Free Speech and Election Law

(Pre)Clarifying The Muddy Red Waters of The Texas Redistricting War

*By Ronald Keith Gaddie & Charles S. Bullock, III**

The fight for political preeminence in the Texas congressional map unfolded amidst upheaval in governing election law by the United States Supreme Court. In this uncertain environment, the creativity exhibited by lawyers seeking victory paralleled the creativity of the maps themselves and touched on every element of election law related to redistricting. Despite the best machinations of lawyers to craft new law, and of politicians to seize political advantage, the courts navigated a restrained course that limited the political and constitutional impact of the Court's intervention.

At base, the Texas redistricting was a partisan enterprise, designed to undo the consequences of the 1991 Democratic congressional map and then to subsequently do to the Democrats what the previous map had done to Republicans: deny them political power. Hopes for Republicans were dashed in their failure to take full control of Texas government in the 2000 legislative elections, leaving the state with divided government and a hopeless deadlock on the design of the new congressional districts. The subsequent takeover of the entire Texas government in 2002 afforded Republicans an opportunity to redo the congressional district maps.

The effort was not so easily pursued as the Republican gerrymander of Pennsylvania. As a (VRA) Section 5 state with a large minority population, Texas had to take steps to ensure that it did not retrogress against existing minority access to the political process, while also walking a tightrope of not unduly considering race in the crafting of districts.[1] The product was a congressional district map that would create eight majority-Hispanic and three black-access districts. Ten of these districts elected Democrats and nine elected members of the predominant racial or ethnic minority (including eight who were representatives of choice of the relevant minority). The plan shifted a net of six seats out of thirty-two from the Democrats to the Republicans, and introduced a pro-Republican electoral bias approaching the bias introduced to the favor of Democrats in 1991.

By the time the Texas redistricting reached the U.S. Supreme Court in early 2006, the litigation encompassed virtually every controversy in redistricting: The districts were challenged because they allegedly constituted an illegal partisan gerrymander.[2] The gerrymander was in evidence because of the mid-decade nature of the redistricting.[3] The mid-decade redistricting was unreliable because population growth allegedly made it impossible to comply with the one-person, one-vote requirement.[4] The districts were racially packed and violated Section 2 of the VRA, and constituted retrogression because of the lack of protection for "influenced" and coalitional districts, which numbered as many as eight out of thiry-two total districts, in addition to the existing minority-majority and minority-access districts.[5] The new minority districts were allegedly insufficiently compact, and united disparate and distant communities of interest due to ethnic considerations. In sum, in the view of the plaintiffs, everything was wrong with this map.

The Supreme Court decision and the subsequent actions of federal district court panel in responding to the various judicial challenges in remapping Texas are instructive. The Texas decision is the first to deal with issues of minority opportunities in redistricting subsequent to the *Georgia v. Ashcroft* decision. The case demonstrates the limited willingness of the Court to intervene in issues of partisan gerrymandering or to indulge creative legal shadow arguments in order to justify overturning unsavory, unpleasant, but otherwise legal political power plays. And, in Texas, a federal district court was twice called on to revise boundaries as a consequence of the inability of the legislature to craft a legal map, and the court did so in a restrained and circumspect manner that left intact all of the damaging elements of the Texas remap.

I. The 2003 Remap

The Republican-dominated state legislature elected in 2002 undertook to redraw the congressional map of Texas with an eye toward maximizing Republican opportunities and eliminating or inconveniencing as many of the seventeen Democratic incumbents as possible. This remap was aggressively pushed by Texas legislative leadership in the state House and also by Republican House majority whip Tom DeLay, and had as its primary goals the displacement of as many incumbent Democrats as possible from their constituencies, and particularly the elimination of noted urban liberal Democrats Martin Frost (D-Texas 24) and Lloyd Doggett (D-Texas 10). The reaction of minority Democrats to the proposals are well-known and need only be briefly recounted: On May 6, 2003, fifty-three Texas House Democrats fled to Ardmore, Oklahoma, in an effort to prevent a quorum for the conduct of business in the Texas House of Representatives. In another special session later that summer, eleven Senate Democrats fled to Albuquerque, and remained there through the expiration of one special session and only returned for a third special session when it was evident that a ruling by the lieutenant governor regarding the rules governing the taking up of legislation had been changed to nullify the Democrats abstention policy. On

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October 12, 2003, Plan 1374C (HB-3) passed out of the legislature and was signed into law by Republican Governor Rick Perry the following day.

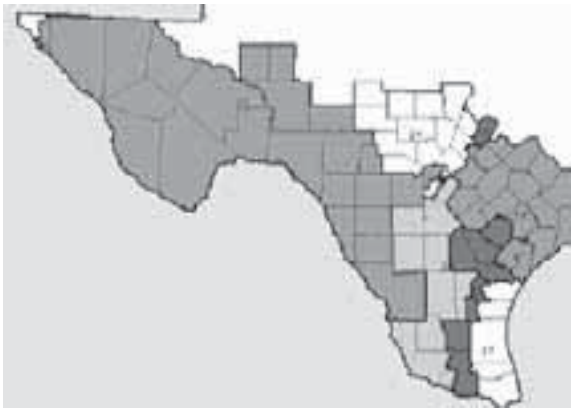
The redistricting was guided by two principles: (1) maximizing Republican electoral opportunities; (2) ensuring non-retrogression of minority opportunities. To this end, care was taken in ensuring a continuity of minority districts in Dallas County, Harris County, and in South Texas from El Paso to Gulf of Mexico. The maps created by Republican mapmakers fell into two general categories, dubbed the "7-2-2" maps and the "8-3" maps.

The "7-2-2" maps did little to disrupt the design of congressional districts in Harris, Tarrant, and Dallas Counties and in South Texas, in order to make no disturbance of the retrogression baseline. The seven referred to the seven majority-Hispanic districts in the map—six in South Texas, one in Harris County. The first two referred to the performing black majority districts in Harris and Dallas Counties. The second "two" referred to then district 24 and 25, held by Democrats Martin Frost and Chris Bell, respectively.[6] Their districts had no ethnic or racial majority, but contained largely non-voting Hispanics together with fewer, politically-active blacks who were potentially dominant in Democratic Party primaries.[7] Other changes to the remaining districts largely scrambled the constituencies of Anglo Democratic congressmen in an effort to shift the majority of the congressional delegation to the GOP.

The "8-3" maps more dramatically redrew the districts of the state. These maps altered the boundaries of every district, save congressional district 16 in El Paso. The eight refers to eight majority-Hispanic congressional districts, seven in South Texas and one in Harris County. The "three" refers to two existing black majority districts of Harris and Dallas Counties (districts 18 and 30) plus another new, black plurality district in south Harris and Fort Bend Counties that would definitely elect a black candidate of choice. The "8-3" maps substantially increased the black population in a successor to Chris Bell's district 25 (now numbered "9") and cracked Martin Frost's district 24. The 8-3 maps also busted

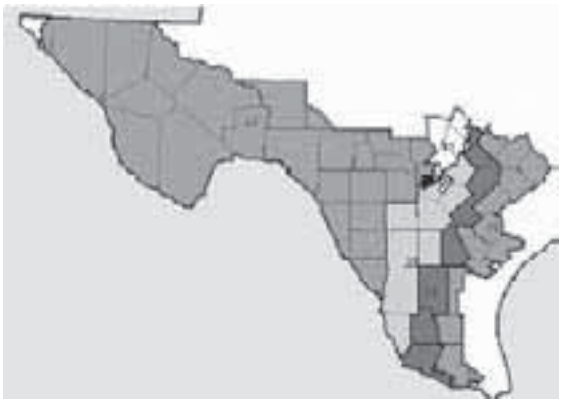
Map 1

South Texas Under Plan 1151C,
Balderas Court-Ordered Map 2001



Map 2

South Texas Under Plan 1374C,
HB-3 Texas Legislature Map, 2003



apart the liberal Democratic district 10 in Travis County (Austin) held by Democrat Lloyd Doggett, in order to facilitate a new, elongated district 25 that ran from heavily Hispanic southern Travis County to the Rio Grande, and which would become the eighth majority-black district. It was a variant of the "8-3" map, Plan 1374C, that became law.

The new 25th district was a necessary consequence of the redistricting process. Representative Bonilla, the only Hispanic Republican in the Texas congressional delegation, had initially defeated scandal-plagued incumbent Albert Bustamante in 1992 while garnering an estimated 40% of the Hispanic vote. Bonilla's Hispanic percentages had fallen with each subsequent election, and in 2002 he managed just 8% of the Hispanic vote against Henry Cuellar.[8] Bonilla's political security depended on making his district more Republican. By pulling the Hispanic percentage of the CVAP significantly down, the partisan polarity of this relatively low Hispanic turnout district shifted to Bonilla's advantage, and his reelection margin in 2004 was 40 points, compared to just four points in 2002.[9]

The overall partisan impact of the new map was evident to any observer. Where the court-drawn districts used in 2002 had a high degree of responsiveness and relatively little partisan bias in potentially translating votes into seats, plan 1374C introduced a dramatic political bias to the favor of Republicans. Justice Stevens would note in his dissent the analysis of both plaintiffs' and state's expert, who found that a 52% GOP vote share statewide would probably translate into over two-thirds Republican seats. Of the nine white Democrats who represented non-minority-majority districts in 2003, only two would make it back to Congress, and one of those would run in the new Latino majority district 25. The political goals of the mapmakers were efficiently realized.

The state's voting rights analysis submission to the Department of Justice asserted an enhancement of minority representation as a consequence of the pursuit of the creation of safe party constituencies.[10] The state's analysis argued for the creation of additional Latino and African-American districts based on the desire of several parties in

the 2001 redistricting trial to do so (an argument ignored by the court) and because the court signaled that such an initiative would have to constitute legislative policy rather than a judicial remedy.[11]

In establishing the benchmark for Texas, the state asserted that an "ethnic 'divide and conquer' strategy [results in] a majority-minority district in which no single minority dominates can be and often are meaningless for minorities."[12] Therefore, "coalition" districts 24 and 25 had no meaning relative to the benchmark, an argument accepted by the federal three-judge panel in subsequent litigation, when they noted that there was neither an obligation to draw or preserve a coalition district, because such districts functioned for the purpose of partisanship rather than racial or ethnic representation purposes.[13]

The state instead argued that the previous baseline of seven Hispanic-majority districts and two black districts was enhanced by the new 8-3 map. "In Texas, no party has contended that minorities actually have an opportunity to elect candidates of choice in as many as 11 districts" under the court-ordered map.[14] Under the 8-3 map, they attempted to certify the enhanced minority representation of eight Hispanic majority districts, though one of these was just 50.9% Hispanic voting age population and less than a majority citizen VAP, a reduction of twelve points from its predecessor, which had not actually performed for twelve years. The state's expert disagreed with the preclearance report in his trial report and expert testimony in deposition, but also pointed to the new district 25 which ran from Austin to the Rio Grande as an offset for the alteration of the configuration of the historic district 23.[15] Congressional district 9, which located itself in the same geography of south Harris County as the old district 25, was clearly a performer for minority voters, did subsequently elect a candidate of choice for the black community. At trial that winter, the district court did not agree with the assessment that seven performing districts were drawn in South Texas, but rather only six, which it deemed to be the maximum possible to draw. However, the court had not accepted the previous district 23 as a currently performing district, and it also refused to consider preclearance issues, which were outside its jurisdiction.[16]

This perspective was generally challenged by the Department of Justice's Voting Rights division. The "Section 5 Recommendation Memorandum" of December 12, 2003 recommended against the preclearance of the Texas congressional maps.[17] The rationale for the denial was that the proposed plan retrogressed relative to the Department of Justice's measurement of the benchmark plan. Professional staff attorneys identified eleven minority majority districts for the purpose of measuring the benchmark: seven majority-Hispanic VAP districts (six majority-CVAP), and four districts with no one racial majority, but two of which have black populations approaching majority status and two others (districts 24 and 25). In other words, the benchmark identified the districts of the 7-2-2 plan. The preclearance report verified the enhancement of black "ability to elect" districts from two to three with the creation of new district 9.

The consequences of the map for minority representation were generally a net-sum gain. The additional black-access district elected an African-American candidate who defeated a white incumbent in the primary. But Ciro Rodriguez, the freshman incumbent from district 28, was defeated in a Democratic primary by another Hispanic, while in the new Hispanic-majority district 25, Anglo Democrat Lloyd Doggett decisively defeated an Hispanic candidate from the southern end of the district.

II. In the Supreme Court

The U.S. Supreme Court, in taking up the Texas redistricting, was confronted with a host of legal and constitutional issues. They reduced it to three: (1) the legality of performing the remap; (2) the motivation and intent of the remap with regard to partisanship; and (3) the racial and ethnic consequences of the remap. In the end, the majority only agreed on one rather narrow illegality—that the creation of district 23 violated Section 2 of the VRA, and that district 25 was an insufficient offset in the context of the entire map and of racially polarized voting in west Texas. Even in this narrow context of legality, the decision cleared some of the thicket away in terms of clarifying what can and cannot be done in redistricting.

A. Legality of Performing the Remap

Subsequent to the ruling in Colorado that the mid-decade redistricting violated the state's constitution, there was much unfounded speculation regarding the legality of the Texas remap. While the legal precedent had no application in Texas, the logic underlying the argument against mid-decade redistricting was advanced. Plaintiffs in Texas attempted to advance arguments against mid-decade redistricting in the trial court, arguing that such an approach could not be undertaken because the census data would be sufficiently dated as to not ensure satisfaction of the one-person, one-vote condition.[18]

Neither the district court judges nor the majority for the Supreme Court accepted the argument. Census data had been used mid-to-late decade to redraw legislative boundaries for four decades by federal courts. In doing so, the courts accepted the notion of a "legal fiction" that the census data were accurate for the purposes of satisfying one-person, one-vote.[19] A separate argument, that because the map had been redrawn by the court it could not be replaced by the legislature, did not find footing either. Indeed, Justice Kennedy goes so far as to state that "if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act,"[20] and reiterates the district court's correct observation that state legislatures are free to replace court-mandated remedial plans. If mid-decade redistricting is a concern, it is a political concern rather than a legal concern, and it will require political means to eliminate the practice. The Court has effectively closed the door on the issue of mid-decade remaps and endorsed the "legal fiction" that census data are valid for redistricting throughout the course of a decade.

B. Partisan Gerrymandering

The issue of partisan gerrymandering was very much in question during the 2003 litigation over the Texas remap. Lawyers for plaintiffs in Texas were arguing the Pennsylvania case before the Supreme Court even as they fought the Texas remap in district court. So there was great uncertainty as to the receptiveness of the Court to arguments regarding partisan gerrymandering claims and also uncertainty regarding what arguments or evidence the Court would consider in support of such a claim. By the time the Texas remap arrived at the Supreme Court in 2006, the *Veith* case had not determined that partisan gerrymandering was non-justiciable, as the Court continued to be divided on the issue.[21] And, in *Veith*, plaintiffs had failed to establish a measurable standard for determining what was an illegal partisan gerrymander. What was at issue in Texas was whether a manageable and reliable measure of fairness existed and was offered by the appellants for determining if partisan gerrymandering is unconstitutional.

Appellants' legal team had not been able to establish a legitimate claim to partisan gerrymandering in Pennsylvania, where a minority of votes made a decisive majority of seats for the advantaged party. They now turned to Texas, where the Supreme Court instructed the federal district court to consider the 2003 remap in light of the *Veith* decision. The second bite at establishing a justiciable partisan gerrymandering standard rested on the notion that a mid-decade redistricting with partisanship as its sole purpose was a violation of equal protection and the First amendment.

The Court rejected this argument on two dimensions: while partisan gain was the "sole motivation for the decision to replace Plan 1151C," partisan gain did not dictate the plan in its entirety; and the application of the mid-decade condition would leave untouched beginning-of-decade gerrymanders such as *Veith* and the 1991 Texas Democratic gerrymander.[22] Further, Kennedy again reiterated a conclusion from the majority in *Veith*, that a plaintiff must demonstrate a burden on their representational rights as measured by a reliable standard.

Every line of the Texas map was not dictated by party. However, most of the lines were determined by partisan and political goals, and the techniques used in the Texas redistricting are eerily similar to those used in the Georgia state legislative districts[23] drawn in 2001: unequal treatment of incumbents, displacement of incumbents in one party, the packing of voters from the party targeted by the redistricting. The districts also become less compact compared to the baseline. The critical difference between the legal Texas maps and the illegal Georgia maps are two, and both are recognized by the Court. First, in Georgia the redistricting made a minority of votes into a majority of seats to perpetuate a declining party. In this respect, the Georgia actions were like that of the Texas majority in 1991. In Texas in 2003, the redistricting had the purpose of "making the party balance more congruent to statewide party power."[24] Second, the redistricting in Georgia was illegal not because of partisan gerrymandering per se, but because "the objectives of the drafters, which included partisan interests along with regionalist bias and inconsistent incumbent protection" did not justify the population deviations exhibited in the plan.[25] This distinction also undercut the second of the appellants' arguments that relied on midterm redistricting as an equal population violation, which the Court contends was "not established" by the appellants.[26]

C. Minority Opportunity

Throughout litigation surrounding the Texas remap, Democratic lawyers made great efforts to get districts with no predominant minority in majority certified as effective minority districts. In 2001, during the initial *Balderas* trial, Democratic lawyers sought to have Martin Frost's district advanced as a "performing" district for minority voters.[27] During the 2003 hearings before the state senate, plaintiff's expert Dr. Allan Lichtman testified that as many as seventeen districts constituted majority-minority or influenced districts and could not be altered against the minority will under the *Ashcroft* decision.[28] Significant effort was made to certify both the Martin Frost district (24) and the Chris Bell district (25) as performing minority districts.[29]

During the preclearance process, Justice Department professional staff recommended against preclearing the Texas map because "influenced" districts such as the predominantly-Anglo district 10 were fractured, and districts where a degree of minority control in coalition such as former districts 9, 24, and 25 of the old map were not sufficiently offset by newer, more safely minority districts.[30] Justice also found the set of Hispanic districts advanced by Texas to include two potential retrogressions in districts 23 and 15, but only one offset in the new district 25.[31] Arguments were made in favor of all of the old minority-majority, coalitional, and influenced districts at trial, but these arguments were rejected by the District Court, which agreed with state's expert with regard to coalitonal districts, that because there is no obligation to draft such a district, there is no obligation to protect one either.[32] The District Court also rejected the notion that old district 23 was a performing minority district, since for a dozen years it had not performed on behalf of minority voters.[33]

To the extent that any racial fairness defect was found in the Texas map, it was in the narrow context of congressional district 23, which stretched from El Paso to San Antonio. Justice Kennedy, writing for the majority, observed that the revised district 23, which had its Hispanic VAP lowered 12 points and which was no longer a majority CVAP district, constituted a violation of Section 2 in that it diminished or diluted the voting rights of the minorities remaining in the district:

> It is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23 . . . the first *Gingles* factor requires that a group be "sufficiently large and geographically compact to constitute a majority in a single district" . . . the Latino majority in the old District 23 did possess electoral opportunity protected by Section 2.[34]

Kennedy goes on to note that "to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla prevailed was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution."[35] The revised District 23, according to Kennedy and concurring with the judgment of the district panel, "is unquestionably not a Latino opportunity district," a conclusion reached by everyone examining the district except the state's Voting Rights report for preclearance submission.

Neither the three-judge panel nor the Supreme Court accepted the argument that districts 25 and 9 were illegal racial gerrymanders per se, though the Court held that the district 25 remedy was deficient in part because it was not a compact district and therefore did not satisfy the *Shaw II* requirement that a Section 2 remedy be compact.[36] District 25's ability to perform in elections was not in question; rather, it was its shape and its appropriateness to the nature of the voting rights problem in Texas. Justice Kennedy wrote further that "The District Court's general finding of effectiveness cannot substitute for the lack of finding on compactness."[37]

So what do we learn as district drawers? First, we are reminded that Section 2 remedies are generally local remedies, and even if a remedy is not functioning, even for a period as long as a decade, the creation of a performing offset in other geography does not compensate for the reduction of a non-performing Section 2 asset. For Texas, this means that the congressional districts of the South Valley are essentially a "lock-in" at redistricting time, and their composition cannot be easily changed.

Second, we learn that the "ability to perform" is different for an existing asset than a proposed asset. District 23 had not performed since 1990, though it showed progress towards performing and held out the potential. The remedial plan of district 25 definitely was an effective district and had an ability to perform, but because that ability was diminished for minorities in one region of the district, it was thrown out. The presence of an Anglo incumbent who could dominate the district also diminished the ability to be a truly effective district in the view of Justice Kennedy, though Rep. Bonilla's decade-long presence in the existing non-performing asset (District 23) presented no such problem. The court also reminds us that it is permissible to identify disparate communities of interest within the same ethnic or racial group, and that analysis which can prove the existence of such communities can undercut the creation of a minority-majority district that is also non-compact. This further reinforces the "lock-in" of south Texas districts and may result in packed Hispanic districts, if community of interest and compactness prevail as Texas' Latino population continues to grow.

Third, with regard to minority-majority, coalitional, and minority-influenced districts, the Court rejected the arguments for the restoration of coalitional and influenced districts held by Anglo incumbents. The absence of evidence opposing an Anglo incumbent in a circumstance where black voters potentially controlled the election of consequence is insufficient in the eyes of the Court to establish that incumbent as a candidate of choice or to prove an ability to perform. But the Court also advances a succinct test for how influence districts might be treated post-*Ashcroft*:[38]

> That African-Americans had influence in the district . . . does not suffice to state a §2 claim in these cases. The opportunity 'to elect representatives of their choice,' 42 U. S. C. §1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of §2. If §2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.[39]

If one wishes to certify a non-single-minority-majority district as a "performing" district and grant to it special protections under the law, then the district needs to be electing a minority candidate who is preferred by the minority community and the minority community must have a high degree of influence or control over the outcome of consequence. If one seeks to certify a district electing an Anglo white candidate, there must be evidence that the Anglo is the candidate of choice that goes beyond a lack of objection. Instead, that candidate must be the choice of minority voters, in the election of consequence, in opposition to attractive alternatives such as a candidate from the same racial or ethnic group as the minority of interest.

So, from a Section 2 perspective, establishing or retaining non-minority-majority and coalitional districts just had its parameters defined: while coalitional districts can contribute to access under Section 5, the failure to create a coalitional district is not a violation of Section 2. The question of influence districts as part of the Section 5 baseline is unresolved, but other than making a sideward allusion toward Section 5, the Court remained silent on the issue of preclearance and the treatment of coalitional and influence districts of the Texas map.

The logic of the Court led it to conclude that the elimination of district 24 did not constitute a Section 2 violation, and, implicitly, that the district did not merit special consideration. The Court also observed that to interpret Section 2 to "protect this kind of influence" infused race too deeply into the politics of redistricting. Implicit in this conclusion is a recognition that politics must be allowed to work at some level, and that to mandate the protection of district designs that maintained minority influence when the minority population is very small is to give race too much weight in the overall redistricting process.

CONCLUSION:

REDISTRICTING DOCTORS AND THE HIPPOCRATIC COURTS

In remanding the case back to the Eastern District Court of Texas, the Supreme Court gave the judges involved their fourth turn in five years to consider what to do about congressional representation in Texas.

The judges received nineteen different map proposals from nine different parties and also a proposal from the state of Texas. Most of the proposals advanced similar remedies to the problem, by increasing the Hispanic VAP percentage in district 23. Two solutions were typically advanced, either restoring Webb County to district 23 or increasing the portion of Bexar County (San Antonio) placed in district 23. Then, various map makers would reconcile the population loss of district 28 by shifting the district east to take in portions of district 25 in Hidalgo County, while also moving district 15 west to pick up other southern portions of district 25. By pulling district 15 south, district 25 again centers on southeastern Travis county and also captures either counties to the east or south, depending on the scope of adjustment to district 15. This counterclockwise movement ensured that the first step in the process was to remedy the legal defects of district 23 while minimizing the effects on other districts in the legislature's map.

During the initial Texas redistricting trial in 2001, the district court was inundated with requests of various parties to engage in affirmative measures to advance the goals of various parties to the litigation. At that time, the Court observed that the undoing of partisan gerrymanders and the enhancement of minority representation, while noble, were also beyond the pale of the court to address. The judges felt constrained to remedy legal defects and nothing more. To that end, they followed the logic of first addressing the superior redistricting principles of racial fairness by maintaining existing minority opportunities, then placing new districts in areas of growth, and then filling in the map with compact and equally populated districts that maintained continuity of representation.

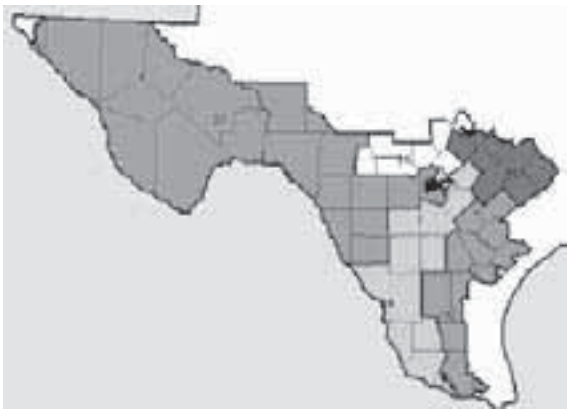
The same parties that aggressively pursued judicial correction in 2001 again inundated the district court with remedial proposals to the state's Plan 1374C, and were rebuked because there was no prospect of the court adopting their remedial solutions. At best, the district court would reject the state's plan and reinstate the last, legal map which it had crafted. By July of 2006, parties to the litigation had generally learned their lesson. The Jackson plaintiffs had resubmitted the Plan 1151C as a statewide remedy, but all of the other submissions confined changes to four to seven districts in south Texas. The most economical plan, Jackson plaintiff's submission Plan 1406, actually corrected the defect of district 23 and made Webb County whole, as implicitly directed by the Supreme Court, while also maintaining a performing district 28 and relocating district 25 in and around Austin.

The district court remedy reflected this thinking, which it had first articulated in 2001. Judges Higgenbothan, Rosentahl, and Ward rearticulated their minimalist approach, stating that "our task is narrow: we must do no more than necessary to correct the flaws the Supreme Court found in Plan 1374 C . . . the Supreme Court found that District 23 in Plan 1374C violated Section 2 of the Voting Rights Act."[40] Citing the effort to protect Republican Congressman Bonilla by moving Hill Country Republicans into his district, Kerr, Kendall, Bandera and Real counties were moved east into heavily-Republican congressional district 21. Webb County is made whole and became the anchor for congressional district 28 which also takes in the southern parts of old district 25. District 25 then migrates north to anchor center southern Travis County. The product, as described by the District Court judges, results from an effort to make "as few [changes] as possible consistent with conscientious partisan neutrality, is not the product of aggressive remediation. Rather, it is the consequence of an aggressive map, which resulted in the Section 2 violation the Supreme Court found."[41]

MAP 3

SOUTH TEXAS UNDER PLAN 1448C,

LULAC COURT-ORDERED MAP, 2006



FOOTNOTES

[1] Shaw v. Hunt 517 US 899.

[2] Sessions v. Perry 2:03-VC-354, Eastern District of Texas; LULAC v. Perry (05-204 US); J. Alford Testimony, *Sessions v. Perry* trial transcript 12/15/2003 AM at 109.

[3] *LULAC.*

[4] Brief for Appelants, *LULAC v. Perry,* 2006.

[5] United States Justice Department (2003) SECTION 5 RECOMMENDATION MEMORANDUM, typescript December 12; Allan Lichtman (2003) "Expert Report of Allan Lichtman," *Sessions v. Perry* 2:03-VC-354, Eastern District of Texas; Statement of Allan Lichtman, Texas Senate Committee on Jurisprudence, July 24 2003.

[6] It was unclear to some mapmakers as to whether the two urban districts held by white incumbents should count toward the baseline of the map. *See* R.G. Ratcliffe and Janet Elliott, *Redistricting Ball in GOP's Court; With Dems Defeated, Republicans Free to Iron Out Their Differences*, HOUSTON CHRONICLE, Sept. 25, 2003.

[7] Statement of Allan Lichtman, op cit.; Statement of Ronald Keith Gaddie Texas Senate Committee on Jurisprudence, July 24 2003.

[8] Allan Lichtman, (2003), op cit. expert report; Jonathan N. Katz, "Report on Texas Congressional Redistricting: Minority Opportunities and Partisan Fairness," submitted in *Del Rio v. Perry,* 2001; Charles S. Bullock III and Ronald Keith Gaddie, *An Assessment of Voting Rights Progress in Texas (*Washington, DC: American Enterprise Institute) (2003).

[9] Congressional Quarterly, Politics in America, 1011 (2006).

[10] A. Taylor and Associates, P.C. 2003. "28 CFR 51.27 (m) and (n): Voting Rights Analysis." Submitted to the United States Justice Department, October 20 2003.

[11] Balderas v. Perry, (6:01-CV-158, Eastern US District of Texas).

[12] "Voting Rights Analysis," page 7.

[13] It is worth noting that Texas sought to craft new minority districts without triggering the strict scrutiny of the *Shaw* cases by doing so in the context of partisan gerrymandering. The state of Texas asserted that the new districts, which enhanced minority representation, were in fact safe Democratic constituencies. The application of a *Cromartie* border comparison test performed by the authors of this article to the districts demonstrated that party, rather than race or ethnicity, better-explained the shape of the districts. *See* Hunt v. Cromartie*,* 526 US 541 (1999).

[14] "Voting Rights Analysis," at 14.

[15] R. K. Gaddie (2003) "Expert Report of Ronald Keith Gaddie, Ph.D." Submitted in *Sessions v. Perry*, November 21; Plaintiff's Appendix I, *LULAC v. Perry* op cit.

[16] *Sessions v. Perry*, op cit.

[17] United States Department of Justice, op cit..

[18] LULAC v. Perry, op cit.

[19] *Id*.

[20] *Id.* at 9.

[21] Veith v. Jubelirer*,* 541 US 267 (2004)*; LULAC v. Perry,* at 7.

[22] *LULAC* at 11.

[23] Cox v. Larios 542 US 947 (2004).

[24] *LULAC* at 12.

[25] *See LULAC* at 16.

[26] *Id*.

[27] *Del Rio v. Perry*, GN003665 353d Judicial Circuit of Texas, 2001 (trial transcript); *Balderas v. Perry,* op cit., (trial transcript).

[28] Statement of Allan Lichtman, Texas Senate Committee on Jurisprudence.

[29] *Balderas v. Perry,* op cit.

[30] United States Department of Justice, "Section 5 Recommendation."

[31] *Id*.

[32] *Sessions* at 46n.

[33] *Id*. at 54.

[34] *LULAC* at 21.

[35] *LULAC* at 22.

[36] It is worth noting that district 25 in Plan 1374C is more compact than neighboring Hispanic-majority district 15 on the Perimeter to Area measure and is nearly as compact as Houston-based minority-majority districts 18 and 29, all of which were sustained by the court.

[37] *LULAC* at 26

[38] This discussion may be academic. The extension of the Voting Rights Act in 2006 includes a provision to legislatively correct the *Ashcroft* decision to the pre-*Ashcroft* retrogression standard.

[39] *LULAC* at 38. This reasoning is consistent with the District Court's analysis of district 24 and the application of the Voting Rights Act. Sessions v. Perry _____.

[40] LULAC v. Perry, civ. 2:03-CV-354-TJW, page 1 (August 4 2006).

[41] *Id*. at 7.