EXHIBIT A

Report of James Harrington
February 28, 2012

EXPERT REPORT
Prepared by James C. Harrington

SUMMARY

I have prepared this report on the issue of whether there is a compelling or substantial reason the Texas legislature or a court should not cut county lines in order to create minority-opportunity state election districts should there be a necessity to do so to obtain proper representation.

My résumé is included with this report, as Attachment E. In short, I have been a civil rights attorney for almost four decades of experience, and am the founder and director of the Texas Civil Rights Project. I graduated from the School of Law at the University of Detroit in 1973, from where I also hold a Masters in philosophy. I served as adjunct professor at University of Texas Law School for 27 years and continue to teach undergraduate writing courses at the university in civil liberties and history-making trials. I’ve been fortunate to have handled landmark civil rights cases and serve on human rights delegations in different areas of the world. I am author of: The Texas Bill of Rights: A Commentary and Litigation Manual; Wrestling with Free Speech, Religious Freedom, and Democracy in Turkey: The Political Trials and Times of Fethullah Gülen; myriad law review articles; and a wide assortment of op-ed pieces and book reviews.

I am being compensated at the rate of $150/hour by the Mexican American Legislative Caucus-Texas House of Representatives. As of this point, I have been paid $5,000, which includes research assistants.

I have come to the conclusion that there is no compelling or substantial reason the Texas legislature or a court should not cut county lines in order to create minority-opportunity state election districts should there be a necessity to do so to obtain proper representation.

My conclusion is supported, I believe, by the attached memorandum and the authorities in the bibliography, at the end of the memorandum.

The following are main reasons for drawing the conclusion that I have.

1. Texas counties were formed haphazardly (and sometimes even re-formed) more for the state’s administrative facility or simply to reinforce state governance in the area. In the late 1800’s, the legislature simply “squared off” large, sparsely-populated areas of west Texas, just to make counties. They were formed around an existing community located essentially in the center of the county and which provided the geographical pivot for laying out county lines (e.g., the county seat had to be at least 12 miles from each county line). The artificiality of county boundaries in many respects is seen today in counties have cities and communities that straddle county lines. Those communities of interest have nothing to do with county boundaries; county lines simply continue to serve
administrative functionality as they have since their creation. The only constitutional requirement was “for the convenience of the people.” Tex. Const. art. IX §1.

Quite often, counties were formed solely to reflect economic interests, such as in South Texas, where seven counties were divided into thirteen as a result of the struggle between ranchers and farmers trying to protect their economic interests from the other. Once that happened, there was systematic disenfranchisement of the Mexican Americans within the counties.

2. As to Article of the Texas Constitution, it is my opinion that Article I, §3a, Texas’ Equality of Rights Amendment, overwhelmingly adopted by the voters on November 7, 1972, would supersede any legal vitality of Article III, §26, to the extent that it was at odds with Article I, §3a, which provides:

   EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

   It is a solid legal principal that a constitutional provision adopted later it time modifies any earlier-adopted provision, if possible, so that the former is not inconsistent with the former. If it is not possible, then the later provision controls.

   Similarly, a more specific constitution provision controls a more general one. Article I, §3a is specific in demanding equality of rights for racial and ethnic minorities, among others.

   Moreover, Article III, §26 articulates no constitutional purpose or value other than convenience, whereas Article I, §3a expresses a strong constitutional value of equality under the law.

   The Austin Court of Appeals has accepted Article I, §3a’s application to the redistricting context.¹

3. Under the Supremacy Clause of the Federal Constitution, in any regard, the Voting Rights Act (VRA) would take precedence over any state constitutional provisions to the extent necessary for compliance with the VRA, which is a 14th Amendment statute.

4. Finally, in the hierarchy of progression, again under the Supremacy Clause of the Federal Constitution, that Constitution, specifically, the 14th Amendment would ultimately control.

5. Cutting county lines so as to draw a district close together that created a minority opportunity district, with a community of interest, has been done on numerous occasions

¹ Del Valle ISD v. López, 863 S.W.2d 507 (Tex. App. - Austin 1993, writ denied)
by the legislature. Nor would doing so offend *Reno v. Shaw*, which counseled against drawing excessively strange geographical districts in which citizens of the district were extremely distant from each other such that there would be no real community of interests (e.g. west side of the state vs. the east side and 160 miles in between).
TEXAS COUNTY FORMATION AND THE COUNTY LINE RULE

I. County Line Rule

The Texas “county line rule” derives from Article III, Section 26 of the Texas Constitution, and its application has evolved and has been slightly modified to comply with federal law. See Smith v. Craddick (1971), Clements v. Valles (1981), infra. Under the rule, a county line may be disrupted in drawing a Texas legislative district only when required to comply with the one-person-one-vote requirement of the 14th Amendment to the U.S. Constitution or by the federal Voting Rights Act. As applied to legislative districts, the one-person, one-vote requirement generally allows a 10% deviation without justification.

Since Baker v. Carr (1962), a case from Texas, the U.S. Supreme Court has recognized three primary standards governing redistricting plans: “(1) districts must be of equal population to ensure that the value of every person’s vote is substantially equal; (2) a plan may not intentionally dilute the voting strength of members of a racial or ethnic minority group; and (3) a plan that contains districts drawn primarily on the basis of race or ethnicity requires a compelling justification.”

When the Texas Legislative Redistricting Board examines redistricting after the decennial census, the Board must comply with the laws governing redistricting found in “the U.S. Constitution, the federal Voting Rights Act of 1965, and the Texas Constitution,” in that order. Beyond these specific requirements, the legislature is relatively free to create districts as it chooses.

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2 As described by David Hanna to the Texas Redistricting Committee on March 1, 2011. However, he omitted any discussion of the applicability of Texas’ Equal Rights amendment, which voters ratified in 1972 and has been used in redistricting litigation. (Tex. Const. art. I §3a).

3 However, the rule is not absolute. A Georgia state house reapportionment map was struck down even though it met the 10% deviation. Cox v. Larios, 542 U.S. 947 (2004), affirming Larios v. Cox, 300 F.Supp.2d 1320 (N.D. Ga. 2004).


6 Id. p.5.
No legislative district criss crossed or “cut” a county line from 1836 to 1971. The first cut counties in Texas resulted from the enforcement of “one-person one-vote,” after Reynolds v. Sims (1964).\(^7\)

Reynolds v. Sims framed redistricting in terms of mathematical equality, known commonly as “one-person, one-vote.” Before Reynolds, states often emphasized county representation over popular representation,\(^8\) which meant that population disparities between districts limited citizens’ influence in the democratic process in heavily populated districts.

Reynolds could have disavowed completely the Texas legislature’s devoutness to the county line rule because the rule operated as an impediment to redistricting in the most fair and democratic way possible, based on federal standards, but did not do so.\(^9\) Mathematical equality in the democratic process and districting based on static boundaries are probably ultimately irreconcilable principles, practically speaking.

Texas sticks by its guideline to the point of making the county line rule practically equivalent to a constitutional mandate. The Texas Supreme Court in Smith v. Craddick (1971) bolstered enforcement of the county line rule by rejecting a 1971 legislative plan because it did not adequately justify cutting and dividing counties as a necessary means to comply with federal law. The legislature cannot cut excessively but only to the extent necessary to comply with federal and state law. The Texas Supreme Court reiterated this point in Clements v. Valles (1981).\(^10\) These cases are discussed later in this memo.

\(^7\) 377 U.S. 533 (1964).

\(^8\) Id. p.23.

\(^9\) Id. p.41. More on this topic:

The Texas Constitution appears to provide a strong basis for justification of population deviation above 10 percent. Section 26, Article III, Texas Constitution, requires state house districts to consist of whole counties. In the 1970s, 1980s, and 2000s, the house plans adopted by the Legislative Redistricting Board split a few counties in violation of Section 26 to avoid population deviations of 10 percent or more. The House plan adopted by the legislature for the 1990s took the same approach. However, the state may be able to justify population deviations of 10 percent or more to comply with Section 26. The Supreme Court in White v. Regester recognized the validity of Section 26 and compared it to the similar state provision used by Virginia in Mahan to justify a population deviation range of 16.4 percent. Id. at 118. “State plans adopted in the 1970s, 1980s, 1990s, and 2000s by both the legislature and the Legislative Redistricting Board sacrificed the county line rule when necessary to maintain an overall deviation range of less than 10 percent. Id.

\(^10\) State and Federal Law Governing Redistricting in Texas, supra n.4, p.142:
II. History

A. Origins of County Lines

Accurate maps or county descriptions were rare for the first century of Texas history. During the early days of colonized Texas from 1825-1836, strife and tension frequently arose because of vague boundary wording. It is from these early and contentious roots that the Republic Constitution of 1836 adopted pre-existing Mexican municipalities to create the first 23 counties.

The example from the Mexican Congressional records for the Municipality of Brazoria highlights the vagueness of even the best descriptions:

Article 1: In the southern portion of the Municipality of Austin a new Municipality shall be formed of which the town of Brazoria shall be the capital.

Article 2: The limits of said municipality shall be as follows: commencing at the mouth of Clear Creek on Galveston Bay, followed the principal branch of said creek to its source, then southwesterly in a straight line to strike the Brazos four leagues above the mouth of Big Creek, thence in a straight line to the confluence of Guajaro Creek and the River St. Bernard.

Most county boundaries from this period trace their roots to political squabbles. These lines were not drawn with political equality in mind, but administrative efforts by the judicial system to create beneficial local policy.

The court reaffirmed the rule announced in Craddick that plaintiffs may establish a prima facie violation of Section 26 by showing that the adopted plan divides one or more counties between house districts in violation of Section 26, and that the burden then shifts to the state to prove that each county split is necessary to comply with federal law. In that case, the plaintiffs established a prima facie violation by showing that 34 counties had been divided between districts. The state offered an explanation for each such county, arguing that dividing it was necessary to comply either with the one-person, one-vote standard or with Section 5 of the Voting Rights Act, to which Texas had become subject in 1975. The court refused to accept all of the state’s rationale for the divided counties, in large part because plaintiffs presented numerous alternative plans that complied with those federal laws without dividing nearly as many counties as the legislature’s plan. The court held that the plan violated the county line rule of Section 26 and permanently enjoined its implementation. [footnote omitted].


12 Municipalities were designated as electoral districts for the First Congress of the Republic of Texas, and thereafter were referred to as counties without formal revision.

Until 1840, chief justices presided over county organization. Thereafter, county surveyors were elected by the county’s population.\footnote{Seymour Connor, “The Evolution of County Government in the Republic of Texas,” \textit{Southwestern Historical Quarterly}, pp.174-75 (Oct. 1951).} The Provisional Government went along, creating and defining the first 23 counties through an assumed extralegal power recognized under the 1836 Constitution. “Congress was empowered to establish a new county on the petition of one hundred free male inhabitants of the territory sought to be established,” Seymour Connor wrote in his thorough history of Texas county formation, “provided that the territory contained nine hundred square miles, and that each new county was entitled to at least one representative in Congress.”\footnote{Id. p.181.}

Clearly, the intent was to represent a geographic area, rather than to account for any notion of political equality based on population. This was not unusual in that era, which had a much narrower view of democratic participation than Americans do in the 21\textsuperscript{st} century.

Counties were developed to solve the basic problem of local governance, and “the importance of geographical boundaries to the operation of county government can not be overemphasized, and the various Texas Congresses spent as much if not more time wrestling with the problems of county boundaries than they did with the problems of county organization…. Apparently most of the descriptions were based on available maps, all of which were distorted representations of the actual topography, on reports of different surveyors, and to some extent on general knowledge of the terrain.”\footnote{Id. pp.186-87. Descriptions were difficult, based on patent surveys, rivers and streams, roads and trails, and divides over highlands. The first two could be reasonably accurate but roads and trails appear and disappear, and divides over highlands must be approximated.} But this had nothing to do with political representation by and for a county’s citizens or inhabitants.

Johnson County is a representative case. Created by the Fifth Legislature on February 13, 1854, the Johnson County boundaries were written using the surrounding counties as marking points and ten miles west of Brazos River as a westward border.\footnote{Laws of Texas, 1822-1897, vol. 8, chapter DCXI, An Act Creating the County of Johnson passed by the Fifth Legislature: “Section 1. Be it enacted by the Legislature of the State of Texas, that all that portion of territory lying west of Ellis County and north of Hill County and south of Tarrant County, beginning at the northwest corner of Ellis County, on the south boundary of Tarrant County; thence running due west to the bank of the Brazos river; thence continuing due west ten miles; thence south thirty degrees east to Bosque County; thence north sixty degrees east to the west bank of the Brazos River; thence down the same with its meanders to the north-west corner of Hill County; thence north seventy-five degrees east to the northeast comer of Hill County on the south-west boundary line of Ellis Case 5:11-cv-00360-OLG-JES-XR Document 1057-1 Filed 06/09/14 Page 8 of 37
November 6, 1866, the boundary lines of Johnson County were redefined, not only in terms of other county boundaries, but also to the “upper corner of a 320-acre survey in the name of J. Lyon.”

Five years later, on March 25, 1871, the eastern boundary changed once again, this time by attaching the western part of Ellis County to Johnson County’s eastern border. In 1880, a referendum was held in Hill County that attached a portion onto Johnson County, now taking into account the southeast corner of William Kinsey’s 320-acre survey. Other revisions took place that left the boundary lines of Johnson County in 1892, according to Article 822 of the Revised Statutes of 1879, as a combination of the aforementioned boundary revisions. However, due to a Dallas County surveyor’s error part of Tarrant County was cut off and given to Dallas County. In the compromise Tarrant’s territory pushed into Ellis County. Johnson County’s northern border was to “extend thirty miles due west from the northwest corner of Ellis, which is 801½ varas farther south than it should be, thereby giving Tarrant a strip about thirty miles long and 801½ varas wide which does not belong to her.” This brief history of less than forty years of Johnson County’s boundary line evolution is by no means exceptional; many more counties experienced similar degrees of revision during this era and as described in the next section. None of these maneuverings had anything with political representation of the county’s population, only geographic tinkering.

“The areas and shapes of the original twenty-three counties changed considerably after 1836. Divisions allowed for the formation of two hundred thirty-one new government entities. Boundaries shifted and warped…”, Luke Gournay wrote in his book on Texas county boundaries. “In some years, the Congress of the Republic or the Texas Legislature created only one new county. In other years, such as 1876, as many as fifty-four new ones appeared. And in some years, no new counties were created.”

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18 A Memorial and Biographical History of Johnson and Hill Counties, Lewis Publishing Company (Texas, 1892), pp.79-80.
19 Id. n.17, p.81.
20 Gournay, supra n.10, p.ix.
County creation rules changed under the 1876 Constitution, requiring that new counties could be no less than nine hundred square miles and should be drawn as square as possible.\(^{21}\) Squareness became the defining criteria used to draw the physical county lines, explaining the layout of much of the panhandle area and west Texas. Few would argue that county lines were drawn in a systematic and thought-out fashion; let alone fashioned to account for democratic representation. County boundaries are, almost by definition, arbitrary, developing organically over time.

While the formation of counties over Texas’ history was complicated, it does not differ greatly from the process of westward migration and the formation of other states in the area. So why are Texas county lines sacrosanct? It is because county line boundaries, like any political border, become imbued with relevance even when formed in casual or politically irrelevant reasons. The individual instances of statecraft may be explainable, but the process is complex and messy, traversing geographic, economic, political, and interpersonal concerns.

Counties were ultimately developed to spread local economic and political governance throughout the state in an as orderly and controlled manner as possible but without regard to proportionality. There were benefits from incorporating territory into the greater United States, whether it was protection from Indian raids, federal projects such as railroads, or individuals’ personal coveting of power in their communities. The same was true of Texas, especially of its own internal westward expansion.

However, county lines are not only political constructions -- they become deeply entwined with the growth of the personal social power of the people who build the infrastructure and fight for the boundaries now. The general population initially paid little attention to the meanings of these boundaries; but, within each generation of acceptance, the county lines become more concretized.

Quite often, counties were subdivided and new ones formed solely to reflect economic interests, such as in South Texas, where seven counties were divided into thirteen as a result of the struggle between ranchers and farmers trying to protect their economic interests from the

\(^{21}\) Id. p.32. Also, counties were constructed so that the city or town to be the county seat would be close to the center of the county (or, at least, that was the goal).
Once that happened, there was systematic disenfranchisement of the Mexican Americans with the counties.\textsuperscript{22}

One should not take county boundaries for granted, but rather, understand the significance of the arbitrary creation. County lines are not the ethos of a historical destiny. Article III, §26, is just one of many normative conceptions that lend authority to the recognition and observance of a county’s specific territory for purposes of developing state supervision into local administration.

**B. Examples and Historical Precedent for Cutting County Lines**

Throughout Texas history, counties have been formed and reformed repeatedly by moving borders and cutting apart existing counties to create new ones. The Texas Constitution allows for the Legislature’s “power to create counties for the convenience of the people” and outlines detailed provisions for county formation.\textsuperscript{23}

The frequency of shifting borders, combined with the legislative precedent, suggests that Texas lawmakers have not always viewed political boundaries as sacrosanct, and indeed that county borders have historically been viewed as fluid and changeable.

A chart denoting county population between 1850 and 2010, developed by the Texas State Historical Association in the 2010 *Texas Almanac*, indicates that the borders of at least 72 counties (28% of counties) have changed in some manner since 1850, including complete annexation and dissolution of some counties.\textsuperscript{24} Many counties underwent multiple changes over brief periods, further indicating the willingness of Texas lawmakers to manipulate boundaries as a reflection of competing interests.

For example, Presidio County (formed from El Paso County in 1850, which itself was formed from Bexar County) was divided up to form Pecos County in 1871 as the area grew in size and influence. Pecos County was subsequently split to form Reeves County in 1883 after


\textsuperscript{23} Tex. Const. Art. 9, §1.

Texas and Pacific Railway built tracks through the region, expanding the population (and economic power) of what would become Reeves County.\textsuperscript{25}

The political geography of southwest Texas changed again when Presidio County was cut apart to create Jeff Davis County in 1887 after the residents of Fort Davis — citing a lack of representation for their interests in the existing Presidio County — called for a new county with their town as the seat.\textsuperscript{26} Later that year, parts of Presidio were taken to create Brewster, Buchel, and Foley Counties as a nod to the burgeoning economies and populations of those areas.\textsuperscript{27}

Only two years later, Foley and Buchel Counties were annexed to Brewster County, further changing the political landscape.\textsuperscript{28} The borders of the region would be altered yet again after the culmination of a long-running border dispute between Jeff Davis and Presidio Counties. In 1903, the counties sought judicial mediation to settle the confusion over the border, which had been defined differently in 1887 and in 1889.\textsuperscript{29} A new border was eventually drawn in January 1905 giving more land to Jeff Davis; Presidio County was diminished still more in April 1905 with the creation of Terrell County.\textsuperscript{30}

Tom Green County provides another interesting example of county line shifts. It was formally established in 1874 from parts of Bexar County, though its borders were redrawn in 1876, with the northern boundary extending from the northwest corner of Runnels County to the New Mexico border.\textsuperscript{31} Over the next decades, Tom Green County would be divided up multiple times to form 11 new counties, including modern-day Coke, Crane, Ector, Glasscock, Irion, Loving, Midland, Reagan, Sterling, Upton, and Ward Counties. The formation of these counties was not necessarily a reflection of slow and deliberate change in population or interests. In fact, six of these counties were created at once during the 28\textsuperscript{th} legislative session in 1887, indicating

\textsuperscript{25} Susan D. Navarro, "Creation of Reeves County," \textit{Permian Historical Annual} 8 (1968).

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} Special Laws of the State of Texas, 21\textsuperscript{st} Legislature 1889. Chap. 49. H.S.S.B. No. 191.


\textsuperscript{29} Presidio County v. Jeff Davis County. Civil Appeals of Texas, 4th Dist. (11 Nov. 1903).

\textsuperscript{30} Lucy Miller Jacobsen and Mildred Bloys Nored, \textit{Jeff Davis County}. Fort Davis, TX: Fort Davis Historical Society, 1993.

that Texas lawmakers were not averse to making substantial changes in political boundaries over a short period of time.\textsuperscript{32}

While many of the aforementioned boundary changes occurred earlier in Texas history, entire counties were still being reorganized and dissolved as late as the 1920s and 1930s. A prime example is Willacy County, as mentioned in the preceding section, which was initially formed from parts of Cameron and Hidalgo Counties in 1911. As newcomers from northern states increasingly moved to the fertile Willacy County area, tensions and competition rose among ranchers (the early settlers of the land) and the incoming farmers. As a result of political pressure from both sides, Willacy County was split in 1921, with the northern ranching areas renamed as Kenedy County and a southern strip of land along the coast reorganized as the new Willacy County. Even the new county was not immune to change—the eastern border of the county was soon altered to include a piece of South Padre Island.\textsuperscript{33}

Several counties were even transferred between states, reflecting the attitude that county lines were fluid even across broader political landscapes. An example is Greer County, which in 1896 was transferred from Texas to Oklahoma by mandate of the U.S. Supreme Court after a dispute over the location of the 100\textsuperscript{th} meridian along the Texas Panhandle.\textsuperscript{34} The land was resurveyed in 1902, but failed to address the problem of ownership of a strip of land 134 miles long and 3,600 to 3,700 feet wide.\textsuperscript{35} Following a period of conflict between the two states over the meridian’s exact location, the land was again resurveyed in the 1920s, and a 1930 Supreme Court decision dictated that the meridian should be moved approximately 3,800 feet to the east.\textsuperscript{36} Eventually, parts of Oklahoma were annexed to Texas counties, including Childress, Collingsworth, Hemphill, Lipscomb, and Wheeler Counties.

The historical fluidity of Texas county borders is further illuminated by the interesting phenomenon of combining “unorganized” counties with organized counties for “judicial and

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\textsuperscript{34} United States v. Texas, 162 U.S. 1 (1896).


\textsuperscript{36} Oklahoma v. Texas, 281 U.S. 109 (1930).
\end{footnotes}
land-surveying purposes.” Unorganized counties — those whose territory had been demarcated by the Texas legislature but had not yet been sufficiently populated as to achieve judicial and administrative autonomy — were attached to organized counties for the purposes of day-to-day administration and statewide elections. A county could be organized upon the petition “of the Presiding Justice of an adjoining county or the nearest organized county” by at least 75 “bona fide, free, white, male inhabitants” of the unorganized territory.

There are many examples of judicial “attachment” in Texas history, suggesting that counties’ borders were not considered strict barriers in electoral proceedings. For instance, the Thirteenth Representative District in 1870 was made up of Jack, Johnson, Hood, Parker, and Palo Pinto Counties, with 9 unorganized counties attached, including Stephens, Eastland, Throckmorton, Shackelford, Callahan, Taylor, Jones, Young, and Haskell.

Unorganized counties could also be shifted between different organized counties, which could happen frequently and rapidly. For instance, Bailey County had been formed and attached to Jack County in 1876, but its administration was transferred to Baylor County in 1881. By 1887 its administration had been shifted once more to Hale County, and in 1892 Bailey was legally attached to Castro County. In another case, fourteen unorganized counties were attached to Wheeler County after it became the first organized county in the Texas Panhandle in April 1879.

Appendix—List of Maps [See Attachment A]

- Texas Counties in 1836: http://hometownchronicles.com/tx/wilbarger/maps/1836tx.jpg
- Texas Counties in 1840: http://hometownchronicles.com/tx/wilbarger/maps/1840texas.jpg
- Texas Counties in 1855: http://texashistory.unt.edu/ark:/67531/metapth192681/m1/1/?q=texas
- Texas Counties in 1866: http://www.laits.utexas.edu/txp_media/html/cons/features/0500_01/slide1.jpg

37 Herman G. James, County Government In Texas, Austin, Texas: The University, 1917.
38 General Laws of the State Legislature of 1858, Chap. 75 §26.
• Texas Counties in 1883:
  http://texashistory.unt.edu/ark:/67531/metapth190656/m1/1/?q=texas
• Texas Counties in 1892 (with Greer County as “Unassigned Land”):
  http://texashistory.unt.edu/ark:/67531/metapth231476/m1/1/?q=greer%20county
• Texas Counties in 1895:  http://hometownchronicles.com/tx/wilbarger/maps/1895tx.jpg

C. County Lines as District Lines as Political Convenience

District lines drawn along county boundaries are traditional in Texas and, since 1836, have been viewed as essentially a constitutional requirement. There is, of course, an administrative and political convenience for this – politically convenient because it streamlines redistricting and helps avoid periodic paralysis as districts are redrawn.

The framework for the Republic of Texas began as a provisional government formed from an amalgamation of the defunct Mexican Constitution of 1824 and Anglo-American traditions. 42 Under the Mexican Constitution, Coahuila y Texas was divided into seven departments in 1835, with Bexar, Nacogdoches, and Brazos departments in present-day Texas. Departments were segmented into municipalities, the most important part of local government. 43 Each municipality was an independent regional area with an executive and council.

The Texas Republic Constitution of 1836 formed a centralized republican government in Texas based on the municipal, thereafter referred to as county, unit. Electoral district lines and county lines were the same, with rare exceptions. In the first years of the republic, counties were created as electoral districts. 44

The forty-person limit on the maximum number of representatives led to the creation of “judicial counties” that could not directly participate in congressional elections. A judicial county had to vote in the parent county and be represented by that county’s legislator. However, the Texas Supreme Court struck down these “phantom counties” in 1842. 45

Limestone County was created during the Extra Session of the Ninth Congress of the Republic of Texas shortly after statehood annexation in 1845; but, because it did not yet have a

42 Evolution of County Government, supra n.13, p.164.
43 Id.
44 Gournay, supra n.10, p.29.
45 Id. pp.30-32.
numerically large enough population to be entitled to separate legislative representation, the citizens of Limestone voted with Robertson County.\footnote{The Act establishing Limestone County passed in 1846, as seen in Estill Franklin Allen’s \textit{Central Texas 1846-1865 County Creation and Settlement Noted by Methodist Expansion}, Howard Payne University Publishing, 1983, p.11.} This practice continues today.

One of the alterations to the Mexican Constitution that happened in 1836 was establishment of an electoral system based on the twenty-three counties, and groupings of those counties for the election of Senators. At the time the framers had no idea how counties were to be created, but they did clearly delineate counties were to be used for the election of congressmen; in fact this is the only capacity in which these local governments were mentioned by name.\footnote{Texas State Historical Association. \textit{Southwestern Historical Quarterly}, Volume 55, July 1951 - April 1952, H. Bailey Carroll, editor, Journal/Magazine/Newsletter, 1952; digital images, (http://texashistory.unt.edu/ark:/67531/metaph101139/, University of North Texas Libraries, Portal to Texas History, http://texashistory.unt.edu; crediting Texas State Historical Association, Denton, Texas.} The electoral system of Texas clearly was founded on the county unit, without regard to comparable political representation by or for the populations of the counties.

Given this history, there seems little reason to recognize any absoluteness of county boundaries, especially when facing a subsequent equal rights protection to the state constitution or looking at current understanding of democratic participation expressed by the Voting Rights Act and the 14\textsuperscript{th} Amendment. The “County line” rule should inform the process but not straight jacket it.

### III. Judicial Precedent and Related Cases

The Texas Supreme Court has issued various rulings to clarify the county line rule and show it will be enforced when not in contravention of federal law.\footnote{George D. Braden, et al., \textit{The Constitution of the State of Texas: An Annotated and Comparative Analysis} (TACIR, 1977), p.154. It should be noted that the Texas Supreme Court has not yet interpreted Art I, §3a, added to the constitution in 1972, for redistricting purposes. Under principles of constitutional construction, Art I, §3a, being later in time, would guide and govern application of Art III, §26.}

#### A. Reynolds v. Sims (1964)

The U.S. Supreme Court in \textit{Reynolds v. Sims} overhauled redistricting at both the local and federal level. The defining motto of modern reapportionment, “one-person one-vote,” became the most important criteria for district apportionment. Mathematical equality was prioritized over historical, geographical, economic, and other group interests\footnote{\textit{Reynolds v. Sims}, 377 U.S. at 579-80.}: “...the concept of...”

\footnote{Reynolds v. Sims, 377 U.S. at 579-80.}
equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live."

By framing the issue in terms of the Equal Protection Clause, equi-populous districts became the ideal under Reynolds. The Court identified the primary inequality created by redistricting at the time was the inferior and unequal voter influence of populous districts compared to the influence of a voter in a less populous district. Reynolds rejected all other justifications in favor of mathematical equality, without giving much consideration to whether that interpretation functioned best to promote democratic ends.

Reynolds provides a dilemma regarding the Texas county line precedent. On one hand, the Court upheld a doctrine that uses political subdivisions for the drawing of district boundaries as a primary determination; but, on the other hand, the mathematical interpretation in Reynolds overturned the custom and constitutional law that had legislators exclusively use county lines to draw their districts. The concept of “one-person, one-vote” was fundamentally inconsistent with the geographic and county-based district lines that had been used historically. According to Justice Harlan in Reynolds, once traditional constraints to districting (e.g. county lines) were eliminated, district lines could snake all over the place, opening an invitation for gerrymandering.

50 Id. at 565.


52 Reynolds v. Sims, 377 U.S. at 622, 578-79:
A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.... Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.... So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.
In this mathematical districting regimen, what rights do common interest population groups have to claim representation? Reynolds decided that “the extent to which any group is benefitted or disadvantaged under equal apportionment depends only on whether its members fortuitously benefit from geographically based constituencies, which neither the Court nor the dissenters were willing to abandon.”

County lines provided a hedge against gerrymandering by making it more difficult to “load the dice” for district maps; and drawing districts along county lines allowed the coordination of local, state, and federal government (in theory) that gave voters a better idea of who represented them. However, Reynolds warned of the possibility of populations being submerged by a mathematical apportionment plan, ruling that county lines should not be used in this fashion.

A 1966 Harvard Law Review article summarized the issue:

The Court suggested in Reynolds that in drawing district boundaries the legislature could take political subdivisions into account in order to avoid gerrymandering. Although political subdivisions may have little intrinsic significance, often serving merely as arbitrary units of administration, they can provide a historically fixed limit on legislative discretion in drawing district boundaries. Therefore a districting scheme that has followed political subdivision lines should be immune from attack as a gerrymander unless the subdivision lines have been recently redrawn. Because of the difficulties of creating equally apportioned districts that follow subdivision lines, however, legislatures should be free to choose some other guiding principle.

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53 Reapportionment, 79 Harv.L.Rev. 1245. (Apr. 1966), See also pp.1245-46:
Assuring Minimum Representation - One reason for overrepresenting an interest group might be to provide representation to a group that would otherwise lack a legislative spokesman. Such an interest group although sufficiently distinctive, might be either too spread out among the population to command any representation or, though politically concentrated, not quite large enough to be a majority of any district. While a group might be too dispersed ever to be capable of representation by geographical constituencies, in many cases an unduly small district that would give the group one representative could be constructed at the point of maximum population concentration. Although the group might still be underrepresented in relation to the number of its supporters, that underrepresentation would be a result of the basic commitment to geographically based representation. Even where a group existed solely as a concentrated political entity, one might decide to create a smaller district as an alternative to no representation at all.

54 Id. p.1249.

55 Id. p.1284.
The “one-person, one-vote” view of apportionment has determined reapportionment since *Reynolds* and was concurrently the foundation for Texas courts’ interpretation of the county line rule, and the cause for multiple exceptions thereto.

**B. Kilgarlin v. Martin (1966)**

Texas Attorney General Waggoner Carr, in a letter to the Speaker of the Texas House of Representatives, dated May 19, 1965, offered the opinion that, “should the keeping of counties intact result in a violation of the Supreme Court ‘one man, one vote’ rule, then the county lines must be crossed but only to the extent necessary to carry out the mandate of the Supreme Court. In all other instances, county lines must remain intact and multi-county districts or flotorial (or floterial) districts be formed by the joining of complete and contiguous counties.”

The county line rule was reaffirmed as an interpretation of Article III, §26 of the Texas Constitution by the Houston federal district court in *Kilgarlin v. Martin*, in response to the legislature’s reapportionment plan using flotorial districts.

In devising the district plan at issue in *Kilgarlin*, the Chair of the House Committee on Congressional and Legislative Districts, Rep. Gus Mutscher, encountered the problem of counties with populations deserving fractional representation. Mutscher explained the logic of the committee: “The committee at first thought the proper way to proceed in such a case was to take the excess population of the county and combine it with a smaller adjoining county. However, the state Attorney General advised the committee that such a course would violate Article III, Section 26 of the Texas Constitution.”

The court in *Kilgarlin* argued that: “The desire to maintain the integrity of a political subdivision such as a county is a legitimate aim for a state, so long as the resulting plan does not contain substantial population disparities.” The legitimacy of multi-member districts was

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57 The Supreme Court in *Davis v. Mann* (1964) defined the term “floterial district” in a footnote as “a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned.”


justified by “a desire to avoid cutting county lines, which would violate Article III, Section 26 of the Texas Constitution, except where necessary to satisfy the Reynolds standard.” The court also mentioned the vagueness and difficulty “of obtaining adequate and accurate legal descriptions of districts smaller than county size.”

Further, the court in Kilgarlin concurred with the Attorney General’s interpretation of Article III, §26 as embodying “the State policy to maintain the integrity of counties and county lines” in terms of electoral districting, and “that such is a rational policy.” The court noted that, “the Committee found it necessary to use flotorial districts, and it reflects their computation of the deviations of populations in such districts from the population of an ideal district.”

The U.S. Supreme Court eventually ruled flotorial districts as a violation of the “one-person, one-vote” requirement. Kilgarlin v. Hill (1967).


The Texas Supreme Court in Smith v. Craddick interpreted Art. III, §26 in a similar fashion as Kilgarlin: “the district lines shall follow county boundaries and the counties shall be contiguous. A county not entitled to its own representative must be joined to contiguous counties so as to achieve a district with the population total entitled to a representative. The exception to this mandate is that a county may be divided (county lines crossed) if to do so is necessary to comply with the equal population requirement of the Fourteenth Amendment.”

Smith nullified the dictate that the only remedy for surplus population was to merge contiguous counties, while ruling permissible the joining of a portion of a county with a surplus population with contiguous area of another county, “for example, if a county has 100,000

60 Kilgarlin, 252 F.Supp 404.
61 Id.
62 Id. Appendix D: Waggoner Carr, Attorney General of Texas, Supreme Court, May 19, 1965, to Hon.Ben Barnes, Speaker of the House: “Should the keeping of counties intact result in a violation of the Supreme Court “one man, one vote” rule, then the county lines must be violated but only to the extent necessary to carry out the mandate of the Supreme Court. In all other instances, county lines must remain intact and multi-county districts or flotorial districts be formed by the joining of complete and contiguous counties.”
63 Kilgarlin, 252 F.Supp 404.
65 Smith v. Craddick, 471 S.W. 2d 375, 377 (Tex. 1971).
population, and if a district of 75,000 population is formed wholly within that county, the county is given its district, and the area wherein the 25,000 live may be joined to a contiguous area.  

Given these considerations, Smith rejected the 62nd Legislature’s districting plan in 1971 because it cut the boundaries of thirty-three counties and had forty-three districts with “only a portion of one or more counties with the contiguous county or counties.”  

The Texas Supreme Court in Clements v. Valles summarized and solidified its position:

In Smith v. Craddick … we declared a statute redrawing the representative districts of the state invalid for its “wholesale cutting” of county lines in violation of Section 26. The boundaries of thirty-three counties were cut under the terms of the statute, eighteen of which had less than sufficient population to form a separate representative district. We noted that although the burden is on one attacking an act to establish its invalidity, once it is established that the statute violated Article III, §26 of the constitution by cutting county lines, the proponents were then required to justify the redistricting plan by presenting evidence that the cutting of county lines was necessary to satisfy the requirements of equal representation. We found that the provisions of the statute violated the constitution because appellants (state and local officials) failed to present evidence that the cutting of county lines was justified to comply with the equal population requirement of the Fourteenth Amendment.  

While never directly mentioned or defended by the Attorney General or the courts in Kilgarlin, Smith, or Clements beyond reference to the Texas Constitution, there are various arguments for the important role of county lines when it comes to reapportionment which Reynolds and some out-of-state cases present, discussed later in this memo.

D. Thornburg v. Gingles (1986)

The U.S. Supreme Court in Thornburg v. Gingles decided that a minority group in a multi-member district must show, as a threshold matter, that it is sufficiently large and

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66 Id. at 378
67 Id.
69 State and Federal Law Governing Redistricting in Texas, supra n.4, p.147: Preserving the integrity of counties in redistricting promotes several significant state interests. Each county has its own identifiable representative or delegation of representatives, an important factor in a state in which a significant amount of legislation directly affects individual counties and county government. The natural constituencies and communities of interest that form within a county are not divided. Voter confusion regarding district boundaries is minimized, and administering elections, organizing constituencies, and conducting campaigns are facilitated. In addition, the opportunity for gerrymandering is limited.
geographically compact enough to constitute a majority in a single-member district to sustain a challenge to a redistricting plan. “Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.”

Given the generally random formation of county lines, compact communities of minority citizens that exist across county lines certainly may have a cognizable injury claim against the county line rule.

**E. Shaw v. Reno (1993)**

The U.S. Supreme Court ruled in *Shaw v. Reno* that race-based redistricting must be held to the strict scrutiny standard. North Carolina drew extremely irregular districts in order to create two majority-black districts. These districts, one of which was compared to a “Rorschach ink-blot test,” and the other (160 miles long), to a snake winding throughout the state, sometimes so narrow that “if you drove down the interstate with both car doors open, you’d kill most of the people in the district,” as one legislator quipped in the *Washington Post.*

The district lines at question were the second iteration of districts after the U.S. Attorney General had objected to the first round of district boundaries that only created one majority-minority district under the Voting Rights Act.

Using the preclearance provision under Section 5 of the VRA, the Attorney General ruled that two majority-minority districts could be drawn. The Attorney General also believed the legislature could have created another majority-minority district by using boundary lines “no more irregular than [those] found elsewhere in the proposed plan.” The districts that the legislature then drew the second time then were alleged to be an unconstitutional racial gerrymander without the consideration of “compactness, contiguousness, geographical boundaries, or political subdivisions.”

A three-judge panel had previously dismissed the complaint based on *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (1977), which tested discrimination in the creation of a majority-minority district by the district’s dilution or canceling of other groups’

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72 *Id.* at 635.
73 *Id.* at 637.
voting strength. In Shaw, the question was whether the majority-minority districts diluted or canceled white voting strength.74

The Supreme Court noted that constant vigilance is necessary to identify and eliminate the subtle instruments of racial discrimination:

Ostensibly race-neutral devices such as literacy tests with "grandfather" clauses and "good character" provisos were devised to deprive black voters of the franchise. Another of the weapons in the States' arsenal was the racial gerrymander - "the deliberate and arbitrary distortion of district boundaries... for [racial] purposes." In the 1870's, for example, opponents of Reconstruction in Mississippi "concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." Some 90 years later, Alabama redefined the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in a manner that was alleged to exclude black voters, and only black voters, from the city limits.75

A wide variety of practices developed to racially discriminate in the franchise, even using the "one-person, one-vote" principle such as with discriminatory multimember, flotorial, and at-large electoral districts.76 Even though the districts focused on by the appellants in Shaw resembled those constructed by legislatures unhappy with Reconstruction in the 1870s, the purpose of those districts was the opposite. The appellants did not argue that white voting rights were degraded, but that the deliberate racial districting "violated their right to participate in a color-blind electoral process."77 What was at issue was the irregular shape of the district insofar as it could only rationally be understood as an effort to racially district without "regard for traditional districting principles, and without sufficiently compelling justification."78

The risk of racial tunnel vision is countered by the burden of compelling government interest. State policy based on race must further a compelling state interest to comply with the standard of strict scrutiny. Shaw issued a warning about race-dependent policy:

74 Id. at 638.
77 Shaw, 509 U.S. at 642
78 Id.
No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect because, "[a]bsent searching judicial inquiry.... there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Richmond v. J. A. Croson Co., 488 U. S. 469, 493 (1989) (plurality opinion); id. at 520 (Scalia, J., concurring in judgment); see also UJO, 430 U. S. at 172 (Brennan, J., concurring in part) ("[A] purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries").

Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U. S. 81, 100 (1943). Accord, Loving v. Virginia, 388 U. S. 1, 11 (1967). They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. Croson, supra, at 493 (plurality opinion); UJO, supra, at 173 (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs"). Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.

Given this line of reasoning, district boundaries that cannot be explained on compelling grounds other than race are subject to the same death knell as other governmental policies based on race.

What furthers a compelling state interest when it comes to redistricting? The clear first priority is mathematical equality according to the U.S. Supreme Court; but, when that can be achieved in a variety of ways, what comes next? Compactness? Geography? Age? Economics? Religion? Political views? Minority rights? Political subdivisions?

Shaw decided that: “appearances do matter.”

79 Id. at 642-45
80 Id. at 647. Explained by the majority in Shaw:

We believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere
Justice Douglas in his dissent to Wright v. Rockefeller (1964) explains the pernicious message racial districting:

Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here. 376 U.S. at 66-67.

Shaw decided that extreme instances of racial gerrymandering even for proper reasons in the Court’s eyes, were equivalent to segregated voting segments: "redistricting legislation [is unconstitutional if it] is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."81

However, in dissent, Justice White argued that the appellants had not presented a cognizable injury stemming from the majority-minority districts created by the legislature, which did allow the first black representatives to be elected from North Carolina. The decision of which redistricting principles to prioritize carries significant political weight, White explained:

The other part of the majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts. Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful indicator that some form of gerrymandering (racial or other) might have taken place and that "something may be amiss." Karcher v. Daggett, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) .... Disregard for geographic divisions

as impermissible racial stereotypes. See, e.g., Holland v. Illinois, 493 U.S. 474, 484, n.2 (1990) ("[A] prosecutor's assumption that a black juror may be presumed to be partial simply because he is black ... violates the Equal Protection Clause" (internal quotation marks omitted)); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. Id. at 647-48.

81 Shaw, 509 U.S. at 1309.
and compactness often goes hand in hand with partisan gerrymandering. See Karcher, supra, at 776 (White, J., dissenting); Wells v. Rockefeller, 394 U. S. 542, 554 (1969) (White, J., dissenting).

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snakelike, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." Gaffney, 412 U. S. at 752, n.18; see ante, at 647. It is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one. By focusing on looks rather than impact, the majority "immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition." R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459 (1968). Limited by its own terms to cases involving unusually shaped districts, the Court's approach nonetheless will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation. This will be true in areas where the minority population is geographically dispersed. It also will be true where the minority population is not scattered but, for reasons unrelated to race — for example incumbency protection — the State would rather not create the majority-minority district in its most "obvious" location. When, as is the case here, the creation of a majority-minority district does not unfairly minimize the voting power of any other group, the Constitution does not justify, much less mandate, such obstruction. We said as much in Gaffney:

"[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U. S. at 754.

It certainly does not seem to be the case that the district boundaries drawn by H329 in Lubbock, Nueces, and Ector/Midland counties are the kind of move toward political segregation warned of in Shaw.

Have the traditional redistricting principles been co-opted and used to disenfranchise Hispanics in the latest Texas redistricting? Is there a cognizable injury that minority voters can

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82 Id. 509 US 630, n.9: "As has been remarked, "[d]ragons, bacon strips, dumbbells and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an
claim, based on the interim district map, that would be resolved with the adoption of H329? 
Shaw should give this claim credibility because of the history of Texas and the recent elimination of Section 5 of the VRA. The VRA was the only reason North Carolina got two majority-minority districts in the first place, instead of the one originally devised by the legislature.

**F. Vera v. Richards (1994)**

In *Vera v. Richards* a federal district court in Houston considered a complaint that the 1991 Congressional Redistricting Plan "represents an unconstitutional effort to segregate the races for purposes of voting: (1) without regard for traditional districting principles, including compactness, contiguousness [sic], consistency with existing political, economic, societal, governmental or jurisdictional boundaries; (2) without sufficiently compelling justification; and (3) without `narrow tailoring' as required by the United States Constitution."\(^{83}\)

The Texas legislature seems not to be bound by Article III, §26 when drawing congressional districts. The court in *Vera* concurred, with minor reservations, with Texas’s defense that “its districts cannot be unconstitutionally bizarre in shape because Texas does not have and never has used traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions."\(^{84}\) The court


\(^{84}\) *Id.* at 1333. This point is contested in footnote 43:

> Traditional, objective districting criteria are a concomitant part of truly "representative" single member districting plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can no longer importune their Congressman and expect to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

In influencing the Legislature to draw districts that ensured their electoral success, Texas Congressional incumbents apparently foreswore these principles and opted to rely on their name recognition and a small base of zealous supporters to gain re-election.
continued, “It is true that Texas has no constitutional or statutory constraints on creating legislative districts. However... since 1960, the principle of assigning at least one Congressional seat to each major city has been followed, satisfying obvious geographical and community interests.”

_Vera_ found that many districts in the 1991 redistricting plan cut county lines based on racial data:

Lubbock County is a prime example of this trait among these districts. While the part of Lubbock County that was split into Congressional District 13 – occupied by Democrat Bill Sarpalius – contained 77.4% African-American and Hispanic population, the part split into Republican Larry Combest’s District 19 contained only 19.2% African-American and Hispanic population.

The Chair of the Subcommittee on Congressional Districts, Senator Eddie Bernice Johnson explained the reason for the county split – “to remove that Black community into a district where they can have more impact.”

The Midland and Ector Counties split had similar demographic data as the Lubbock County split, which Senator Johnson defended as a way to protect minorities: “We made sure we had the minorities’ input on these areas. I have heard comments about somebody in Midland, what have you. We were responding to minorities. They wanted to be certain places. They didn't

more pernicious tendency would seem to follow their incumbent gerrymandering: as the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles.

Vera, 861 F.Supp at 1333-34. Also see footnote 9:

Ted Lyon, a former member of the Texas House and Senate involved in the 1980 and 1990 redistricting battles, asserted that "[C]ompactness is not a 'traditional districting principle' in Texas. For the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can. There is no reason why the State should now have to draw compact majority-minority districts when it has shown no interest over the years in drawing compact majority-white districts." Lawson Exh. 14, ¶ 17; see id. at ¶ 12 ("Neither pretty districts nor compact districts are a priority in Texas, and they have not been since well before I was involved in districting, if ever.").

Id. at 1326.

Id. at 1326 (U.S. Exh. 1092 at 21).
always feel free, they tell me, to even say that to anyone else, but they felt free to tell me. And we were responsive to them.”

Some of the most compelling evidence in support of county splits was anecdotal, coming from town meetings and community outreach by the redistricting committees. People’s opinions about what they wanted their district to look and behave like should not be undervalued.

Senator Johnson defended county splits in the same way as she defended the city split of Amarillo. In response to a question over why the black population of Amarillo was moved into the 13th Congressional District, Johnson responded, “that they would rather be in Potter and have a Representative that they could relate to best and the – the respect to the other one in Randall County, and they felt that with the two the various populations could communicate well and they had two good team members to look after their interests.”

G. The Texas Equality of Rights Amendment

A law review article presents the current analysis of how Tex. Const. art I §3a applies in the redistricting context and offers at least as much protection as Reynolds v. Sims, if not more.

Were it to conflict with Tex. Const. III, §26, it would control because it is later in time and also because it has greater specificity.

H. County Line Cutting When Necessary

Attachments B and C show the times over the years when it has been necessary to cut county lines when creating districts so to comport with federal law. There are no studies or reports complaining of disenfranchisement as a result.

IV. Arguments & Rejoinders

A. Texas Constitution (Art. III, §26)

While observance of the county line rule does on its face align with the words of Article III, Section 26, of the Texas Constitution, the courts’ interpretation of the rule misunderstands the framers’ intent. When formulating the phrasing in the 1875 Constitutional Convention, counties were still very much in a state of flux. Boundaries were frequently disputed and multiple counties were formed each year. The framers assumed only two strategies would be

88 Id. at 1327 (Plaintiff Exh. 8B at 243).
89 Id. at 1328.
used to account for population distribution, a fact they had to account for given the limited numbers of representatives allocated to Texas. The first strategy was the use of flotorial districts, and the second, at-large districting.

The county line rule as it exists today is an adherence to a principle never considered or advocated by the framers of the Texas Constitution. The framers advocated the use of a convenient districting paradigm and at the time the only possible convenient way of sectioning the state into electoral districts was to use preexisting county boundaries, at least without a huge survey project that seemed both unnecessary and was costly. The framers of the Texas Constitution never held county lines as sacrosanct in and of themselves in the way the current understanding of the rule implies. Flotorial and at-large districting both have significant evidence against them as tools of racial vote dilution, concerns the framers could not have foreseen.

Convenient districting was the intention when the county line rule was formulated in 1875. This concern is no longer relevant. Computer software and satellite imagery revolutionized the task of redistricting and give legislatures unprecedented ability to create a fair and accurate map that allows all populations the ability to elect the candidate of their choice.

David Hanna, a member of the Texas Legislative Council and an adamant believer in the county line rule, said during his testimony at a Texas legislative redistricting hearing on March 1, 2011, that the way districting is done now differs greatly from when the constitution was written. The rule is a remnant of a time when county representation was prioritized over popular representation, and a good reapportionment (the handful of times it happened from 1876-1933, and then the break until 1971) was judged by having representatives from a fair array of county seats. At the time of drafting the constitution and thereafter, legislators assumed flotorial districts would be used to comply with the county line rule, but that was long before the concept of “one-person, one-vote” developed and even longer before the Voting Rights Act became law. And long before, Art. I §3a was added to the Constitution to assure equality under the law.

B. Identifiable Representative and Grassroots Organization

The idea that an individual citizen has an accurate understanding of county boundaries is misguided. County boundaries are rarely relevant to an individual citizen’s everyday life, which means there is a good chance the average person has never looked at the boundaries of his or her county on a map. Correlating a person’s ability to identify his or her representative with an
accurate understanding of district limits, or county boundaries could easily be disproved using a simple survey or study.

There is no evidence at all that grassroots activity is weaker in internal and bizarre districts in counties like Bexar and Tarrant compared with compact and more readily discernable districts.

C. Voter Confusion

This argument has been previously overturned in *Reynolds*, and fails to meet the spit test because counties or parts of counties are drawn within districts in bizarre shapes for Congressional districts or, if the counties are large enough, have bizarrely drawn districts within them.

D. Counties as Neutral

The maintenance of whole counties is neutral, since it does not distinguish between or take into account political, racial, social, economic, or regional interests.

This is an appealing argument if taken at face value. However, the point of this section of the lawsuit is to prove that county lines are not neutral and being used as a subtle form of racial discrimination. When formed, the lines may not have had discriminatory intent. However, over time they sometimes have functioned with that purpose even if their form has stayed the same.

E. Gerrymandering

The county line rule allows for extreme gerrymandering within county lines. The criteria of compactness, understandable shape, geography, and respect for communities of interest can be pushed aside inside the counties.

Computer modeling makes gerrymandering immediately understandable and arguable. The lines of today are limited in their potential fairness in terms of adherence to “one person, one vote” and Section 2 of the VRA. Theoretically, more fair and accurate counties could be drawn around real and logical communities with less population deviation.

David Hanna of the Texas Legislative Council noted a clear example of the conflicting policies of using population deviation and ideal district numbers. Ellis County had to add population to come close to the ideal district population but could not add any contiguous county without going over the 10% deviation. A county would need to be cut in order to achieve ideal district population, with the only real possibilities being Dallas or Tarrant Counties. This simple
scenario played out dozens of times over the last three redistricting cycles and proves that district lines can cross county lines without negative consequences.

If the math dictates, any county can be cut. There are no sacred boundaries. Especially in East Texas, there are a limited number of ways to district and cut counties have been and will be necessary.

**F. Geography**

Grand Prairie is a prime example of the geographic inconsistency of the county line rule. The rule was developed during a time when the population centers were few and far between and it was believed that the county seat would be the center of growth. Texas now has more than 25 million citizens and grew by almost 4.3 million people between 2000 and 2010; it is a very different state than when the county line rule was codified in the mid 19th century. Grand Prairie lies in three counties, Ellis, Dallas, and Tarrant Counties. It is cut into six districts by the interim plan, Nos. 10, 101, 92, 105, 104, and 111. Examples such as Grand Prairie flip many of the arguments for the county line rule. Six different people represent this unified community of just over 178,000 people, which is within 10% of the ideal district size of a 167,637. Grand Prairie could form a single, compact, politically understandable, and mathematically justified district in absence of the county line rule.
V. Conclusion

The county line rule is imbedded in Texas’s redistricting protocol. In “The State and Federal Law Governing Redistricting in Texas,” a report meant to educate legislators taking on the task of redistricting, included a forward looking statement about the county line rule that points to further use of the rule as computer models allow more districting scenarios.91

Protection of minority rights may be a justifiable specific explanation for selective and principled ignoring of Art. III, §26, where there exists a cognizable injury and evidence of minority bloc voting.92

91 State and Federal Law Governing Redistricting in Texas, p.148:
Because violations of the county line rule were so egregious in both the 1971 and 1981 house plans invalidated in Craddick and Valles, respectively, the Texas Supreme Court did not have to develop detailed guidelines for balancing the rule and federal law. It is clear from this prior litigation under Section 26 that a plaintiff’s ability to draw alternative plans that more closely comply with the valid provisions of Section 26 while complying with federal law is a key factor in determining whether a house plan adopted by the legislature or Legislative Redistricting Board is valid. It is not entirely clear what criteria will be used to judge whether alternative plans introduced by plaintiffs challenging a legislative plan comply with the county line rule to a greater degree than the legislative plan. A court might compare the number of counties divided in violation of Section 26, the number of districts that do not comply with Section 26, or the number of persons affected by the violation of Section 26. New technology enables persons wishing to challenge the 2011 house plan to produce a large number of alternative plans. The existence of this technology increases the burden on the legislature or Legislative Redistricting Board to justify violation of Section 26, a burden the state was unable to satisfy in the 1971 and 1981 litigation. The redistricting bodies must be fully cognizant of the need to analyze proposed house plans against the apparent dictates of Section 26 and develop specific explanations for why each apparent violation of Section 26, if any, is required by federal law. In addition, in striking a balance between state and federal law, the redistricting bodies should be able to articulate the reasons for their actions and should apply the criteria established for the application of Section 26 consistently in any house plan that is adopted.

92 Thornburg v. Gingles, 478 US 30, 35 (1986). The “results test” was established and defined in White v. Regester, 412 U. S. 755 (1973). The minority autonomy standard was explained in the footnotes 16 and 17 of Thornburg:

[16] In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

[17] The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives
TEXAS CONSTITUTIONAL PROVISIONS

Texas Constitution, Article III -- Legislative Department


The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

Texas Constitution, Article IX -- Counties

[in the original 1876 constitution]

Sec. 1. The Legislature shall have power to create counties for the convenience of the people, subject to the following provisions:

First. In the territory of the State exterior to all counties now existing, no new counties shall be created with a less area than nine hundred square miles, in a square form, unless prevented by pre-existing boundary lines. Should the State lines render this impracticable in border counties, the area may be less. The territory referred to may, at any time, in whole or in part, be divided into counties in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained: "To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates .... [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." Blacksher & Menefee 55-56 (footnotes omitted; emphasis added).
in advance of population, and attached, for judicial and land surveying purposes, to the most convenient organized county or counties.

Second. Within the territory of any county or counties not existing no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may, in whole or in part, be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing may be created by a two-thirds vote of each house of the Legislature, taken by yeas and nays, and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing of the county from which it was taken, in such manner as may be prescribed by law.

Third. No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each.

[Transcription, errors in original preserved]

[as amended in 1991]

Sec. 1. CREATION OF COUNTIES. The Legislature shall have power to create counties for the convenience of the people subject to the following provisions:

(1) Within the territory of any county or counties, no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may in whole or in part be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing, may be created by a two-thirds vote of each House of the Legislature, taken by yeas and nays and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to, or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing of the county from which it was taken, in such manner as may be prescribed by law.

(2) No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the voters of both counties, and shall have received a majority of those voting on the question in each.
**Government Documents, Letters, Interviews, and Websites**


**Court Cases**

*Del Valle ISD v. López*, 863 S.W.2d 507 (Tex. App. - Austin 1993, writ denied)


Smith v. Craddick, 471 S.W.2d 375 (Tex. Supreme Court 1971).

Terrazas v. Ramírez, 829 S.W.2d 712 (Tex. 1991)