Finding the Sweet Spot: Deference in Redistricting

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> "Now, I do want to talk about the deer with two antlers, because what that ignores is that in the benchmark plan, the deer had one antler and an antenna."
>
> ~Paul Clement, attorney for the State of Texas, describing the design of a district in El Paso in oral argument for *Perry v. Perez*[1]

I. INTRODUCTION

Redistricting plays a major role in American democracy. Census after census, map drawers (most often legislators) draw districts and courts grapple with what kind of supervisory role they should play in redistricting. Even if the public is interested in the process and wants to hold map-drawing legislators accountable for redistricting decisions, self-interested drawers can redistrict around major anticipated threats. Thus, complaints often have to be channeled through the courts.

When evaluating whether a districting plan contains any constitutional or statutory violations, the U.S. Supreme Court's analysis can be fairly fact-intensive. But with respect to when and how to defer to the map-drawing entity, the Court's approach is often couched in abstract terms about interests and policies. This approach may not be altogether helpful when the practical reality sets in—at the end of the day, lines must be drawn.

The Court recently held in the per curiam opinion, *Perry v. Perez*, that a district court must defer to legislative policies in drawing an interim map, to the extent that those policies do not violate the U.S. Constitution or the Voting Rights Act.[2] This concept is not new, and neither is the Court's presentation of the district court's task as one that sounds almost simple.[3] But in the redistricting context, the practical application of deference is anything but simple.

Redistricting involves a variety of legislative policy choices. Some policies may be required by state constitutional mandate. Others may be

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[1] Transcript of Oral Argument at 20, Perry v. Perez, 132 S. Ct. 934 (2012) (per curiam) (Nos. 11-713, 11-714, 11-715).

[2] *Perez*, 132 S. Ct. at 941.

[3] *See, e.g.*, Upham v. Seamon, 456 U.S. 37, 40–41 (1982) (per curiam) ("[A] court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan.").

applied to the map but never recorded as something the legislature intended to do. Some may be chosen for parts of the map but not applied consistently statewide. Others still may be partly motivated by a discriminatory intent or may result in a disparately negative effect on minority communities. And of course, some jurisdictions are covered under Section 5 of the Voting Rights Act—an extraordinary burden-shifting remedy that has become somewhat controversial in recent years. How does a district court defer to legislative policy choices in the midst of these various circumstances, while also adequately accounting for the rights that should be protected by the Constitution and the Voting Rights Act?

Parsing legislative choices from an adopted map and distilling them into a set of policies to which district courts should defer is a difficult task. But rather than discussing deference in redistricting as if it were a binary choice (to defer or not to defer), this Note proposes consideration of various models along a deference spectrum. A concept discussed in a variety of other jurisprudential contexts,[4] the notion of different models of deference along a spectrum is helpful—indeed, necessary—for understanding how courts defer, and how they ought to defer, in various redistricting contexts. On one end of the deference spectrum is complete deference—for example, using a newly adopted map as an interim map without regard to any likely or actual constitutional or statutory infirmities. At the other end is zero deference—the court draws whatever map it chooses without any regard for the policies of an adopted map. The appropriate deference model is likely somewhere in between these two extremes,[5] but there are a number of options in the middle. The key is in finding the sweet spot, and recognizing that perhaps the presence of certain circumstances ought to shift that sweet spot in one direction or the other along the deference spectrum.

First, this Note will briefly explore the normative arguments on each side of the deference debate and discuss some overarching considerations to keep in mind. Given the tenuous foothold of racial gerrymandering claims[6] and partisan gerrymandering claims,[7] this Note

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[4] *See generally, e.g.*, Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003) (proposal for a deference continuum in international tribunal decisions); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (discussion of alternative deference standards with respect to agency interpretations of statutes). *See also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 319–23 (2002) (discussing how the political question doctrine is "part of a spectrum of deference to political branches' [constitutional interpretations]").

[5] *Perez*, 132 S. Ct. at 941 ("[A] district court should take guidance from the State's recently enacted plan in drafting an interim plan. . . . 'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'") (quoting Abrams v. Johnson, 521 U.S. 74, 79 (1997)).

[6] *See infra* Part II.C.3 for an abbreviated discussion on race-based policy decisions in redistricting.

[7] *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality op.) (stating that claims of excessive partisanship in redistricting are nonjusticiable); *but see* Cox v. Larios, 542 U.S. 947, 947 (2004) (summarily affirming lower court decision to strike down partisan districting plan on one-person-one-vote grounds).

focuses primarily on statutory claims under the Voting Rights Act and vote dilution claims under the Constitution. This Note also, at times, refers to the map-drawing entity as the legislature—this is merely meant as shorthand for the map-drawing entity, even though there are several states that employ a redistricting commission or hybrid system.[8]

This Note will explore how some of these models are already implicit in courts' existing approaches, and it will evaluate each of the models, highlighting some considerations specific to redistricting that seem to be (or perhaps should be) determinative in evaluating which model to use. Finally, this Note will discuss how the deference question could have an important role in the debate over the constitutionality of Section 5.

II. COMPETING IDEALS

The American democracy that we experience today is a constructed reality—"the outcome of legal rules and institutional frameworks, rather than some entity such as 'We the People' that preexists these structural choices."[9] Two structural mechanisms within American democracy are at the root of the normative arguments for and against deference in the context of redistricting, each one aimed at preventing tyranny for future generations. One is systematic disbursement of power among the three branches of government (with built-in checks and balances), as well as between federal and state government.[10] The other is protection of individual rights—creation of areas that are primarily off-limits to government power, providing protection against tyranny in the traditional sense, as well as protection against the tyranny of the majority.[11]

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[8] For the 2010 redistricting round, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington gave redistricting commissions primary responsibility for drawing state legislative maps. Some states (Connecticut, Illinois, Maine, Mississippi, Oklahoma, Texas, and Vermont) instead used commissions on an advisory basis to draw or serve as a backup map drawer of their state legislative maps, while others (Arizona, Connecticut, Hawaii, Idaho, Indiana, Montana, New Jersey, and Washington) used commissions as backup map drawers for congressional redistricting. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 163–71 (Nov. 2009), *available at* http://redistrictingonline.org/uploads/Redistrictinglaw2010.pdf.

[9] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1128 (3d ed. 2007) (quoting U.S. CONST. pmbl.).

[10] *See generally* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 2003) (arguing for a government with separate branches controlled by checks and balances).

[11] *See* Letter from Thomas Jefferson to James Madison (March 15, 1789), *in* 2 THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 442 (Thomas Jefferson Randolph ed., 1829) ("[T]he declaration [Bill] of [R]ights is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. But the good, in this instance, vastly outweighs the evil."); THE FEDERALIST NO. 10, at 72 (James Madison) ("[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.").

A. Merits of Deference

The disbursement-of-power mechanism of checks and balances provides a key pro-deference argument. Courts have long been uneasy with entering the "political thicket," as issues in this arena are generally reserved for states (or occasionally Congress).[12] Not only are courts concerned about separation of powers and overstepping the proper role of the judiciary, but federal courts are also more and more concerned about basic federalism principles and states maintaining their primary responsibility over this particular area of law.[13]

In addition, courts are concerned about a lack of institutional competence in redistricting.[14] This is an area in which the judiciary views its own branch as, "at best, ill-suited" to evaluate competing policies and make decisions.[15] This competency concern is a major reason that courts have continually emphasized that redistricting is a power and duty primarily reserved for state legislatures.[16] As such, "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."[17]

Furthermore, the question of what remedy is appropriate is also a thorny issue for courts. Courts have entertained a wide range of remedial options, from declaring a map invalid without ordering a remedy[18] to ordering cumulative voting,[19] none of which seem entirely satisfactory.

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[12] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").

[13] *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 557 U.S. 193, 202–04 (2009) (discussing the federalism concerns implicated by enforcing Section 5 of the Voting Rights Act).

[14] Abrams v. Johnson, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); ISSACHAROFF ET AL., *supra* note 9, at 117.

[15] Perry v. Perez, 132 S. Ct. 934, 941 (2012) (per curiam).

[16] Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); White v. Weiser, 412 U.S. 783, 795 (1973) (holding that a federal district court should "honor state policies in the context of congressional reapportionment"); Whitcomb v. Chavis, 403 U.S. 124, 160 (1971) (opining that the district court should not "intrude upon state policy any more than necessary" in crafting a reapportionment plan). *See* Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination.").

[17] Growe v. Emison, 507 U.S. 25, 34 (1993).

[18] Colegrove v. Green, 328 U.S. 549, 553 (1946) ("Of course no court can affirmatively re-map [state] districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave [the state] undistricted and to bring into operation, if the [state] legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket.").

[19] McCoy v. Chi. Heights, 6 F. Supp. 2d 973, 985 (N.D. Ill. 1998), *rev'd sub nom.* Harper v. City of Chi. Heights, 223 F.3d 593 (7th Cir. 2000). Cumulative voting is an alternative voting system in which a voter casts as many votes as there are seats to fill, but the voter can choose how to allocate those votes among candidates; in other words, the voter is able to "cumulate" votes behind the candidate(s) that voter most prefers. Richard Briffault, *Electing Delegates to a State*

This problem of the appropriate remedy further supports the institutional competence argument as to why courts should defer.

B. Concerns About Deference

Contrast the considerations fueling courts' continued emphasis on deference with the concerns underlying deference and the compelling interests that may receive short shrift if courts were to always defer.

First, let us consider what, exactly, courts are deferring to. Certainly, there are general legislative policy choices underlying redistricting decisions. But courts and the public are very much aware that purely policy-based decisions are not the only motivations behind redistricting. American democracy does not have a non-partisan approach to redistricting, and given our effectively two-party system, combined with the fact that most states leave the task to state legislators, it is no surprise that partisan motivations typically play a major role in redistricting.

But perhaps of even greater concern is the self-interest at stake in the outcome. Even when legislators tasked with redistricting are drawing districts for legislative bodies other than their own, self-interest in the outcome is still very much present. This could be because of a desire to draw a district for a different office that would be easy for a drawer to win, or it could even be due to a desire to garner clout with incumbent and incoming legislators who will benefit from the drafting.

Redistricting, therefore, is a setting in which a self-interested faction has the potential to commandeer the political process.[20] Some scholars argue that courts should therefore not defer in voting rights cases, because the democratic process cannot work in light of the self-interested faction.[21]

Furthermore, voting rights have come to rest on an individual rights premise. This is because courts have come to treat the right to vote as a fundamental right protected by the Equal Protection Clause.[22] There is ample debate over whether voting rights cases should be grounded in a

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Constitutional Convention: Some Legal and Policy Issues, 36 RUTGERS L.J. 1125, 1145 (2005).

[20] ISSACHAROFF ET AL., *supra* note 9, at 133 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980)).

[21] *See, e.g., id. Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (noting that more rigorous judicial scrutiny may be necessary when the challenged legislation restricts "[the] political processes which can ordinarily be expected to bring about the repeal of undesirable legislation").

[22] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in [*Yick Wo v. Hopkins*], the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.'" (quoting 118 U.S. 356, 370 (1886)).

rights-based theory or a structural theory[23] (a topic not broached in this Note), but regardless of whether it is the best jurisprudential approach, courts have chosen the rights-based approach.[24]

Given the history and context of voting rights cases, it makes sense that courts would emphasize the rights element. The Fifteenth Amendment directs that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[25] But almost 100 years after the Amendment was ratified, its guarantee was far from reality. Eventually the pressure for courts to apply judicial review to these cases outweighed the reluctance to enter the political thicket.[26]

But in 1965, even after judicial intervention and victories for plaintiffs, certain states were still making rampant use of literacy tests, poll taxes, moral character requirements, and other devices, as part of "a calculated plan to deprive Negroes of their right to vote."[27] Congress could no longer ignore the reality that certain states were taking extreme and overt measures to disenfranchise and dilute the votes of racial minorities.[28] The case-by-case approach to stopping "those determined to circumvent the guarantees of the [Fifteenth A]mendment" proved futile—Congress (and President Johnson) recognized the need to pass legislation with teeth.[29] Thus, "almost a century after the Fifteenth Amendment was ratified, Congress passed the Voting Rights Act of 1965—with Section 5 at its core—in order 'to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.'"[30]

Section 5 of the Voting Rights Act provides an extraordinary remedy designed to address the serious, pervasive problems that the Fifteenth Amendment alone was not able to solve.[31] Shortly after its

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[23] *See, e.g.*, Pamela S. Karlan, *Politics By Other Means*, 85 VA. L. REV. 1697, 1717–19 (1999) (questioning the wisdom of the individual rights-based approach); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106–07 (2000) (arguing that the individual rights-based approach is incorrect and has produced negative results); Guy Uriel-Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)) (exploring the rights versus structure debate).

[24] Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("In a recent searching re-examination of the Equal Protection Clause, we held, as already noted that 'the opportunity for equal participation by all voters in the election of state legislators' is required. We decline to qualify that principle . . . . Our conclusion . . . is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." (citations omitted)).

[25] U.S. CONST. amend. XV, § 1.

[26] *See* Baker v. Carr, 369 U.S. 186, 210–11 (1962) (holding that whether a state's reapportionment deprived plaintiffs of equal protection was a justiciable question); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.")

[27] H.R. REP. NO. 89-439, at 12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443.

[28] *See id.* at 11 ("[T]he wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.").

[29] *Id.* at 4, 11.

[30] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) (citations omitted), *cert. granted*, 133 S. Ct. 594 (2012).

[31] *Id.* Section 5 shifts the burden to covered jurisdictions to demonstrate that a proposed voting

passage, the Court held that Section 5 was constitutional.[32] This holding was the result of a very deferential standard of review,[33] coupled with the serious realities of blatant disenfranchisement and vote dilution.[34] In order to address the rampant constitutional violations, Congress decided on an extraordinary remedy addressed at only a handful of jurisdictions, and the Court viewed that remedy as a perfectly rational decision in 1966.[35]

In light of this extraordinary remedy and the normative arguments against deference, what kind of deference should courts give jurisdictions covered by a statute intended to take some control away from states that have demonstrated a history of discriminatory voting practices? In discussing the various models of deference, I will address considerations unique to challenges of covered jurisdictions' maps and whether a different model of deference may be better suited for jurisdictions covered under Section 5.

Section 5 has become a subject of much debate today in the wake of the Court's sobering words about its constitutionality in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*)[36] and the Court's recent grant of certiorari in *Shelby County v. Holder*.[37] This Note is in no way intended to summarize or contribute to the debate over Section 5's constitutionality, but it will briefly discuss the interplay between the deference issue and the constitutionality of Section 5.

III. OVERARCHING CONSIDERATIONS

A. When Does the Deference Question Arise?

There are a number of situations in which courts have to consider whether or not to defer in redistricting. First, this question arises when courts are drawing permanent plans. A court may need to draw a permanent plan because it found a violation of some sort, and the map-drawing entity has not fixed the plan. Or a court may need to draw a

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change will not be retrogressive. 42 U.S.C. § 1973c(a) (2006).

[32] South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

[33] *Id.* at 324 ("The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

[34] *Id.* at 328 ("After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.").

[35] *Id.* at 324, 337.

[36] 557 U.S. 193 (2009).

[37] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) (citations omitted), *cert. granted*, 133 S. Ct. 594 (2012).

permanent plan because the entity tasked with redistricting failed to reach the necessary consensus, and thus, failed to adopt any map. If no new map was adopted, questions of deference then center around the benchmark plan (the map currently in use).

The deference question also arises when a court is tasked with drawing an interim plan. This situation occurs when time constraints necessitate the use of a map, but no legally enforceable map is available. Court-drawn interim plans often tend to become permanent plans. There are a variety of reasons this may occur—the most notable is that the legislators who would be responsible for drafting a new plan are now incumbents elected under the interim plan. The reality of interim plans often becoming permanent makes it all the more important for courts to get the interim map right.

The deference question may be further complicated by a case's procedural posture. As background, Section 5 requires that covered jurisdictions obtain approval for voting procedure changes before implementing them.[38] This approval must be obtained from either the Attorney General[39] or a three-judge panel in the U.S. District Court for the District of Columbia.[40] Meanwhile, Section 2[41] and constitutional challenges can be heard by any district court with jurisdiction.[42] Because the U.S. District Court for the District of Columbia has exclusive jurisdiction over preclearance suits,[43] no other court may prejudge the merits of a Section 5 case.[44] Should the possibility of dual litigation in two courts make the deference question more problematic if circumstances require an interim map to be drawn while preclearance is still pending? This was precisely the situation the Court in *Perez* faced, as the next section details.

Furthermore, questions of deference can arise even prior to the question of what remedy would be appropriate. Courts may discuss deference even in deciding whether to find a violation. While questions of deference in determining whether a violation has occurred are important, this Note focuses on questions of deference when courts are drawing interim or permanent maps.

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[38] 42 U.S.C. § 1973c(a) (2006).

[39] This does not require an affirmative stamp of approval by the Attorney General. It may be obtained implicitly if the covered jurisdiction submits the change to the Attorney General and the Attorney General does not interpose an objection within 60 days after the submission. *Id.*

[40] *Id.*

[41] Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* §1973.

[42] *Id.* § 1973a(c).

[43] *Id.* § 1973l(b).

[44] Perry v. Perez, 132 S. Ct. 934, 942 (2012) (per curiam).

B. *Upham v. Seamon* and *Perry v. Perez*

One cannot discuss deference in the redistricting context without discussing two important per curiam decisions by the Court—one decades old (*Upham v. Seamon*[45]), one very new (*Perry v. Perez*[46])—both arising out of Texas (a covered jurisdiction[47]).

In *Upham v. Seamon*, the Department of Justice denied preclearance to Texas's newly apportioned congressional map (Senate Bill 1), based on its objection to two contiguous districts in South Texas.[48] The three-judge panel from the Eastern District of Texas then redrew the map in an attempt to rectify the two districts that were the object of the Attorney General's objection.[49] But in addition to revising those two districts, the district court also changed the Dallas districts, while leaving all the map's other districts exactly the same as in Senate Bill 1.[50] The changes to the Dallas districts were made because one judge found the Dallas districts unconstitutional and another judge thought the Dallas districts did not meet the higher standard of population equality and racial fairness required for court-drawn maps.[51]

The Supreme Court held that without either a Department of Justice objection or a finding of a constitutional or statutory violation, the district court must defer to Senate Bill 1.[52] The Court held that the stricter standard that concerned the district court judge only applies to "remedies required by the nature and scope of the violation: 'The remedial powers of an equity court must be adequate to the task, but they are not unlimited.'"[53]

Perry v. Perez turned on what exactly *Upham* stands for today. As background, the 2010 census revealed that Texas's rapid growth resulted in four new congressional districts for the state.[54] The Texas legislature then adopted new maps for the state house, state senate, and U.S. Congress.[55] Rather than seeking preclearance from the Department of Justice, Texas opted for the alternative option of submitting those maps for a declaratory judgment in the U.S. District Court for the District of

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[45] 456 U.S. 37 (1982) (per curiam).

[46] 132 S. Ct. 934.

[47] 28 C.F.R. pt. 51 app. (2012).

[48] *Upham*, 456 U.S. at 38.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 39.

[52] *Id.* at 39–41.

[53] *Id.* at 42 (quoting Whitcomb v. Chavis, 425 U.S. 130, 161 (1976)).

[54] Perry v. Perez, 132 S. Ct. 934, 939 (2012) (per curiam).

[55] *Id.* The Texas legislature also adopted a new map for the Texas Board of Education, but that map was not at issue in *Perry v. Perez*. Texas v. United States, No. 11-1303, 2012 WL 3671924, at *95 n.1 (D.D.C. Aug. 28, 2012) (stating that Texas sought preclearance for its redistricting plan for the State Board of Education, and given that there was no opposition or Section 5 infirmity, preclearance for the plan was granted).

Columbia.[56] Meanwhile, challenges to the map were brought by several plaintiffs under Section 2 and the Constitution in the Western District of Texas.[57] As is customary,[58] the Texas district court withheld judgment pending resolution of the preclearance process;[59] but given the looming primary dates, the district court drew interim maps for the 2012 election.[60] The State of Texas requested and received a stay from the Supreme Court, based on the argument that the interim maps did not properly defer to the legislatively adopted maps.[61]

The State argued that the district court should have used the adopted maps as the interim maps unless the court found that some aspect of the maps were likely to violate the Voting Rights Act or the Constitution.[62] Counsel for the State argued that under *Upham*, "even when preclearance is denied with respect to certain districts, the State's legislatively enacted map remains entitled to deference, and any remedy must be narrowly tailored to correcting the legal defects in the challenged districts."[63]

The appellees argued that the district court acted appropriately, and that *Upham* is distinguishable. For one, the district court in *Perez* conducted a full trial on the Section 2 and constitutional challenges, whereas the district court in *Upham* conducted only a hearing.[64] Furthermore, unlike *Upham*, where the court had a specific objection detailing the two problematic districts, the *Perez* district court had no indication of what the Section 5 preclearance issues might be.[65]

In its per curiam opinion, the Supreme Court clarified the district court's role when an interim plan is necessary for a covered jurisdiction and there are concurrent challenges to the map at issue. *Perez* held that in this somewhat rare situation, the district court considering the Section 2

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[56] *Perez*, 132 S. Ct. at 939–40.

[57] *Id.* at 940.

[58] *See* Branch v. Smith, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with [Section 5], the district court 'err[s] in deciding the constitutional challenges to these acts.'" (quoting Connor v. Waller, 421 U.S. 656, 656 (1975) (per curiam))).

[59] *Perez*, 132 S. Ct. at 940.

[60] *Id.*

[61] *Id.*

[62] Brief for Appellants at 30, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715) ("The process the district court should have followed is straightforward: Texas'[s] legislatively enacted map, which is entitled to a presumption of good faith, must be used as the 'interim' map while preclearance is pending, unless the court makes a finding that some aspect of that plan is likely to violate the [Voting Rights Act] or the Constitution.").

[63] *Id.* at 36.

[64] *E.g.*, Brief for Appellees Texas State Conference of NAACP Branches, et al., and Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green at 15, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715).

[65] *E.g.*, *id.* at 15–16. The appellees argued that in *Upham*, because the Attorney General singled out two improperly drawn districts in violation of Section 5, that implied that the other districts were in compliance with Section 5; in contrast, appellees argued that in *Perry v. Perez*, it was unclear which parts of the plan complied with Section 5, and therefore, there was not a remainder of the map to which the district court could defer based on the Department of Justice's lack of objection. They suggested that the controlling precedent in the case was not *Upham* but instead *Lopez v. Monterrey County*, 519 U.S. 9 (1996). *Id.*

and constitutional challenges can satisfy the need to avoid prejudging the merits of preclearance by taking guidance from the state's policy judgments, unless those policy judgments reflect aspects of the state plan that stand a "reasonable probability" of failing to gain preclearance.[66] The Court went on to clarify that "reasonable probability" in this context means that the challenge is "not insubstantial."[67] Determining whether a Section 5 challenge is not insubstantial presents yet another practical challenge for courts in evaluating these challenges.

C. Should All Legislative Policies be Deferred to Equally?

Courts do not always defer to all legislative policies equally. Although courts may not openly say how they are deferring, upon examination, one can see that courts already apply varying degrees of deference. The way courts approach deference implies that there are considerations that already do guide courts in how they defer to adopted maps. Some of these considerations include:

1. whether the source of the legislative policy is the state's constitution,
2. the skepticism that courts have long demonstrated toward multimember districting and alternative voting systems,[68]
3. whether the policy is to create new minority opportunity or coalition districts, and
4. the presence of discriminatory intent (coupled with whether the jurisdiction is covered under Section 5).

This Note will discuss each of these considerations in turn.

In addition, while map drawers may utilize general policies like these, they may well also utilize policies that are more specific in nature—for example, "add this neighborhood because my grandchildren to go school there" or "make sure this city is the majority constituency for a representative." Courts should consider whether a policy that is applied only to a very limited part of the map should be afforded the same level of deference as a policy that is applied throughout the map. This consideration may also depend on how clearly the legislature expressed its intent regarding the specifically applied decision.

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[66] *Perez*, 132 S. Ct. at 942.

[67] *Id.*

[68] Multimember districts have more than one elected representative for the district, as opposed to single-member districts, which elect only one representative. Alternative voting systems include cumulative voting, preference voting or single-transferrable voting (STV), and limited voting. *See generally* ISSACHAROFF ET AL., *supra* note 9, at 1128–1207 (discussing alternative democratic structures).

Otherwise, one might legitimately question whether a narrowly applied decision that is not clearly announced should be considered a "policy" at all for deference purposes.

1. State Constitution as the Legislative Policy Source

If the source of the legislative policy is a state constitutional provision, enshrinement in the state's most authoritative legal document certainly presents stronger reasons to defer to that policy. But even when a state constitutional provision is the source of the policy applied, a deference issue arises when that policy is mutually exclusive with a federal statutory or constitutional requirement as applied to a particular area.[69] While a state constitutional provision should trump a legislative policy in general, it should not be deferred to at the expense of the Constitution or the Voting Rights Act.[70]

Another interesting problem is whose interpretation of the state constitutional provision should govern. For instance, suppose the constitutional provision is that the legislature may not unnecessarily "cut" county lines when districting. But suppose the legislature would like to define what it means to unnecessarily cut county lines differently from how the state's highest court does. In light of the deference arguments previously discussed, which interpretation should govern in federal court?

2. A Skeptical Court: Multimember Districting and Alternative Voting Systems

Courts are less inclined to be deferential toward districting plans that make use of multimember districts. For example, in *Connor v. Finch*,[71] the defendants argued that the district court should have adhered more to the state's policy of respecting county lines, which, the defendants argued, would have required multimember districting for the more populous counties.[72] The Court responded to this argument with

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[69] *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 159 (1993) (holding that where the map drafter believed the Voting Rights Act conflicted with the Ohio Constitution, his decision to draft in adherence to the Voting Rights Act "does not raise an inference of intentional discrimination[. Instead,] it demonstrates obedience to the Supremacy Clause of the United States Constitution").

[70] U.S. CONST. art. VI, cl. 2.

[71] 431 U.S. 407 (1977).

[72] The redistricting at issue in *Finch* had been the subject of litigation for over a decade. *Id.* at 410. The original state reapportionment plan used county lines to draw districts, some of which were single-member and some of which were multimember. Connor v. Johnson, 256 F. Supp. 962, 965 (S.D. Miss. 1966). The first two plans the district court promulgated relied extensively on multimember districting. *Finch*, 431 U.S. at 410. However, after the Supreme Court advised the district court that single-member districts were preferable, and the Attorney General objected to the

language that was anything but deferential:

> Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities . . . single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a "singular combination of unique factors" that justifies a different result.[73]

Under this holding, a court has to go to some lengths in order to justify deferring to a policy of multimember districting. This is in stark contrast to the more typical approach in which the court drawing a map will instead try to justify a decision *not* to defer to a particular policy.

Courts are also skeptical of court-ordered remedies that involve other alternative voting systems. Take, for example, in *Harper v. City of Chicago Heights*,[74] where the Seventh Circuit reversed the district court's order implementing an alderman system (incorporating cumulative voting) as a remedy for a Section 2 violation.[75] The remedy was not one proposed by any party to the litigation, but the district court cited Illinois law that provided a process for local governments to utilize cumulative voting in local elections (though Chicago Heights did not utilize that process).[76] The Seventh Circuit held that Chicago Heights demonstrated a clear preference for single-member districts by proposing a remedial plan with single-member districts—a preference to which the district court should have deferred.[77] This holding was in spite of the fact that drawing single-member districts would have required adding several government seats (an entry into the realm of governance, which courts typically try to avoid[78]) and raised serious *Shaw* concerns.[79]

But suppose we take a step back and consider why courts disfavor multimember districting and alternative voting systems generally—is this justified? At the time of *Connor v. Finch*, multimember districting was often a mechanism to effectuate discriminatory intent, a fact that may be the root cause for this shift in the deference conversation with respect to an alternative voting system policy.[80] But if discriminatory intent is the

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1975 legislative reapportionment, the district court ultimately adopted a permanent plan that used only single-member districts. *Id.* at 410–14.

[73] *Finch*, 431 U.S. at 415 (citing Mahan v. Howell, 410 U.S. 315, 333 (1973)).

[74] 223 F.3d 593 (7th Cir. 2000).

[75] *Id.* at 601.

[76] *Id.* at 599.

[77] *Id.*

[78] *Cf.* Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 507 (1992) (stating that courts should not interfere with routine matters of governance, such as deciding the number of appointive positions, in an effort to comply with Section 5).

[79] McCoy v. Chi. Heights, 6 F. Supp. 2d 973, 981–82 (N.D. Ill. 1998) (stating that drawing single-member districts ran the risk of an Equal Protection challenge), *rev'd sub nom. Harper*, 223 F.3d 593 (7th Cir. 2000). Racial gerrymandering is discussed briefly in Part II.C.3.

[80] *See, e.g.*, White v. Regester, 412 U.S. 755, 769–70 (1973) (affirming the district court's

issue, why not focus on that as the reason not to defer, instead of the mechanism on its own (especially given that several election law scholars have lauded some alternative voting schemes as potential solutions to solve some of our biggest election problems[81])? This question is too involved to discuss at length in this Note, but it is worth mentioning in this context.

Regardless of whether disfavoring multimember districting specifically and alternative voting systems generally is justified, the reality is that this legislative policy is disfavored under current redistricting jurisprudence. Thus, it seems prudent for a district court that attempts to implement a disfavored scheme such as multimember districting or an alternative voting system into its remedy, to be prepared to give extensive justification for doing so—even if adoption of the scheme means the court is deferring to the policy choices of the jurisdiction.

3. Creation of Minority Opportunity Districts

A map-drawing entity could choose to create additional minority or coalition districts in its adopted map for any number of reasons: to comply with the Voting Rights Act, to achieve partisan goals, to see a more diverse group of legislators elected, etc. Whatever the reason, if the map-drawing entity made a conscious decision to create minority opportunity or coalition districts, should a district court defer to that policy decision?

Since *Shaw v. Reno*,[82] in which the Supreme Court first recognized a racial gerrymandering claim, taking race into account to any substantive degree has been a tricky line to walk—even if it is for a benign purpose, such as creating additional minority opportunity or coalition districts in hopes of increasing diversity of representation. But it is unclear how much bite *Shaw* still has in the wake of the holding in *Easley v. Cromartie*[83] that a partisan aim could be a valid defense to a claim of racial gerrymandering.[84] Given that maps are often drawn by legislative staff or experts hired to keep an eye toward partisan goals, the partisan defense could likely always be raised as a defense to racial gerrymandering claims.

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conclusion that certain multimember districts in Texas were drawn in an effort to dilute the minority vote).

[81] *See, e.g.*, Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)) (advocating single transferrable voting, in which voters rank candidates by preference, which, among other benefits, increases competitiveness of elections).

[82] 509 U.S. 630 (1993).

[83] 532 U.S. 234 (2001).

[84] *Id.* at 243, 257.

Furthermore, *Bartlett v. Strickland* has come to stand for the notion that district courts may not set out on their own to create new minority opportunity or coalition districts—they may only draw districts that simply reflect population growth.[85] But can (or should) a court defer to a legislature that decided to draw a new minority opportunity district in order to achieve a partisan goal? The answer seemed to be a cautious "no" when the Court held in *Abrams v. Johnson* that the district court did not err by refusing to defer to a legislative plan that created an additional minority opportunity district.[86] But *Abrams* pre-dates *Cromartie*'s holding that partisan gerrymandering was only unlawful when the predominant purpose of the redistricting was racial and not partisan.[87] Thus, it is unclear whether the answer is still a tentative "no" when the purpose is to achieve a partisan goal.

So on one hand, courts were extremely unlikely to defer in the 1990s to race-based line-drawing; it is unclear how far that non-deference extends today, given that it is not clear what is left of *Shaw* after *Cromartie*. But on the other hand, the choice of whether to spread a minority community among several districts or concentrate it in a few districts is normally left to the political process.[88] Indeed, courts seem especially likely to embrace legislative efforts to comply with the Voting Rights Act—at least if the court agrees that that is what is going on.[89]

Yet, even where the latter occurs, if courts simply approve of certain types of legislative changes when they are the type that the court would order in an appropriate Voting Rights Act challenge, then it is not clear that this is actually deference. But if courts defer to map drawers' choices about *how* to comply with the Voting Rights Act, then that looks more like deference.

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[85] Perry v. Perez, 132 S. Ct. 934, 944 (2012) (per curiam) ("If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so." (citing Bartlett v. Strickland, 556 U.S. 1, 13–15 (2009) (plurality opinion))).

[86] Abrams v. Johnson, 521 U.S. 74, 90 (1997).

[87] *Cromartie*, 532 U.S. at 257 ("The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." (emphasis in original)).

[88] *See* Voinovich v. Quilter, 507 U.S. 146, 156 (1993) (stating that courts may not order the creation of majority-minority districts unless necessary to remedy a violation of law, but it does not follow that a state's power is "similarly limited").

[89] *See, e.g.*, Quilter v. Voinovich, 981 F. Supp. 1032, 1051 (1997), *aff'd*, 523 U.S. 1043 (1998) ("[G]iven the demands of the Voting Rights Act, which requires some degree of race consciousness on the part of states engaged in redistricting, consideration of race, in conjunction with (and not in predomination over) other demographic data and traditional districting criteria, clearly is a legitimate state interest."); *but see* Miller v. Johnson, 515 U.S. 900, 921 (1995) ("Whether or not in some cases compliance with the Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here.")

4. Presence of Discriminatory Purpose & Section 5

Sometimes courts are (and should be) reluctant to defer, because there is some degree of merit to a discriminatory purpose claim. Obviously it does not make sense to require a district court to defer to the discriminatory policies of a legislature. But when considering the variety of legislative policies utilized in a map, should a district court be expected to cull out the non-discriminatory policies from those that are discriminatory?

For jurisdictions covered under Section 5, this is an even more relevant inquiry, as the burden is on the jurisdiction to demonstrate that its plan is non-retrogressive and that there is not a discriminatory purpose behind it.[90] In the 2006 Amendments to Section 5,[91] Congress expressly disapproved of the Court's construction of discriminatory purpose in *Reno v. Bossier Parish School Board* (*Bossier Parish II*).[92] *Bossier Parish II* held that Section 5 only bars changes to an existing map that manifest a purpose to retrogress—thus, changes that merely aim to perpetuate existing levels of unconstitutional or illegal discrimination cannot justify denial of preclearance.[93] The Amendments' findings state that the *Bossier Parish II* majority "misconstrued Congress'[s] original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by [Section 5]."[94] The findings also clarified that under Section 5, "[t]he term 'purpose' . . . shall include any discriminatory purpose."[95]

In other words, if the map drawers intended to continue diluting minority votes through an adopted plan, even if they did not intend to dilute minority votes more than the existing map already did, the 2006 Amendments clarified that this qualifies as a discriminatory purpose under Section 5. This arguably implies that a court should not defer when a discriminatory purpose has been found in a covered jurisdiction's plan.

But while the 2006 Amendments seemed to clarify the deference question in this sense, they complicate the deference question when one also considers the issue of Section 5's constitutionality. This Note explores this issue after examining the models along the deference spectrum.

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[90] 42 U.S.C. § 1973c (2006).

[91] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 557.

[92] 528 U.S. 320 (2000)

[93] *Id.* at 341 (holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose").

[94] § 2(b)(6), 120 Stat. at 558.

[95] § 5(c), 120 Stat. at 581.

IV. MODELS ALONG THE DEFERENCE SPECTRUM

The Court has made it clear that it wants district courts to defer, to some degree, to maps adopted by state legislatures.[96] But in all its emphasis on deference, the Court has been (perhaps intentionally) vague in describing *how* to defer to legislative policies. Sometimes it chides the district court for "drawing a district that does not resemble any legislatively enacted plan"[97]—seemingly emphasizing appearances more than underlying policies. Other times the emphasis is on the "legislative judgments the plans reflect,"[98] perhaps implying that a court's deference should include policy decisions consciously made, as well as common features reflected in the map that were not explicitly incorporated into the map.

There are a variety of models along the deference spectrum that courts could utilize in the redistricting context. Some of these models have been rejected (in some, or perhaps all, circumstances), some only work if certain circumstances are present, and choosing between the rest may simply come down to which normative arguments the Court finds more persuasive. Under each model, this Note attempts to highlight circumstances that appear to be pertinent to whether courts defer in a manner consistent with the model, in addition to some circumstances that perhaps should be more directly considered before implementing the particular model.

A. The Extremes

1. Complete Deference

In an ideal world, an adopted plan has no constitutional or Voting Rights Act violations and it is implemented without a need for court intervention. The complete deference model essentially has the same result—there is a challenge to an adopted map, and either the adopted plan is left to stand regardless of any constitutional or statutory violations, or the adopted plan is adopted as an interim map while the constitutional and statutory claims are pursued.

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[96] *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 79 (1997) ("[A] court, as a general rule, should be guided by the legislative policies underlying the existing plan . . . ."); Upham v. Seamon, 456 U.S. 37, 39 (1982) (per curiam) ("[A] court must defer to legislative judgments on reapportionment as much as possible . . . .").

[97] Perry v. Perez, 132 S. Ct. 934, 944 (2012) (per curiam).

[98] *Upham*, 456 U.S. at 40–41 ("[A] court must defer to the legislative judgments the plans reflect . . . .").

i. Covered Jurisdictions

Implementing a covered jurisdiction's adopted plan without regard to any potentially meritorious constitutional or statutory claims is the most deferential model a district court can employ. Implementing such an adopted plan as an interim plan until preclearance has been granted or denied is a particularly interesting situation. In *Perez*, this is what the State of Texas argued should have been the standard in such a setting.[99] But this model is problematic for several reasons.

If applied to covered jurisdictions, this model would eviscerate Section 5. A critical piece of Section 5 is that it halts the implementation of a voting change until a covered jurisdiction demonstrates that its plan does not have a discriminatory purpose and is not retrogressive.[100] This model of deference completely undoes the crux of the Section 5 remedy—the burden of proof shift. Use of this model would encourage jurisdictions to delay either adoption of a map or the preclearance process as long as possible, so that even a plan with a blatant discriminatory purpose or retrogressive effect under Section 5 could not be stopped before an election.

Furthermore, challenges to a covered jurisdiction's plan under Section 2 or the Constitution cannot be ruled on until the preclearance question is resolved.[101] Therefore, under this model of deference, there is no mechanism available to plaintiffs or courts to prevent implementation of a discriminatory map in a covered jurisdiction. This cannot be. Thus, it makes sense that courts have rejected this model for jurisdictions covered under Section 5.[102]

ii. Non-Covered Jurisdictions

For non-covered jurisdictions, however, these two important concerns are not present. The burden in Section 2 and constitutional challenges rests with the plaintiff; hence, the concern about a jurisdiction gaming the system in order to avoid the need to satisfy its burden is a

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[99] Brief for Appellants, *supra* note 62, at 54–55, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715) ("[T]his Court should vacate the interim orders and remand to the district court with instructions to impose Texas'[s] legislatively enacted plan as the interim plan while preclearance is pending.").

[100] 42 U.S.C. § 1973c(a) (2006).

[101] *See, e.g.*, Branch v. Smith, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with [Section] 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.'" (quoting Connor v. Waller, 421 U.S. 656, 656 (1975) (per curiam))).

[102] *See Perez*, 132 S. Ct. at 940 ("This Court has been emphatic that a new electoral map cannot be used to conduct an election until it has been precleared."); Clark v. Roemer, 500 U.S. 646, 652 (1991) (finding error where a district court did "not enjoin[] elections held for judgeships to which the Attorney General interposed valid [Section 5] objections").

nonissue. In addition, the district court's hands are not tied with waiting on the preclearance process to resolve itself—if the adopted map presents a Section 2 or constitutional violation, the district court can go ahead and rule on that.

If a court is drawing an interim map for a non-covered jurisdiction, one of two situations has occurred—there has either been a finding of a Section 2 or constitutional violation, or there is not enough time to expedite proceedings and rule on the claims before a map needs to take effect. Where there is a valid Section 2 or constitutional claim, courts cannot justify deferring completely to the infirm map.[103]

But where there is not time to evaluate the claims before an impending election, whether the court should defer completely to the adopted map may depend on a few circumstances. First, why was there not time to rule on the claims before the map needed to take effect? Is it because plaintiffs did not bring suit in a timely fashion? Or is it because the legislature left such a small window of time between adoption of the new plan and the primary date that it would be impossible for any plaintiff to challenge the new map? If the legislature delayed passage with the intention of avoiding any challenges before the map can be used in the next election, then that delay starts to look like discriminatory intent. But because discerning legislative intent is a highly problematic endeavor,[104] it might be not be wise to require a court to make a finding of intent in order to determine which model of deference to use.

Second, what other legislative policies are at play? For instance, it is likely very important to the states with pre-Super Tuesday primaries that those primaries remain before Super Tuesday. In that situation, delaying a primary in order to first make a determination on challenges to the adopted map may result in sacrificing a policy (having an early voice in the primary candidate selection process) that the legislature holds more dear than having its new map adopted in whole.

In fact, there have been times when the Court has authorized elections using constitutionally or statutorily infirm maps.[105] These cases have come up only when necessity is the prevailing factor.

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[103] *See Perez*, 132 S. Ct. at 941 ("A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan."); Abrams v. Johnson, 521 U.S. 74, 85 (1997) ("[T]he precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations."); White v. Weiser, 412 U.S. 783, 797 (1973) ("Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge."). Complete deference despite a constitutional challenge would essentially remove the judiciary's role in evaluating these claims entirely, a proposition contrary to fifty years of jurisprudence. *Cf. Baker v. Carr*. 369 U.S. 186, 237 (1962) (holding that a vote dilution claim under the Equal Protection Clause is justiciable).

[104] *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 858–70 (2006) (describing why it is particularly difficult to determine legislative intent behind election law).

[105] *E.g.*, Upham v. Seamon, 456 U.S. 37, 44 (1982) (per curiam) (citing Bullock v. Weiser, 404 U.S. 1065 (1972), and Whitcomb v. Chavis, 396 U.S. 1055 (1970), for the proposition that the Court has authorized the use of legally infirm maps on an interim basis when "[n]ecessity has been the motivating factor").

Given the narrow situations in which this model may be useful and the various considerations at play, this model is only potentially viable for non-covered jurisdictions and only when there is not time to properly evaluate Section 2 and constitutional claims. Even then, utilization of this model should be considered on a case-by-case basis, carefully considering why there is not time for proper evaluation and whether any other potentially more weighty legislative policies are at play.

2. Zero Deference

Given the federalism and the judicial competency concerns the Court has continually raised in the redistricting context, it is not surprising that this model has been rejected by the Court on a number of occasions.[106] Most recently, the Court in *Perez* rejected this model while the preclearance process was pending.[107] Even in *Upham*, where preclearance was denied, the Court held that the district court must defer to those parts of the map free of either a Department of Justice objection or a finding of a constitutional or statutory violation.[108]

There may be an exception to the general ban on this model when there is a case of racial gerrymandering. In *Abrams*, the Court indicated that district courts may decline to defer to an adopted map when race was the predominant factor behind the map.[109] In that case, it was unclear whether the Court meant that the district court could only refuse to retain those districts with racial gerrymandering, or whether the district court could refuse to defer to the new map in its entirety.[110] But how this would or should play out today is likely no longer relevant, given *Easley v. Cromartie*'s holding that partisan gerrymandering could be a valid defense to a claim of racial gerrymandering.[111]

3. An Extreme?: Maintain the Status Quo

A census will almost certainly render any benchmark plan unconstitutional as a violation of one person, one vote.[112] So after census

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[106] *E.g.*, *Growe v. Emison*, 507 U.S. 25, 42 (1993) (rejecting the zero deference approach).

[107] *Perez*, 132 S. Ct. at 944.

[108] *Upham*, 456 U.S. at 39–41.

[109] Abrams v. Johnson, 521 U.S. 74, 90 (1997) ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan . . . .").

[110] *Compare id.* ("In these circumstances, the trial court acted well within its discretion in deciding it could not draw *two majority-black districts* without itself engaging in racial gerrymandering.") (emphasis added), *with id.* at 90 ("Interference by the Justice Department . . . disturbed any sound basis to defer to the 1991 unprecleared *plan*.") (emphasis added).

[111] *Infra* Part II.C.3.

[112] The one-person-one-vote principle requires that legislative districts contain roughly equal

data is released, the benchmark plan should not remain in place as is, even as an interim option.[113] Rather, this model of deference, starts with the benchmark plan, and then requires district courts to apply either legislative principles utilized in that map, or neutral districting principles, to repair constitutional or statutory infirmities.

As explained below, this model of deference is either the equivalent of zero deference or almost completely deferential, depending on whether or not the map-drawing entity in fact adopted a map.

i. Interim Maps

When a new map has been adopted, using a benchmark as a starting place for an interim map instead of the new map is arguably not deferring at all. Here, the legislature has spoken and prioritized potentially different legislative policies in different ways than it did previously. In one sense, this approach "defers" to the actions of the previous legislature. But because the new legislature rejected the benchmark plan, the argument for deference to the benchmark plan is arguably no stronger than that for starting from a clean slate and using neutral principles under the zero deference model.

Yet, courts generally are much more at ease with starting from a benchmark for an interim plan, rather than starting from scratch.[114] This stance may be because then the court can at least point to something that has already been in use, and thus, the institutional competency concern is somewhat mitigated. The plaintiffs in *Perez* argued that the district court used this model of deference in drawing its interim map by starting from the benchmark and applying neutral districting principles in order to comply with one person, one vote.[115]

The *Perez* Court rejected this model, at least when there was a shift in the number of districts to be drawn.[116] In that situation, the adjustments necessary to change the number of districts are so large that

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numbers of people. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 757 (2004); *see also* Reynolds v. Sims, 377 U.S. 533, 557, 562 (1964) (holding that apportionment of state legislative seats that failed to include equal populations in each district diluted the weight of some citizens' votes in violation the Equal Protection Clause).

[113] *But see Upham*, 456 U.S. at 44 (citing Bullock v. Weiser, 404 U.S. 1065 (1972), and Whitcomb v. Chavis, 396 U.S. 1055 (1970), for the proposition that the Court has authorized the use of legally infirm maps on an interim basis when "[n]ecessity has been the motivating factor").

[114] *See* Perry v. Perez, 132 S. Ct. 934, 940–41 (2012) (per curiam) ("[T]he plan already in effect may give sufficient structure to the court's endeavor. Where shifts in a State's population have been relatively small, a court may need to make only minor or obvious adjustments to the State's existing districts in order to devise an interim plan.").

[115] Reply Brief for Appellees Texas Latino Redistricting Task Force, Texas Mexican American Legislative Caucus and Shannon Perez at 15, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715).

[116] *See Perez*, 132 S. Ct. at 941 ("The problem is perhaps most obvious in adding new congressional districts: The old plan gives no suggestion as to where those new districts should be placed.").

the benchmark no longer provides helpful guidance.[117] Hence, regardless of whether starting from the benchmark is truly deferential or not, it is not a viable option where the number of districts has changed.

ii. Permanent Maps

Juxtapose the use of this model in drawing an interim map with the use of this model in drawing a permanent map, as might occur if the legislature failed to reach a consensus on a new map. Now, maintaining the status quo is arguably the most deferential option. The benchmark is the most recent legislative guidance available, even where the benchmark is a court-drawn plan (since the legislature either chose not to redraw the map or could not reach a consensus on an alternative before the next census). Thus, when crafting a permanent map where the number of districts to be apportioned has not changed, starting with the benchmark and remedying any constitutional or statutory defects is the most deferential option. This method should work where the legal defects of the benchmark are population deviation (one person, one vote) or a discriminatory effect (vote dilution under Section 2 or retrogression under Section 5).

Yet consider what should happen if the benchmark plan were infected by a discriminatory purpose. It would be impossible to remedy a map with this infirmity by deferring to that very map. For the benchmark plan to be infected with a discriminatory purpose implies that such a claim either lost in court or was never brought the first time around. In this day of ardent voting rights litigation,[118] it is hard to imagine a map not being challenged for its discriminatory purpose if there were even a remote chance one could be proved (there are always potential plaintiffs unhappy with a new map). Therefore, this concern should not be a barrier to utilizing this model where legislatures fail to reach a consensus on a new map.

A further consideration arises under this situation when the number of districts has increased or decreased. While the Voting Rights Act does not address what to do when there is a change in the number of districts, there is a statutory provision that addresses this very issue if a state fails to implement a congressional redistricting after a census. The U.S. Code provides that if there is an increase or decrease in the number of districts, and there is no map in place, either the additional representatives (if an increase) or all the representatives (if a decrease) shall be elected at-large.[119] Despite the presence of this statutory provision, at-large

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[117] *Id.*

[118] *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 90 (2009) (stating that the average number of election law cases handled in federal and state courts between 2000 and 2008 was more than double the pre-2000 number).

[119] 2 U.S.C. § 2a(c) (2006).

districting is so disfavored[120] that courts would rather undergo the unwelcome task of redistricting than use this statutory mechanism. But if courts are truly concerned with institutional competence, perhaps utilization of this statute might be just the incentive necessary to encourage a legislature that has otherwise stalled to reach consensus.

In sum, too much or too little deference is equally problematic, except in very limited circumstances. Let us therefore turn to models that fall somewhere in between the two extremes—what this Note terms "sweet spot contenders."

B. Sweet Spot Contenders

1. Defer Except for Challenged Districts (Leave Unchallenged Districts in the Adopted Map Untouched)

This model seems to be the interpretation of *Upham* that states (including Texas) have pushed for,[121] and the Court has not yet confirmed or denied whether this is the model of deference that should be used.[122] But in all the Court's talk of deference, there has not been much talk of the practical realities and challenges of map drawing except when pointing out what a district court did incorrectly. In order for guidance to be truly useful for lower courts that have to draw these maps, it should be practical and forward-looking. This model, in particular, presents many practical challenges for a map drawer.

i. Treatment of Challenged Districts

This model focuses on the treatment (or lack thereof) of the unchallenged districts, but the question remains: how should a court treat the challenged districts? The most deferential version of this model is to allow changes to challenged districts only where there is a finding of a constitutional or statutory violation—the approach Justice Thomas would have taken in *Perez*.[123] Alternatively, one could utilize a variation that is

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[120] *See, e.g.*, Connor v. Finch, 431 U.S. 407, 415 (1977) (describing the Court's preference for single-member districting of Mississippi courts).

[121] *See supra* text accompanying note 63; *see also* Brief of State-Appellants at 35, *Easley v. Cromartie*, 532 U.S. 234 (2001) (Nos. 99-1864, 99-1865) (arguing that the legislature did what *Upham* commanded—namely, to "retain the core of the prior redistricting plan, while taking those steps necessary to cure the constitutional violation").

[122] *Cf.* Upham v. Seamon, 456 U.S. 37, 40–41 (1982) (per curiam) (holding that "a court must defer to the legislative judgments the plans reflects," but without clarifying exactly what that means, and perhaps implying that district courts do not have to leave every unchallenged line exactly in place).

[123] *Perez*, 132 S. Ct. at 945 (Thomas, J., concurring).

more moderately deferential, such as requiring some showing of probability of success on the merits. Finally, the least deferential variation is to allow changes to any challenged districts regardless of probability of success on the merits.

It is unclear whether the Court in *Perez* was advocating for a version of this model or a version of the principles-over-limits model discussed in the next section. But while it is unclear which model the Court in *Perez* would like to see, the *Perez* Court did make clear that if the defer-except-challenged-districts model applies, it needs to be the medium deferential variation. The Court clarified that district courts do not have to defer to districts with legal challenges that have some probability of success.[124] For constitutional or Section 2 claims, that means the claims have to be likely to succeed;[125] for Section 5 claims, that means there has to be a "reasonable probability" that preclearance will be denied ("reasonable probability" in this context means the Section 5 challenge is "not insubstantial").[126] The Court justifies the Section 5 standard as one that provides a sufficient balancing of the competing ideals:

> That standard ensures that a district court is not deprived of important guidance provided by a state plan due to [Section 5] challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination. And the reasonable probability standard adequately balances the unique preclearance scheme with the State's sovereignty and a district court's need for policy guidance in constructing an interim map.[127]

ii. Practical Difficulties

The difficulty of redrawing a few districts while leaving all the other districts completely untouched renders this model impractical. This is especially true in congressional redistricting where the equipopulation standard under one person, one vote is so restrictive.[128]

Upham has long been the go-to case in support of the idea that

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[124] *Id.* at 942 (per curiam).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] The equipopulation requirement has been interpreted to require essentially exact precision in achieving population equality among congressional districts, as opposed to state legislative districts, which are currently afforded some minimal flexibility. Cox, *supra* note 112, at 757; *see also* Karcher v. Daggett, 462 U.S. 725, 727 (1983) (affirming that even minimal population variation between congressional districts in reapportionment plans requires justification and a good-faith effort to obtain population equality).

district courts should be more deferential to adopted plans. But the Court in *Upham* emphasized the practical facts that made it easy to defer to the unchallenged districts in that case: there were only two challenged districts and they were contiguous.[129] From a practical standpoint, it therefore made sense that the interim map could be very similar to the adopted plan—because there was a relatively small infirm area, and there were at least some lines that could be shifted without changing the shape of any surrounding districts. Therefore, it may make sense to only utilize this model after a fact-specific inquiry demonstrates that it is actually a practical option.

2. Principles Over Lines

Instead of deferring strictly to every precise line drawn for every unchallenged district (some of which will also be lines of challenged districts), perhaps lower courts should be allowed greater flexibility through the principles-over-lines model. There are two versions of this model—one significantly less deferential than the other.

i. The Less Deferential Version

The less deferential version of this model does not require a district court to use the adopted map's specific district lines as a starting place. Instead, a district court may draw its own map, so long as it utilizes the non-discriminatory legislative principles from the adopted map.

The Court in *Perez* may have left a door open for this model. The Court's straightforward statement that "the state plan serves as a starting point for the district court"[130] seems pretty clearly to reject the zero deference model in any context. Then specifically, the Court rejected the zero deference model while the preclearance process was pending—but with an important caveat. The opinion states, "[w]ithout . . . a determination [of a reasonable probability that preclearance would be denied or of a likelihood of success for a Section 2 or constitutional claim], the District Court had no basis for drawing a district that does not resemble any legislatively enacted plan."[131] Notice the Court's holding does not preclude the possibility of this less deferential version of the principles-over-lines model in a situation where there is a reasonable probability that preclearance would be denied on the basis of a discriminatory purpose that permeated the entire map.

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[129] Upham v. Seamon, 456 U.S. 37, 38 (1982) (per curiam).

[130] *Perez*, 132 S. Ct. at 941.

[131] *Id.* at 944.

However, this less deferential version is problematic for two reasons. First, despite *Perez* perhaps not precluding use of this model where a discriminatory purpose permeated the entire map, this model may ultimately leave too much room for the district court's discretion in how to implement the state legislature's policies. Given the Court's desire to see lower courts take a more deferential approach, a model that does not begin with any previously drawn lines may simply not be deferential enough to satisfy the Court's concerns.

Second, this model presents an administrability problem in that district courts will potentially have to choose whether to utilize one policy over another. This dilemma would arise when a legislature employed districting policies inconsistently in an adopted map or when two policies are mutually exclusive when applied to a particular area. Inconsistent application of policies could make it difficult for district courts to identify the policies the legislature intended to utilize. But even if the legislature made its intended policies very clear, this situation still forces a district court to choose which policies to apply where and what to do when two policies cannot both be applied to a single district. This added discretion may resonate too deeply with the Court's institutional competence concerns.

So while *Perez* seemingly left the door open to the use of the less deferential version of the principles-over-lines model, the Court's strong language in favor of deference indicates this version of the model would likely be rejected, even in the statewide discrimination scenario.

ii. The More Deferential Version

The more deferential version of this model requires the lower court to generally leave the unchallenged district lines intact. But where those lines would need to be changed to accommodate a change to a challenged district, the lower court would not be forbidden from changing those lines. Instead, changes to the lines would be guided by the legislative principles from the adopted map.

This version shares the less deferential version's administrability problem. It is unclear how pervasive throughout the map the legislative policy should be to merit deference—specifically, it is unclear how a court should address the situation in which a legislature applied policies only in a specific area or if the legislature adhered to a particular policy in one district but not another.

It is equally unclear how a court should treat policy choices the legislature did *not* employ. Such an omission may or may not have been intentional. For instance, in *Perez*, the Court chastised the district court's decision not to cut through precinct lines when the legislature did so

freely in the plan.[132] But suppose it was not a deliberate legislative policy choice to cut precinct lines. Should a district court be bound by an absence of a particular policy, when there may not have even been a conscious decision to omit that policy?

While this model of deference presents problems, it also presents the most promise for the right combination of deference and accommodation of the practical realities of map drawing. Utilization of this model may require the court to give more clear guidance on some circumstances that arguably do not warrant as much deference—namely, inconsistently applied "policies" and the absence of a policy—but ultimately this model is the most appealing candidate for a default sweet spot.

V. DEFERENCE AND THE CONSTITUTIONALITY OF SECTION 5

Keeping in mind the broader definition of discriminatory purpose under Section 5, and the compelling reasons to use a less deferential model where a court finds discriminatory purpose, it is important to consider the flip side of those reasons for less deference: whether utilization of a less deferential model could render Section 5 unconstitutional.

Marbury v. Madison[133] famously announced, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[134] So while it was clear that, at a minimum, the judiciary shared in the role of constitutional review, it remained unclear whether that duty was intended to be shared with the other two branches, or whether it was a duty exclusively reserved for the judiciary. By the mid-twentieth century, the Court quashed any remaining doubt by the time of *Cooper v. Aaron*[135]: the federal judiciary's interpretation of constitutional law trumps that of all other branches.[136]

Still, the Court's standard of review for determining whether a statute was constitutional was very deferential to Congress under *South Carolina v. Katzenbach*—Congress could extend rights protections beyond that which the court recognized, so long as it did not drop below the court's baseline minimum rights protection.[137] The Rehnquist Court then made clear in *City of Boerne v. Flores*,[138] at least with respect to Section 5 of the Fourteenth Amendment, that the Court defined the scope

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[132] *Id.* at 943–44.

[133] 5 U.S. (1 Cranch) 137 (1803).

[134] *Marbury*, 5 U.S. at 177.

[135] 358 U.S. 1 (1958)

[136] *Id.* at 18 ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

[137] 383 U.S. 301, 327–28 (1966).

[138] 521 U.S. 507 (1997).

of the constitutional right and Congress could only protect the right with remedies that were congruent and proportional to violations.[139] The Court made clear in subsequent cases that the *City of Boerne* standard extended beyond the Fourteenth Amendment, but whether it extends to rights and remedies protected under the Fifteenth Amendment has yet to be confirmed.

This brings us to Section 5 of the Voting Rights Act. Passed pursuant to Congress's enforcement power under the Fifteenth Amendment, Section 5 is an extraordinary remedy for voting rights violations that occur in covered jurisdictions. Whether Section 5 is still constitutional post-*City of Boerne* is the topic of much debate—especially after the Court expressed serious concern over its constitutionality in *NAMUDNO*[140] and granted certiorari in *Shelby County v. Holder*.[141]

The *NAMUDNO* Court seemed particularly troubled by the question of whether a covered jurisdiction could take advantage of Section 5's bailout provision.[142] The Court made clear that all covered jurisdictions can bail out,[143] and given that the Attorney General has consented to every bailout action since 1984,[144] it seems unlikely that this will be the issue upon which Section 5's constitutionality will turn.[145]

A different issue, which perhaps could be determinative of Section 5's constitutionality, is which model of deference district courts utilize. Could a less deferential model render Section 5 unconstitutional? One reason this could be the case is the practical reality that many interim plans end up becoming permanent plans. This reality, combined with the importance of a benchmark plan in Section 5's retrogression analysis, means that an interim plan will likely have a long-term effect on a covered jurisdiction's apportionment efforts. If the model employed is not deferential enough, redistricting in covered jurisdictions could effectively become the province of the courts. This seems to reach the heart of the Court's concern about Section 5.[146]

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[139] *Id.* at 529–30.

[140] NAMUDNO, 557 U.S. 193, 201–03, 211 (2009).

[141] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), *cert. granted*, 133 S. Ct. 594 (2012).

[142] *NAMUDNO*, 557 U.S. at 209–11. Section 5 allows jurisdictions to bail out of their reporting requirements if certain criteria are met. In order to bail out, jurisdictions must request a declaratory judgment by a three-judge panel from the U.S. District Court for the District of Columbia, satisfy a number of measures showing the absence of discriminatory voting practices over a ten-year period, and provide evidence of constructive efforts taken to provide access to voting. 42 U.S.C. § 1973b(a) (2006).

[143] *NAMUDNO*, 557 U.S. at 211.

[144] *Shelby Cnty.*, 811 F. Supp. 2d at 500 (citing Berman Decl. ¶¶ 27, 29.

[145] The petition for writ of certiorari in *Shelby County* was granted for the following question: "Whether Congress'[s] decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." *Shelby Cnty.*, 133 S. Ct. at 594.

[146] *See NAMUDNO*, 557 U.S. at 202. ("[Section] 5, which authorizes federal intrusion into

The Court in *Perez* said the constitutionality concerns about Section 5 would be "exacerbated if [Section 5] required a district court to wholly ignore the [s]tate's policies in drawing maps . . . without any reason to believe those state policies are unlawful."[147] Instead, "the state plan serves as a starting point for the district court[,] . . . [providing] important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences."[148] The Court clarifies that, in deferring to adopted plans, district courts should still take care not to incorporate any legal defects of the adopted plan into the interim plan.[149]

As previously discussed, this makes clear that basically neither extreme on the deference spectrum is permitted, even when Section 5 applies. But beyond that, it does not help narrow down which other model of deference to use. Though *Perez* did not seem to preclude the less deferential version of the principles-over-lines model, perhaps the Court's own application of its holding provides a little more guidance—particularly in light of the Court's stated link between deference and the constitutionality of Section 5:

> Although Texas'[s] entire State House plan is challenged in the [Section 5] proceedings, there is apparently no serious allegation that the district lines in North and East Texas have a discriminatory intent or effect. The District Court was thus correct to take guidance from the State's plan in drawing the interim map for those regions. But the court then altered those districts to achieve de minimis population variations—even though there was no claim that the population variations in those districts were unlawful. In the absence of any legal flaw in this respect in the State's plan, the District Court had no basis to modify that plan.[150]

"[N]o basis to modify that plan," coupled with the other statements by the Court discussed above, seems to imply that the appropriate deference model in *Perez* has narrowed to either the more deferential version of the principles-over-lines model or the medium deferential version of the defer-except-challenged-districts model—in either case, a district court should begin with the actual lines of the adopted plan. From there, however, it is not clear whether the district court can change lines

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sensitive areas of state and local policymaking, imposes substantial federalism costs. These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of [Section] 5." (citations omitted) (citing Lopez v. Monterrey County, 519 U.S. 9 (1996))). *See also* Abrams v. Johnson, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.").

[147] Perry v. Perez, 132 S. Ct. 934, 942 (2012) (per curiam).

[148] *Id.* at 941.

[149] *Id.* at 941–42.

[150] *Id.* at 943 (citations omitted).

of unchallenged districts in order to accommodate changes to legally infirm districts, if the change applies the adopted map's policies (as opposed to policies imposed on a map by the district court, which is how the *Perez* Court viewed the district court's aim of achieving *de minimis* population variations).

While perhaps the normative arguments for deference generally, and the concerns over Section 5's constitutionality in particular, weigh in favor of the defer-except-challenged-districts model, the normative arguments for voting rights and administrability concerns weigh in favor of the principles-over-lines model. The defer-except-challenged-districts model's administrability problems are in many cases insurmountable—how many infirm districts there are, whether they are contiguous, and the nature of the infirmity will all factor into how usable this model is.

However, the more deferential version of the principles-over-lines model is nicely situated to accommodate competing concerns to some degree in most cases. This model is still quite deferential, in that it requires the lower court to generally leave the unchallenged district lines intact. But this model does a better job of accommodating the practical realities of map drawing—where the unchallenged district lines must be changed in order to address the infirmity, the lower court would not be forbidden from changing those lines, so long as those changes are guided by the legislative principles from the adopted map. Thus, so long as the Court does not view the principles-over-lines model as so undeferential that it renders Section 5 unconstitutional, it remains the strongest contender for the default "sweet spot" along the deference spectrum.

VI. CONCLUSION

Conceptualizing deference in terms of a spectrum, rather than a binary choice, can be a particularly helpful way to look at how courts are implementing this vague concept in redistricting, and perhaps how that implementation should be done differently. Certain circumstances render some models of deference inapplicable and others tend to push the needle in either direction along the spectrum. Some situations still do not fit neatly into one particular model, but the spectrum of deference at least incorporates the flexibility necessary to reflect the practical reality that is map drawing.

The models at the two extremes—complete deference and zero deference—should generally not be used by lower courts, with two possible exceptions. The complete deference model is only potentially viable for non-covered jurisdictions and only when there is insufficient time to properly evaluate Section 2 and constitutional claims. Even then, utilization of the complete deference model should be considered on a case-by-case basis, carefully considering why there is insufficient time

for proper evaluation and whether any other potentially more weighty legislative policies are at play. The zero deference model is only potentially viable when a state has engaged in racial gerrymandering, but even then, it is not clear this is a valid option post-*Cromartie*.

The maintain-the-status-quo model could be either very deferential or not at all deferential, depending on whether the legislature adopted a map. Use of this model is acceptable, but it makes the most sense when the legislature did not adopt a map and the number of districts did not change.

Courts have left room in the middle for sweet spot contenders, and we saw why the strongest candidates are either the medium deferential version of the defer-except-challenged-districts model or the more deferential version of the principles-over-lines model. On one hand, the renewed emphasis on deference would support utilization of the defer-except-challenged-districts model, particularly when considered in the context of Section 5's constitutionality. But on the other hand, the more deferential version of the principles-over-lines model is only marginally less deferential than its sweet spot adversary, and it is a far more practical model to apply in the map-drawing reality that district courts face.

Clearer guidance is helpful when district courts are forced to undertake the unwelcome task of redistricting, but that guidance does not have to mean adoption of one deference model for all situations. While it may be that one of these sweet spot contenders should apply in an wide range of situations, a one-size-fits-all is not the way courts are deferring in practice—nor should it be, given the varied nature and range of sources underlying policies utilized. Some merit greater deference than others. But conceptualizing deference as a spectrum, and pinpointing what circumstances do, and should, shift the needle along the spectrum would be a useful and welcome change to the vague, abstract language used now in reference to deference in redistricting.