Casenote

Politics As Usual: The Continuing Debate Over Partisan Gerrymandering Schemes in *League of United Latin American Citizens v. Perry*

In *League of United Latin American Citizens v. Perry*,[1] the Supreme Court held that a statewide challenge to the Texas State Legislature's mid-term redistricting plan did not violate Section Two of the Voting Rights Act of 1965,[2] but that the redrawing of district lines in one particular district (District 23) did violate the Act.[3] The case leaves open the ability of the Supreme Court to adjudicate political gerrymandering schemes in cases where equal protection claims are made.

I. FACTUAL BACKGROUND

In 2003 the Republican Party gained control of the Texas state house, senate, and governorship.[4] The Republicans "'set out to increase their representation in the congressional delegation,'" and to accomplish this

1. 126 S. Ct. 2594 (2006).
2. 42 U.S.C. § 1973(b) (2000).
3. *Perry*, 126 S. Ct. at 2626.
4. *Id.* at 2606.

goal, they promulgated a plan known as Plan 1374C.[5] As a result of Plan 1374C, the 2004 Texas Congressional elections brought the Republicans twenty-one of the state's thirty-two congressional seats while also garnering them fifty-eight percent of the popular vote in statewide elections.[6]

Plan 1374C made changes to districts in south and west Texas, the most significant of which involved District 23 and the newly created District 25.[7] Changes in these districts were challenged as violations of Section Two of the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment[8] insofar as it affected the Latino vote.[9] After the 2002 election, it became apparent that an increasing Latino population in District 23 was going to oust Henry Bonilla, the incumbent Republican candidate from that district. Through Plan 1374C, the legislature divided up the largely Hispanic district, adding voters from largely white, Republican areas. To avoid retrogression, the legislature also created District 25, forming a majority Latino voting district to replace the divided District 23.[10]

Soon after Plan 1374C was enacted, the League of United Latin American Citizens ("The League") challenged the plan as an unconstitutional partisan gerrymander that violated Section Two of the Voting Rights Act of 1965 by splitting up largely Hispanic areas for purely partisan gain.[11] The district court "entered judgment against [the plaintiffs] on their claims," and the plaintiffs appealed to the Supreme Court.[12] Before the Court heard the case, however, the Court issued its opinion in *Vieth v. Jubelirer*,[13] in which a plurality of the Court held that political gerrymandering schemes presented a nonjusticiable issue.[14] The Court then remanded *Perry* back to the district court for reconsideration in light of *Vieth*.[15]

On remand, the district court, interpreting its mandate to include only claims of political gerrymandering, again rejected the appellant's claims.[16] The Supreme Court granted certiorari.[17]

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5. *Id.*
6. *Id.*
7. *Id.* at 2613.
8. U.S. CONST. amend. XIV, § 1.
9. 126 S. Ct. at 2612.
10. *Id.*
11. *See id.* at 2607.
12. *Id.*
13. 541 U.S. 267 (2004).
14. *Id.* at 305.
15. *Perry*, 126 S. Ct. at 2607.
16. *Id.*

II. LEGAL BACKGROUND

The 1990 census resulted in Texas gaining three additional seats in its congressional delegation, bringing its total delegation to thirty seats.[18] When new district lines were drawn in 1991, the Democratic party had control of "both houses in the state legislature, the governorship, and [nineteen] of [Texas's twenty-seven] seats in Congress."[19] The Democrats in the state legislature, fearful that the Republicans would soon constitute the majority of voters in the state, designed a congressional redistricting plan that would favor Democratic candidates.[20] The Democrats used computer technology to draw what has been referred to as the "shrewdest gerrymander of the 1990s."[21] The 1991 plan packed "'heavily Republican' suburban areas" into just a small number of districts, while keeping Democratic areas just strong enough to ensure continued election of Democratic candidates.[22]

Voters who sought to invalidate the plan criticized the 1991 redistricting scheme, claiming that the plan was nothing more than a simple partisan gerrymander, but each of the claims brought by the voters were rejected by the courts.[23] As a result of the 1991 gerrymandering scheme, the Republican Party, despite garnering fifty-nine percent of the vote in the 2000 statewide elections, won only thirteen of the state's thirty congressional seats.[24] When it came time to incorporate two additional congressional seats as a result of the 2000 Census, the Republican Party controlled the governorship and the state senate, but not the state house of representatives.[25] Due to this division in the legislature, the Texas Legislature was unable to agree on a new redistricting plan that would incorporate the two new seats.[26] The courts were brought in to provide a plan, and the litigation resulted in a plan known as Plan 1151C.[27] The court in *Balderas*, which drew the plan, sought to apply "only 'neutral' redistricting standards" in drawing

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17. *Id.* at 2604-05.
18. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2605 (2006).
19. *Id.*
20. *Id.*
21. *Id.* (quoting M. BARONE, R. COHEN & C. COOK, ALMANAC OF AMERICAN POLITICS 2002 1448 (2001)).
22. *Id.* (quoting Henderson v. Perry, 399 F. Supp. 2d 756, 768 n.47 (2005)).
23. *Id.*
24. *Id.* at 2606.
25. *Id.*
26. *Id.*
27. *Id.* (*see* Balderas v. Texas, No. 6:01CV158, 2001 WL 35673968 (E.D. Tex. Nov. 14, 2001) (per curium, *aff'd*, 536 U.S. 919 (2002)).

its plan, meaning that no party was to be favored over another, and the court explained that it did not wish to "'und[o] the work of one political party for the benefit of another,'" realizing that the primary authority for the drawing of district lines rested with the legislative branch.[28] Plan 1151C resulted in the Democrats retaining a slim majority in the Texas delegation, despite the fact that in the previous election Republicans had gained almost sixty percent of the popular vote.[29] Plan 1374C, which scrapped the *Balderas* plan, is the subject of this case.

A. *Introduction: The Voting Rights Act of 1965*

Section Two of the Voting Rights Act now states that:

> 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 this Act].[30]

A State violates Section Two of the Voting Rights Act if:

> [B]ased on the totality of the 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 or ethnic 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.[31]

Article I, section 4, of the United States Constitution delegates the duty of reapportionment of districts to the state legislatures.[32]

The Voting Rights Act of 1965 was passed "primarily to enforce the [Fifteenth] [A]mendment to the Constitution of the United States and . . . to enforce the [Fourteenth] [A]mendment and [A]rticle I, [S]ection 4."[33] Barriers to voting such as literacy tests and poll taxes had for years been used in a number of states to deny the right to vote to many people because of their race.[34] The Act was amended in 1982[35] dispos-

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28. *Id.* (quoting *Henderson*, 399 F. Supp. 2d at 768) (alteration in original).
29. *Id.* (citing *Henderson*, 399 F. Supp. 2d at 763-64).
30. 42 U.S.C. § 1973(a) (2000).
31. 42 U.S.C. 1973(b) (2000).
32. U.S. CONST. art. I, § 4; *Perry*, 126 S. Ct. at 2607-08 (citing Growe v. Emison, 507 U.S. 25, 34 (1993)).
33. H. COMM. ON THE JUDICIARY, Voting Rights Act of 1965, H. Rep. No. 439 (1965), *reprinted in* 1965 U.S.C.C.A.N. Vol. II 2437, *and in* 2 STATUTORY HISTORY OF THE UNITED STATES CIVIL RIFHTS PART II, at 1484 (Bernard Schwartz, ed.) (1970).
34. *Id.* (citing H.R. Rep. No. 89-439).

itively rejecting the position of the Court in *Mobile v. Bolden*,[36] which stated, in a plurality opinion, that proof that a contested electoral practice or mechanism was adopted with the intent to discriminate was necessary in order to establish a Section Two violation.[37] The Senate Report that accompanied the 1982 amendments emphasized that the proper inquiry, when examining voter discrimination, was whether the contested electoral practice resulted in a situation that denied a particular group "equal opportunity to participate in the political processes and to elect candidates of their choice."[38] After the 1982 amendments, the Act required only a showing that a particular electoral practice or mechanism had a discriminatory effect or result on a particular group in order to establish a Section Two violation.[39]

B. Development of Political Gerrymandering Jurisprudence Under Section Two Following the 1982 Amendments

The Supreme Court construed Section Two of the Voting Rights Act, as amended June 29, 1982 (the Act's current form), for the first time in *Thornburg v. Gingles*,[40] a case in which black voters challenged several North Carolina voting districts, claiming that the districts impaired black voters' "ability to elect representatives of their choice."[41] In *Gingles* the Court identified three factors that must be present in order for a minority group to bring a cognizable claim of vote dilution of a minority bloc.[42] Initially, "the minority group must be able demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[43] If this were not true, as would be the case in a "substantially integrated" district, then the makeup of the district cannot be necessarily shown to be the cause of the inability of minority voters to elect their preferred candidates.[44] Second, the minority group must be shown to be "politically cohesive," meaning that the majority of minority members in the district tend to vote for candidates of a particular political affiliation.[45] Third, "the minority must be able to demonstrate that the white majority votes

35. *See* Pub. L. No. 97-205, 96 Stat. 134 (1982).
36. 446 U.S. 55 (1980).
37. *Id.* at 64-65.
38. S. Rep. No. 97-417, at 28 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206.
39. *Gingles*, 478 U.S. at 44 n.8.
40. 478 U.S. 30 (1986).
41. *Id.* at 50.
42. *Id.* at 50-51.
43. *Id.* at 50.
44. *Id.*
45. *Id.* at 51.

sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[46]

Eight years later, in *Johnson v. De Grandy,*[47] the Court rejected a so-called "safe harbor" rule that would have precluded challenges to state gerrymandering schemes where the percentage of single-member districts in which minority voters formed an effective voting bloc mirrored the minority voters' percentage of the relevant population.[48] In addition, the Court concluded that "the rights of some minority voters . . . may [not] be traded off against the rights of other members of the same minority class," meaning that Section Two violations in one district could not be remedied by the creation of another majority-minority district.[49] Finally, the Court held that proportionality is not an affirmative defense to a Section Two challenge because "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."[50]

In 1996 the Court in *Bush v. Vera,*[51] held that Section Two did not forbid the creation of a noncompact majority-minority district,[52] meaning that the majority-minority district does not have to be tailored around a centralized location or follow a certain shape. However, such a noncompact district could not be created to remedy a Section Two violation elsewhere in the state.[53] Therefore, minority districts do not have to sit in a centralized location, so long as a minority district was not created in response to the destruction of another compact opportunity minority district in violation of Section Two.

The development of the statute's jurisprudence took another turn in *Vieth v. Jubelirer*[54] when the Court, in a plurality opinion, stated that because no "discernible and manageable standards" existed for the adjudication of political gerrymandering schemes, such schemes must necessarily be nonjusticiable issues.[55] Previously, the Court had stated that such a standard may exist, but the Court could not define it at that time.[56] In *Vieth* the Court opined that the loose "standard" employed

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46. *Id.* (citations omitted).
47. 512 U.S. 997 (1994).
48. *Id.* at 1017-19.
49. *Id.* at 1019-20.
50. *Id.* at 1020-21.
51. 517 U.S. 952 (1996).
52. *Id.* at 979.
53. *Perry*, 126 S. Ct. at 2617 (citing *Vera*, 517 U.S. at 1008).
54. 541 U.S. 267 (2004).
55. *Id.* at 281.
56. Davis v. Bandemer, 478 U.S. 109, 123 (1986).

by the Court in *Davis v. Bandemer*,[57] which involved a determination of (1) discriminatory intent and (2) discriminatory effect, was simply an unworkable method for evaluating political gerrymandering schemes for two reasons.[58] First, it is difficult to determine whether the effect of a political gerrymandering scheme was intended by the legislature at the time the scheme was enacted; second, it is even more difficult, if not impossible, to find that a group has been effectively denied its opportunity to participate in the political process because a group could effectively participate even without electing a single candidate.[59]

III. COURT'S RATIONALE

Justice Kennedy, writing for the Court in *Perry*, quickly determined that the last two prongs of the *Gingles* analysis were present in the redistricting of District 23.[60] The second *Gingles* requirement of cohesion among the minority group was demonstrated by the fact that ninety-two percent of Latinos voted against the Republican incumbent Bonilla in 2002, whereas eighty-eight percent of non-Latinos voted for him.[61] The third *Gingles* factor of majority bloc voting was demonstrated by the previous finding by the district court and by the finding of "'racially polarized voting'" not just in south and west Texas, but "'throughout the [S]tate [of Texas].'"[62]

In finding that Latino voters in the old (pre-Plan 1374C) District 23 were "'sufficiently large and geographically compact to constitute a majority'" in the district (the first *Gingles* factor), the Court determined that the Latino population constituted a majority of the voting-age population in the district and possessed an electoral opportunity that was protected by Section Two of the Voting Rights Act of 1965.[63] The direction that the district was moving—toward an increasing Latino population—indicated that while the district may not yet have constituted a district in which Latinos could consistently elect a candidate of their choice, breaking up the district would deprive Latinos of an "opportunity district" that they would have had in the near future.[64]

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57. 478 U.S. 109 (1986).

58. *Vieth*, 541 U.S. at 281-84 (citing *Bandemer*, 478 U.S. at 127).

59. *Id.* at 281-82.

60. 126 S. Ct. 2594, 2615 (2006).

61. *Id.* (citing Allan Lichtman, VOTING-RIGHTS ISSUES IN TEXAS CONGRESSIONAL REDISTRICTING 51 (2003) http://www.votingrightsact.org/appendix/midatlantic_regional/pdfs/hirsch_exhibit5.pdf).

62. *Id.*

63. *Id.* (quoting *Gingles*, 478 U.S. at 50).

64. *Id.*

The Court pointed to the "increase in Latino voter registration and overall population," "the near-victory of the Latino candidate of choice in 2002," "the . . . threat to . . . Bonilla['s] incumbency," and the "concomitant rise in Latino voting power in each successive election" as reasons that the redistricting was a "denial of opportunity" to the Latino population in the new (post-Plan 1374C) District 23.[65] The new District 23 was found not to be a Latino opportunity district because although Latinos made up the majority of the population in the district, not all of that population was eligible to vote.[66] Among eligible voters in the new District 23, Latinos no longer made up the majority of the eligible voters and were thus denied an opportunity district by the gerrymandering scheme.[67]

In dismissing the State's argument that the creation of the new opportunity district for Latinos (District 25) offset the loss of the opportunity district in District 23, the Court determined that the creation of a non-compact majority-minority district cannot remedy a Section Two violation elsewhere in the state.[68] Although no specific rule was established as to whether a district qualified as compact, the Court held that "'traditional districting principles such as maintaining communities of interest and traditional boundaries'" should govern the determination.[69] The simple fact that two isolated segments of a racial group have been combined to form a single district does not mean that an opportunity district has been created because, as the Court stated, there is no reason to believe that those voters will share the same candidates, concerns, and interests.[70] Combining two disparate groups into a single district could have the opposite effect of preventing both groups from achieving their political goals.[71]

After concluding that all three of the *Gingles* requirements were met in regards to District 23, the Court then proceeded to examine the "totality of the circumstances" to determine if Section Two was violated.[72] In *Johnson v. De Grandy*,[73] the Court held that where "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the . . .

65. *Id.* at 2615-16.
66. *Id.* at 2616.
67. *Id.* at 2615-16.
68. *Id.* at 2616-17 (citing Shaw v. Hunt, 517 U.S. 899, 916 (1996)).
69. *Id.* at 2618 (quoting *Bush*, 517 U.S. at 977).
70. *Id.* (citing Miller v. Johnson, 515 U.S. 900, 920 (1995)).
71. *Id.*
72. *Id.* at 2619-20.
73. 512 U.S. 997 (1994).

population," no Section Two violation can be found to exist.[74] The Court held that while "proportionality is not dispositive" in striking down a Section Two challenge, "it is a relevant factor in the totality of [the] circumstances."[75]

Examining proportionality in *Perry*, the Court agreed with the plaintiffs that proportionality as a factor should be examined on a statewide, rather than a regional, basis.[76] The Court reached this conclusion based upon the principle that "the right to an undiluted vote does not belong to [a minority group] but to 'its individual members'"[77] and because the claim focused on an alleged injury to Hispanic voters throughout the state, not just a portion of the state.[78] The vote dilution that occurred in District 23 as a result of Plan 1374C would have implications on Hispanic voters throughout the state.[79] The district court found that Latinos made up twenty-two percent of the voting-age population, yet the Latino compact opportunity districts amounted to roughly sixteen percent of the total voting districts, approximately a two-district deficit for Latinos.[80] The Court did not examine whether this deficit was insubstantial because it found other evidence of vote dilution for Latinos in District 23, including increased political activity among Latinos in the District, increased voter registration among the population, and the fact that Latino voters were on the verge of ousting the incumbent Bonilla from office in District 23.[81]

The Court noted that the protection of incumbents is a legitimate factor in redistricting decisions, but the legislature may not do so simply because the voters appear poised to vote the incumbent out of office.[82] Redistricting that has the effect of not allowing a cohesive minority group to vote an incumbent out of office when it is poised to do so cannot stand when it has the effect of diluting the votes of that minority group.[83] The Court frowned upon what it called a "troubling blend of politics and race" and determined that the dissection of the old District 23 constituted a Section Two violation and the creation of the new

74. *Id.* at 1000.
75. *Id.*
76. *Perry*, 126 S. Ct. at 2620.
77. *Id.* (quoting *Shaw*, 517 U.S. at 917).
78. *Id.* at 2620-21.
79. *Id.* at 2621.
80. *Id.*
81. *Id.*
82. *Id.* at 2622-23.
83. *Id.* at 2623.

District 25 as a Latino opportunity district did not compensate for the loss of the opportunity district in District 23.[84]

The Court, although finding that the new District 23 violated Section Two of the Voting Rights Act, did not invalidate the entire Texas redistricting plan.[85] Only District 23 was ordered redrawn because, based on the three *Gingles* factors and the totality of the circumstances, the redistricting diluted the rights of Latino voters to elect their candidate of choice.[86]

Justice Kennedy, in dicta, noted that there is nothing inherently suspect about mid-district redistricting plans, while reaffirming the belief that legislatively made plans are preferable to court-made plans.[87] He also noted that the plaintiffs had provided "no legally impermissible use of political classifications," thus dooming their claims.[88] Finally, Justice Kennedy concluded that changes to District 24—a primarily African-American district—did not constitute a Section Two violation because such a violation cannot be established merely by the ability of a minority group to influence the outcome of an election; instead, Section Two requires that the minority group show an ability to elect their candidate of choice "'with the assistance of cross-over votes.'"[89]

A. Justice Stevens, Concurring in Part and Dissenting in Part

In his opinion, Justice Stevens, after recounting the sordid history of redistricting in Texas,[90] argued that the purely political redistricting scheme, which invalidated the court-drawn scheme, was unconstitutional and should be invalidated.[91] In formulating his opinion, Justice Stevens announced a test for evaluating the constitutionality of partisan gerrymanders.[92] First, in order to have standing to challenge a redistricting plan, a plaintiff would have to be either a "candidate or a voter" in a changed district.[93] Second, a plaintiff would have to prove

84. *Id.*
85. *Id.* at 2626.
86. *See id.*
87. *Id.* at 2608.
88. *Id.* at 2612.
89. *Id.* at 2624-26 (quoting Voinovich v. Quilter, 507 U.S. 146, 158 (1993)).
90. *Id.* at 2627-31 (Stevens, J., concurring in part, dissenting in part).
91. *Id.* at 2646-47.
92. *Id.* at 2642.
93. *Id.*

an "improper purpose" for the gerrymander.[94] Third, the plaintiff would have to prove an improper effect of the plan.[95]

In order to prove improper purpose, the plaintiff would have to prove that the legislature subordinated neutral redistricting standards to their political motives and that the biggest motivating factor for the redistricting was increasing one party's political power.[96]

To satisfy the improper effect prong of the test, the plaintiff would be required to prove three facts: "(1) her candidate of choice won election under the old plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district."[97] Satisfying the standing, improper purpose, and improper effect prongs of the test would, for Justice Stevens, prove that a redistricting plan violates a person's constitutional rights.[98]

B. Justice Souter, Concurring in Part and Dissenting in Part

Justice Souter acknowledged that the Court had established no single criterion that would render a gerrymander unconstitutional.[99] Justice Souter reasoned that the plurality of the Court was incorrect in holding that the dissolution of District 24 (a primarily black district) did not violate Section Two because it did not meet the first *Gingles* requirement.[100] Interpreting the first *Gingles* requirement—that is, that a minority group must be "'sufficiently large and geographically compact to constitute a majority in a single-member district'"[101]—Justice Souter would have held that the requirement would be satisfied if minority voters in a redrawn district would "constitute a majority of those voting in the primary of the dominant party."[102] Under his rule, he would remand the case back to the district court with instructions not to be tethered to the rule that a minority group must constitute fifty percent of the population in order to claim a violation under Section Two.[103]

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94. *Id.*
95. *Id.*
96. *Id.* at 2642-43.
97. *Id.* at 2643.
98. *Id.*
99. *Id.* at 2647 (Souter, J., concurring in part, dissenting in part).
100. *Id.* at 2650.
101. *Gingles*, 478 U.S. at 50.
102. *Perry*, 126 S. Ct. at 2648 (Souter, J., concurring).
103. *Id.* at 2651 (Souter, J., concurring in part, dissenting in part).

C. Justice Breyer, Concurring in Part and Dissenting in Part

Justice Breyer argued that the plan violated the Equal Protection Clause of the Constitution because the only justification for the redistricting was based on partisan grounds, which could have "harmful electoral consequences."[104]

D. Chief Justice Roberts, Concurring in Part, Concurring in the Judgment in Part, and Dissenting in Part

Chief Justice Roberts urged that the holding of the majority—that District 25 was not sufficiently "compact" to compensate for the breaking apart of District 23—was erroneous because there was no showing that Latino-preferred candidates would be more disadvantaged under the new plan (1374C) than under the old one and because the actual distance between points in the old District 23 was beyond the farthest points in the new District 25.[105] Chief Justice Roberts further emphasized that District 25 was not created by making "assumptions" about how the Latino members of that district would vote at the polls, but rather by analyzing statistical evidence, a finding supported by the district court.[106] Further, he concluded that the majority erred by not holding that District 25 was an effective opportunity district for Latinos because the six Latino opportunity districts out of thirty-two constitute nineteen percent of the seats, which is "roughly proportional" to their percentage in the population.[107] The fact that the Latino population in the district are from different areas, Chief Justice Roberts concluded, does not mean that the Latino population does not have an opportunity voting district.[108]

E. Justice Scalia, Concurring in the Judgment and Dissenting in Part

Justice Scalia believed that the issue of unconstitutional partisan gerrymandering should not be before the Court.[109] Justice Scalia pointed out that the district court's finding that intent to discriminate based on race was not a factor in the redistricting plan precludes the

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104. *Id.* at 2652 (Breyer, J., concurring).

105. *Id.* at 2653, 2657 (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

106. *Id.* at 2656-57, 2661.

107. *Id.* at 2662.

108. Id. at 2662-63.

109. *Id.* at 2663 (Scalia, J., concurring in part, dissenting in part).

plaintiff's claims of vote dilution in this case.[110] Justice Scalia further asserted that the use of race as *the* dominant factor in the creation of District 25 (as a majority-minority district) triggers strict scrutiny under the Equal Protection Clause.[111] Justice Scalia noted that he would normally remand the case to the district court to conduct a "'fact-intensive' inquiry" as to whether the creation of District 25 was done in order to comply with Section Five of the Voting Rights Act; but in this case the appellants had already conceded that it was, and he therefore would allow District 25 to remain as it was.[112]

IV. LEGAL IMPLICATIONS

A plurality of the Court in *Perry* seems to have backtracked from its plurality decision in *Vieth*, which held that political gerrymandering schemes were nonjusticiable issues.[113] Now, it appears that partisan gerrymandering schemes may fall under the purview of the courts when equal protection questions are raised under Section Two of the Voting Rights Act. Therefore, it seems that while racial minority groups are obviously still a protected class for purposes of equal protection, minority political groups are not. The three *Gingles* requirements still appear to be presumptively valid, but the validity of the first requirement—that the racial group is sufficiently large to constitute a majority in the district—has been brought into question, particularly by Justice Souter's concurring opinion in *Perry*.[114]

Political parties may still redistrict their respective states for purely political reasons, but must do so with the awareness that they may not unfairly infringe upon the ability of minority groups to have the opportunity to select their candidate of choice. The ruling from *Perry* does not mean that states may not place their own individual restrictions on mid-decade redistricting plans. In *Lance v. Dennis*,[115] decided two months after *Perry*, the United States District Court for the District of Colorado held that state constitutions may place more stringent restrictions on redistricting than the federal Constitution and prohibit mid-decade redistricting altogether.[116]

The Court has not yet articulated a clear standard for when partisan gerrymandering schemes may be challenged under Section Two. The

110. *Id.* at 2664.
111. *Id.* at 2666-67.
112. *Id.* at 2668-69 (citing Georgia v. Ashcroft, 539 U.S. 461, 484, 490 (2003)).
113. Vieth v. Jubelirer, 541 U.S. 267, 305 (2004).
114. 126 S. Ct. 2594, 2648 (2006) (Souter, J., concurring in part, dissenting in part).
115. 444 F. Supp. 2d 1149 (D. Colo. 2006).
116. *Id.* at 1157 n.12.

"totality of the circumstances" language leaves a great deal of room for interpretation, notwithstanding the three *Gingles* requirements. Gerrymandering schemes will no doubt continue to be challenged in the courts, but the general opinion of the Court appears to give deference to the legislature in drawing such schemes, except in cases where it can be shown that a district has diluted a minority group's ability to overcome prior electoral discrimination. Minority opportunity districts, once established, may not be dismantled by a partisan legislature, particularly when that group has a history of discrimination in that state.[117]

The definitional question of what constitutes a "compact" district for purposes of the *Gingles* requirements awaits future litigation because the Court has laid out no clear standard in this area. There will continue to be a large number of these types of cases brought before the district courts because of the enormous political consequences that can result from a partisan scheme. An effective gerrymander can continue to allow a party that is declining in popularity in a state to maintain control of a majority of the seats for many years.

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117. *See Perry*, 126 S. Ct. 2594, 2626 (2006).