Below Board: How Texas's Legislative Redistricting Board Violates Section 2 of the Voting Rights Act

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As Texas lawmakers take up their decennial duty to redraw new legislative districts in 2021, the state's Legislative Redistricting Board looms largely over the process. If the Texas Legislature fails to approve new district lines, then the five-member Board becomes empowered to do it for them. This Note argues that the structure of the Legislative Redistricting Board violates Section 2 of the Voting Rights Act because it dilutes the voting power of minority group members by effectively excluding them from the redistricting process. This Note compares the Board to an at-large election district and proposes that the Board should be eliminated and that control over redistricting should be retained by the Legislature, where minority groups have an opportunity to influence the redistricting process.

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Introduction

Every ten years, Texas lawmakers convening in Austin have one additional constitutional duty: to redraw the state's electoral districts for the next decade. The process is a famously fractious one, as lawmakers battle one another to secure district lines that will guarantee success for themselves and their party. When that process runs aground, the Texas constitution provides a backstop: If legislators fail to agree on a redistricting plan—or if the governor declines to sign it—then the responsibility for redrawing the state's legislative districts shifts to Texas's Legislative Redistricting Board (the Board). That five-person Board, which is dominated by four officials who are elected statewide, effectively removes the redistricting process from the Legislature. The Board is not required to hold any hearings, and there is no formal process the Board must follow in drafting a redistricting plan. Three members of the Board can approve a plan without any oversight or input from the legislature.

That lack of legislative influence is by design. The Board was initially conceived as a cudgel that would force recalcitrant legislators to engage in redistricting, at a time when rural legislators refused to redraw their own districts and federal courts were reluctant to get involved. The Supreme Court's decision in *Baker v. Carr*[1] largely obviated the need for such a device,[2] and the Board's functional effect today is simply to guarantee that whichever party controls statewide elections is able to command the redistricting process, regardless of the balance of power in the Legislature itself. The effect of this system has been to deny Texans of color an opportunity to make their voices heard in the redistricting process.

In this Note, I argue that Texas's Legislative Redistricting Board violates Section 2 of the Voting Rights Act by denying voters of color the opportunity to fully participate in the political process and to elect candidates of their own choosing. While the preclearance requirements of Section 5 provided some protections for minority voters during previous redistricting cycles; the Supreme Court's decision in *Shelby County v. Holder* eliminated those protections and increased the need for a robust reading of Section 2. This Note contends that the Legislative Redistricting Board violates Section

1. 369 U.S. 186 (1962).

2. *Id.* at 237 (holding that a state's apportionment scheme "present[s] a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision").

2, because the Board effectively operates as an at-large voting system by shifting control over redistricting from the legislature—where minority voters can elect individual representatives who then influence the redistricting process—to a slate of statewide officials who are elected by the state's racial majority and enjoy total control over the drawing of legislative districts. As such, the Board denies minority voters meaningful representation in the redistricting process, regardless of how well their candidates perform at the polls. This structure means that minority voters will have no meaningful influence over the composition of electoral districts in the state until they can triumph in statewide elections. Locking minority voters out of the redistricting process creates downstream consequences for voter participation, turnout, representation, and ultimately, resources. While the Board's unique structure differs from the typical vote-denial or vote-dilution claims that are often litigated under Section 2, the Board clearly produces the kind of discriminatory effect that the 1982 amendments to the Voting Rights Act were designed to address and that courts have often recognized as violations of the statute.

I. History of the Legislative Redistricting Board

The Legislative Redistricting Board was proposed in 1947 as a solution to gridlock. For decades, state legislators had declined to redraw the state's electoral maps, in flagrant violation of the Texas constitution, which requires the legislature to draw new district lines every ten years during the legislative session following the federal census.[3] Rather than comply with the state constitution, rural legislators simply refused to pass any plan that would diminish their lopsided grip on power, leaving the state with districts that were grossly out of proportion to an increasingly urban population.[4] Federal courts, reluctant to enter the "political thicket" of state politics, offered no redress for these violations;[5] the maps thus remained unchanged, even as cities swelled and the population disparities between rural and urban districts became ever more lopsided.[6]

3. TEX. CONST. art. III, § 28.

4. *See* JONATHAN WINBURN, THE REALITIES OF REDISTRICTING 135 (2008) (discussing how "the population in Texas shifted from mostly rural population to having a majority of Texans living in urban centers").

5. Colegrove v. Green, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.").

6. *See* WINBURN, *supra* note 4, at 135 (highlighting that because the legislative plans "severely overrepresented rural interests," "rural legislators dominated the leadership" in the state).

A. Composition and Powers of the Board

The proposed Board was designed to ensure that districts would be redrawn every ten years, either by prodding legislators into passing their own redistricting plans or forcing legislators to gamble their electoral fate on maps drawn by a Board that was not beholden to them. As such, the five-member Board consists of four members from the executive branch, each of whom is elected statewide—the Lieutenant Governor, the Attorney General, the Land Commissioner, and the Comptroller of Public Accounts.[7] Only the Speaker of the Texas House, who is selected by his peers in the chamber,[8] represents the interests of lawmakers on the Board.[9]

The Board is empowered to draw new legislative districts when the legislature fails to do so at the "first regular session" following the federal decennial census.[10] The Board is required to redraw districts for the Texas House or Senate, or both, "as the failure of action of such Legislature may make necessary."[11] The Board is required to meet in Austin within ninety days after the end of the regular legislative session.[12] It then has sixty days after its initial meeting to craft new district lines.[13] Importantly, the Board does not have the authority to draw federal congressional districts.

Aside from the time constraints, the Texas constitution does not prescribe any specific procedures that the Board must follow in drawing new districts.[14] The Board is not obliged to hold hearings, to consult with legislators or committees, or to make any information public about its own deliberations.

The Board requires only a simple three-member quorum to conduct meetings, and a three-member majority may give final approval to a redistricting plan.[15] After being signed by three board members and filed with the secretary of state, the Board's plan has the "force and effect of law," and the new apportionment takes effect "at the next succeeding statewide general election."[16] There is no provision for approval by legislators or the governor,

7. TEX. CONST. art. III, § 28; TEX. CONST. art. IV, §§ 1–2.

8. TEX. CONST. art. III, § 9(b).

9. TEX. CONST. art. III, § 28. The Lieutenant Governor serves as President of the Texas Senate, but he is elected in a statewide election. TEX. CONST. art. IV, § 16.

10. TEX. CONST. art. III, § 28.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See generally id.* (omitting any specific procedures that the Board must abide by in fulfilling its constitutional duty); *see also* Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 575 (Tex. 1971) (holding that "[t]he manner in which the Board apportions the state into new districts is entirely within the judgment and discretion of the Board," subject to state and federal constitutional limits).

15. TEX. CONST. art. III, § 28.

16. *Id.*

nor any recourse for legislators or board members who oppose the majority's plan.

B. The Board, in Action

The 1947 proposal for the Board required a constitutional amendment to take effect, which first required a two-thirds majority in both the Texas House and Senate. The votes in both chambers were close; the resolution initially fell one vote short in the house, but after intensive lobbying by Governor Beauford Jester, the House Speaker, W.O. Reed, cast the deciding vote to approve the measure.[17] The amendment then went to Texas voters, who overwhelmingly approved it in November 1948, with 77.5% voting in favor.[18]

The amendment was not slated to take effect until 1953, yet it appeared to have an immediate effect on the redistricting process. In 1951, the legislature passed its own redistricting plan for the first time in three decades.[19] Ten years later, in 1961, the legislature again passed its own redistricting plan. As a result, the board did not officially convene until 1971, when legislators failed to agree on new districts for the Texas Senate.

By the time the Board convened, its purpose had largely been obviated by the U.S. Supreme Court. In 1962, after decades of demurring on the issue of redistricting, the Court held in *Baker v. Carr* that a state legislature's refusal to reapportion was justiciable on equal protection grounds.[20] The facts of *Baker* were similar to the situation that had given rise to Texas's Legislative Redistricting Board: Tennessee legislators had not redrawn their state legislative districts since 1901, despite a state constitutional requirement that new districts be drawn every ten years.[21] The Justices remanded the case, rather than redraw the districts, but the message was clear. Less than a month after the ruling in *Baker v. Carr*, a federal district court in Alabama served notice on state legislators—who had not redrawn their own districts since 1901—that they would be required to redistrict, or risk having the court do it for them.[22] When the Alabama legislature passed a redistricting plan that

17. STEVE BICKERSTAFF, REDISTRICTING TEXAS: THE HISTORY AND PRINCIPLES OF DRAWING CONGRESSIONAL AND STATE LEGISLATIVE DISTRICTS IN TEXAS 1845–2010, at 18–19 (2011); *see also* S.J. Res. 2, 50th Leg., Reg. Sess. (Tex. 1947) ("Taken up, and finally passed by the following vote: Yeas 23, Nays 7."); H. JOURNAL, 50th Leg., Reg. Sess., at 3153–56 (Tex. 1947) (statement of Rep. Willis) ("I voted 'yea' on S. J. R. 2 because I would not be the one man in this large body to keep the people of Texas from having a right to vote on this Constitutional issue.").

18. TEX. LEGIS. COUNCIL, AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876, at 20 (2020), https://tlc.texas.gov/docs/amendments/Constamend1876.pdf [https://perma.cc/HYL2-QEC3].

19. WINBURN, *supra* note 4, at 135.

20. 369 U.S. 186, 237 (1962).

21. *Id.* at 188–89, 191.

22. Sims v. Frink, 205 F. Supp. 245, 248 (M.D. Ala. 1962).

failed to divide districts based on equal population, the federal court redrew the districts[23]—a move that was upheld by the U.S. Supreme Court in *Reynolds v. Sims*.[24] The so-called "reapportionment revolution" that resulted from these decisions meant states could no longer simply avoid redistricting without risking the intervention of federal courts. The federal courts' newfound willingness to enter the "political thicket" meant there was little need for the Legislative Redistricting Board; if Texas legislators refused to redistrict after *Baker v. Carr*, the federal courts stood ready to do it for them.

Nevertheless, the Board persisted. When Texas lawmakers failed to pass a Senate redistricting plan in 1971 and the House plan was invalidated by the Texas Supreme Court,[25] the Board convened for the first time, with the charge to draw maps for both chambers.[26] The Board's plans for the Texas House included a combination of seventy-nine single-member and eleven multimember districts,[27] which were almost immediately challenged as impermissibly diluting the voting power of minority groups.[28] In reviewing the proposed maps, the federal district court described the Board's disorganized—and seemingly disinterested—process:

> The plan before the Court was not a product of legislative action, but of the action of a board of five members, only one of whom is a member of the legislature. It appears to this Court that the board never really acted as a board but only as individuals. There never seems to have been a tandem of operations among the board members with regard to the constitutional principles or even to any lesser policy guidelines. The committee met for hearings only four times. The full board did not participate in two of those meetings, and one member of the board testified that he did not pay much attention to the hearings in any event. The full board did not even meet to approve the final plan; it was merely passed around. In fact, only three members of the committee signed both plans. There is ample testimony that the board was given absolutely no legislative guidance, nor did the board begin

23. Sims v. Frink, 208 F. Supp. 431, 440–42 (M.D. Ala. 1962).

24. 377 U.S. 533, 587 (1964).

25. Smith v. Craddick, 471 S.W.2d 375, 376, 379 (Tex. 1971).

26. *See* Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 572, 575 (Tex. 1971) (ordering the Board to redistrict the representative districts that had been invalidated by the Texas Supreme Court).

27. Steve Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980s*, 34 SW. L.J. 607, 629 (1981) (explaining that the plan actually created ninety single-member districts); *see also id.* at 629 n.190 ("The United States Supreme Court erroneously indicated in White v. Regester, 412 U.S. 755, 758 (1973), that the Texas apportionment included only 79 single-member districts."). Multimember districts are districts in which more than one member is elected from the same geographical jurisdiction as another member. For example, each state is a multimember district with respect to the U.S. Senate, since two senators are elected from within the same state boundaries.

28. Graves v. Barnes, 343 F. Supp. 704, 708–09 (W.D. Tex. 1972).

> from the legislative discussions that accompanied the earlier apportionment plans for Texas.[29]

The court also noted that "at no point in its deliberations did the board ever debate or discuss the general issue of single-member districts as opposed to multi-member districts, obviously a very important issue in any apportionment plan, and particularly in the Texas proposal."[30] The court further found that the map approved by the Board actually contradicted a state policy regarding multimember districts, which had been called to the attention of the Board during one of its meetings "but was apparently ignored."[31] The court ultimately found that the Board's plan for multimember districts in Dallas and Bexar counties diluted the votes of Black and Mexican-American voters, respectively, based on a legacy of racial discrimination in those districts, and current practices that reduced the likelihood of electing candidates of color.[32]

The U.S. Supreme Court upheld that portion of the ruling in *White v. Regester*.[33] The Justices echoed the district court's doubts that the Board "did the sort of deliberative job . . . worthy of judicial abstinence."[34] While the Court based its holding on constitutional grounds, it also endorsed the district court's searching inquiry into the discriminatory context of the redistricting process, producing a set of factors that would later become a model for members of Congress, when they sought to expand Section 2 of the Voting Rights Act.[35]

As Texas evolved into a two-party state, the Board became an instrument for partisan manipulation. In 1981, Governor Bill Clements, the first Republican elected to that office since Reconstruction, vetoed the Democratic legislature's plans for the State Senate, forcing the Board to convene for a second time.[36] The Board undertook a more organized and

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29. *Id.* at 716.

30. *Id.*

31. *Id.* at 716–17.

32. *Id.* at 735.

33. 412 U.S. 755, 765 (1973).

34. *Id.* at 762.

35. *Id.* at 765–70. *See also infra* subpart II(A). Separately, the decision in *White v. Regester* is considered a landmark case in voting rights law because it established the principle that population deviations of up to 9.9% are constitutionally permissible for state legislative districts. *White*, 412 U.S. at 763.

36. BICKERSTAFF, *supra* note 17, at 33 (noting that Clements's veto was questionable as a partisan maneuver, since the Board was entirely controlled by Democrats). The Board was subsequently called upon to redraw maps for the Texas House as well, after the legislature's plan was struck down by the Texas Supreme Court for cutting too many county boundaries. *See* Clements v. Valles, 620 S.W.2d 112, 115 (Tex. 1981) ("Although a legislative enactment is entitled to a presumption of validity, it is our opinion that House Bill 960 violates the Texas Constitution and must be declared invalid in its entirety.").

inclusive process[37] than it had in 1971. The Board held all of its hearings in a public session with advance notice, and it circulated its proposed plans to a mailing list of "700 interested persons," along with the news media.[38] The Board also allowed for public testimony at each meeting, and it accepted certain amendments that had been proposed by minority groups. Nevertheless, the maps that resulted from this process suffered from some of the same constitutional defects as the Board's maps ten years earlier. The Board's maps initially failed to attain preclearance under Section 5 of the Voting Rights Act and were later modified by federal courts before being implemented.[39]

In 2001, with control of the Legislature split between the two parties, Republicans demonstrated how the Board could be used by one party to manipulate the redistricting process. Democrats controlled the Texas House during that session, but Republicans controlled the Texas Senate, along with every statewide elected office.[40] Rather than compromise with House Democrats on a set of new maps, Senate Republicans ensured that the session would end without a redistricting plan, and that responsibility would then shift to the Board. When the Board convened, Attorney General John Cornyn led a three-member bloc that pushed for an aggressively partisan map that could potentially flip the Texas House to Republican control.[41] That plan was eventually approved by three of the statewide executive officials on the Board, over the objections of the two presiding officers from the legislature: House Speaker Pete Laney, a Democrat, and Lieutenant Governor Bill Ratliff, a Republican who was also elected statewide, but maintained close ties to the Legislature and favored a more incumbent-friendly plan.[42] The Board's initial plan failed to win preclearance from the Justice Department, on the grounds that it diminished Hispanic influence.[43] But the state quickly agreed to modify the maps, and the Board's maps ultimately succeeded in flipping the Texas House the following year.[44]

When one party controls state government, the Board is less likely to be called upon to fashion new maps. In 1991, Democrats in the Legislature passed a redistricting plan that was signed by Democratic Governor Ann Richards.[45] However, because a series of preemptive lawsuits were already

37. *See infra* notes 101–03 and accompanying text.

38. Terrazas v. Clements, 537 F. Supp. 514, 534 (N.D. Tex. 1982).

39. BICKERSTAFF, *supra* note 17, at 33–34.

40. *Id.* at 45.

41. *Id.*

42. *Id.*

43. *Id.* at 45–46.

44. *Id.* at 45–46, 48.

45. *Redistricting History*, TEX. LEGIS. COUNCIL, https://redistricting.capitol.texas.gov/history [https://perma.cc/39MA-UQVC].

pending in the federal courts, the Board convened for a brief meeting—in case the Legislature's plan was invalidated—but ultimately deferred to that process, without having crafted or approved new maps.[46]

In 2011, the Board did not convene because Republicans, who controlled both chambers of the Legislature, passed a redistricting plan that was approved by Republican Governor Rick Perry.[47] Similarly, Republicans entered the 2021 legislative session firmly in control of state government. This means the Board is unlikely to meet in 2021 unless intraparty conflicts prevent Republicans from unifying around a single set of maps, or—perhaps more likely—delays in the reporting of the federal Census prevent new maps from being approved during the legislative session.

II. The Evolution of Section 2 of the Voting Rights Act

When the Supreme Court held in *White v. Regester* that the Legislative Redistricting Board had diluted the political power of minority voters, the Court's opinion did not so much as mention Section 2 of the Voting Rights Act. While Section 2 is now considered the cornerstone for vote-dilution claims, in the Act's infancy, courts were unsure what to make of Section 2 and its brief, but broad, guarantee: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[48]

The consensus among courts seemed to be that Section 2 reflected the sweeping ambitions for the Voting Rights Act—President Lyndon Johnson had instructed Attorney General Nicholas Katzenbach to "write the god-damnedest, toughest voting rights act you can devise"[49]—but there was considerable confusion about how to apply it in a courtroom. In *Allen v. State Board of Elections*,[50] the Supreme Court recounted the legislative history of Section 2 to support its holding that the Voting Rights Act was "intended to reach any state enactment which altered the election law of a covered State

46. In 1991, a series of preemptive lawsuits threw the redistricting process into the federal courts even before the legislative session had ended. *See* Terrazas v. Slagle, 789 F. Supp. 828, 830–32 (W.D. Tex. 1991) (recounting the "convoluted" procedural history of overlapping lawsuits following the 1990 census). Unsure what to do, members of the Legislative Redistricting Board held a perfunctory meeting to satisfy their constitutional obligation, but ultimately deferred to the judicial process without having crafted or approved a Board map. *See generally Redistricting History*, *supra* note 45 (discussing the redistricting history during the 1990s).

47. *Redistricting History*, *supra* note 45.

48. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (2018)).

49. Edwin M. Yoder, Jr., *Civil Rights: Much More to Do*, WASH. POST (May 19, 1982), https://www.washingtonpost.com/archive/politics/1982/05/19/civil-rights-much-more-to-do/b5a109f5-3b4f-4361-9aef-66e75c3baa45/ [https://perma.cc/4T8J-MMRR].

50. 393 U.S. 544 (1969).

in even a minor way."[51] The Court noted there were initial concerns among some legislators that the original formulation of Section 2, which barred any discriminatory "qualification or procedure," was too narrow and that, in response, "Congress [had] expanded the language in the final version . . . to include any 'voting qualifications or prerequisite to voting, or standard, practice, or procedure.'"[52] The Court concluded that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race,"[53] and that voting includes "all action necessary to make a vote effective."[54] In doing so, the *Allen* Court struck down an "at-large" electoral scheme in Mississippi that had eliminated individual districts for county supervisors—positions that could have been won by Black candidates in certain jurisdictions—in favor of countywide elections that could be controlled by the state's white majority.[55] But the Court's decision ultimately rested not on Section 2 but on the more straightforward protections in Section 5.[56]

Because its language echoed the constitutional guarantees of the Fifteenth Amendment,[57] many courts treated Section 2 claims as synonymous with constitutional claims.[58] This view was ultimately endorsed by the Supreme Court in *Mobile v. Bolden*,[59] where the Court held that Section 2 did not grant any new statutory rights bearing on a vote-dilution challenge to an

51. *Id.* at 566.

52. *Id.* at 566–67 (citation omitted).

53. *Id.* at 565.

54. *Id.* at 566 (citation omitted).

55. *Id.* at 569, 572.

56. *Id.* at 572.

57. *Compare* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (2018)) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."), *with* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

58. Why would Congress include language that simply restated an existing constitutional guarantee? Some commentators suggest that Section 2 was intended to serve as an introduction to the substantive portion of the Act. *See, e.g.*, Enbar Toledano, *Section 5 of the Voting Rights Act and Its Place in "Post-Racial" America*, 61 EMORY L.J. 389, 393 (2011) ("Section 2 laid the foundation for the VRA, echoing the language of the Fifteenth Amendment . . . ."). Or Congress may have sought to quell concerns about the Act's constitutionality by tying the bill to the Fifteenth Amendment, which grants Congress the power to enforce its guarantees "by appropriate legislation." U.S. CONST. amend. XV, § 2. It is also possible that Section 2, with its nationwide application, was a sop to Southern lawmakers who felt their states were unfairly targeted by the coverage provisions that made up the meat of the Act. *See, e.g.*, Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352 (1983) ("The nationwide applicability of section 2 was originally designed to appease Southerners who felt that their constituencies were being singled out for extraordinary federal action.").

59. 446 U.S. 55 (1980).

at-large voting district.[60] According to the Court, "[e]ven a cursory examination of [the Section 2] claim . . . clearly discloses that it adds nothing to the appellees' complaint."[61] The Court continued: "[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."[62]

A. The 1982 Amendments to Section 2

The holding in *Mobile* became the catalyst for Congress to strengthen Section 2. The *Mobile* decision, which upheld an at-large electoral scheme in Alabama, provoked outrage among civil rights groups. The Court's decision required a showing of *purposeful* discrimination in order to strike down such an election scheme under the Equal Protection Clause[63]—a standard that was becoming increasingly difficult to satisfy, as legislators reacted to judicial findings of intentional discrimination by simply avoiding any discriminatory remarks that could be used to prove such a claim.

In 1982, Congress repudiated the decision in *Mobile* by amending Section 2 to require only a showing of discriminatory *effect*.[64] The amendments added a "results" test to the existing language of Section 2:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).[65]

The amendment also added a new subsection explaining the basic test that a court should conduct:

> (b) A violation of subsection (a) is established 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 class of citizens

60. *Id.* at 60–61.

61. *Id.* at 60.

62. *Id.* at 60–61.

63. *Id.* at 65.

64. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131, 131 (codified as amended at 52 U.S.C. § 10303(a)(1)(A) (2018)). Congress passed the amendments after a spirited lobbying campaign by civil rights groups and a series of subcommittee field hearings, including one in Austin, Texas, that heard compelling testimony about the discrimination faced by Mexican-Americans in the South. *See* Boyd & Markman, *supra* note 58, at 1360–61 (discussing the subcommittee field hearing held in Austin, Texas).

65. Voting Rights Act Amendments of 1982, Pub. L. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301(a) (2018)) (emphasis added).

> protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[66]

In adding this language, Congress drew directly from the Supreme Court's opinion in *White v. Regester*, which had considered the Board's redistricting plan in the context of Texas's long and continuing history of official and unofficial discrimination.[67] The Senate Committee on the Judiciary issued a report accompanying the amendments that enumerated nine factors—derived, in part, from the contextual approach in *White*[68]—that are relevant to a Section 2 claim: (1) the history of official discrimination affecting the right to vote; (2) the degree to which voting is racially polarized; (3) the use of electoral structures or devices that tend to enhance the opportunity for discrimination; (4) whether minority candidates are denied access to candidate-slating processes; (5) the extent to which minority groups are discriminated against in socioeconomic areas, such as education, employment, and health; (6) whether overt or subtle racial appeals exist in campaigns; (7) the extent to which minority candidates have won elections; (8) the degree to which elected officials are unresponsive to minority concerns; and (9) whether the policy justification for the challenged law is tenuous.[69] As Thomas M. Boyd and Stephen J. Markman note in their article on the legislative history of the 1982 amendments, the Senate Report "seemed to be directed, not toward Senators, but toward federal judges who almost certainly would be called upon in the future to interpret the language of the new proposal."[70]

B. Thornburg v. Gingles

Three years later, in *Thornburg v. Gingles*,[71] the Supreme Court considered whether a multimember districting scheme in North Carolina violated the amended version of Section 2. The Court was unanimous in its

66. *Id.* (codified as amended at 52 U.S.C. § 10301(b) (2012)).

67. 412 U.S. 765, 766 (1973) (finding 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 . . . to participate in the political processes and to elect legislators of their choice").

68. The factors also drew from *Zimmer v. McKeithen*, a Fifth Circuit case that had expanded on *White*'s discrimination analysis. 485 F.2d 1297, 1305–07 (5th Cir. 1973).

69. S. REP. NO. 97-417, at 28–29 (1982).

70. Boyd & Markman, *supra* note 58, at 1420.

71. 478 U.S. 30 (1986).

holding that parts of the state's plan violated Section 2, although the Justices divided over which of the seven districts at issue should be invalidated.[72]

In his plurality opinion, Justice Brennan reviewed, at some length, the legislative history of the 1982 amendments, and concluded that the new Section 2 was intended to apply broadly to claims of discrimination against voting: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[73] Justice Brennan's opinion set out a multipart test for deciding vote-dilution claims, beginning with three "preconditions" that plaintiffs must ordinarily satisfy: (1) the minority group must be sufficiently "large and geographically compact to constitute a majority in a single-member district"; (2) the group must be "politically cohesive"; and (3) there must be racial bloc voting by whites, so as to defeat minority candidates.[74] If plaintiffs clear that threshold, the Court then performs a "totality of the circumstances" test, using the factors from the Senate Report accompanying Section 2,[75] to determine whether minority groups have been denied an opportunity to fully participate in the political process and elect candidates of their choosing.[76] Brennan's plurality opinion described that inquiry as highly "fact-intensive,"[77] requiring an "intensely local appraisal."[78]

III. The Legislative Redistricting Board Violates Section 2

Nearly thirty-five years after *Gingles*, Justice Brennan's opinion still provides the framework for adjudicating Section 2 claims. In general, lower courts read *Gingles* to require that plaintiffs show both that the law, structure, or practice has a racially disparate impact, and that the impact results from the "interaction" of the law, structure, or practice with the "social and historical conditions" in the jurisdiction.[79] But the question of liability ultimately turns on a court's view of the totality of the circumstances—a concept that has made outcomes under Section 2 unpredictable.[80]

In this section, I argue that the Legislative Redistricting Board violates Section 2 because the Board dilutes the voting power of minority voters and

72. *See generally id.* (holding that the district court erred in its judgment regarding one of the districts but disagreeing as to whether that was the district court's only error).

73. *Id.* at 43–47.

74. *Id.* at 50–51.

75. *See id.* at 43–44 (noting that "[t]he Senate Report specifies factors which typically may be relevant to a § 2 claim").

76. *Id.* at 43.

77. *Id.* at 46.

78. *Id.* at 79 (quoting Rogers v. Lodge, 458 U.S. 613, 622 (1982)).

79. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2155 (2015).

80. *Id.* at 2156.

denies them the opportunity to fully participate in the political process. The Board eviscerates the political power of minority voters by removing redistricting from the Legislature—where Black and Latino voters have an opportunity to influence the process—and shifting that power to a slate of statewide elected officials, who are elected by the state's white political majority. While the unique structure of the Board defies the typical, quantitative application of *Gingles*, the Board could be found to violate both the "opportunity to participate" prong of Section 2—which remains largely undeveloped by courts—and the more traditional "opportunity to elect" prong that is governed by the analysis in *Gingles*.

In Part A, I argue that Section 2 applies to the Board because the Board is a political structure that directly impacts elections through the drawing of district lines. In Part B, I suggest that the Board need not be analyzed under the *Gingles* preconditions, but instead should be considered as a denial of the opportunity to participate under Section 2. Part C explains how the Board also satisfies the *Gingles* preconditions, should a court choose to apply that framework. In Part D, I consider how the other Senate factors interact with the Board and conclude that the totality of the circumstances shows that the Board creates an ongoing discriminatory effect under Section 2.

A. "The Essence of a § 2 Claim"

The Legislative Redistricting Board has been the focus of considerable litigation over the years, but these cases have focused on the maps created by the Board and not on the Board as a political structure in and of itself. This may be the result of Section 2's delayed development; when the Board first met in 1971 and 1981, Section 2 had not yet been amended by Congress to include a results test. By the time the Board met again in 2001, it was firmly entrenched in the redistricting process. While the Board itself has never been challenged under Section 2, it is subject to a Section 2 claim because the Board is an electoral "structure" that impacts the right of minority groups to fully participate in the political process.

In distilling "the essence of a § 2 claim," Justice Brennan interpreted the "standard, practice, or procedure"[81] language of Section 2 to include an electoral "structure," when that structure "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[82] This sweeping scope is in keeping with the broad mandate of the Senate Report, which states that, in addition to combating vote dilution, "Section 2 remains the major statutory prohibition of all voting rights discrimination."[83] The Senate Report further

81. 52 U.S.C. § 10301(a) (2018).
82. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).
83. S. REP. NO. 97-417, at 30 (1982).

states that Section 2 "prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members."[84] Redistricting is undoubtedly a crucial phase of the electoral process—and the Senate Report makes clear that the Board's episodic, nonpermanent structure should not insulate it from a claim under Section 2.

Further, the Section 2 amendments were crafted, in part, to target the submergence of minority group voting power in at-large and multimember schemes, and the Supreme Court "has long recognized that . . . at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"[85] As discussed in greater detail below, the Board acts in a similar way to minimize the voting strength of racial minorities, by shifting power from the legislature—where geographical districts allow for a modicum of Black representation—to a set of elected officials who are chosen by the statewide majority. In this way, the Board acts much like an at-large voting scheme and therefore falls squarely within the ambit of Section 2.

The fact that the Board was created by the Texas Legislature in a seemingly race-neutral process does not preclude it from violating Section 2. The Senate Report notes that the purpose of the Voting Rights Act was "not only to correct an active history of discrimination, . . . but also to deal with the accumulation of discrimination."[86] The "functional," "fact-intensive" test outlined in *Gingles* was designed to ferret out facially neutral electoral structures, like the Legislative Redistricting Board, when those structures have discriminatory effects. Justice Brennan's majority opinion in *Gingles* makes clear that Section 2 should be read as a broad attack on overt—and subtle—forms of discrimination in the political process.

B. Opportunity to Participate in the Political Process

While most Section 2 claims focus on the ability of minority groups to elect candidates of their choosing, Section 2 is also violated when members of a minority group "have less opportunity than other members of the electorate to participate in the political process."[87] This opportunity-to-participate prong of Section 2, however, has not been adequately fleshed out by courts. This may be due, in part, to confusion about the *Gingles* preconditions, and whether the decision's tripartite test is a threshold for every vote-dilution claim. In fact, Justice Brennan's opinion reserved

84. *Id.*

85. *Gingles*, 478 U.S. at 47 (alteration in original) (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966)).

86. S. REP. NO. 97-417, at 5 (quoting remarks of Sen. Javits).

87. 52 U.S.C. § 10301(b) (2018).

judgment on whether this framework would apply "to other sorts of vote dilution claims."[88] Because an opportunity-to-participate challenge is less quantifiable than a typical vote-dilution claim, it would probably fall into this category.

In such a case, *Gingles* instructs that "courts take a 'functional' view of the political process, and to conduct a searching and practical evaluation of reality."[89] Some courts have heeded this call and conducted a functional assessment of the way in which power is allocated within an electoral structure—often between at-large and geographically elected representatives—in order to gauge whether minority groups are truly afforded an opportunity to fully participate in the political process. In *Dillard v. Crenshaw County*,[90] a federal district court held that maintaining an at-large chairperson of the county commission, with "enhanced powers enjoyed by no other member of the commission," diluted the voting strength of minority voters who elected commissioners from geographical districts.[91] According to the court, "[i]mportant day-to-day political power would be transferred to a single person, who would be elected by the very at-large majority vote system that . . . dilutes black voting strength."[92] The court further stated that approving the at-large chairperson feature

> would in effect be adopting plans containing a public office completely beyond the reach of the counties' black citizens and thus reserved exclusively for the white citizens of the counties; this result would be intolerable under section 2 where, as here, there are alternative electoral schemes that could effectively serve the interests of the counties and are also racially fair.[93]

A functional assessment of the Legislative Redistricting Board yields a similar conclusion. The Board only enters the redistricting process when the Legislature is unable to agree on a redistricting plan, or a plan approved by the Legislature is vetoed by the Governor. This is most likely to occur when Republicans and Democrats each control one chamber in the Texas Legislature—that is, when minority voters have captured enough seats in the Legislature to wield real power in the process.[94] In that instance, the Board's effect is clear: It takes the tangible legislative power won at the polls—control of one chamber—and shifts it to officials who are elected statewide.

88. *Gingles*, 478 U.S. at 46–47 n.12.
89. *Id.* at 66 (citations omitted).
90. 649 F. Supp. 289 (M.D. Ala. 1986).
91. *Id.* at 296.
92. *Id.*
93. *Id.* at 297.
94. *See supra* subpart I(B).

If the Board did not exist, redistricting would simply remain with the Legislature, forcing the two parties to a compromise on new district lines, which would allow minority voters to influence the process in proportion to the power they had won at the polls. The net effect of the Board, then, is to eliminate the influence that minority voters would have had on the process through their duly elected legislative representatives.[95]

The mere existence of the Board means that as long as a white majority dominates statewide elections, it can also dominate the redistricting process, regardless of how well minority voters' preferred candidates perform at the polls. While this is conceptually similar to how power in *Dillard* was shifted away from the elected members of the commission to a chairperson elected at-large, the power-shifting effectuated by the Board is even more dramatic and detrimental, given its ability to completely foreclose the participation of minority voters in the crucial process of drawing new electoral districts.[96]

The U.S. Supreme Court has narrowed—but not foreclosed—such an inquiry into post-election power-allocation in the years since *Dillard* was decided. In *Presley v. Etowah County Commission*,[97] the Court held that transferring control and funding over road projects from a county commission to a central engineer was not sufficiently related to voting to come under the protections of the Voting Rights Act.[98] The Court found that the changes at issue "had no impact on the substantive question whether a particular office would be elective or the procedural question how an election would be conducted."[99] The Court worried that a finding for the plaintiffs would have essentially brought every county budget decision within the purview of the Voting Rights Act.

But *Presley* should not be read to preclude a claim against the Board. In *Presley*, the Court left open the possibility that some transfers of power would still qualify under the Act—such as transfers that shifted duties between constituencies, or a case in which the powers at issue were more closely tied to voting.[100] The Board does both: it shifts power between constituencies, but, more importantly, that shift directly implicates voting and elections. Decisions over county roads can scarcely be compared to unilateral decision-making over redistricting, which defines the electoral playing field

95. *See* BICKERSTAFF, *supra* note 17, at 45–46 (discussing the power for approval being effectively placed in three statewide officials).

96. *See Dillard*, 649 F. Supp. at 296 (explaining that the majority-dominated determination of power will dilute the strength and influence of the minority position).

97. 502 U.S. 491 (1992).

98. *Id.* at 509–10.

99. *Id.* at 510.

100. *Id.* at 508 ("We need not consider here whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a *de facto* replacement of an elective office with an appointive one . . . .").

for a decade, and the Court's concern in *Presley* about expanding the VRA to include municipal budget decisions is not an issue in considering the Board.

The Board has, at times, sought to include minority interests in its process. When a federal court considered the Board's plan following the 1981 redistricting, the judge credited the Board for developing an inclusive process that allowed minority groups to participate.[101] The court in that case acknowledged the all-white composition of the Board, but suggested "[t]he procedures adopted by the LRB at its first meeting were designed to assure fair and equal access by all interests."[102] These procedures included holding all hearings in a public session with advance notice, circulating proposed plans to a mailing list of "700 interested persons" and the news media, allowing for public testimony at each meeting, and accepting certain amendments that had been proposed by minority groups.[103]

But the Board's proactive efforts in 1981 to ensure "fair and equal access" only highlights the fact that Board members are not required by the Texas Constitution to conduct such an inclusive process, and, in fact, the 1981 Board is an anomaly. When the Board met in 2001, it crafted a redistricting plan without any efforts to include a diverse set of interests, and approved its plans over the fierce objections of minority groups and some fellow members of the Board.[104] Further, the court's ruling following the 1981 redistricting came before the Section 2 amendments had been enacted, and it considered the process only in the context of an equal protection claim, so it should not be read to foreclose an opportunity-to-participate claim under Section 2.

Some courts have been reluctant to consider opportunity-to-participate claims challenging so-called "single-member" offices like those that comprise the Board. These offices complicate a Section 2 claim because they traditionally represent an entire jurisdiction and, in a majority-rule system, such an office cannot simply be divvied up to allow for participation by minority groups.[105] The classic example of a single-member office is a mayor who necessarily serves the entire city and is therefore elected at "at-large."

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101. Terrazas v. Clements, 537 F. Supp. 514, 534–36 (N.D. Tex. 1982).

102. *Id.* at 534 (noting that "[t]here were no minority or republican members of the LRB; each of the five members was an anglo democrat").

103. *Id.* at 534–36.

104. BICKERSTAFF, supra note 17, at 45; *Legislative Redistricting Board Adopts District Maps*, TEX. SENATE NEWS (July 24, 2001), https://senate.texas.gov/news.php?id=20010724a [https://perma.cc/XLN2-U92J].

105. *See, e.g.*, Butts v. City of N.Y., 779 F.2d 141, 148 (2d Cir. 1985) (finding that "there is no such thing as a 'share' of a single-member office"); *see also* Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199, 2225 (1990) ("Advocates of the 'share of' approach would argue that [the first *Gingles* factor] bars any

The four Board members who are elected statewide each occupy such a "single-member" office, but that should not preclude a claim against the Board as a whole. The important executive duties that make, say, the attorney general or the comptroller a single-member office do not extend to their *ex officio* duties on the Board. There is nothing about the Board's redistricting work that necessitates that those members come from single, statewide districts. To the contrary, redistricting is first assigned to the representatives of the Legislature, who may be more attuned to the unique, block-by-block implications of drawing new districts. In the case of the Board, members could just as easily be selected from geographical districts, or the Board could simply be abolished, without disrupting the "single-member" duties that necessitate their statewide election.

An opportunity-to-participate claim against the Board should also be distinguished from the challenges brought against redistricting plans in *Rucho v. Common Cause*.[106] In that case, the U.S. Supreme Court held that politically gerrymandered maps were outside the purview of the federal courts, in part because courts are ill-equipped to determine what proportion of political power should be allocated to political groups.[107] That problem of proportionality has long plagued redistricting plaintiffs, but a claim against the Board presents no such problem. Eliminating the Board would not force courts to assign political power among groups; it would simply return the power over redistricting to the Legislature, where power has already been allocated by voters at the ballot box. This is consistent with the Court's opinion in *Rucho*, which stressed that redistricting is an inherently political process best left to the legislature.

C. The Opportunity-to-Elect Prong of Section 2

The Board also violates the more traditional opportunity-to-elect prong of Section 2. Minority voters are denied adequate representation on the Board because a controlling majority of the Board is made up of statewide elected officials. As such, the *Gingles* tripartite test can be applied to the Board itself. The Board satisfies the three *Gingles* preconditions, since minority groups could conceivably win seats on the Board if its members were elected statewide, and racially polarized voting continues to exist in Texas—as recognized by recent federal court decisions.

The first *Gingles* precondition is that minority groups be sufficiently "large and geographically compact to constitute a majority in a single-

challenges to single-member offices because the minority group cannot constitute a majority in the only district possible—the entire jurisdiction.").

106. 139 S. Ct. 2484 (2019).

107. *Id.* at 2499 ("Partisan gerrymandering claims invariably sound in a desire for proportional representation. . . . 'Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation . . . .'") (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986)).

member district."[108] Combining all minority groups, Texas is comprised of approximately 58.5% people of color—with Black voters making up about 13% of that total, and Hispanic or Latino voters accounting for an estimated 39.6%.[109] Non-Hispanic white voters make up the remaining 41.5%.[110] Based solely on population, then, minority voters are a large enough bloc to achieve two to three seats on the five-person Board. In most years, the Board has had zero minority members. If the Board meets in 2021, it is likely to have one member who is partially of Latino descent.[111] When a body is relatively small, courts have found that even a one-seat reduction in minority voting power can qualify as a violation of Section 2.[112]

The *Gingles* analysis then asks whether minority voters are geographically compact enough to win a majority in those districts.[113] In the case of the Board, five geographical districts could almost certainly be drawn from the whole of Texas to create two or three majority-minority seats, which is sufficient to satisfy the *Gingles* threshold.[114]

The second and third *Gingles* preconditions—that the minority group must be "politically cohesive,"[115] and that the majority group vote as a bloc to prevent the election of minority candidates[116]—are often considered together under the combined term "racially polarized" voting. Racially polarized voting exists when the race or ethnicity of a voter correlates with the voter's candidate preference.[117]

By almost any measure, Texas sees extremely high rates of racial polarization in voting. According to one 2010 study, 67% of white voters in Texas identified as Republican, compared to 90% of African-Americans and 62% of Hispanic voters who identified as Democrats.[118] In 2014, a federal

108. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

109. *QuickFacts: Texas*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/TX [https://perma.cc/2JAM-2EWP].

110. *Id.*

111. The state land commissioner, George P. Bush, is the son of former Florida Governor Jeb Bush and Columba Bush, who was born in Mexico. Paul J. Weber, *George P. Bush Says GOP Can't Let 'Racist' Episodes Slide*, ABC NEWS (Dec. 12, 2019, 4:46 PM), https://abcnews.go.com/US/wireStory/george-bush-gop-racist-episodes-slide-67697391 [https://perma.cc/8QHE-PMFP].

112. In *Patino v. City of Pasadena*, a federal district court in Texas found that eliminating even one minority-opportunity district (by the creation of two new at-large districts) on an eight-person city council constituted vote dilution under Section 2. *See* 230 F. Supp. 3d 667, 710 (S.D. Tex. 2017) (stating that "by simple arithmetic, this is dilution").

113. *Gingles*, 478 U.S. at 50.

114. *Id.* at 90–91 (O'Connor, J., concurring).

115. *Id.* at 51 (majority opinion).

116. *Id.*

117. *Id.* at 53 n.21.

118. Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1857–59 (2018) (citing data from CCES Common Content 2010, *Cooperative Cong.*

district court in Texas found racial polarization was present throughout the state, noting that the gap between Anglo and Latino Republican support was between thirty and forty percentage points, with an even greater gap between Anglo and Black voters, and that Texas had conceded in other litigation that racially polarized voting exists in 252 of 254 counties.[119] The U.S. Supreme Court has also acknowledged "'racially polarized voting' in south and west Texas, and indeed 'throughout the State.'"[120] This polarized voting has clearly manifested in statewide elections over the last several decades. Since the two state parties realigned in the late 1980s and early 1990s, Republicans have dominated state politics with an overwhelmingly white constituency. Since 1994, Republicans have won every statewide election in Texas.[121] In that time, white voters have twice defeated Latino candidates for governor,[122] along with several other candidates of color running for other statewide offices.

The plurality opinion in *Gingles* suggested such a correlation was sufficient to find racially polarized voting, and that causation was not required—"[m]eaning it did not matter if other factors, such as political party affiliation, could explain *why* protected minority voters had less opportunity than others 'to participate in the political process and to elect representatives of their choice.'"[123] But other courts have suggested that causation does matter. The Fifth Circuit has held that Justice Brennan's opinion did not command a majority of the Justices on this point, and that a court should not find a Section 2 violation when partisan affiliation is the true driver of racially polarized voting; Section 2 "is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[124] The court conceded, though, that "this rule is easier stated than applied,"[125] and it agreed with the plaintiffs "that courts should not

Election Study, https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/17705 [https://perma.cc/26VE-HHF8]).

119. Veasey v. Perry, 71 F. Supp. 3d 627, 637–38 (S.D. Tex. 2014).

120. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 427 (2006) (citation omitted).

121. Ben Philpott, *Why Is Texas so Red, and How Did It Get That Way?*, HOUS. PUB. MEDIA (Oct. 31, 2016, 6:30 AM), https://www.houstonpublicmedia.org/articles/news/politics/2016/10/31/174443/why-is-texas-so-red-and-how-did-it-get-that-way/ [https://perma.cc/J54W-9U8R].

122. Tony Sanchez was defeated by Rick Perry in the 2002 gubernatorial contest, despite receiving 85% of the Latino vote. *Texas General Election November 5th, 2002 Exit Poll Results*, WILLIAM C. VELASQUEZ INST., https://wcvi.org/latino_voter_research/polls/tx/2002/exit_results02.html [https://perma.cc/X4S4-KVMA] (last updated Jan. 16, 2003). In 2018, Greg Abbott received approximately 70% of the white vote in defeating Lupe Valdez, who won more than 60% of the nonwhite vote. *Fox News Voter Analysis - Texas Governor Analysis*, FOX NEWS, https://www.foxnews.com/midterms-2018/voter-analysis?filter=TX&type=G [https://perma.cc/SK5U-8Z5Z].

123. Hasen, *supra* note 118, at 1857 (quoting 52 U.S.C. § 10301(b) (2012)).

124. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 854 (5th Cir. 1993) (en banc).

125. *Id.*

summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as 'political defeats' not cognizable under § 2."[126] More recently, in *Veasey v. Abbott*,[127] the Fifth Circuit, sitting en banc, credited the district court's finding of racially polarized voting through correlation.[128]

In the case of the Board, it is an oversimplification to say that minority voters are "los[ing] because they are Democrats." The Board is most likely to convene when Democrats are *winning*—that is, when they have won enough electoral seats to control one chamber of the Texas Legislature. At that point, the structure of the Board takes the power that has been won at the ballot box and transfers it to a group of statewide officials, where Democrats do, in fact, lose elections. Thus, the Board creates a system by which the minority group will *always* lose when it comes to redistricting. The Board's structure, combined with racially polarized voting, puts redistricting effectively out of reach for these groups, creating a "heads we win, tails you lose" situation for the majority, which systematically dilutes the voting power of minority groups.

D. The Totality of the Circumstances Test

Regardless of which approach a court takes, the ultimate test under Section 2 considers the totality of the circumstances to determine whether a challenged practice or structure "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[129] Following the lead of *Gingles*, courts have come to rely on the Senate factors in performing this analysis, which results in a fact-intensive, highly local appraisal of the effects of discrimination in a given jurisdiction.[130] In *Gingles*, the Court declared the most important factors to be the "'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'"[131]

The test provides little analytical guidance, though, for what constitutes a sufficient showing, leading to some understandable confusion regarding its

126. *Id.* at 860–61.

127. 830 F.3d 216 (5th Cir. 2016) (en banc).

128. *Id.* at 258.

129. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

130. *See, e.g.*, United States v. City of Euclid, 580 F. Supp. 2d 584, 592 (N.D. Ohio 2008) (using the Senate Report factors—affirmed in *Gingles*—to hold that a method of electing city council members violated the anti-dilution provision of the Voting Rights Act).

131. *Gingles*, 478 U.S. at 48–49 n.15 (quoting S. REP. NO. 97-417, at 28–29).

application among the lower courts.[132] Part of the confusion stems from the fact that there is no predetermined number of Senate factors that must be found for a claim to succeed, and there is no precise formula for weighing the factors. What is clear, as Professor Samuel Issacharoff has noted, is that the Senate factors look "both backward from the electoral process, to examine the historical circumstances leading to its establishment, and forward to determine the outcomes of policy decisions by legislative bodies elected under such electoral arrangements."[133] In the case of the Board, this means considering: the history of the Board itself, the factors that make minority voters unable to elect members of the Board, and the redistricting outcomes that have resulted from the Board's existence. Applying the Senate factors to the Board demonstrates that it is an electoral structure that interacts with conditions of inequality to deprive minority voters of the opportunity to participate in the political process and elect their preferred candidates.

1. History of Official Discrimination.[134]—Texas has a long history of official discrimination that includes all-white primary elections, literacy and "secret ballot" restrictions, poll taxes, voter re-registration and purging of voter rolls.[135] Many of these restrictions existed at the time that the Board was created, giving minority voters no voice in the legislature on these issues and little influence in the referendum that approved the Board.[136] The lack of representation in the legislature is especially significant because the Board was approved by just one vote. Had minority voters been afforded proper representation at the time, it is highly possible that the Board would never have been established in the first place.

In the wake of *Shelby County v. Holder*,[137] however, plaintiffs bringing claims under the Voting Rights Act must be mindful that "history did not end in 1965."[138] More recently, Texas has been found to have violated the Voting Rights Act with racially gerrymandered districts in every redistricting cycle

132. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845 (1992) (describing the test as being "as empty as the resigned 'I know it when I see it' approach to obscenity under the First Amendment").

133. *Id.*

134. *See* S. REP. NO. 97-417, at 28–29 (1982) (recognizing "the extent of any history of official discrimination" and the use of "voting practices or procedures that may enhance the opportunity for discrimination" as factors).

135. *See, e.g.*, Chandler Davidson, *African Americans and Politics*, TEX. ST. HIST. ASS'N, https://www.tshaonline.org/handbook/entries/african-americans-and-politics [https://perma.cc/J8RK-VSGP] (discussing how "[r]acial conflict is a basic feature of Texas history").

136. There were no Black members of the Texas Legislature between 1897 and 1966. *Id.*

137. 570 U.S. 529 (2013).

138. *Id.* at 552.

since 1970.[139] Three of these redistricting plans were crafted by the Legislative Redistricting Board, which has been found in violation of both constitutional guarantees and the Voting Rights Act.[140] Thus, this factor points heavily toward a finding of discrimination.

2. Effects of Past Discrimination.[141]—Texans of color are more than twice as likely as white Texans to live in poverty, and their median income is more than 50% lower.[142] They suffer from greater health problems, have less access to health insurance, and graduate at lower rates from high school and college.[143] In *Veasey*, the federal district court found that "[t]hese socioeconomic disparities have hindered the ability of African-Americans and Hispanics to effectively participate in the political process."[144] This includes not only lower rates of voting, but less ability to organize and fundraise—all of which makes it less likely that minority voters will elect any of the statewide officials who sit on the Board.

3. Lack of Responsiveness to Minority Needs.[145]—The Board has effectively ignored the appeals of minority voters to create redistricting plans that increase minority voting power. In 2001, the three nonlegislator members of the Board effectively ignored the House Speaker, who presented the only plan that had been passed by either chamber. Instead, the Board approved an aggressively partisan plan that the U.S. Department of Justice later found to have diminished Hispanic voting power.[146] While those flaws were corrected, the map did little to empower voters of color; in the ten years after the Board approved the 2001 plan, the number of Hispanic representatives in the Legislature increased by a total of just three members,[147] despite an increase of nearly 42% in the Hispanic population in Texas during that time.[148] These disparities endure to the present day. In the

139. Veasey v. Perry, 71 F. Supp. 3d 627, 636 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016).

140. *See supra* notes 25–39 and accompanying text.

141. *See* S. REP. NO. 97-417, at 29 (recognizing "the extent to which members of the minority group" are hindered in "their ability to participate effectively in the political process" as a factor).

142. *Veasey*, 71 F. Supp. 3d at 697.

143. *Id.*

144. *Id.*

145. *See* S. REP. NO. 97-417, at 29 (recognizing "a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group" as a factor).

146. BICKERSTAFF, *supra* note 17, at 45–46.

147. Ryan Murphy, *Getting a Closer Look at the Makeup of the Lege*, TEX. TRIB. (Jan. 11, 2013, 6:00 AM), https://www.texastribune.org/2013/01/11/legislators-are-younger-little-change-diversity/ [https://perma.cc/PX2H-YPG9].

148. Ross Ramsey, Matt Stiles, Julián Aguilar & Ryan Murphy, *Minorities Drove Strong Texas Growth, Census Figures Show*, TEX. TRIB. (Feb. 18, 2011, 5:00 AM), https://www.texastribune.org/2011/02/18/minorities-drove-texas-growth-census-figures-show/ [https://perma.cc/Y6DF-J6FJ].

2019 legislative session, people of color comprised just 36% of the Texas Legislature, despite making up 58% of the state's population.[149]

4. Election of Minority Group Members.[150]—This is the only factor expressly mentioned in the amendments to Section 2 and is cited in *Gingles* as one of the two most important Senate factors.

In the seventy years since the Board was created, only two members of minority groups have ever been elected to any of the five positions that comprise the Board: former Attorney General Dan Morales, who was elected in 1990 and re-elected in 1994, and the current Land Commissioner, George P. Bush, who was elected in 2014 and re-elected in 2018. The Board did not meet during Morales' tenure, [151] and it has yet to meet during Bush's, meaning no member of color has ever helped draft a Board plan for redistricting.

5. State's Justification for the Electoral System.[152]—While the Legislative Redistricting Board initially served a government interest by ensuring that redistricting would take place every ten years, that interest was obviated by the "reapportionment revolution" in the federal courts.[153]

Other state interests are similarly uncompelling. Members of the Board possess no special expertise with regard to redistricting that would lead them to be more effective in crafting legislative districts. Nor are they insulated from partisan politics, as is the case with redistricting commissions in some states. Nor is the Board speedier in effectuating a redistricting plan. As it stands, the Board can take up to 150 days—or roughly five months—following the legislative session to devise and approve its plan.[154] In the absence of the Board, the legislature could consider redistricting in a special session immediately after *sine die*, as it often does with congressional

149. Alexa Ura & Darla Cameron, *In Increasingly Diverse Texas, The Legislature Remains Mostly White and Male*, TEX. TRIB. (Jan. 10, 2019), https://apps.texastribune.org/features/2019/texas-lawmakers-legislature-demographics/ [https://perma.cc/8TNH-NV59].

150. *See* S. REP. NO. 97-417, at 29 (recognizing "the extent to which members of the minority group have been elected to public office" as a factor).

151. The Board did convene for one perfunctory meeting with Morales as a member in 1991, but the Board did not draw a redistricting map that year because the courts had preemptively intervened in the process after minority groups filed suit over the possibility of a statistical undercount in the federal census. *See generally Redistricting History*, *supra* note 45 (discussing the redistricting history during the 1990s).

152. *See* S. REP. NO. 97-417, at 29 (recognizing "whether the policy underlying" the use of a voting practice "is tenuous" as a factor).

153. *See supra* subpart I(B).

154. The Board has ninety days to convene, and then has sixty days to approve a redistricting plan. TEX. CONST. art. III, § 28 (requiring the Board to "assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session," and then "within sixty (60) days after assembling, apportion the state into senatorial and representative districts").

redistricting.[155] The lack of any compelling government interest for the Board clearly weighs in favor of a discriminatory effect.

6. The Legislative Redistricting Board Creates a Discriminatory Result.— In sum, the Senate Factors strongly suggest that the Legislative Redistricting Board interacts with the state's social and historical conditions to produce a discriminatory effect. Minority groups have little opportunity to elect members to the Board, and the Board does not adequately respond to their concerns. This system denies minority groups the right to fully participate in the redistricting process and thereby reduces their power to elect representatives of their own choosing.

IV. Remedies for the Legislative Redistricting Board

Upon finding a violation of Section 2, a court has broad equitable powers to remedy past wrongs. The Senate Report that accompanied the Section 2 amendments suggests that a district court "should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."[156] With regard to the Board, this could be accomplished in one of two ways.

A. Reform the Legislative Redistricting Board

A court could require that the five members of the Legislative Redistricting Board be elected from geographical districts that could allow for minority representation on the Board. While this would be the typical solution in a vote-dilution case, it is problematic in the Board context, since it would require the creation of entirely new elected positions, and a new structure for electing them. In most cases, courts are hesitant to embark on such a task, preferring more surgical solutions that require less creation by the court.

B. Eliminate the Legislative Redistricting Board

A more elegant solution is simply to invalidate and eliminate the Board altogether. Abolishing the Board would not require a court to affirmatively create any new elective office; the court could simply return the redistricting process to the Texas Legislature. This would allow minority groups to fairly compete for representation in the chamber, and then, to translate that power

155. The fact that the state regularly accomplishes congressional redistricting without the involvement of a redistricting board is further evidence that the Board is unnecessary.

156. S. REP. NO. 97-417, at 31.

into the redistricting process without being stunted by the at-large structure of the current Board.

Conclusion

The Legislative Redistricting Board functions like an at-large voting system to deny the rights of minority voters in Texas to elect candidates of their choosing. This is a clear violation of the Voting Rights Act, and courts should not retreat from Justice Brennan's robust reading of Section 2. Redistricting has a profound effect on all aspects of the political process, and a structure that systematically excludes minority groups from participating in redistricting dilutes the votes of those minority group members. Section 2 has become the primary means for protecting minority group members' ability to fully engage in political life, and to narrow those protections now would leave minority Texans vulnerable, and violate the spirit of all that the Voting Rights Act has so long sought to protect.