* are distinguishable on their facts from reapportionments in other states. In both of these cases, the reapportionments had average and median deviations significantly smaller than the maximum deviations.275 In addition, there were only a small number of districts with a deviation of as much as 3% to 5% from the ideal district, and there was evidence in each case that the reapportionments did, in fact, preserve county or other political subdivision boundaries.276 Fourth, a deviation that is tolerable in one state under certain circumstances was held not to be so in another. Connecticut had conceded that its legislative districts reflect the relative strengths of the major political parties and to insure "safe districts" for each, and still no prima facie case existed against the validity of the reapportionment plan. Id. at 736-37.277

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277. Texas's average deviation among districts in its house of representatives was 1.82%. White v. Regester, 412 U.S. at 764. Connecticut's average deviation in its house of representatives was 1.9%; its median deviation was 1.8%. Gaffney v. Cummings, 412 U.S. at 737.
278. White v. Regester, 412 U.S. at 764; Gaffney v. Cummings, 412 U.S. at 742.
279. White v. Regester, 412 U.S. at 764 n.8; Gaffney v. Cummings, 412 U.S. at 739.
circumstances may not be acceptable in another state or even in the same state under different circumstances.\textsuperscript{280} Finally, despite the several Supreme Court pronouncements that distinctions exist between congressional and state legislative districting allowing application of different numerical and evidentiary standards, several dissenting opinions have argued forcefully that the expressed standard of "as nearly of equal population as is practicable" for state legislative districts is identical to the one applied to congressional reapportionments.\textsuperscript{281} Furthermore, many of the reasons for adopting a minor deviation standard for legislative redistricting, such as the inaccuracy of census data relied on in \textit{Gaffney}, are equally applicable to congressional redistricting.\textsuperscript{282}

The Supreme Court has recognized that the federal decennial census is not a statistically flawless basis for reapportionment.\textsuperscript{283} The census inevitably has a certain percentage of error in its numerical counting. For example, historically, both blacks and Hispanics have been undercounted.\textsuperscript{284} Furthermore, a census may include some aliens\textsuperscript{285} or other persons not eligible to vote, or transients, or military personnel\textsuperscript{286} who are present in a

\begin{footnotesize}
\begin{enumerate}
\item \textit{See} note 256 \textit{supra} and accompanying text.
\item \textit{See} Justice Brennan's dissent in \textit{Mahan v. Howell}, 410 U.S. 315, 340-41 (1973), noting that there is a difference between recognizing that state legislative and congressional reapportionments are different and establishing two distinct controlling standards for review. For example, there may be certain considerations, such as the recognition of local government boundaries, that are peculiarly applicable to legislative redistricting because of the duties of a state legislature.
\item \textit{Id.} at 341.
\item Recently Congressmen tried unsuccessfully to enjoin the Bureau of Census from including illegal aliens in the population count. Federation for American Immigration Reformation v. Klutznick, No. 79-3269 (D.D.C. Feb. 26, 1980).
\item \textit{See} Borough of Bethel Park v. Stans, 449 F.2d 575 (3d Cir. 1971). Any effort to exclude military personnel must take into consideration that under Carrington v. Rash, 380 U.S. 89 (1965), a person in the military cannot be denied the right to vote. The consideration of military personnel required in \textit{Mahan v. Howell}, 410 U.S. 315 (1973), related to the district in which the military personnel resided and could vote, not to whether they should be counted, but Davis v. Mann, 377 U.S. 678, 691 (1964), held that discrimination against military personnel on the basis of occupation in reapportionment is violative of the Constitution. Among states excluding military personnel or students from the population base of particular regions in their 1971 apportionments were Alaska, Idaho, New Hampshire, Vermont and Washington. \textit{See} Council of State Governments, \textit{Reapportionment in the States} 36-83 (1972). \textit{See also} Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (only those
\end{enumerate}
\end{footnotesize}
particular district at the time of the census but actually reside and vote in other districts. The Supreme Court has suggested that under certain circumstances such persons may be excluded from the apportionment base.\textsuperscript{287} If this disparity between "census persons" and persons properly part of the apportionment base for purposes of equal representation is large enough to result in significant underrepresentation, the legislature is under an affirmative obligation to take this fact into consideration during the reapportionment process.\textsuperscript{288} A reapportionment plan that ignores such anomalies may be invalid. On the other hand, any apportionment plan failing to rely exclusively on census figures probably is prima facie invalid,\textsuperscript{289} casting upon the state the burden to show by clear and convincing evidence that the census figures are unreliable and that the figures utilized by the state have a "high degree of accuracy"\textsuperscript{290} and are not "substantially different from that which would have resulted from the use of a permissible population base."\textsuperscript{291} The Supreme Court, in limited circumstances, has allowed the use of a citizen population base,\textsuperscript{292} an eligible voter base,\textsuperscript{293} and a registered voter base\textsuperscript{294} in lieu of the census population. In recognizing the possibility of using a registered voter base, however, the Court warned that such a modification of the census population could be susceptible to improper influence and could allow the perpetuation of underrepresentation.\textsuperscript{295} States that attempt to use an alternative population base in lieu of the census population must bear the heavy burden of justification if the reapportionment is challenged as invidious, especially in those states where any such modification could be shown to adversely affect the

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\item students actually excluded by county apportionment have standing to challenge the apportionment on equal protection grounds; Winter v. Docking, 373 F. Supp. 308 (D. Kan. 1974) (sustaining use of state census in which students and military personnel were counted under special rules).
\item In Burns v. Richardson, 384 U.S. 73, 92 (1966), the Supreme Court indicated that, "in [no] decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base . . . ." See Gaffney v. Cummings, 412 U.S. 735, 746 (1973).
\item Burns v. Richardson, 384 U.S. 73, 92-93 (1966).
\item WMCA, Inc. v. Lomenzo, 382 U.S. 4, 6 (1965) (Harlan, J., concurring); see Burns v. Richardson, 384 U.S. 73, 94-95 (1966); Winter v. Docking, 373 F. Supp. 308 (D. Kan. 1974).
\item Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (Court assumed an eligible voter base is valid if properly identified and systematically used throughout the apportionment scheme).
\item Burns v. Richardson, 384 U.S. 73, 92-93 (1966). See generally Padilla & Gross, supra note 17, at 296-98. But see Martin v. Venables, 401 F. Supp. 611, 617 (D. Conn. 1975) ("When districts include substantially equal numbers of registered voters, it is difficult to see how the weight of anyone's vote has been diminished in a constitutional sense.").
\end{itemize}
\end{footnotesize}
voting strength of minorities and thereby perpetuate or maintain the group’s underrepresentation. If a state adopts a modification of census population figures, it must apply the modification in a systematic manner throughout the state.\footnote{296}

Legislators and courts who must consider the constitutionality of reapportionments containing a total maximum deviation of less than 10% may find it difficult to realize that less than two decades ago reapportionments in many states had gross deviations among their state legislative and congressional districts reaching the range of 422 to 1.\footnote{297} At least one writer has urged that once the more flagrant malapportionments were remedied, the Supreme Court should have adopted a maximum allowable deviation below which reapportionments would be secure.\footnote{298} To some extent this result has been achieved for state legislative districts through recognition of the concept of “minor” deviations that are not prima facie unconstitutional. The Court, however, has repeatedly refused to adopt such a standard for congressional districts. Notwithstanding the Court’s repeated indications that legislative reapportionments will be scrutinized less intensely than congressional districting plans, state legislatures cannot be remiss in fulfilling their constitutional obligation to make a good faith effort to reach population equality.

\section*{B. Dilution of Voting Strength}

When the United States Supreme Court announced the principle of equal population in \textit{Reynolds v. Sims},\footnote{299} it emphasized that the principle applied “without regard to race, sex, economic status or place of residence within a State”\footnote{300} and that “each and every citizen has an inalienable right to free and effective participation in the political processes of his State’s legislative bodies.”\footnote{301} One year later, in an opinion upholding particular multimember districts,\footnote{302} the Court utilized the above concepts to suggest


297. In California after the 1960 census, the population of the smallest senatorial district was 14,294, while the largest district encompassed all of Los Angeles County with a population of 6,038,771. \textit{Representation and Apportionment, supra note 64, at 11.} Each district elected one state senator. Eleven percent of the population in the state could elect a majority of the senate. In Vermont where representation in the lower house was by township, one town with 24 inhabitants elected a representative to serve with one elected from a city of 35,531. The ratio resulting was 1,480 to 1. Other significant disparities such as 1,414 to 1 (Rhode Island Senate), 223 to 1 (Nevada Senate), 424 to 1 (Connecticut House), and 99 to 1 (Georgia Senate) were present. It took less than 40% of the population to elect a controlling majority in the legislatures of 44 states. In 13 states, less than one-third of the population could elect a majority.


a basis for challenging a reapportionment that dilutes a group's right to participate in the political processes: "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."\(^{303}\)

Since that decision over fifteen years ago, the Supreme Court and lower federal courts have utilized this language, with occasional modification,\(^{304}\) for determining the constitutionality of multimember districts and racial or political gerrymanders that affect electoral minorities.\(^{305}\)

Considerable dispute exists today regarding the nature of the nondilution principle and the evidence necessary to show that a reapportionment unconstitutionally dilutes minority voting strength. Most visible has been the dispute over whether the principle, as based on the fourteenth or fifteenth amendment\(^{306}\) to the United States Constitution, requires a showing that the districting scheme in question was enacted purposefully to minimize or cancel the complaining element's voting strength,\(^{307}\) or whether it is sufficient to show only that the districting plan has that effect.\(^{308}\)

In the only opinion in which it has set forth its approval of a find-

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303. *Id.* at 439. (emphasis added).
304. See, e.g., *White v. Regester*, 412 U.S. 755, 765 (1973), in which the Court limited its reference to racial groups.
305. For background on dilution of voting strength, see text preceding note 76 *supra* and notes 76-79 *supra* and accompanying text.
307. In *Beer v. United States*, 425 U.S. 130, 148 n.4 (1976) (Marshall, J., dissenting), Justice Marshall suggested that Supreme Court opinions on this subject under the fifteenth amendment are "somewhat less than a seamless web" and allowed three possible approaches: (1) that purpose alone is sufficient, and effect is irrelevant; (2) that effect alone is the test, and purpose is irrelevant; or (3) that purpose or effect, alone or in combination are sufficient. Justice Marshall did not include an apparent fourth alternative, that purpose and effect in combination are required. On several occasions, the members of the United States Supreme Court have suggested that a showing of a discriminatory purpose is necessary in reapportionment cases under the fourteenth and/or fifteenth amendments. See, e.g., *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 165 (1977); *Id.* at 179 (Stewart, J., concurring in judgment). See also *Whitcomb v. Chavis*, 403 U.S. 124, 150 (1971) (suggesting that an at-large district must be conceived or operated as a purposeful device for racial or economic discrimination); *Wright v. Rockefeller*, 376 U.S. 52, 56-58 (1964) (fifteenth amendment case suggesting need to show purposeful discrimination); *Nevett v. Sides*, 571 F.2d 209, 215-17 (5th Cir. 1978) (illicit racial motivation is a necessary element in both a fourteenth amendment and fifteenth amendment voting dilution claim), *appeal docketed*, No. 78-492 (U.S. Aug. 21, 1979).
ing that a reapportionment was unconstitutional as dilutive of voting strength, *White v. Regester*, the United States Supreme Court failed to discuss whether a showing of intentional or purposeful discrimination was required. Evidence produced by petitioners in the case was such as to be probative of both discriminatory purpose and effect. Subsequent to the decision in *Regester*, however, the Court, in non-voting-rights cases, found that a mere showing of disproportionate impact on a racial minority is inadequate to establish a violation of the equal protection clause of the fourteenth amendment and that a plaintiff must show that the state acted with a racially discriminatory intent. Recently, in *City of Mobile v. Bolden* a plurality of the Court found that a showing of purposeful discrimination is required to establish a denial or dilution of voting strength in violation of the fourteenth or fifteenth amendments. Five Justices, however, either dissented from this view or found it unnecessary to determine the issue. The Fifth Circuit Court of Appeals had determined that purposeful discrimination is required but that a reapportionment plan may be invalid if improperly motivated either in its creation or in its maintenance. Motivation or purpose may be shown through

310. *Id.* at 766.
312. 48 U.S.L.W. 4436 (Apr. 22, 1980). The plurality, quoting from *Massachusetts v. Feeney*, 442 U.S. 256, 279 (1980), indicated: "Discriminatory purpose '... implies more than intent as volition or intent as awareness of consequences. ... It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of," its adverse effects upon an identifiable group.'" 48 U.S.L.W. at 4440 n.17. Several standards have been suggested in lieu of a need to show that the motive was blatant, including: (1) a standard similar to torts in which each person intends the natural consequences of his actions, Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); *Brown v. Moore*, 428 F. Supp. 1123, 1137 (S.D. Ala. 1976); (2) a "quasi-impact" test, see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); or (3) the "inference of intent," *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), *appeal docketed*, No. 78-492 (U.S. Aug. 21, 1979); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 147 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). See Comment, *Vote Dilution Challenges After Washington v. Davis*, 30 *Ala. L. Rev.* 396, 415 (1979).
315. In the Fifth Circuit, the test regarding maintenance of a reapportionment or characteristic of districting that cannot be shown to have been purposefully discriminatory when enacted is whether it has been maintained by either action or inaction "for the purpose of excluding minority input or devaluing the votes of minorities." *Bolden v. City of Mobile*, 571 F.2d 238, 245-46 (5th Cir. 1978), *aff'd*, 48 U.S.L.W. 4436 (Apr. 22, 1980); *Nevett v. Sides*, 571 F.2d 209, 222 (5th Cir. 1978), *appeal docketed*, No. 78-492 (U.S. Aug. 21, 1979). A recently enacted and racially neutral reapportionment still may be invalid if it is an "instrumentality for carrying forward patterns of purposeful and intentional segregation." *Kirksey*.
direct evidence\textsuperscript{316} or circumstantial evidence,\textsuperscript{317} including a showing of the plan's effect.

Allegations that a reapportionment plan dilutes the voting strength of an electoral minority are of a "qualitative" nature because they focus "not on population-based apportionment but on the quality of representation."\textsuperscript{318} Since no group has a constitutional right to be represented in a legislative body in direct proportion to its numerical voting strength or potential,\textsuperscript{319} no controlling numerical tests are available to determine constitutionality. Instead, the constitutionally protected right is one of equal access to the political process.\textsuperscript{320} Therefore, as explained in \textit{White v. Regester}:\textsuperscript{321}

[The plaintiffs'] burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.\textsuperscript{322}

Although no strictly numerical test exists for purposes of determining whether unconstitutional dilution is present, federal courts have suggested some evidentiary guidelines. Most dilution of voting strength cases arise over certain recurring characteristics or "devices" of districting that are questionable to the extent that in combination with other evidence they may establish a prima facie case of invidiousness. Primary among such characteristics are multimember districts,\textsuperscript{323} "crazy-quilt" apportionments,\textsuperscript{324} and districts that gerrymander\textsuperscript{325} a substantial and compact mi-

\textsuperscript{316} \textit{E.g.}, Terry \textit{v. Adams}, 345 U.S. 461, 469-70 (1953).

\textsuperscript{317} \textit{See White \textit{v. Regester}, 412 U.S. 755, 765 (1973).}


\textsuperscript{321} \textit{412 U.S. 755 (1973).}

\textsuperscript{322} \textit{Id. at 766.}

\textsuperscript{323} \textit{See notes 77-78 supra} and accompanying text.


\textsuperscript{325} The objective of a gerrymander is to redistrict for political benefit by causing as many as possible of the opposition's votes to be "wasted," either by concentrating them in a few districts or spreading them as minority segments among many constituencies. The political advantage sought may be for the benefit of one group or party over another or one
majority community. To show that the characteristic or device is unconstitutional in a particular circumstance, the complaining minority must show through corroborative evidence that it operates invidiously to minimize or cancel the group's voting strength. Among elements considered by the courts as corroborative evidence of invidious discrimination in a variety of contexts are the following: (a) a decision-making process controlled by a majority group unresponsive to the minority's interests or needs; (b) a starkly differential or disparate impact of the character-

candidate over another. Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring) (the gerrymander is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"). The drawing of districts for political benefit has been present throughout the history of this country. See Colegrove v. Green, 328 U.S. 549, 555 (1946). The term "gerrymander" owes its origin to the Governor of Massachusetts in 1812, Eldridge Gerry. The state legislature that year carved a district for the political benefit of Gerry's Democratic party that when later observed on a map had the extraordinary appearance of a salamander. It, therefore, soon acquired the name "gerrymander." In reality, any redistricting of a nonhomogeneous area is a gerrymander in the sense that any line drawn on a political map represents an electoral advantage for someone and a disadvantage for another. See generally Adams, A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 HARV. J. LEGIS. 825 (1977); Edwards, The Gerrymander and "One Man, One Vote," 46 N.Y.U. L. REV. 879 (1971); Gottlieb, Identifying Gerrymanders, 15 ST. LOUIS U.L.J. 540 (1971); Hardy, Considering the Gerrymander, 4 PEPPERDINE L. REV. 243 (1977); Sickels, Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment?, 75 YALE L.J. 1306 (1966); Comment, Racial Gerrymandering in the Deep South, 22 ALA. L. REV. 319 (1970); Comment, Constitutional Challenges to Gerrymanders, 45 U. CHI. L. REV. 845 (1978).

326. In 1973 the United States Court of Appeals for the Fifth Circuit established a specific evidentiary formula consisting of certain primary and enhancing factors, for application by district courts to determine whether dilution exists. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. E. Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). Once a finding is made separately for each factor, the district court is to consider the findings together in the aggregate. 485 F.2d at 1305. Since 1978 the circuit has established that a violation of either the fourteenth amendment or fifteenth amendment requires the showing of an illicit or racially motivated purpose, so this evidentiary formula is utilized to raise an "inference of intent." Nevett v. Sides, 571 F.2d 209, 221 (5th Cir. 1978), appeal docketed, No. 78-492 (U.S. Aug. 21, 1979); Kirskey v. Board of Supervisors, 534 F.2d 159, 171 (5th Cir.) (en banc), cert. denied, 434 U.S. 963 (1977). In City of Mobile v. Bolden, 48 U.S.L.W. 4436 (Apr. 22, 1980), a plurality of the Supreme Court found that an aggregate of the Zimmer factors was not sufficient to establish the unconstitutionality of an apportionment. Id. at 4440-41. Justice Stevens apparently agreed. Id. at 4444. Insofar as the Zimmer formula embodies the basis of White v. Regester, 412 U.S. 755 (1973), and is understood to be some circumstantial evidence of discriminatory purpose, its factors appear to remain a useful but nonexclusive means of determining an apportionment's constitutionality. For an indication of how federal district courts were applying the Fifth Circuit's specific formula before the Supreme Court decided Bolden, see Clark v. Marengo County, 469 F. Supp. 1150 (S.D. Ala. 1979) (upholding at-large county elections); Mosely v. Sadler, 469 F. Supp. 563 (E.D. Tex. 1979) (upholding at-large city council elections); Kirskey v. Board of Supervisors, 468 F. Supp. 285 (S.D. Miss. 1979) (upholding redistricting plan for county board); Kirskey v. City of Jackson, 461 F. Supp. 1282 (S.D. Miss. 1978) (upholding at-large city elections); Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978) (declaring at-large elections for county commission invalid); Auchberry v. City of Monroe, 456 F. Supp. 460 (W.D. La. 1978) (declaring at-large elections for city council invalid). See also David v. Garrison, 553 F.2d 923 (5th Cir. 1977) (reversing district court for findings inadequate under the Zimmer formula). These cases may be contrasted with recent district court dilution decisions in other circuits where the Zimmer formula is not in use. E.g., Aranda v. Van Sickie, 455 F. Supp. 625 (C.D. Cal. 1976) (denying claim by Hispanic petitioners).

327. E.g., White v. Regester, 412 U.S. 755, 768-69 (1973). Control of the decision-
istic as applied to the group; an historical pattern of a disproportionately low number of the group's members being elected to the legislative body; permitting elected representatives to ignore the affected group's interests without fear of reprisal at the polls; residual effects of past discrimination that operate to preclude the group from effective participation in the election process today; (f) depressed social and economic status, which makes the group's parti-

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pation in community processes difficult;\textsuperscript{333} (g) the historical background of the decision to include the device in the reapportionment, particularly as such history shows a resistance to recognition of the voting rights of the affected group;\textsuperscript{334} (h) legislative or administrative history,\textsuperscript{335} including any irregularities in the process that produced the disparity; (i) substantive factors, particularly if regularly considered important by the decision-maker;\textsuperscript{336} and (j) the presence of other rules in the electoral system favoring exclusively majoritarian control.\textsuperscript{337} The specific nature of evidence offered under these elements will vary according to whether the objectionable characteristic is a multimember district or a gerrymander. No list of elements is likely to be exhaustive.\textsuperscript{338} Moreover, none of these elements alone is sufficient to establish invidiousness.\textsuperscript{339} Some of the elements relate to impact; some to purpose. Ultimately, as observed by the Court in \textit{Regester}, the determination of unconstitutionality comprehends "a blend of history and an intensely local appraisal of the design and impact of the [reapportionment] in light of past and present reality, political and otherwise."\textsuperscript{340}

\textbf{Multimember Districts.} On numerous occasions the United States Supreme Court has held that multimember districts alone or in combination with single-member districts are not unconstitutional per se.\textsuperscript{341} The decisions. \textit{See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,} 429 U.S. 252, 266 n.14 (1977).

\textsuperscript{333} \textit{E.g.,} White v. Regester, 412 U.S. 755, 767-70 (1973); Kirksey v. Board of Supervisors, 554 F.2d 139, 145 (5th Cir.) (en banc) ("Inequality of access is an inference which flows from the existence of economic and educational inequalities"), \textit{cert. denied,} 434 U.S. 968 (1977). The combination of this factor and past discrimination are not dissimilar from the basis for a "suspect classification" under other Supreme Court decisions. For example, in \textit{San Antonio Independent School Dist. v. Rodriguez,} 411 U.S. 1 (1973), the Court described such a classification as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." \textit{Id.} at 28. A "suspect classification" is described as an "immutable characteristic determined solely by the accident of birth." \textit{Frontiero v. Richardson,} 411 U.S. 677, 686 (1973). \textit{But see City of Mobile v. Bolden,} 48 U.S.L.W. 4436, 4441 n.22 (Apr. 22, 1980), referring to such historical and social factors as "gauzy sociological considerations" without constitutional significance.

\textsuperscript{334} \textit{E.g.,} Kirksey v. Board of Supervisors, 554 F.2d 139, 148 (5th Cir.) (en banc), \textit{cert. denied,} 434 U.S. 968 (1977); Robinson v. Commissioners Court, 505 F.2d 674, 679 (5th Cir. 1974); Clark v. Marengo County, 469 F. Supp. 1150, 1173 (S.D. Ala. 1979); Kirksey v. City of Jackson, 461 F. Supp. 1282, 1291 (S.D. Miss. 1978).


\textsuperscript{336} \textit{See, e.g.,} Conner v. Finch, 431 U.S. 407, 422 (1977) (unexplained departures from application of neutral guidelines).


\textsuperscript{339} \textit{See Village of Sides v. Sides,} 571 F.2d 209, 224 (5th Cir. 1978), \textit{appeal docketed,} No. 78-492 (U.S. Aug. 21, 1979); McGill v. Gadsden County Comm'n, 535 F.2d 277 (5th Cir. 1976).


\textsuperscript{341} \textit{E.g.,} Wise v. Lipscomb, 437 U.S. 535 (1978); Chapman v. Meier, 420 U.S. 1 (1975);
Court also has recognized, however, that multimember districts can contribute to voter confusion, make legislative representatives more remote from their constituents, increase the cost of campaigning, and tend to submerge electoral minorities while overrepresenting electoral majorities.\textsuperscript{342} In \textit{White v. Regester}\textsuperscript{343} the Supreme Court invalidated multimember legislative districts in Bexar County and Dallas County, Texas, because the districts unconstitutionally diluted the voting strength of racial minorities.\textsuperscript{344} No electoral minority other than racial minorities has successfully challenged multimember districts. The Supreme Court has continued to suggest, however, that the nondilution principle applies to "racial" and "political" elements of the population.\textsuperscript{345}

The Supreme Court has considered the following factors as evidence corroborative of the unconstitutionality of multimember districts:\textsuperscript{346}

(a) the presence of a history of official racial discrimination in the region in question, such as the past presence of a poll tax or other discriminatory voting qualification;\textsuperscript{347} (b) the number of members of the racial minority elected in proportion to the group's voting strength or potential;\textsuperscript{348} (c) residual effects of past official discrimination that adversely affected racial minority participation in the electoral process, such as low voter registration or turnout;\textsuperscript{349} (d) bloc voting that results in the ability of a white candidate to win elections without the support of racial minorities;\textsuperscript{350} (e) the presence of a white dominated political organization effectively controlling party nomination and employing racial campaign tactics;\textsuperscript{351} (f) the responsiveness of elected legislators to the needs and interests of the


\textit{To replace an at-large system with several single member districts invites variance from the perfect one person—one vote goal, and forever compartmentalizes the electorate, reinforces the bloc voting syndrome, and prevents members of a minority class from ever exercising influence on the political system beyond the bounds of their single member districts.}

\textsuperscript{344} 412 U.S. 755 (1973).

\textsuperscript{345} \textit{See} note 368 infra.


\textsuperscript{348} \textit{Id.}

\textsuperscript{349} \textit{Id.}

\textsuperscript{350} \textit{Id.} at 767.

\textsuperscript{351} \textit{Id.}
racial minority; the presence of other electoral rules that favor electoral majorities, such as a “majority rule” requiring run-offs, “place” elections, “anti-single shot” provisions, and the lack of a requirement for residence in a particular area of the multimember district; and (h) the size of the multimember district itself.

Racial Gerrymanders. The Supreme Court has not directly invalidated a redistricting plan as constituting an impermissible racial gerrymander. From its decisions, however, it appears virtually certain that a redistricting gerrymander purposefully drawn to dilute racial minority voting strength is violative of the fourteenth and fifteenth amendments to the United States Constitution.

The leading Supreme Court decision regarding racial gerrymandering, Gomillion v. Lightfoot, technically is neither a reapportionment case nor one in which the voting strength of a group was diluted by a configuration of congressional, state, or local district lines. Instead, in Gomillion, the Supreme Court found justiciable a claim that the Alabama Legislature redrew the boundaries of the city of Tuskegee from the outline of a square to a strangely irregular twenty-eight sided figure so as to exclude from the city virtually all black voters. While not a reapportionment, the Alabama Legislature’s alleged effort to “fence-out” a compact racial group for fear of its impact on elections constitutes legislative action segregating racial elements of the voting population that the Supreme Court would likely find impermissible in the drawing of state legislative or congressional districts as well. Moreover, Gomillion is an example of legislative action that is so striking on its face and disproportionate in its impact that “the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration,” that the legislation is solely concerned with accomplishing a constitutionally proscribed purpose. Such extreme forms of legislative action may thus be viewed as comparable to those districting plans containing disparities in population so large that they establish the unconstitutionality per se of the reapportionment in question, or at least a showing of a prima facie case of invidious discrimination. While Gomillion is distinguishable from reapportionment dilution cases insofar as the black voters of Tuskegee were entirely deprived of their formerly held right to vote in city elections, Justices of the Supreme Court and lower federal courts have treated the case as authority for the proposition that

352. Id.
353. Id. at 766. In a multimember district the legislator’s tenure depends “upon the county-wide electorate [and] he must [. . .] be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district.” Fortson v. Dorsey, 379 U.S. 433, 438 (1965). This applies even when there are subdistrict residency requirements. Dallas County v. Reese, 421 U.S. 477, 480 (1975) (per curiam).
354. Id. at 767.
357. Id. at 341.
racial gerrymanders which disenfranchise or dilute racial minority voting strength are constitutionally impermissible.\textsuperscript{358}

A second Supreme Court decision, \textit{Wright v. Rockefeller},\textsuperscript{359} also supports the conclusion that racial gerrymandering is violative of the Constitution. In \textit{Wright} the Court affirmed a New York district court decision dismissing a claim that certain congressional districts in the state were a contrivance to segregate voters on the basis of race or place of origin. The Court determined that while one of the four challenged districts had a population that was 94.99\% white and another was 86.3\% nonwhite and Puerto Rican, the district court was justified in finding that petitioners failed to carry their burden of proof.\textsuperscript{360} Conceding that the record might establish a prima facie case that the New York Legislature was either motivated by racial considerations, or in fact drew the districts on racial lines, the Court found that there also was "equally, or more persuasive"\textsuperscript{361} evidence that the legislature did not create the districts on the basis of race and place of origin.\textsuperscript{362} The Court's decision was perhaps influenced as well by a group of intervenors, led by Congressman Adam Clayton Powell, who urged approval of the districts in question because districts drawn as desired by petitioners to equalize white and nonwhite population among the districts could themselves be unconstitutional.\textsuperscript{363}

There are two cognizable types of racial gerrymanders. One dilutes minority voting strength by purposefully fragmenting a compact minority community among two or more districts, while the other accomplishes the same purpose by concentrating the minority community in a single district. The Fifth Circuit Court of Appeals concluded in 1977 that a redistricting plan is constitutionally impermissible as racially discriminatory when it fragments a geographically concentrated and substantial minority community in a context of bloc voting.\textsuperscript{364} The court found that, against an historical background of purposeful and intentional discrimination, the residual effects of which still persist, this fragmenting perpetuated a denial of access


\textsuperscript{359}. 376 U.S. 52 (1964).

\textsuperscript{360}. \textit{Id.} at 53-58.

\textsuperscript{361}. \textit{Id.} at 57.

\textsuperscript{362}. \textit{Id.} at 55-57.

\textsuperscript{363}. \textit{Id.} at 58.

\textsuperscript{364}. Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), \textit{cert. denied}, 434 U.S. 968 (1977); see Robinson v. Commissioners Court, 505 F.2d 674, 676, 679 (5th Cir. 1974) ("acting as a modern Caesar dissecting its private Gaul," the commissioners court cut the county's black population into three illogical parts; \textit{id.} at 676); Moore v. Leflore County Bd. of Election Comm'rs, 502 F.2d 621, 622-24 (5th Cir. 1974) (although plan satisfied the arithmetical aspect of one-man, one-vote standard, it diluted black voting strength and failed to consider legitimate planning objectives; it was rejected); Sims v. Baggett, 247 F. Supp. 96, 104-05 (M.D. Ala. 1965) (reapportionment for discriminatory purpose cannot be approved). See also United States v. Texas, 321 F. Supp. 1043, 1051-52 (E.D. Tex. 1970) (racially discriminatory district lines, whether for elections or school attendance, is constitutionally improper), \textit{aff'd}, 447 F.2d 441 (5th Cir. 1971) (stay of judgment denied in 404 U.S. 1206 (1971)).
to the election process. Other federal decisions have recognized that the purposeful oversaturation or "packing" of a racial minority in a single district can operate as an unconstitutional denial of the racial minority's voting strength. The concentration of racial minorities in one or more districts with populations significantly greater than the ideal district may, in certain circumstances, constitute racial gerrymandering. Moreover, dicta in recent opinions suggest that a reapportionment plan that on its face attempts proportional representation may be invalid if employed as a "contrivance to segregate" the population on a racial basis.

Partisan Gerrymanders. Although the concept of dilution of minority voting strength theoretically includes other electoral minorities in addition to racial ones, no federal court has based an invalidation of a reapportionment solely on the ground that it diluted the voting strength of a nonracial minority. Challenges by political parties and other interest groups almost uniformly have been rejected either because (1) the plaintiff failed


366. E.g., Wright v. Rockefeller, 376 U.S. 52 (1964); Nevett v. Sides, 571 F.2d 209, 219 (5th Cir. 1978), appeal docketed, No. 78-492 (U.S. Aug. 21, 1979); Mississippi v. United States, No. 78-1425 (D.D.C. June 1, 1979), aff'd, 100 S. Ct. 994 (1980). In Beer v. United States, 425 U.S. 130, 154 n.12 (1976) (Marshall, J., dissenting), Justice Marshall posed the question: "Is it not as common for minorities to be gerrymandered into the same district as into separate ones?" The mere presence of one or more districts with an exceptionally large percentage of nonwhites, e.g., 75-100%, however, does not necessarily constitute "packing," particularly where the nonwhite population is densely concentrated and there is no evidence that adjoining nonwhite neighborhoods are diffused among surrounding districts in which white voters constitute a majority. See NAACP v. City of Canton, 472 F. 2d, 859 (S.D. Miss. 1979).

367. See United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring in part, dissenting in part); Id. at 179 (Stewart, J., concurring in judgment).

368. Several Supreme Court opinions seem to suggest that the idea of "dilution of minority strength" contemplates protection of political minorities in general, not merely racial minorities. E.g., Connor v. Finch, 431 U.S. 407, 426 (1977) (Blackmun, J., concurring) (inquiring as to a "racial or other improperly motivated gerrymander"); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 166 (1977) ("racial or political groups"); Dallas County v. Reese, 421 U.S. 477, 480 (1975) (per curiam) ("identifiable element of the voting population"); Gaffney v. Cummings, 412 U.S. 735, 754 (1973) ("what is done . . . to achieve political ends or allocate political power, is not wholly exempt from judicial review"); Whitcomb v. Chavis, 403 U.S. 124, 150 (1971) (no evidence of purposeful device to further racial or economic discrimination); Gordon v. Vance, 403 U.S. 1 (1971) (individual may not be denied access to the ballot because of some extraneous condition such as tax status, military status, or wealth); Burns v. Richardson, 384 U.S. 73, 88 (1965) (racial or political elements of the voting population). But see City of Mobile v. Bolden, 48 U.S.L.W. 4436, 4442 n.26 (Apr. 22, 1980) (suggesting that some questions regarding group representation are unanswerable).

to meet his burden of showing the invidiousness of the alleged discriminatory device, as the relief sought was subsumed in claims by racial minorities, or (3) the court concluded that the group did not have a constitutionally protected right of access to the political process. No Supreme Court decision, however, has expressly held that the federal courts may not hear and decide a claim of malapportionment by members of such a group. Several commentators have urged that the Court should expressly recognize that a claim of diluted minority voting rights is available to all politically disadvantaged groups, rather than simply to racial minorities. At present, it appears that the federal courts remain open to a claim by a political element or group that a reapportionment invidiously dilutes its voting strength.


372. 343 F. Supp. at 734.

373. In 1965, however, the Court in a per curiam opinion affirmed the decision of a district court that the issue of partisan gerrymandering was not justiciable. WMCA, Inc. v. Lomenzo, 382 U.S. 4, aff’d 238 F. Supp. 916 (S.D.N.Y. 1965). Justice Harlan, in a concurring opinion, noted that the affirmation recognized as “eminently correct” the district court’s rejection of the partisan claims. 382 U.S. at 6. See Bagley v. Hare, 385 U.S. 114 (1966) (dismissing appeal of state court decision for lack of federal question).


375. See note 368 supra; City of Mobile v. Bolden, 48 U.S.L.W. 4436, 4444-45 (Apr. 22, 1980) (Stevens, J., concurring in judgment) (“In the line drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.”); Cousins v. City Council, 466 F.2d 830, 852 (7th Cir.) (Stevens, J., dissenting) (Circuit Judge Stevens, now Supreme Court Justice Stevens, urged that the concept of dilution must apply equally to ethnic, political, and economic gerrymanders), cert. denied, 409 U.S. 893 (1972); Lipscomb v. Johnson, 459 F.2d 335 (5th Cir. 1972) (acknowledging that “ghetto dwellers” could state a cause of action if subject to a purposeful attempt “to fence them out”); Sutton v. Dunne, 365 F. Supp. 483 (N.D. Ill. 1973) (finding total maximum deviation of 9.74% unacceptable when it resulted in overrepresentation of city dwellers and underrepresentation of the suburban dwellers); Winter v. Docking, 356 F. Supp. 88 (D. Kan. 1973) (finding total maximum deviation of 12.41% unacceptable when it arbitrarily cut political subdivisions); Wendler v. Stone, 350 F. Supp. 838, 841 (S.D. Fla. 1972) (Roetigter, D.J., dissenting) (urging that a cause of action for political gerrymandering exists when districts are not compact or contiguous or there is unnecessary and arbitrary splitting of political subdivisions); Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222, 224 (E.D. La. 1971) (requiring local government to justify decision to carve up “areas which have traditionally identifiable interests”), appeal dismissed, 452 F.2d 1386 (5th Cir. 1972); Klahr v. Williams, 313 F. Supp. 148 (D. Ariz. 1970) (finding inapposite the consideration of party strength in reapportionment), aff’d on other grounds sub nom. Ely v. Klahr, 403 U.S. 108 (1971); Wells v. Rockefeller, 311 F. Supp. 48, 54 (S.D.N.Y.) (Canella, J., dissenting) (urging that claim of political gerrymandering can be made when districts lack contiguity and compactness), aff’d, 398 U.S. 901 (1970); Long v. Docking, 282 F. Supp. 256 (D. Kan. 1968) (accepting that the unnecessary division of a county may thwart the purpose of constitutional apportionment and dilute the political power of those counties); Sincock v. Gately, 262 F. Supp. 739, 855 (D.C. Del. 1967) (Wright, D.J., dissenting in part) (urging that partisan gerrymandering is justiciable); Drum v.
C. Affirmative Representation of Racial or Political Elements

No state is required to maximize the voting strength of any political or racial element or to provide for proportional representation. Likewise, no such element has a constitutional right to an apportionment plan drawn to maximize its political strength. The United States Supreme Court has recognized, however, that a state legislature has authority to draw district lines in such a manner that they achieve a rough approximation of the strengths of political parties or racial groups. In 1973 the Court rejected a constitutional challenge to a reapportionment that purported to draw districts statewide in accordance with the relative strength of the Democratic and Republican parties. The Court held:

[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Cognizant of the abuses that a purposeful misreading of this holding might engender, the Court cautioned that districting plans would be vulnerable if racial or political groups "have been fenced out of the political process and their voting strength invidiously minimized."

Four years later the Court applied this concept to approve a reapportionment that contained districts drawn intentionally with black voting majorities. In United Jewish Organizations, Inc. v. Carey a plurality of the Court held that "neither the Fourteenth nor the Fifteenth Amend-

Seawell, 250 F. Supp. 922 (M.D.N.C. 1966) (invalidating plan in part because districts not compact and contiguous). Even if partisan claims are justiciable, however, it is unlikely that either of the two major political parties could carry the burden of showing invidious discrimination. See note 373 supra; United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 167 (1977); Whitcomb v. Chavis, 403 U.S. 124, 155 (1971) (ghetto residents in the case no more discriminated against than "other Democrats").


378. Id. at 754.
379. Id.
381. The plurality opinion of four Justices based its judgment on two approaches to the issue of proportional representation. One focused on the Voting Rights Act and the need for a state to use racial criteria and race-oriented remedies in its effort to comply with the Act by maintaining nonwhite voting strength. Id. at 163-65. Justice Brennan concurred in this approach. Id. at 168-80 (Brennan, J., concurring in part). The second approach adopted by the plurality was that the state was free to use racial factors in apportioning as long as it did not violate the United States Constitution. Id. at 165-68. Justices Stewart and Powell concurred in this approach on the basis that the petitioners had failed to show that the state's use of racial criteria violated either the fourteenth or fifteenth amendment. Id. at 179-80
ment mandates any per se rule against using racial factors in districting and apportionment. The plurality stated that:

We think it . . . permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

Thus, a state apparently is not confined to using racial criteria only to eliminate the effects of past discrimination. It may do so for the purpose of providing proportional representation as long as it does not “fence out” another group from participation in the political processes or “minimize or unfairly cancel out” the voting strength of such a group. In United Jewish Organizations, Inc. v. Carey the district lines were drawn “in such a way that the percentage of districts with a nonwhite majority roughly approximate[d] the percentage of nonwhites in the county,” and white voters remained the majority in approximately 70% of the assembly and

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382. 430 U.S. at 162. Mr. Justice Brennan, however, in his concurring opinion warned that apparently remedial or “benign” uses of racial criteria may actually “disguise a policy that perpetuates disadvantageous treatment of the plan’s supposed beneficiaries,” stigmatize racial groups, or be viewed as unjust by those who are disadvantaged by the preference given other groups. Id. at 173-75.

383. Id. at 168. The Court’s statement is not unlike that expressed in Justice Powell’s opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), that a state university may consider race as one factor in determining medical school admissions. Whether it similarly is possible for a court to draw districts with the objective of proportional representation is less certain. See Marshall v. Edwards, 582 F.2d 927 (5th Cir. 1978) (holding that courts should leave racially proportional representation to legislative bodies and admonishing the district court to give more attention to equal population and rational boundaries than to the “political objective” of proportional representation). But see Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). See generally Note, Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts, 91 HARV. L. REV. 1847 (1978).


385. 430 U.S. at 165. All of the members of the Court, except Chief Justice Burger (dissenting), placed emphasis on the fact that whatever discrimination occurred against the white petitioners did not “stigmatize” them. Four Justices repeated this test in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in judgment in part and dissenting). In United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 171 (1977), Justice Brennan contrasted the affirmative use of racial criteria in that case with other cases where it was used to reduce a minority’s voting strength and therefore would be viewed as “suspect.” Perhaps, as noted by the Court in Hunter v. Erickson, 393 U.S. 385, 391 (1969), “[t]he majority needs no protection against discrimination. . . . “ Accord, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723, 727 (1974). Contra, Dixon, The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination, 52 CORNELL L. REV. 494, 503-04 (1967); Emerson, Malapportionment and Judicial Power, 72 YALE L.J. 64, 74 (1962).


387. Id. at 165.
V. TEXAS LAW APPLICABLE TO LEGISLATIVE REAPPORTIONMENT

Provisions of Texas law governing apportionment of the Texas Senate and House of Representatives are embodied in sections 25, 26, 26a, and 28 of article III of the Texas Constitution. As a result of federal court decisions over the past two decades, however, these state constitutional provisions no longer have their apparent or literal meaning. At least one, section 26a, clearly is no longer in effect at all. Section 25, governing apportionment of the Texas Senate, was invalidated in part in 1965 by the same federal court that declared section 26a unconstitutional. Portions of the section, however, are not violative of the United States Constitution and therefore are severable from the offensive provisions and are still in effect. The Texas Supreme Court has refused to find that the provisions of section 26 governing apportionment of the house of representatives have been invalidated or to permit the legislature to dispense with the section’s requirements except to the extent necessary to comply with the United States Constitution. Therefore, compliance with the existent requirements of the Texas Constitution will be necessary for enactment of a valid state legislative reapportionment.

Section 25, at least insofar as it prohibits any single county from entitle-ment to more than one senator, was declared violative of the United States Constitution in 1965 by the federal district court in Kilgarlin v. Martin. If the section otherwise remains in effect, it imposes three identifiable requirements: that the state’s thirty-one senators be elected from single-member districts, that the districts be composed of contiguous territory, and that the districts be drawn on the basis of qualified electors. Total population rather than the number of electors was used to apportion the senate both in 1965 and 1971. Continued use of total population instead of qualified electors as the apportionment base is advisable because apportionment on the basis of qualified electors, although not unconstitutional per se, is permitted under the United States Constitution only if required by extraordinary circumstances. Under section 3 of article III of the Texas Constitution, a new senate must be elected after each apportion-
ment. Section 26 of article III requires that state representatives be apportioned among the counties according to population. If a county has sufficient population to be entitled to a representative, it is to be formed into a separate district. Section 26 neither prevents nor requires drawing districts within a county entitled to two or more representatives. Therefore, multi-member districts are possible. Section 26, however, prevents the division of a county and the combination of a part of that divided county with another county or counties unless such division results from apportioning surplus population from a county otherwise entitled to a representative or is necessary under federal law. Counties or portions of counties combined to form legislative districts must be contiguous.

In holding the 1971 reapportionment of the Texas House of Representatives invalid, the Texas Supreme Court in Smith v. Craddick expressly directed that:

The only impairment of this mandate [apportionment by county] is that a county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment.

... If the population of the county is slightly under or over the ideal population figure, the state constitution requires that the county constitute a separate district.

... It is still required that a county receive the member or members to which that county's own population is entitled when the ideal district population is substantially equalled or is exceeded.

The United States Supreme Court acknowledged, and impliedly approved,

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396. TEX. CONST. art. III, § 3. Senators elected after every apportionment must be divided into two classes: those whose terms expire two years later and those whose terms expire four years later. The Texas attorney general ruled in 1969 that this requirement similarly would apply to bills intended to make changes in only a few districts. TEX. ATT'Y GEN. OP. NO. M-349 (1969); see Spears v. Davis, 398 S.W.2d 921 (Tex. 1966).

397. TEX. CONST. art. III, § 26 provides:

The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county had more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.


399. TEX. ATT'Y GEN. OP. NO. WW-1041 (1961) (providing a definition for the term contiguous).

400. 471 S.W.2d 375 (Tex. 1971).

401. Id. at 377-78.
this Texas decision in *White v. Regester*, 402 wherein the Court indicated by footnote that the preservation of county lines would have been sufficient to justify the 9.9% total maximum deviation in population existing among Texas house districts in the 1971 State Redistricting Board plan. 403

The view of the Texas Supreme Court with regard to enforcement of the state constitutional requirement for apportionment on the basis of counties is apparent from *Smith v. Craddick*. 404 The Republican petitioners in the case were able to show that the 1971 enactment divided thirty-three counties, thereby establishing a prima facie case that the plan was unconstitutional. At that point the burden shifted to the State of Texas to show the reason behind the divisions. 405 The only reason acceptable under section 26 was equalization of population, either as a result of apportioning the surplus population in a county already entitled to a representative or as otherwise required to comply with the equal protection requirement of the United States Constitution. The state failed to make such a showing. 406 Instead, as pointed out by the Court, eighteen counties with less than the ideal population were divided rather than joined with other similar counties and one county, which had population sufficient for a representative, was divided between two districts. 407 The naked assertion by the state of the need to equalize population under the United States Constitution was not sufficient in the face of the petitioners' proof.

In assessing the significance of *Craddick* and the provisions of the Texas Constitution on reapportionment in the 1980's, the following observations are offered. First, the current requirements of sections 25 and 26 should be followed insofar as possible subject to the overriding requirements of federal law. For this purpose, compliance with the fifteenth amendment and the Voting Rights Act, in addition to the equal protection requirement of the fourteenth amendment, should justify a failure to follow strictly the provisions of the Texas Constitution. If adherence to federal law is the reason for a failure to follow the Texas Constitution, legislators must be careful to distinguish between what is required by federal law and what is permitted by it. Exercise of legislative discretion, even if consistent with federal policy, may not be sufficient to justify deviation from the specific prescriptions of the state constitution. Secondly, the legislature, in enacting the reapportionment legislation, must provide the evidence that will allow the state to carry its burden of explaining any deviation from the requirements of the Texas Constitution. For example, whenever a proposed districting plan divides a county, the proponent of the plan must demonstrate that such division is required in order to comply with federal

403. *Id.* at 764 & n.8 ("[T]he State achieved a constitutionally acceptable accommodation, between population principles and its policy against cutting county lines in forming representative districts.").
404. 471 S.W.2d 375 (Tex. 1971).
405. *Id.* at 378.
406. *Id.*
407. *Id.*
law or, in the house of representatives, that such division is the result of apportioning a county’s excess population.

Section 28 of article III of the Texas Constitution requires that the Texas Legislature apportion the state into senatorial and representative districts at its first regular session after publication of each United States decennial census. It does not apply to congressional districts. If the legislature, at the first regular session, fails to apportion either the house or senate, the State Legislative Redistricting Board shall assemble within ninety days after adjournment of the regular session and, within sixty days thereafter, apportion the state. In 1971 the Texas Supreme Court, in *Mauzy v. Legislative Redistricting Board*, considered several questions concerning the meaning of section 28 that may be material for redistricting in the 1980’s. First, although section 28 provides that redistricting shall occur at the first regular session “after” publication of the census, section 28 applies if publication occurs either before the legislature convenes or during the session, even though publication in mid-session may permit only “a few weeks, or even only a few days in which to put the finishing touches on a redistricting bill.” Secondly, although the court left open the question of what constitutes “publication” for purposes of section 28, it implied that “furnish[ing the legislature with] all census figures necessary to apportion the state into legislative districts” would be sufficient.

Thirdly, the court held that a legislatively enacted reapportionment

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408. *Tex. Const.* art. III, § 28 provides:

The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26 and 26a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: 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, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding state-wide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expenses during the Board’s session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951.

409. 471 S.W.2d 570 (Tex. 1971).

410. *Id.* at 573.

411. *Id.*
"which is invalid, for whatever reason, is no apportionment,"\textsuperscript{412} and that "the Board's duty to proceed with apportioning the state . . . accrued when the regular session adjourned . . . without having enacted a valid apportionment statute."\textsuperscript{413} Presumably, therefore, if a reapportionment is invalid under federal law, the State Legislative Redistricting Board has a duty to proceed to apportion the state. Finally, uncertainty exists as to whether the legislature has the power to apportion when the invalidity of the legislative enactment is determined more than 150 days after adjournment of the legislature and therefore beyond the period prescribed in section 28 for action by the Redistricting Board. The court declined to decide whether the legislature could apportion in special session "if the power did not reside in the Board or if the Board's own scheme [was] declared invalid."\textsuperscript{414} By enacting state legislative reapportionment bills in 1975 and 1979, the Texas Legislature assumed that it has authority, at least in regular session, to pass a reapportionment bill under such circumstances. In the view of this writer, the legislature has authority in either regular or special session to cure an invalid reapportionment once the State Legislative Redistricting Board is no longer empowered to do so.

There are several other aspects of Texas law that may affect reapportionment in the 1980's. Although article 29d of the Texas Civil Statutes\textsuperscript{415} prohibits official recognition of or action on any report of the federal decennial census prior to September of the year after the census was taken, the legislature is specifically exempted from the prohibition. Moreover, the Texas Supreme Court in \textit{Mauzy} held the provision ineffective to the extent that it conflicts with the obligation of the legislature to reapportion under section 28 of article III of the Texas Constitution.\textsuperscript{416} The Governor of Texas almost certainly has authority to veto legislative reapportionments, although the issue has never been addressed in Texas.\textsuperscript{417} The United States Supreme Court has established that a governor has such authority with regard to congressional districting.\textsuperscript{418} Governors have vetoed reapportionment acts on several occasions in other states.\textsuperscript{419}

Although much attention over the coming months with regard to potential litigation challenging state legislative apportionments is likely to focus on the requirements of federal law, the Texas Legislature must achieve a proper accommodation between federal mandates and applicable require-

\textsuperscript{412} \textit{Id.} at 574.
\textsuperscript{413} \textit{Id.}
\textsuperscript{414} \textit{Id.} \textit{But see} TEX. ATT'Y GEN. OP. NO. M-881 (1971).
\textsuperscript{415} TEX. REV. CIV. STAT. ANN. art. 29d (Vernon 1971).
\textsuperscript{416} 471 S.W.2d at 574-75. In 1976 Congress authorized a mid-decade census, 13 U.S.C. § 141(d) (1976), but provided that the information could not be used to reapportion congressional districts. \textit{Id.} § 141(e)(2). The state could impose a similar limitation on reapportionment by the Texas Legislature or political subdivisions.
\textsuperscript{417} In 1921 Governor Neff, while not vetoing the legislatively enacted apportionment plans, refused to sign them and again submitted the subject for action in a special session called immediately following the regular session. TEX. H.R.J. 16 (1921).
\textsuperscript{419} \textit{See} note 86 \textit{supra} and accompanying text.
ments of the Texas Constitution. During the past two decades, at least four suits have been filed in state courts challenging state legislative reapportionments, with the 1971 enactment apportioning the house of representatives declared invalid.\textsuperscript{420} The legislature should anticipate the possibility of state as well as federal litigation in the 1980's.\textsuperscript{421} Moreover, the legislature should consider the role of the State Legislative Redistricting Board in regard to legislative enactments to which the United States Attorney General objects under the Voting Rights Act. If an objection is received within ninety or 150 days after adjournment of the regular session, there may be authority under section 28 for the board to redraw the legislative districts to eliminate the cause for the objection. The legislature should consider whether such an alternative, especially if the required modification is minor, is preferable to a declaratory judgment action in the United States District Court in the District of Columbia.\textsuperscript{422}

VI. Principles of Reapportionment Under Section 5 of the Voting Rights Act of 1965

A. The Act

In 1965 prompted by what it perceived as "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution,"\textsuperscript{423} Congress enacted the Voting Rights Act of 1965\textsuperscript{424} to enforce both the fourteenth\textsuperscript{425} and fifteenth amendments\textsuperscript{426} to the United States Constitution and "to rid the country of racial discrimination in voting."\textsuperscript{427} The Act prohibits certain prerequisites to voting and established a requirement of preclearance.

\textsuperscript{420} See notes 404-07 supra and accompanying text.


\textsuperscript{422} See text accompanying notes 454-55 infra.


\textsuperscript{427} Id. at 315.
by federal authorities of changes proposed in state elections.\textsuperscript{428} Initially, the Act applied only to certain states\textsuperscript{429} and was for a limited duration. In 1975 Congress extended the Act for seven years and expanded it to include “language minorities” in addition to other racial minorities,\textsuperscript{430} thus extending its coverage to certain states, including Texas, that had not been covered by the Act when passed in 1965 or when amended in 1970.

The Act prohibits any state or political subdivision from imposing or applying any voting qualification or prerequisite to voting, or any standard, practice, or procedure to deny or abridge the right of any citizen of the United States to vote on account of race or color.\textsuperscript{431} In response to what it viewed as the “common practice of some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as old ones had been struck down,”\textsuperscript{432} Congress prescribed an extraordinary remedy in section 5\textsuperscript{433} of the Act.\textsuperscript{434} Under section 5, no

\textsuperscript{429} Under the original 1965 Act, a state or political subdivision is covered by § 5 if, on Nov. 1, 1964, it maintained a test or device as a prerequisite to registration or voting and less than 50% of the voting age population was registered on Nov. 1, 1964, or voted in the 1964 presidential election. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (current version at 42 U.S.C. § 1973c (1976)). In 1970 the Act was amended to add those jurisdictions that maintained a “test or device” on Nov. 1, 1968, and in which less than 50% of the voting age population was registered on Nov. 1, 1968, or voted in the 1968 presidential election. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 5, 84 Stat. 314.
\textsuperscript{434} The Act provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with re-
jurisdiction may change a voting qualification, prerequisite, standard, procedure, or practice without first obtaining a declaration from the District Court of the District of Columbia or the United States Attorney General that the change has neither the purpose nor the effect of "denying or abridging the right to vote on account of race or color." The burden of proof before both the court and the Attorney General is on the state to show that the change has neither such a purpose nor such an effect. Therefore, if the plan is submitted to the Attorney General, it cannot be enforced if he timely notifies the state that the plan is violative of the Act or that he is unable to conclude that the plan does not have a discriminatory purpose or effect.

**B. Administration of the Act**

Designated federal officials determine whether the Act is applicable to a particular state and whether, for purposes of the required review, a particular state or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: Provided, That each qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.


435. Id. A voting change brought about by a state court decision construing an already precleared statute apparently is not within the scope of § 5. See Williams v. Sclafani, 444 F. Supp. 895, 904 (S.D.N.Y. 1977).

436. 28 C.F.R. § 51.19 (1979). See also id. § 51.4(b). An election change failing to meet preclearance requirements is "of no force or effect," and elections conducted pursuant to such a change are unlawful. United States v. County Comm'n, 425 F. Supp. 433, 436 (S.D. Ala. 1976), aff'd, 430 U.S. 924 (1977). The United States Attorney General or a private party may sue to enjoin the use of such an election change. Id.; see note 456 infra. See also Georgia v. United States, 411 U.S. 526, 538 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

ular change has a racially discriminatory effect or purpose. Furthermore, no direct appeal of such determinations is possible. Once federal officials determine a state or political subdivision to be within the Act's coverage, exemption is possible only through a "bail-out suit" brought against the United States in the District Court for the District of Columbia. In such a suit, the state or political subdivision must show, or the United States Attorney General must agree, that no test or device denying the right to vote on account of race or color has been used for the preceding ten or seventeen years, depending on the applicable portion of 42 U.S.C. §§ 1973b(a), (f).

Once a proposed election change is submitted to him, the United States Attorney General is afforded sixty days in which to review it and to object. If he fails to convey an objection to the state within that period, the change becomes effective. A nunc pro tunc objection by the Attorney General is invalid, and a state has the right to enforce the change. Department of Justice regulations direct that the Attorney General also will notify a jurisdiction within sixty days after submission if the proposed change is approved. Expedited consideration is possible only under certain circumstances.

In construing what actually constitutes submission of a change pursuant to the Act, the courts have required that the state "in some unambiguous and recordable manner submit any legislation . . . directly to the Attorney General with a request for his consideration pursuant to the Act." Department of Justice regulations set out in considerable detail the requirements of a submission and the nature of supportive information deemed necessary for adequate review. For redistricting proposals, the regulations strongly urge jurisdictions to provide supportive information includ-

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442. Id.

443. Morris v. Gressette, 432 U.S. 491, 504 (1977). The Court noted: "Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be 'no dragging out' of the extraordinary federal remedy beyond the period specified in the statute." Id.


445. Id. § 51.22.


ing the following: reasons for change; any litigation affecting the change; prior laws; a map showing population distribution by race within existing and proposed districts; populations by race of the areas to be affected; voting age population and number of registered voters by race; a record of past candidates and elections; and evidence of public notices, hearings, speeches, and newspaper articles discussing the proposed change. A failure to provide information that the Attorney General determines to be necessary for his review under Department of Justice regulations will result in a determination that the submission is inadequate, and the period of review will not commence until the information is provided.

Department of Justice regulations require an Attorney General to enter an objection if the evidence regarding the purpose or effect of the change is conflicting and he is unable within the prescribed sixty-day period to resolve the conflict. If an objection is lodged, a request for rehearing may be made within ten days to allow submission of further information. A similar sixty-day period exists for a decision on rehearing. Under the regulations, the Attorney General may withdraw an objection. Although a state may not appeal the decision of the United States Attorney General to object to a particular election change, it is not prevented from bringing a declaratory judgment action under section 5 in the District Court of the District of Columbia for a declaration that the proposed change does not have the proscribed purpose or effect. In such a declaratory judgment proceeding, the prior determination of the Attorney General, while apparently admissible, is not conclusive of whether the plan should be approved.

Private parties also are restricted in their recourse under the Act. A person objecting to proposed election changes may enforce section 5 only by instituting an action for a declaratory judgment that an election change is subject to the Act and by seeking an injunction to prevent implementation of the change unless it has first been submitted for federal review. Department of Justice regulations, however, encourage private citizens opposed to a voting change to make the reasons for their opposition known to the Department. Persons may request that their identity not be dis-

448. Id. § 51.10(a)-(b).
449. Id. § 51.3(b); see City of Rome v. United States, 48 U.S.L.W. 4463 (Apr. 22, 1980).
450. Id. § 51.19.
451. Id. § 51.21(b).
452. Id. § 51.24.
453. Id. §§ 51.3, .25.
closed to anyone outside the Department. Pursuant to the regulations, a registry is maintained of persons in each jurisdiction to be notified when a proposed change is submitted. If deemed necessary, the Attorney General may provide public notice sufficient to invite other interested persons to provide evidence. Since 1965 persons opposed to certain changes as racially discriminatory have made the reasons for their opposition known to the Department of Justice. Such opposition has undoubtedly affected decisions by the United States Attorney General to object to certain changes. If the Attorney General fails to make a timely objection to a proposed change, private parties have no right of appeal, but retain the right to challenge the change in court as violative of other state or federal requirements, including the United States Constitution.

C. Standards under the Act

Section 5 of the Voting Rights Act prohibits a voting change having either the effect or the purpose of denying or abridging the right to vote on account of race or color. The substantive meaning of section 5 as applied to redistricting remains unclear. In the United States Supreme Court's only decision directly applying the substantive provisions of the Act to a reapportionment, Beer v. United States, the Court considered what standard should be used under section 5 to determine when a new reapportionment has the proscribed effect. A majority of only five Justices concluded that the question was one of statutory construction, rather than constitutional law, and, after a review of the Act's legislative history, ruled: "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Using this retrogression test, the Court compared the old and new apportionments and found that "a legislative reapportionment that enhances the position of racial minorities . . . can hardly have the

458. Id. § 51.12(c).
459. Id. § 51.13.
460. Id. § 51.18(c).
462. There is no question, however, that it applies to reapportionment enactments. Beer v. United States, 425 U.S. 130, 133 (1976); Georgia v. United States, 411 U.S. 526, 531 (1973). In Georgia the Court expressly reserved the question of whether a district that is identical to a district in the previous apportionment is subject to preclearance under the Voting Rights Act. Id. at 535 n.7. The Court again reserved this question in Beer v. United States, 425 U.S. 130, 139 n.10 (1973). In Beer the Court ruled that a preexisting plan for certain at-large city councilman seats was not subject to review under § 5. Id. at 139.
464. Id. at 139.
465. Id. at 141 (emphasis added). In Beer Justice White would have adopted a very different standard under the Voting Rights Act. When it appears that polarized voting exists and a racial minority cannot win in any district where the racial group does not constitute a majority of the voters, Justice White would find that: "where these facts exist, combined with a segregated residential pattern, § 5 is not satisfied unless, to the extent practicable, the new electoral districts afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population in the community." Id. at 143-44 (White, J., dissenting).
'effect' of diluting or abridging the right to vote on account of race . . . [and] cannot violate § 5 unless . . . [it] so discriminates on the basis of race or color as to violate the Constitution."

In determining that the reapportionment in Beer did not have a retrogressive effect, the Court found that the plan increased the likelihood of election of a member of the racial minority because it increased the percentage of districts where members of the protected racial minority had a clear majority of the voters. The Court arrived at this standard for applying the retrogression test in the context of the lower court's findings that bloc or polarized voting existed in the city and that a minority candidate could not win an election except in districts where a majority of the voters were members of the racial minority. The majority opinion did not expressly reject other possible standards for other circumstances, such as where bloc voting is not present and minority voting strength might be heightened by being spread through several districts rather than concentrated in one. Still, assumptions of bloc or polarized voting and minority representation only through the election of members of the minority itself are prevalent in other decisions regarding the Voting Rights Act.

The Department of Justice has used two population thresholds in determining whether a racial minority has a majority of voters in any particular district. The Department considers a percentage of at least 65% of the district's total population and 60% of the district's voting age population necessary for members of a racial minority to have some chance of electing a candidate of their own choice due to the higher percentage of nonvoting age persons and the presence of low voter registration and turnout among racial minorities. These figures, like the standard applied in Beer, are based on an assumption of polarized or bloc voting. The Department further urges that factors such as incumbency, strength of campaign organization, qualifications of individual candidates, and the activism of local

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466. Id. at 141.
467. Id. at 142.
468. See id. at 136-37; id. at 143-44 (White, J., dissenting).
469. In considering dilution of voting strength claims, several courts have found that minorities may wield political strength by being a large minority in a district. E.g., Dove v. Moore, 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); Panior v. Iberville Parish School Bd., 536 F.2d 101, 104-05 (5th Cir. 1976); Moore v. Leflore County Bd. of Election Comm'rs, 520 F.2d 621 (5th Cir. 1974); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir.), cert. denied, 407 U.S. 925 (1972). The Fifth Circuit noted in Panior that "there is no agreement on whether the political interests of a minority group are best maximized by an overwhelming majority in a single district, bare majorities in more than one district or a substantial proportion of voters in a number of districts." 536 F.2d at 105. See also Wright v. Rockefeller, 376 U.S. 52 (1964); United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978); Turner v. McKeithen, 490 F.2d 191, 197 n.24 (5th Cir. 1973).
minority concentrations also should be considered in determining the effect of any particular reapportionment plan.

The *Beer* Court dealt only with whether the reapportionment plan in question had the effect of denying the right to vote on account of race. A state carries the additional burden of showing that the plan does not have such a purpose. The Supreme Court has indicated in other cases arising under the Voting Rights Act that a state must prove that "a racially discriminatory purpose" was not a factor motivating it in devising the plan.\(^473\)

The Court has firmly directed that "[a]n official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."\(^474\) Evidence material to whether the plan is purposefully discriminatory is of the same nature as that considered by the courts in challenges based on the unconstitutional dilution of a group's voting strength.\(^475\)

For example, the Department of Justice views the following characteristics of a reapportionment as possibly indicative of a racially discriminatory purpose: (1) multimember districts; (2) an abnormally high concentration of nonwhites in districts when adjoining nonwhite neighborhoods are diffused among surrounding districts in which white voters constitute a majority; (3) fragmentation of a nonwhite community among several districts in which white voters constitute a majority; or (4) districts with substantial nonwhite voting population that also have a total population significantly in excess of the ideal district.\(^476\)

These characteristics in combination with other corroborative circumstantial evidence, such as a state's past record of purposeful discrimination, may provide the basis for an objection by the United States Attorney General. Since the burden of proof under section 5 rests with the state,\(^477\) any state subject to section 5 should be cognizant of such characteristics as they appear during the reapportionment process and eliminate them unless to do so would conflict with an identifiable and significant state goal otherwise applied systematically in the reapportionment plan. If such characteristics are present in the final reapportionment, a state must be prepared to demonstrate an objectively verifiable, legitimate purpose for their existence.\(^478\)

### D. Conclusions

Section 5 of the Voting Rights Act is likely to have a significant impact on reapportionment after the 1980 census in the states to which it ap-

\(^{473}\) City of Richmond v. United States, 422 U.S. 357, 378 (1975).

\(^{474}\) *Id.* at 378. The Court observed that "acts generally lawful may become unlawful when done to accomplish an unlawful end." *Id.* at 379.


\(^{476}\) Address by Drew S. Days III, National Conference of State Legislatures, Assembly on the Legislature (Feb. 15, 1980).

\(^{477}\) *See* note 436 *supra* and accompanying text.

The extraordinary nature of the preclearance requirement, the uncertainty of the substantive meaning of the Act, and the substantial authority and discretion of the United States Attorney General pose significant practical and legal difficulties for the affected states and for persons likely to oppose the adopted reapportionments. The following recommendations are made in view of the potential significance of the Act.

First, any state subject to the Act must begin preparations for compliance with it and for submission of the state's reapportionment plan even before the plan is considered in the legislative process. Every member of the legislative body, as well as essential staff persons, must be made aware of the substantive and procedural requirements of the Act. In addition, staff personnel should begin early in the reapportionment process to collect the materials and data and complete the calculations required by Department of Justice regulations for support of the reapportionment. As part of this preparation, lines of communication and cooperation with appropriate Department of Justice personnel should be established. Since the burden under the Act remains with the state, however, no state should limit its preparation solely to those materials expressly requested by the Department of Justice.

Second, though this Article assumes that each state legislature will carry out the reapportionment process without purposefully discriminating against racial or language minorities, special precautions should be considered to assure a fair and equal reapportionment process. Part VIII outlines suggested precautions. Additionally, legislators must be alert during the reapportionment process to the existence of districting characteristics that may dilute a racial minority's voting strength and suggest a racially discriminatory purpose. To some extent, a legislature may rely on its members to bring such characteristics to the attention of the appropriate committee or to the full legislature during debate on a districting bill. A state may choose, however, to establish quantitative criteria to be utilized systematically through the reapportionment process for purposes of identifying some characteristics, such as district boundaries that have the effect of fragmenting or packing compact minority communities. Once alerted to the existence of a potentially dilutive characteristic, the legislature must make an informed determination regarding the impact of the particular district boundaries and whether an objectively verifiable, legitimate purpose exists for maintaining the boundary.

Third, since a reapportionment plan that is not purposefully discriminatory still may be violative of the Voting Rights Act if it will lead to a retrogression in racial minority voting strength, a state covered by the Act should adopt a policy in favor of districts with sufficient minority voting-age population to assure the minority group some chance of electing a can-

479. For a discussion of the impact of the Act on reapportionments after the 1970 census, see note 109 supra.
480. See note 436 supra and accompanying text.
481. See notes 539-46 infra and accompanying text.
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didate of its own choice. This objective should be applied systematically throughout the reapportionment process together with population equality and other objectively verifiable, legitimate state goals. Several standards exist for testing a proposed reapportionment against the existing apportionment to determine "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change." Some standards, such as those based on the criteria of bloc voting and lower minority voter registration, may be inapplicable in some states or in parts of some states. An assumption of such criteria when they do not actually exist may cause the needless "packing" of a minority group into only a few districts, when the group could have a greater political impact if it constituted a smaller majority or even a significant minority of the population in a larger number of districts. Whatever standards are utilized, the tests for retrogression should be applied on a statewide and, when practicable, on a local basis, such as when there are several districts within a county. If Department of Justice criteria or standards for determining effect are either unavailable or, in the state's view, inappropriate, the state must carefully document the basis for the criteria and the standards it believes applicable.

Fourth, each state should provide formally, by statute, for the person or persons responsible for submission of a reapportionment plan, and possibly other election changes, to the United States Attorney General. The Voting Rights Act and Department of Justice regulations permit designation of the state's chief legal officer or other appropriate state officials. In some states this responsibility may fall naturally on the state's chief legal officer or elections officer. In Texas, by tradition rather than law, the sec-

482. Beer v. United States, 425 U.S. 130, 141 (1976). For example, to determine whether retrogression exists in a particular proposal, a state legislature may wish to compare the proposed and existing apportionments to determine (1) the number of districts with over 75% minority group population and/or voting age population (a substantial majority); (2) the number of districts with 60% or more minority group population and/or voting age population (a clear majority); (3) the number of districts with 51% or more minority group population and/or voting age population (a numerical majority); and (4) the number of districts with 35-50% minority group population and/or voting age population (a substantial minority). In addition, the legislature may wish to consider both the existing and proposed plans in terms of the proportion of the group in the general population as shown by comparing the previous and new census.

483. See Dove v. Moore, 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); Panior v. Iberville Parish School Bd., 536 F.2d 101, 104-05 (5th Cir. 1976); Moore v. Leflore County Bd. of Election Comm'rs, 520 F.2d 621 (5th Cir. 1974); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir.), cert. denied, 407 U.S. 925 (1972). See also Wright v. Rockefeller, 376 U.S. 52 (1964); United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978); Turner v. McKeithen, 490 F.2d 191, 197 n.24 (5th Cir. 1973).

484. Compare Connor v. Finch, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring) ("[d]istricts that disfavor a minority group in one part of the state may be counterbalanced by favorable districts elsewhere") with United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 162-64 (1977) (considering percentage of districts with nonwhite majorities within a county).

485. For example: (1) whether bloc voting is present; (2) whether the percentage of persons registered to vote is equal among white and nonwhite voting age populations; (3) whether the turnout of eligible voters is equivalent among white and nonwhite groups.
Secretary of state has exercised the responsibility. This responsibility should be entrusted expressly by statute, and provision should be made for participation in the process by at least the state's chief legal officer, chief elections officer, and in reapportionment matters, a person or persons chosen to represent the state legislature.

Fifth, the state should consider what alternative, if any, exists under state law for changing a reapportionment plan if the United States Attorney General objects to the plan passed by the legislature. If the objection is a minor one, a state may find that a modification of the plan in response to the objection is preferable to initiation and prosecution of a declaratory judgment action. For example, in Texas, a state in which the legislature meets in regular session only every two years, immediate reconsideration by the legislature of a disapproved plan is impossible, but other means for modification exist: action by the State Legislative Redistricting Board, by a special session of the legislature called by the Governor, by a court of competent jurisdiction, or by the next regular session of the Texas Legislature in 1983. Each of these possibilities, however, raises several significant legal and practical questions, which should be considered and decided long before the objection is received.

Sixth, states should consider whether initiation of a declaratory judgment action in the District Court of the District of Columbia is preferable to submission of the reapportionment plan to the United States Attorney General. Submission to the Attorney General has the apparent advantages of being less costly and time-consuming than a declaratory judgment action if the officer's approval is obtained and, even if such approval is not obtained, of allowing informal exploration of any difficulties in the plan while ultimately not prejudicing a subsequent declaratory judgment action. On the other hand, approval by the Attorney General does not constitute an adjudication of the issue of constitutionality. The Act does provide that neither approval by the Attorney General nor approval by the District Court of the District of Columbia shall "bar a subsequent action to enjoin enforcement" of the reapportionment, but whether the issue of constitutionality may effectively be litigated as part of a declaratory judgment action and a favorable determination made res judicata of subsequent challenges is unclear.

Finally, in view of the great degree of discretion exercised by the United States Attorney General under the Act and the inability of states or individuals to appeal directly his decision approving or disapproving a reapportionment plan, the attitude and policy of that officer will be of considerable importance in determining the impact of the Voting Rights Act on state reapportionments during the next decade. If the Attorney General disapproves a reapportionment plan, a state confronts the alternatives of either modifying a state legislative enactment to meet the objections of a federal administrative officer or initiating and prosecuting a declaratory judgment action in a distant forum against the Department of

Justice and other intervenors. Moreover, a state must obtain approval of its new reapportionment expeditiously or confront court challenges to its existing legislative or congressional districts on the basis of the disparity in population among the districts as demonstrated by the new census. The inability to put new legislatively enacted districts into effect could result in elections under court drawn plans. On the other hand, if the Attorney General approves the state's plan, private parties are without any right to appeal his decision and must institute a separate action in which the burden is upon them to show that the enactment is violative of the United States Constitution.

VII. THE RECOGNITION OF STATE INTERESTS IN REAPPORTIONMENT

In Reynolds v. Sims, when the United States Supreme Court first authorized intervention by federal courts in the reapportionment process, it directed:

[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

This preference that reapportionment remain a matter for legislative rather than judicial concern persists through recent Supreme Court decisions. Although the Court has recognized that a state legislature has discretion in the reapportionment process, particularly with regard to state legislative districting, it has imposed certain requirements for proof supportive of those interests when they are called into question before the United States Attorney General or in court. States often have faltered when forced to substantiate legitimate state interests. Interests that have been offered as supporting the district lines in particular reapportionments have appeared tenuous on close scrutiny.

For equal population cases arising under the fourteenth amendment, the Supreme Court has established specific requirements for a state called upon to show justification for certain district lines. The Court has required that the factors considered by the state in districting be "free from any taint of arbitrariness or discrimination." Divergences from a strict population standard are possible when based on legitimate considerations that

487. See NAACP v. New York, 413 U.S. 345 (1973) (an unsuccessful intervenor under § 5 has a right to appeal the denial of intervention).
490. Id. at 586.
491. E.g., Wise v. Lipscomb, 434 U.S. 1329, 1331 (1977) (wherein the Court agrees that legislative reapportionment is a matter of legislative consideration); Connor v. Finch, 431 U.S. 407, 414-15 (1977) ("A state legislature is . . . by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.").
are incident to the effectuation of a rational state policy.\footnote{Reynolds v. Sims, 377 U.S. 533, 579 (1964).} With regard to the requirement of a rational state policy, the Supreme Court has rejected the position that the interests must be governmental necessities.\footnote{Mahan v. Howell, 410 U.S. 315, 326 (1973) (the test for determining whether there is justification for deviations from absolute equality in population is not “governmental necessity” but rational consideration). \textit{See also} Whitcomb v. Chavis, 403 U.S. 124 (1971); Cousins v. City Council, 503 F.2d 912 (7th Cir. 1974). \textit{But see} Hill v. Stone, 421 U.S. 289, 297 (1975) (“any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest”); Evans v. Cormany, 398 U.S. 419, 422-23 (1970) (applying compelling interest test to denial of vote for persons on a federal enclave). These decisions may be distinguished as cases involving actual “exclusion” from the right to vote rather than dilution of an existing right. Still, in reaching its result in \textit{Evans}, the Court relied on \textit{Reynolds} and the concept that “a State may not dilute a person’s vote to give weight to other interests.” 398 U.S. at 422-23.} Some federal courts have insisted, however, that it is not sufficient that a plan happens to accomplish certain policies; the state must show that the policy was considered important in the process that produced the reapportionment and must articulate clearly the relationship between the variance and the state policy served.\footnote{\textit{See} Chapman v. Meier, 420 U.S. 1, 24-25 (1975); Graves v. Barnes (Graves IV), 446 F. Supp. 560, 570 (W.D. Tex. 1977), \textit{aff’d} 
\textit{sub nom.} Briscoe v. Escalante, 435 U.S. 901 (1978).}

The Supreme Court has not been as specific in prescribing requirements for proving state interests in dilution of voting strength cases. The Court of Appeals for the Fifth Circuit, however, has developed a specific formula for determining whether a districting plan dilutes minority voting strength, and this formula includes consideration of whether state interests are tenuous.\footnote{Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), \textit{aff’d on other grounds} \textit{sub nom.} East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). See note \footnotemark{326} \textit{supra}.} In those circumstances in which the complaining plaintiff establishes a prima facie case of invidiousness, a state is subject to requirements similar to those imposed in equal population cases and must demonstrate that the redistricting characteristic being complained of is justifiable under the circumstances of the particular case.\footnote{\textit{City of Richmond} v. United States, 422 U.S. 358, 375 (1975).} Similarly, a state under the Voting Rights Act must carry the burden of proving that its reapportionment is not purposefully discriminatory. One element of such a showing is whether there exist objectively verifiable, legitimate purposes for any characteristic of the districting possibly dilutive of racial voting strength.\footnote{\textit{Mississippi} v. United States, No. 78-1425 (D.D.C. June 1, 1979), \textit{aff’d}, 100 S. Ct. 994 (1980).} Moreover, such legitimate state purposes may justify de minimus reductions in minority voting strength that otherwise would be violative of section 5 of the Act and have the effect of denying or abridging the right to vote.\footnote{\textit{Reynolds} v. Sims, 377 U.S. 533, 579 (1964).}

This Article suggests that there are three essential inquiries that should be made in assessing the viability of certain potential state interests for consideration during the reapportionment process. The first inquiry is
whether the interest is a legitimate one, or one that of itself may make a reapportionment invalid, or at least questionable. The second inquiry is whether it will be possible to demonstrate that the interest has been effectuated in the plan. Vague, unclearly defined interests or ones that are effectuated in a haphazard fashion in the plan may appear proffered in lieu of other undisclosed improper motives when subject to the scrutiny of the court. Finally, each interest should be examined to determine whether it is an interest acknowledged by the courts as one of sufficient importance to allow some divergence from strict constitutional standards.

**Integrity of Political Subdivisions.** The preservation of county lines is the only state interest thus far found sufficient by the United States Supreme Court to justify a maximum total deviation of more than 10% from strict population equality. The Court has also acknowledged that the policy of preserving county lines is of importance in cases concerning dilution of voting strength because a plan adhering to county or other political subdivision boundaries presents fewer opportunities for gerrymandering. In *Mahan v. Howell*, where the Court approved a maximum total population deviation among state legislative districts of 16.4%, there was uncontradicted evidence that the plan in question had the lowest deviation that would allow preservation of county lines. Moreover, the state had carried its burden of showing that the preservation of county lines effectuated a rational state policy because the state legislature was responsible for passing local legislation relating directly to counties within their district. In *White v. Regester*, without discussing the matter in detail, the Court indicated that if it had been required to reach the question, preservation of county lines in Texas would have been sufficient justification for the devia-

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500. See Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 871 (S.D. Miss. 1979) ("tenuous state policy . . . may constitute evidence that other, improper motivations lay behind the enactment or maintenance of the plan").

501. *Mahan v. Howell*, 410 U.S. 315, 320 (1973). See also *Abate v. Mundt*, 403 U.S. 182 (1971), in which an apportionment for a county legislature having a maximum deviation from equality of 11.9% was upheld in part because New York had a long history of maintaining the integrity of existing local government units within the county.

502. See *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964) ("[I]ndiscriminate districting, without . . . regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering"). But see *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) (rejecting the claim that adherence to political subdivision lines prevents political gerrymanders).


505. *Mahan v. Howell*, 410 U.S. 315, 321-22, 329 (1973); see *Stewart v. O'Callaghan*, 343 F. Supp. 1080, 1085 (D. Nev. 1972) (explaining need to preserve county boundaries in Nevada); cf. *Connor v. Finch*, 431 U.S. 407, 423 (1977) (refusing to accept district plan drawn on the basis of county supervisory "beats" because there was no long-standing state policy mandating separate representation of individual beats in the state legislature and because factors relevant to a drawing of supervisory beats, such as road mileage, were not material to the apportioning of state legislative seats); *Chapman v. Meier*, 407 F. Supp. 649, 653 (D.N.D. 1975) (invalidating state apportionment plan because state justification that plan intended to preserve county boundaries was inconsistent with fact that districts with largest deviation were those that cut county boundaries).

tion present in that case.\textsuperscript{507} Other decisions of the Court have acknowledged that the recognition of city and possibly other political subdivision lines in reapportionment is proper and, if shown to effectuate a rational state policy, may constitute justification for minor departures from constitutional absolutes.\textsuperscript{508}

**Geography, Compactness, Contiguity, and History.** No independent federal constitutional requirement mandates that state legislative districts be compact or “attractive.”\textsuperscript{509} No requirement directs that congressional districts be compact or contiguous. Courts, however, have viewed compactness and contiguity as desirable policies in districting.\textsuperscript{510} Other policies, such as the recognition of geography or the historical recognition of certain boundary lines or characteristics of districting, also have been acknowledged by the Supreme Court as legitimate considerations in effectuating a rational state policy.\textsuperscript{511} These latter policies may be sufficient in particular circumstances to explain why multimember districts or certain districts that appear gerrymandered are justified.\textsuperscript{512} For example, an oddly-shaped district may be shown to result from rivers or other natural obstacles or from an effort to preserve historical district boundaries.

Under certain circumstances, however, the recognition of one or more of these policies in districting may be viewed as merely an excuse for maintaining existing election inequities\textsuperscript{513} or as inadequate to justify deviation from constitutional absolutes.\textsuperscript{514} When not applied uniformly statewide,
the policies become tainted with signs of arbitrariness. Moreover, they are hard to measure and their presence or systematic application in a plan may be difficult to demonstrate. Courts often have difficulty discerning whether the legislature actually attempted to draw compact districts and which among several alternative districting plans in fact provides districts that are more compact. Compactness, however, remains, in the view of some writers, a criterion that, if required of all districts, would significantly reduce the frequency of gerrymanders.515

Preservation of Incumbents. On several occasions the United States Supreme Court has indicated that a state legislature's objective in drawing districts to prevent or minimize the number of contests between incumbents is not invidious and does not render a reapportionment invalid.516 The Court has viewed maintenance of "constituency-representative relations" as a matter of legitimate concern for state legislatures, particularly in congressional districting where preservation of the seniority of the members of its congressional delegation may be important for a state.517

The Court has not determined the extent to which the interest of minimizing contests between legislators may justify deviations from strict population equality518 or the use of certain characteristics in districting that otherwise adversely affect minority voting strength. While acknowledging that "districting has and is intended to have substantial political consequences,"519 the Supreme Court has not yet specifically approved or disapproved of a legislature's reapportioning so as to draw districts consisting of districts on a map does not justify population variance among congressional districts); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) (geography insufficient for deviations involved); Reynolds v. Sims, 377 U.S. 535, 579 (1964) (neither history alone nor consideration of area alone was sufficient to justify the existing deviations). But see Mississippi v. United States, No. 78-1425 (D.D.C. June 1, 1979) (approving small decreases in minority voting age population in some districts when purpose was compactness), aff'd, 100 S.Ct. 994 (1980).


516. E.g., White v. Weiser, 412 U.S. 783, 791 (1973); Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966). A state court also has recognized that an incumbent does not have a constitutionally protected personal right to have a district drawn for his benefit. Jones v. Falcey, 48 N.J. 25, 222 A.2d 101, 105 (1966).


519. Gaffney v. Cummings, 412 U.S. 753 (1973). The Court suggested: Politics and political considerations are inseparable from districting and apportionment. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Re-
a political constituency supportive of particular incumbents and, therefore, likely to result in the incumbents' being reelected. An effort to protect majoritarian incumbents in this manner under certain circumstances may invidiously dilute the voting strength of electoral minorities.  

Economic, Regional, and Other Communities of Interest. Economic, regional, and other communities of interest have been offered by states or political subdivisions on numerous occasions as factors considered during the reapportionment process. They have not, however, been received well by the courts. One district court observed: "[S]uch [interests] extend across county, district, and national boundaries. They offer no guidelines. They confuse, delay and avoid."  

In 1964 the Supreme Court included "economic and other group interests" among those not sufficient to justify deviations from strict population equality. A state apparently is not prohibited from considering such factors in the reapportionment process in an effort to provide fair or proportional representation, but courts are unlikely either to allow a state to purposefully draw districts so as to allow a state to discriminate on the basis of population among these competing interests or to give such interests much weight as justification for departures from strict numerical equality, or for characteristics of districting that dilute minority voting strength.  

Changes Anticipated During the Decade. In states with rapidly changing patterns of population, a reapportionment drawn on the basis of the decen-
nial census, while initially producing districts of roughly equal population, may result in significant underrepresentation and overrepresentation later in the decade. Though acknowledging that an imbalance in population among districts toward the end of a decennial period was almost certain, the Court in Reynolds v. Sims525 found that "[l]imitations on the frequency of reapportionments are justified by the need for stability and continuity in the organization of the legislative system . . . ."526 The Court since has recognized that a state legislature in drawing districts may consider projected changes in population.527 To do so, however, the legislature must thoroughly document the projected change, and use of the projection must be without any taint of arbitrariness or discrimination.528 The projection must be applied systematically throughout the state and must actually be relied upon by the legislature in drawing districts.529

VIII. THE LEGISLATIVE PROCESS IN REAPPORTIONMENT

The United States Supreme Court has recognized that the administrative and legislative history of a state enactment can be material to a determination of whether the enactment is invidiously discriminatory and violative of the United States Constitution.530 In both equal population and dilution of voting strength cases, federal courts have inquired into the legislative process that produced the reapportionment. The same inquiry, particularly as it relates to the purpose of the enactment, may be found in litigation arising under the Voting Rights Act. This inquiry has assumed added significance with the determination by a plurality of the Court in Bolden that purposeful discrimination is determinative of a constitutional challenge.

In deciding the constitutionality of various reapportionments, federal courts have considered official legislative histories as they appear through committee hearings and reports and public debates. They also have considered evidence relating to matters such as: (1) procedural irregularities in the legislative process;531 (2) the legislature's failure to provide an opportunity for a bill's opponents to appear at public hearings;532 (3) the

526. Id. at 583.
527. White v. Weiser, 412 U.S. 783, 792 n.12 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969); Millican v. Georgia, 351 F. Supp. 447, 448-49 (N.D. Ga. 1972). The court in Millican concluded that a reapportionment with minor underrepresentation (population above the ideal) in districts that experienced above average growth in the preceding decade should be viewed with the same strictness as one with more significant population deviations among districts with less proportional growth. Id. at 448-49. On the other hand, evidence of growth patterns to show the possibility of future discriminatory impact may not be adequate to invalidate a reapportionment that is not discriminatory on the basis of existing census data. See Gilbert v. Sterrett, 509 F.2d 1389, 1392 (5th Cir. 1975).
529. Id.; see Summers v. Cenarrusa, 413 U.S. 906 (1973) (per curiam).
531. Id. at 267.
failure of a legislature to act affirmatively to solicit witnesses or to obtain evidence; unofficial conversations or comments of members of the legislative body showing an allegedly improper motive; the role of the legislative staff in developing and implementing the criteria for reapportionment and in drawing actual districts; and communications between lobbyists and members of the legislature or their staff to show improper influence on the redistricting process. The courts have given significant weight in their deliberations to the consideration given in the legislative process to alternative reapportionment plans that appeared to meet the state's announced objectives while being less offensive to the United States Constitution than the plan that was ultimately adopted.

In order to be prepared in the event a suit is filed, each state legislature should assume for purposes of the reapportionment process that the final reapportionment plan will be challenged in court. The extent to which the legislative process will be scrutinized in such litigation will vary according to the nature of the complaint, the time available for discovery, and the resources and knowledge of the plaintiff. No aspect of the reapportionment process, however, is immune from examination by the court.

538. In Cousins v. City Council, 503 F.2d 912 (7th Cir. 1974), cert. denied, 420 U.S. 992 (1975), then Circuit Judge Stevens warned: "Although there are disturbing aspects of this case, and although, . . . the constitutional claim fails . . . , a thorough review of the evidence makes the required result perfectly clear. Those who would hereafter engage in gerrymandering must anticipate equally careful analysis of comparable claims in the future." 503 F.2d at 925 (Stevens, J., concurring) (emphasis added).

In their search for evidence with which to challenge a redistricting plan, plaintiffs have obtained testimony by deposition or otherwise from such sources as: the presiding officers of the legislative body; individual members of the legislature; members of boards charged with redistricting; experts hired by the legislature to assist in drawing districts; the staff for individual legislators or legislative committees; and, even, lobbyists having no official role in the reapportionment process.
Therefore, the following observations are offered:

First, federal courts have acknowledged the value of public hearings as part of the reapportionment process. As expressed by one district court, if the legislature is to act on the will of the people, it is under some obligation to determine that will.539 In addition to hearings held during a legislative session, legislatures should consider the possibility of hearings prior to a legislative session at locations across a state, allowing access to people who could not attend hearings at the state capitol during the session.

Second, legislative staff and experts should be hired to assist in reapportionment with the view that they ultimately may have to testify, by deposition or in person, in future litigation. Experts who collect and assimilate data, who operate computers, and who draw district lines under legislative supervision are likely to be important witnesses later in explaining the procedures followed, criteria utilized, and availability of time and data for drawing districts.

Third, as part of an affirmative effort to examine applicable state and federal legal standards for reapportionment and to make legislators aware of these requirements, state legislative bodies have authorized legal studies or reports and distributed them among the legislators.540 If such studies are to be prepared, consideration should be given to whether it is preferable that they be accomplished by the state’s chief legal officer or another source. An official opinion from the state’s legal officer may have the effect of fixing a particular procedure or characteristic of districting as lawful or unlawful. Such an opinion could be used later as evidence of bad faith on the part of members of the state legislature if the reapportionment is not in conformance with the opinion.

Fourth, some states have used experts, state universities, commissions, or legislative committees to draw reapportionment plans prior to a legislative session for consideration and amendment during that session.541 Two state constitutions expressly require preparation of a plan in this manner for submission to the state legislature.542

Fifth, consideration should be given to having a representative of the chief legal officer and elections officer of the state monitor appropriate legislative committee hearings and debates during the reapportionment process. The state’s legal officer should select the representative in anticipation that the person ultimately will be involved in submission of the plan under the Voting Rights Act, if applicable, and in defense of the plan, if necessary, in any subsequent litigation. Because of the complexities of the law

540. E.g., Texas Legislative Council, Congressional Redistricting (1965).
in this area, however, and the possibility that any statements made by such a representative may be part of the record in any subsequent litigation, all opinions on the legality of any proposed action under state or federal law should come directly from the chief legal officer, not from the representative, and should be the result of official requests made through traditional means for obtaining legal opinions from that officer.

Sixth, a special effort should be made to assure that the legislative process itself is fair and provides for equal access by all interests. Adequate public notice should be given for all hearings conducted on proposed reapportionment legislation. To the maximum extent possible, procedural irregularities that might deprive a person of notice or opportunities that otherwise might be expected under legislative rules, should be avoided.\(^{543}\)

Seventh, special legislative rules for reapportionment bills may be appropriate to establish criteria\(^{544}\) for consideration in the process and to determine the procedure for consideration of such bills. The legislature may consider other rules designed to insulate the decision-making process from influences other than those coming directly to legislators and through the hearing process.\(^{545}\)

Eighth, any committee assigned to hear and consider reapportionment legislation should include among its members persons who are representatives of the state's diverse geographical and economic interests and who are members of the major identifiable electoral minorities or are known to be sensitive to the needs and interests of those minority groups. Through such appointments, minority groups can be assured access to this important part of the process.

Ninth, the legislature should establish a means for identifying during the reapportionment process when a certain district or configuration of districts may be violative of state or federal law. Criteria for determining such a circumstance are discussed in Parts IV, V, and VII of this Article. Once the legislature identifies a circumstance, it must make an informed decision regarding the purpose for the boundaries of the district or districts and whether such boundaries should remain.

Tenth, the need and purpose for any boundaries that may be questionable under state or federal law must be established clearly as part of the legislative record through committee reports, statements at public hearings

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\(^{543}\) But see Dunn v. Oklahoma, 343 F. Supp. 320 (W.D. Okla. 1972); see note 531 supra and accompanying text.

\(^{544}\) Such criteria may include construction of districts as nearly of equal population as is practicable, avoidance of fragmentation or "packing" of minority communities, and recognition of political subdivision boundaries or other legitimate state interests selected by the legislature for recognition in the reapportionment process. See Kelly v. Bumpers, 340 F. Supp. 568, 573 (E.D. Ark. 1972), aff'd, 413 U.S. 901 (1973). The court in Kelly indicated, however, that the legislature is not bound to follow such guidelines "inflexibly." 340 F. Supp. at 580.

\(^{545}\) Consideration may be given to prohibiting unauthorized contacts with members of the staff or experts charged with actually drawing the district lines under legislative supervision. Such a rule would avoid the lobbying problem recognized in Graves v. Barnes (Graves I), 343 F. Supp. 704, 745-47 (W.D. Tex.), aff'd sub nom. Archer v. Smith, 409 U.S. 808 (1972), modified sub nom. White v. Regester, 412 U.S. 755 (1973).
or committee meetings, and statements or colloquies during debate on the legislation. The announced need and purpose must be supported in the record by adequate evidence. Provision should be made for maintaining transcripts and for obtaining other materials as necessary for such a record.

Eleventh, the legislature should provide for persons or a committee to assist the state's chief legal officer with regard to any litigation challenging the reapportionment and to participate in the process of submitting the reapportionment plan for federal approval in those states subject to the Voting Rights Act.\(^6\)

Finally, the presiding officer of each house of the state legislature bears a heavy responsibility for the fairness of the process. His conduct during the reapportionment process may be subject to special scrutiny in any subsequent litigation.

**IX. Conclusion**

Some observers feel that legislative reapportionment is nothing more than a partisan political process in which one party attempts to improve its political strength at the expense of the opposing party or group. This view oversimplifies a process that involves struggles among competing interests and personalities at every level. The participants realize that each line drawn on a map, whether "aesthetically attractive" or "misshapen," has an unavoidable political impact when applied to our nonhomogeneous society. This impact is felt not only by the political parties and the incumbent or potential candidate who finds his residence shifted among possible constituencies, but also by the numerous and diverse regional, economic, and racial interests within the society.

Increasingly, writers have urged that responsibility for reapportionment be removed from the state legislatures and entrusted to nonpartisan boards, or that the courts recognize and enforce a right of proportional representation to assure that all groups of sufficient identity and size have

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a voice in Congress and state legislatures commensurate with their voting strength.\textsuperscript{548} As a basis for such recommendations, supporters point to the miserable reapportionment record of most state legislatures over the decades of this century and to the potential conflict of interest in having members of a legislative body draw their own districts or the districts of other offices for which they may intend to be candidates.

The line drawn on the map as a district boundary has political impact regardless of who draws it. The architect of that line, whether a member of the legislature, a member of a nonpartisan commission, a plaintiff in a redistricting lawsuit, an assistant United States Attorney, or a state or federal judge, is seldom totally immune from the interplay of competing political and societal policies.\textsuperscript{549} The alternative placements of each boundary are infinite; the alternative political results similarly are unlimited. In this context the Supreme Court recently indicated: "[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality."\textsuperscript{550} With timely notice of the specific requirements of the reapportionment process and an awareness of the likelihood of judicial review, it is the view of this writer that most state legislators will strive to meet these requirements. This conclusion does not suggest that legislators will put aside all partisan or personal ambitions or even that such should be their goal. It does suggest that democracy is at best a search for proximate solutions to insoluble problems\textsuperscript{551} and that the "insoluble problem" of reconciling interests through reapportionment is best entrusted to an informed legislative body led by a knowledgeable and


\textsuperscript{549} See Skolnick v. Mayor of Chicago, 319 F. Supp. 1219, 1227-28 (N.D. Ill. 1970). In Skolnick the court concluded "that if it is unconstitutional to inject politics into districting, there is not a valid districting statute, ordinance or plan in effect in our country." Id. at 1228; accord, Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results"). Even a line drawn by a computer is not void of criticism. As Justice Harlan, in his dissenting opinion in Wells v. Rockefeller, 394 U.S. 542-551 (1969), commented, "[a] computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues."

\textsuperscript{550} Connor v. Finch, 431 U.S. 407 (1977). For this reason it is important that a person allegedly aggrieved by an existing or planned apportionment seek redress from the responsible legislative body. Whether the issue is alleged purposeful discrimination in the enactment or maintenance of an apportionment, a showing that the legislative body was aware of the impact of the plan and intended wrongful effect may be necessary for a successful challenge. See City of Mobile v. Bolden, 446 U.S. 654 (1980).

This Article provides these final guidelines to assist in the reapportionment process.

1. Each state must make a good faith effort to construct legislative and congressional districts of as nearly equal population as is practicable.553

2. State constitutions, while subordinate to federal law, can impose requirements that unless followed will invalidate a state legislative or congressional reappointment. In Texas, the house of representatives must be apportioned among the state's counties except as otherwise necessary to comply with federal law.555

3. A state may consider legitimate factors other than population in reapportionment if these factors produce only minor variations from population equality and can be shown to result from the effectuation of a rational state policy. The standard of equality in population applicable to congressional districts is stricter than the one applicable to state legislative districts.556

4. A state may not reapportion so as to invidiously minimize or cancel the voting strength of racial or political elements.557

5. Before any reapportionment may take effect, a state subject to section 5 of the Voting Rights Act must carry the burden of proving to the United States Attorney General or the District Court of the District of Columbia that the reapportionment has neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. Preparation for carrying this burden must begin long before the reapportionment itself is enacted.558

6. A state subject to section 5 of the Voting Rights Act must draw districts that contain sufficient voting age population of the protected racial minority so as to avoid a retrogression in the position of that minority in its ability to elect candidates of its choice.559

7. Precautions through special rules or procedures should be taken to assure that the legislative process itself remains fair and allows sufficient opportunity for access by the general public and the

552. Among the impending "insoluble problems" is the conflict between individual and group rights. For discussions of this conflict, see Markowitz, Constitutional Challenges to Gerrymanders, 45 U. CHI. L. REV. 845 (1978); authorities cited in note 548 supra. Some writers foresee the demise, or at least the retardation, of the "one man, one vote" principle under the Burger Court. This change will be an issue in future reapportionments. See Leventhal, Courts and Political Thickets, 77 COLUM. L. REV. 345, 352-53 (1977). See generally Comment, The Burger Court and Reapportionment: From One Person, One Vote to One Corporation, Many Votes, 62 GEO. L.J. 1001 (1974).


554. Some state constitutions impose requirements on congressional districting. E.g., W. VA. CONST. art. I, § 4 (providing that each district shall be, as nearly as possible, equal in population).

555. See Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932) (finding a state restriction on congressional elections valid if not in conflict with federal law).

556. See notes 493-95 supra and accompanying text.

557. See notes 299-375 supra and accompanying text.

558. See notes 477-78 supra and accompanying text.

559. See notes 464-68 supra and accompanying text.
diverse interest groups affected by reapportionment.560

(8) Each state legislature should provide for legislative participation in the submission of the reapportionment enactment to the required federal authorities, if the state is subject to section 5 of the Voting Rights Act, and in any litigation concerning the reapportionment.561

(9) Each state legislature should adopt objectively verifiable criteria to be utilized during the reapportionment process and must carefully establish and document as part of the legislative record the basis for deviations of a certain degree from the constitutional norm of population equality or the presence of characteristics of districting that can have the effect of diluting the voting strength of minority groups.562

560. See notes 544-45 supra and accompanying text.
561. See note 546 supra and accompanying text.
562. See notes 489-529 supra and accompanying text.
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