New Developments in the Meaning of the Voting Rights Act

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New Developments

- Section 2 – *Bartlett v. Strickland* (2009), *LULAC v. Perry* (2006)

- Section 5 – 2006 Reauthorization, *NAMUDNO*

Section 2 – Language and Applications

Statutory Language:

> "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. §1973(b).

Applies to dilution by way of:

- Packing -- overconcentration of minorities into too few districts.
- Cracking -- dispersion among too many districts.
- Stacking -- submersion in a multimember district.

Section 2 Litigation

Gingles Prongs:

- **Large** and **compact** enough to form a majority in a single member district.
- Minority political cohesion
- White bloc voting

Plus Senate Factors demonstrating history of inequality, discrimination etc.

Proportionality as a factor in favor of a plan, but not a safe harbor (*DeGrandy*).

How Large?
Bartlett v. Strickland (2009)

- Question presented: Does the VRA require the construction of districts for communities comprising less than 50 percent of a potential single member district?
- Answer: No.

Facts of *Bartlett*

- District's voting age population was 39% African American.
- NC Supreme Court ruled that it violated the whole county provision of the state constitution and that the VRA did not require doing so.
- Supreme Court affirmed (5-4, or really 3+2 to 4).

Reasoning of Bartlett Plurality (Kennedy opinion)

- Need for bright line rules in redistricting.
- Fear of infusing race into virtually any redistricting case no matter how small the minority community involved.
- When a community can comprise 50 percent of the **voting age population,** then it could control the outcome of an election without assistance from other groups.

Remaining question: Fifty percent of what?

- Opinion seems to suggest 50 percent of the voting age population (as opposed to citizen voting age population or aggregate population).
- Opinion leaves open the question as to whether a combination of minority communities that could comprise 50 percent VAP of a district could have a section 2 claim.

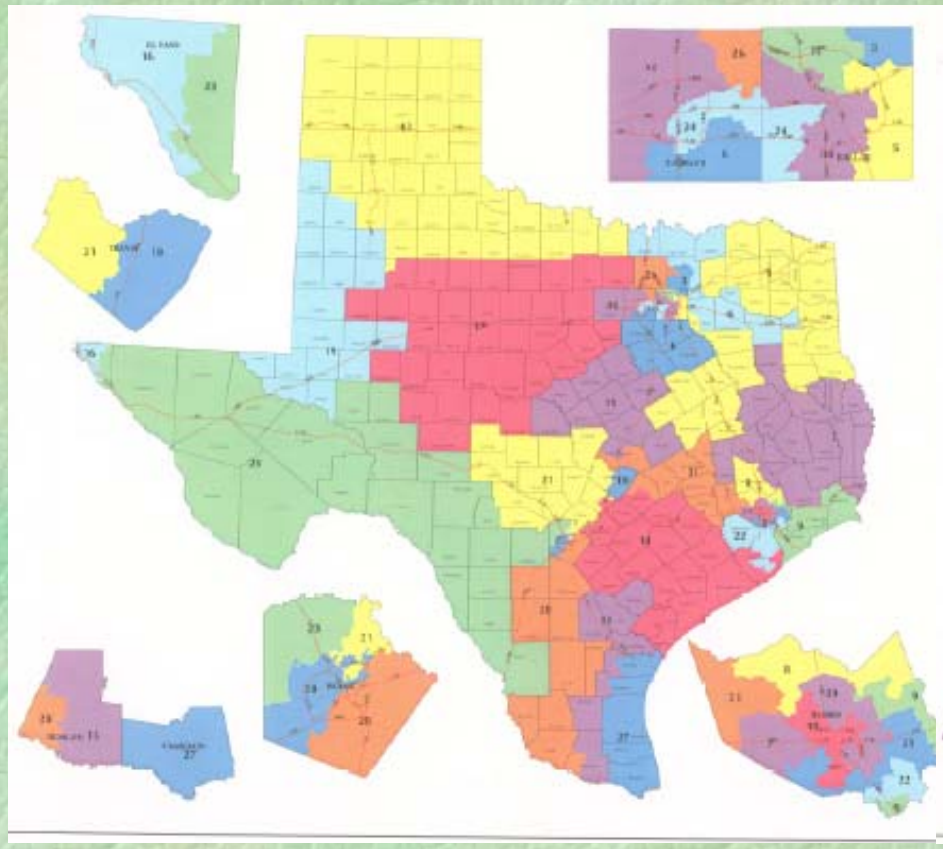
How Compact?
LULAC v. Perry (2006)

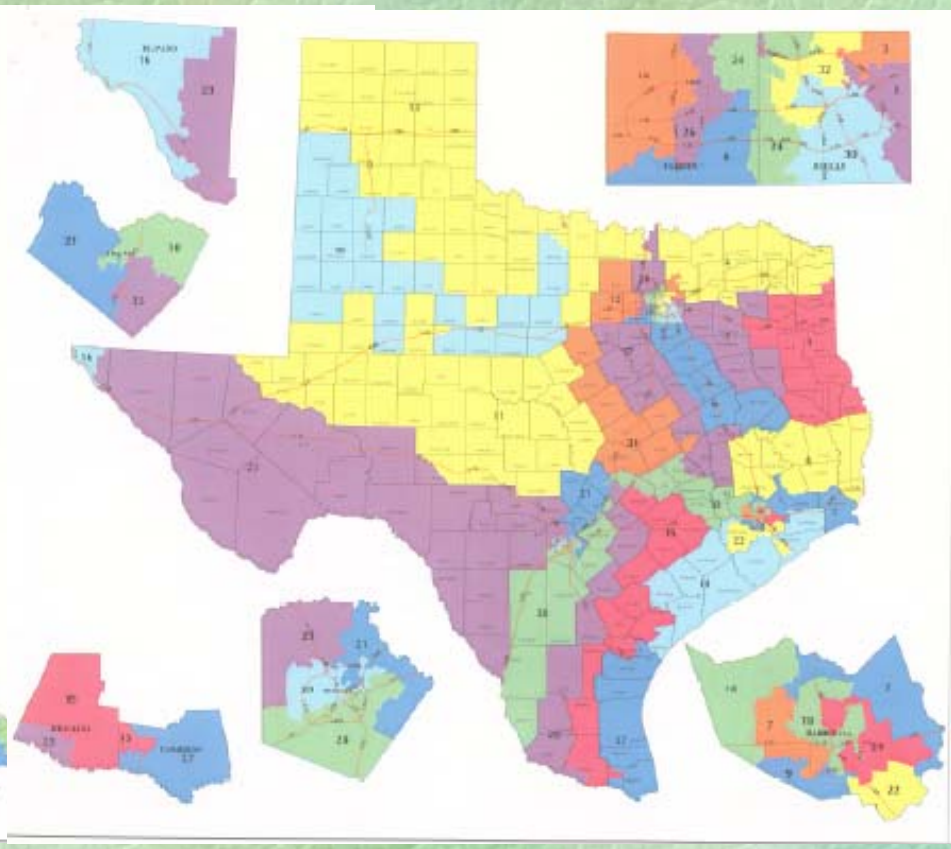
- Question presented: Can a district that creates a voting majority by combining two culturally distinct, far flung Latino communities offset the elimination of a culturally compact majority Latino district that is entitled to a district under Section 2?
- Answer: no.

Cultural Compactness

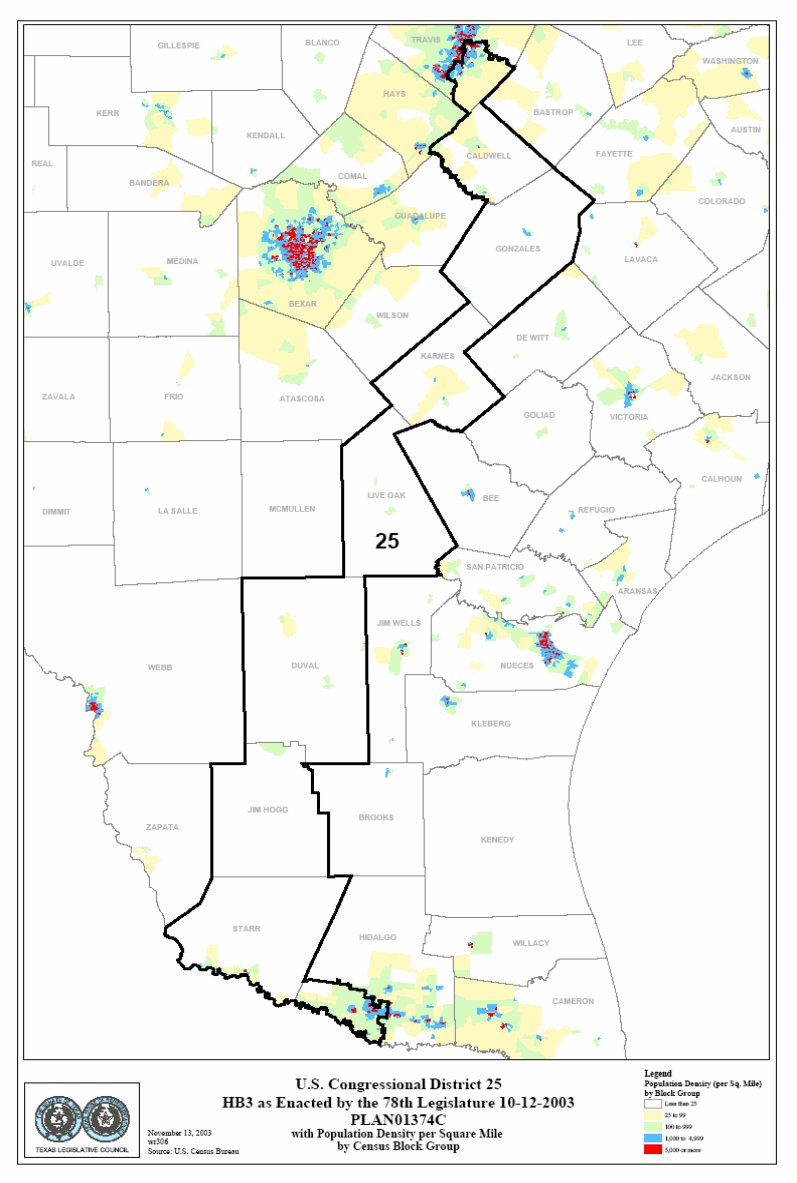
- "there is no basis to believe a district that combines **two far-flung segments of a racial group with disparate interests** provides the opportunity that §2 requires or that the first Gingles condition contemplates."
- "We emphasize it is the **enormous geographical distance** separating the Austin and Mexican-border communities, coupled with the **disparate needs and interests of these populations**—not either factor alone—that renders District25 noncompact for §2 purposes. The mathematical possibility of a racial bloc does not make a district compact."
- "The Latinos in District 23 had found an **efficacious political identity**, while this would be an entirely new and difficult undertaking for the Latinos in District 25, given their geographic and other differences."
- "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it."

Before and After





Inadequate Offset District



Section 5 Basics

- Applies only to “covered” jurisdictions.
- Requires them to gain preclearance from the DOJ or U.S. District Court for DC all redistricting plans.
- Plans will be denied preclearance if they have a discriminatory purpose or a retrogressive effect.

The 2006 Reauthorization

- Retains existing coverage formula and bailout procedures, but see *NAMUDNO*.

- Overturns *Reno v. Bossier Parish* (2000) establishing that any discriminatory purpose, not just retrogressive purpose, violates section 5.

- Overturns *Georgia v. Ashcroft* (2003), establishing a new test for retrogressive effect: a redistricting plan cannot "diminish [minority voters'] ability to elect their preferred candidates of choice."

"The *Ashcroft* fix"

- Two interpretations:
  - Senate Report: cannot reduce the number of "naturally occurring majority-minority districts."
  - Alternative Interpretation: more flexible rule that almost certainly protects against dismantling "coalition districts" (i.e., opportunity districts below 50 percent minority) and perhaps allow tradeoffs among control districts and coalition districts.

Conclusions and Prognostications

- Supreme Court will strike down Section 5 coverage formula.
- Possible that Section 5 will be repassed with different coverage formula, so questions as to its substantive meaning will still remain.
- Both the new Section 5 and the post-*Bartlett* Section 2, place increased importance on majority-minority status.
- However, it is also too early to tell how Obama's election (and the data derived from it) will effect trends in judicial enforcement of section 2, especially analyses as to racial bloc voting.