AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Voting

**Abbott v. Perez, \_\_ U.S. \_\_** (2018)

*Shannon Perez joined a lawsuit filed by Texas voters, Texas state and federal legislators, and voting rights organizations that claimed that the Texas state and federal legislative apportionments in 2011 violated the equal protection clause of the Fourteenth Amendment and the Voting Rights Act. After a first round of litigation in which a federal court refused to preclear the 2011 apportionment, Texas in the 2012 elections relied on an interim apportionment devised by the local federal district court. In 2013, the state legislature repealed the 2011 plan and adopted the interim apportionment plan with minor adjustments. Perez and other plaintiffs continued to claim that the plan continued to discriminate against racial minorities. The local federal district court agreed that the 2013 apportionment plan violated the Constitution and Voting Rights Act. That court also ruled that Congressional District 27 (CD27), House District 32 (HD32) and House District 34 (HD34) violated the Voting Rights Act by depriving Latinos of the right to elect candidates of their choice, and that House District 90 (HD90) was a racial gerrymander. The Governor of Texas, Greg Abbott, appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States unanimously agreed that HD90 was a racial gerrymander but by a 5-4 vote reversed the decision of the lower court on all other matters. Justice Samuel Alito’s majority opinion held that the lower court had unconstitutionally placed the burden on Texas to demonstrate that the 2013 plan was tainted by the racial discrimination in the 2011 plan and that CD27, HD32 and HD34 were drawn up in ways consistent with the Voting Rights Act. The judges agreed that the 2011 plan violated the Constitution, but that the burden of proof was on the plaintiff to demonstrate that the 2013 plan was unconstitutional. How does Alito interpret the relationship between the 2011 and 2013 plans? How does Justice Sonia understand the interpretation between the plans? What is your interpretation of that relationship and how does that affect your view of the case? Alito claims that Texas could not have been discriminating because they largely adopted the interim apportionment plan drawn up by a federal district court. How does Sotomayor counter that claim? Who has the better of that argument? To what extent do the different opinions in this case reflect a conservative view that racial discrimination in the United States has, for the most part vanished, and a liberal view that racial discrimination remains vibrant? What is your view and how does that impact your view on this case?*

JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to “‘competing hazards of liability.’” In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has “ ‘good reasons' ” for believing that its decision is necessary in order to comply with the VRA.

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Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. This rule takes on special significance in districting cases. Redistricting “is primarily the duty and responsibility of the State,” and “[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”  . . . The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. “[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” . . . The “historical background” of a legislative enactment is “one evidentiary source” relevant to the question of intent.  But we have never suggested that past discrimination flips the evidentiary burden on its head.

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The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true “change of heart” and had “engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.”

. . . .

In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. . . .

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

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Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstantial evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and § 2 of the Voting Rights Act if those claims were merely likely to prevail.  And the Texas court was told to accommodate any claim under § 5 of the VRA unless it was “insubstantial.”  Fourth, the Texas court had made a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

The court below and the dissent infer bad faith because the Legislature “pushed the redistricting bills through quickly in a special session.”  But we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith. . . .

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To make out a § 2 “effects” claim, a plaintiff must establish the three so-called “*Gingles* factors.” These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate.  If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.

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[P]laintiffs could not establish a violation of § 2 of the VRA without showing that there is a “‘possibility of creating more than the existing number of reasonably compact’ ” opportunity districts.  And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan.

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[T]he 2013 Legislature had “good reasons” to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors. CD35 was based on a concept proposed by MALDEF. . . . The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State. . . .

The District Court similarly erred in holding that HD32 and HD34 violate § 2. These districts make up the entirety of Nueces County, which has a population that is almost exactly equal to twice the population of an ideal Texas House district. In 2010, Latinos made up approximately 56% of the voting age population of the county.  The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not.

Findings made by the court below show that these two districts do not violate § 2 of the Voting Rights Act. Under *Gingles,* the ultimate question is whether a districting decision dilutes the votes of minority voters, and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

The only plaintiff that pressed a § 2 claim with respect to HD32 and HD34 was MALC,  and as the District Court recognized, that group's own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district. . . .

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. . . . Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had “‘*good reasons* to believe’” that this was necessary to satisfy § 2 of the Voting Rights Act.”

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what § 2 demands. So one group's demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Representative Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes.. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring.

I adhere to my view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting.

JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Id75dbaae787911e89a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

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Under *Arlington Heights,* “in determining whether racially discriminatory intent existed,” this Court considers “circumstantial and direct evidence” of: (1) the discriminatory “impact of the official action,” (2) the “historical background,” (3) the “specific sequence of events leading up to the challenged decision,” (4) departures from procedures or substance, and (5) the “legislative or administrative history,” including any “contemporary statements” of the lawmakers.  Although this analysis must start from a strong “presumption of good faith,” a court must not overlook the relevant facts. This Court reviews the “findings of fact” made by the District Court, including those respecting legislative motivations, “only for clear error.” . . .

The District Court followed the guidance in *Arlington Heights* virtually to a tee, and its factual findings are more than “plausible” in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the “specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects ‘continu[ing] to this day.’ Texas, moreover, has a long “history of discrimination” against minority voters. “In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost.”

. . . . Turning to deliberative process, . . . the District Court concluded that Texas was just “not truly interested in fixing any remaining discrimination in the [maps].”  Despite knowing of the discrimination in its 2011 maps, “the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.” . . .  The Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints, and “there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.” . . .

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Nor can Texas credibly claim to have understood the 2012 interim orders as having endorsed the legality of its maps so that adopting them would resolve the challengers' complaints. In its 2012 interim orders, “the [District] Court clearly warned that its preliminary conclusions ... were not based on a full examination of the record or the governing law and were subject to revision” “given the severe time constraints ... at the time” the orders were adopted. . . . There was substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a “strategy [that] involved adopting the interim maps, however flawed,” to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps.  Texas hoped that, by adopting the 2012 interim maps, the challengers “would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects.” . . .

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[T]he majority sees nothing wrong with the fact that the Legislature failed “to take into account the problems with the 2011 plans that the D.C. court identified in denying preclearance.”  It maintains that the purpose of adopting the interim plans was to “fix the problems identified by the D.C. court,” and reasons that the interim maps did just that by modifying any problematic districts. But of course the finding of discriminatory intent rested not only on what happened with particular districts. Rather, the evidence suggested that discriminatory motive permeated the entire 2011 redistricting process, as the D.C. court considered that “Texas has found itself in court every redistricting cycle [in the last four decades], and each time it has lost”; that “Black and Hispanic members of Congress testified at trial that they were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored”; that the redistricting committees “released a joint congressional redistricting proposal for the public to view only after the start of a special legislative session, and each provided only seventy-two hours' notice before the sole public hearing on the proposed plan in each committee”; that minority members of the Texas Legislature “raised concerns regarding their exclusion from the drafting process and their inability to influence the plan”; and that the Legislature departed from normal procedure in the “failure to release a redistricting proposal during the regular session, the limited time for review, and the failure to provide counsel with the necessary election data to evaluate [Voting Rights Act] compliance.” . . .

. . . . In light of the record before this Court, the finding of invidious intent is at least more than “‘plausible’” and thus “must govern.”  The majority might think that it has a “better view of the facts” than the District Court did, but “the very premise of clear error review is that there are often ‘two permissible’—because two ‘plausible’—‘views of the evidence.’”

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If consideration of th[e] “‘historical background’” factor means anything in the context of assessing intent of the 2013 Legislature, it at a minimum required the District Court to assess how the 2013 Legislature addressed the known discrimination that motivated the drawing of the district lines that the Legislature was adopting, unchanged, from the 2011 maps. Therefore, the findings as to whether the 2013 Legislature engaged in a good-faith effort to address any known discrimination that tainted its 2011 plans were entirely apposite, so long as the District Court “weighed [this factor] together with any other direct and circumstantial evidence” bearing on the intent question, and so long as the burden remained on the challengers to establish invidious intent.

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[T]he majority picks the few phrases that it believes support its argument, choosing to disregard the rest. For instance, the majority quotes the District Court order as having required Texas to show that the 2013 Legislature had a “‘change of heart.’” When that sentence is read in full, however, it is evident that the District Court was not imposing a “duty to expiate” the bad intent of the previous Legislature, . . . but instead was describing what the weighing of the direct and circumstantial evidence revealed about the motivations of the 2013 Legislature: “The decision to adopt the interim plans was not a change of heart concerning the validity of [the challengers'] claims ...—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.”

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. . . . Before 2011, CD27 was a Latino opportunity district, *i.e.,*a majority-HCVAP district with an opportunity to elect a Hispanic-preferred candidate. When the Legislature reconfigured the district in 2013, it moved Nueces County, a majority-HCVAP county, into a new Anglo-majority district to protect an incumbent “who was not the candidate of choice of those Latino voters” and likely would have been “ousted” by them absent the redistricting. The District Court found that the “placement of Nueces County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area.”  It also found that “the political processes are not equally open to Hispanics” in Texas as a result of its “history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process [that] is well documented,” and that “Latinos bear the effects of past discrimination in areas such as education and employment/income, which hinder their ability to participate effectively in the political process.”  Given those findings, the District Court concluded that the newly constituted CD27 “has the effect of diluting Nueces County Hispanic voters' electoral opportunity.”

To explain how it counted to seven, Texas pointed to the creation of CD35 as a supposed new Latino opportunity district that joined Travis County Hispanics with Hispanics in San Antonio. . . . The District Court found that Texas had moved Travis County Hispanics from their pre–2011 district, CD25, to the newly constituted CD35, not to comply with § 2, but “to use race as a tool for partisan goals ... to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).”  Thus, it concluded that “CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest.”

. . . .

Nothing in the record or the parties' briefs suggests that the District Court clearly erred in these findings of fact, which unambiguously support its conclusion that there is a § 2 results violation with respect to CD27. . . . The particular § 2 question here does not concern the status of Travis County Latinos in the newly constituted CD35 after the 2011 redistricting. Rather, it concerns the status of Travis County Latinos in the old CD25, prior to the 2011 redistricting. That is because the challengers' § 2 claim concerns the choices before the Legislature *at the time of the 2011 redistricting,* when it was deciding which Latinos in South/West Texas to place in the new opportunity district to be created in that area of the State. The Legislature chose to include Travis County Latinos in an opportunity district at the expense of the Nueces County Latinos, who were instead moved into a majority-Anglo district. So the question is whether, knowing that Nueces County Latinos indisputably had a § 2 right, the Legislature's choice was nevertheless justified because the Travis County Latinos also had a § 2 right that needed to be accommodated. In other words, did the Legislature actually create a new § 2 opportunity district for persons with a § 2 right, or did it simply move people without a § 2 right into a new district and just call it an opportunity district? To answer that question, the status of Travis County Latinos in 2011 is the only thing that matters, and the District Court thus correctly focused its inquiry on whether bloc voting existed in Travis County *prior* to the 2011 redistricting, such that Travis County Latinos could be found to have a § 2 right. Whether the newly constituted CD35 *now* qualifies as a § 2 opportunity district—an inquiry that would, as the majority suggests, call for district-wide consideration—is beside the point.

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The District Court recognized that the challengers' expert opined that the two HCVAP-majority districts would not perform based on the results of an exogenous election index. But the majority ignores that the District Court rejected that expert's conclusion because “the results of an exogenous election index alone will not determine opportunity,” as “[s]uch indices often do not mirror endogenous election performance.”  Instead of “just relying on an exogenous election index to measure opportunity,” the District Court “conduct[ed] an intensely local appraisal to determine whether real electoral opportunity exists.”

That “intensely local appraisal” resulted in a lengthy analysis that considered, among other facts: that Texas had a long “history of voting-related discrimination”; that “racially polarized voting exist[s] in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates”; “that Hispanics, including in Nueces County, suffer a ‘continuing pattern of disadvantage’ relative to non-Hispanics”; that population growth in the county “was [driven by] Hispanic growth” and that the “HCVAP continues to climb”; that the districts “include demographic distributions strongly favoring Hispanic voters,” and that the “numbers translate into a significant advantage in house district elections”; and that data analysis showed that “performance for Latinos increased significantly in presidential election years,” which “indicates that the districts provide potential to elect.” . . . . Based on this review of the evidence, the District Court concluded “that Hispanics have equal opportunity in two districts drawn wholly within Nueces County (or at least [the challengers] failed to show that they do not).”

. . . .

The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. . . . . The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement. The Court intervenes when no intervention is authorized and blinds itself to the overwhelming factual record below. It does all of this to allow Texas to use electoral maps that, in design and effect, burden the rights of minority voters to exercise that most precious right that is “preservative of all rights.” . . .