FULFILLING THE PROMISE OF "ONE PERSON, ONE VOTE": ELIMINATING THE LEGAL FICTION OF THE TEN-YEAR MINIMUM FOR REDISTRICTING UNDER *REYNOLDS*

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INTRODUCTION

On October 31, 2011, the United States Supreme Court summarily affirmed the lower court's decision in *NAACP v. Barbour*,[1] a case appealed from a three-judge court of the Southern District of Mississippi pertaining to the time by which the Mississippi Constitution requires the state legislature to redistrict itself.[2] In doing so, the Court passed up an opportunity to revisit the question of how frequently congressional and state legislative districts must be redistricted since it first set the constitutional minimum of once per decade, with little other guidance, nearly fifty years ago in *Reynolds v. Sims*.[3]

The plaintiffs asserted that because the Mississippi legislature voluntarily refused to redistrict before the 2011 state elections, after having received the population data from the decennial 2010 U.S. Census, Mississippi violated the Equal Protection Clause by allowing the dilution of votes for the 2011 elections of those living in malapportioned districts under the old district maps.[4] The three-judge court found that under the current constitutional test, Mississippi was within its right not to redistrict until the 2012 legislative session since, because of its similar delay following the 2000 census, it had redistricted only nine years earlier in 2002.[5] Besides the normal shifts in population, which occur in any jurisdiction between censuses, Hurricane Katrina made a huge impact on Mississippi's population, but those major shifts were not accounted for in the 2011 elections even though 2010 census data was available. Without question, the voters of Mississippi are today not given equal voice in their state legislature.[6]

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[1] NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011).

[2] NAACP v. Barbour, 132 S. Ct. 542 (2011) (mem.).

[3] 377 U.S. 533 (1964).

[4] *NAACP*, 2011 WL 1870222, at *1.

[5] *Id.*

[6] For example, according to the 2010 census, DeSoto County, Mississippi is now the third most populous county in the state and grew by 54,053 individuals (50.4%). *See State & County QuickFacts: Desoto County, Mississippi*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/28/28033.html (last visited Apr. 18, 2011). Similarly, Lamar County, Mississippi increased by 16,588 individuals (42.5%) most likely as a result of migration after Katrina, yet these dramatic shifts were not accounted for before the 2011 elections. *See State & County QuickFacts: Lamar County,*

Since the Court's decision in *Reynolds* nearly a half century ago, each jurisdiction is required to redistrict only once every ten years. This standard allows an individual's vote to be diluted over the intervening decade as populations shift in a given jurisdiction, resulting in a "legal fiction"[7] that districts are equal in population. This Comment proposes the Court should revisit the standard so as to more aptly guarantee the promise of "one person, one vote"[8] in the context of today's reality by reducing the constitutional minimum for redistricting to once every five years for both congressional and state legislative districts, accompanied by strict limitations on ad hoc redistricting at any other time.

A comparison of Indiana's population between 2000 and 2010 serves as an example of the innate harm caused by the ten-year minimum standard. Indiana has nine congressional districts, and the state has seen a 6.6% growth in population over the last ten years, as reflected in the 2010 federal census.[9] For the congressional districts to be equal in population, each district should contain 720,420 citizens, yet the most populous district contains approximately 809,402 (over twelve percent higher than the mean) and the least populous, only 676,422 (over nine percent lower than the mean).[10] If such a disparity existed between districts after a decennial redistricting had taken place, the congressional districting regime would unquestionably be deemed unconstitutional;[11] but because these dilutions occurred within the decade between censuses, the Court would rely on the self-

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Mississippi, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/28/28073.html (last visited Apr. 18, 2011).

[7] LULAC v. Perry, 548 U.S. 399, 405 (2006) (citing Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003)).

[8] This phrase, which has generally come to be known as the theme of the redistricting revolution, is often thought to have come into being through the *Baker v. Carr* opinion. *See* Baker v. Carr, 369 U.S. 186 (1962). The phrase was actually first written by Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in which the Court ruled that the practice of the State of Georgia of aggregating popular votes in each county and then awarding the election to whichever candidate received the highest number of counties was unconstitutional. *Id.*

[9] Rachel Justis, *Uneven Population Growth Means Significant Changes Ahead for Indiana's Legislative Districts*, IN CONTEXT, http://www.incontext.indiana.edu/2011/mar-apr/article3.asp (last visited Apr. 18, 2012).

[10] *Id.*

[11] *See infra* Part II.B.

labeled legal fiction of continued population equality to justify the dilution of one person, one vote as each decade proceeds.

The idea that one person's vote should be given equal weight as that of his or her neighbor is the very foundation of representative government at the local level and the cornerstone of the House of Representatives.[12] This was apparent to the Founders and the reason for which the census was included in the Constitution.[13] The principle is so important that Chief Justice Earl Warren wrote in his memoirs that *Baker v. Carr*, the touchstone of the "one person, one vote" canon, was "the most important case of my tenure on the Court."[14] The Court recognized that other elements such as political stability and technology play an important role in the redistricting process but that population equality must be the dominant factor and ultimate goal in redistricting.[15]

Part I of this Comment will explore the historical background of redistricting and the seminal cases leading to what is commonly known as the "redistricting revolution" through the issuing of a series of cases which enshrined the idea of "one person, one vote" in the early 1960s. This historical background will be followed by a summary of the few cases where plaintiffs have actually claimed their rights were violated because of the timing of redistricting.

Part II will lay out the argument that the current ten-year minimum standard needs to be revised because advancements in collecting and synthesizing data and creating districts with mathematical precision since 1964 should induce the Court to consider a revision of the ten-year minimum just as it has for the other aspects of the "one person, one vote" doctrine. The Court has revisited other aspects of the doctrine such as the practicability of population equality between districts, political gerrymanders, and minority voting rights, but it has never again visited the question of how frequently a state must redistrict. Further, the Court's sanctioning of voluntary mid-decade redistricting in *LULAC v.*

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[12] "State legislatures are, historically, the fountainhead of representative government in this country." Reynolds v. Sims, 377 U.S. 533, 564 (1964).

[13] *See infra* Part I.A.

[14] Bernard Schwartz, *How Justice Brennan Changed America*, *in* REASON AND PASSION 31, 33 (E. Joshua Rosenkrantz & Bernard Schwartz eds., 1997).

[15] *Reynolds*, 377 U.S. at 579-80.

Perry is certain to give rise to increased litigation and political instability, which a new five-year standard, including limitations on ad hoc redistricting, would reduce to a large degree. Additionally, the legal assumptions about common state practices which the Court reasonably relied upon in crafting the ten-year minimum in 1964 are no longer valid. Finally, this Section will address some of the concerns which may arise by adoption of the proposed rule.

Part III will describe the five mechanisms by which a new five-year minimum standard could be implemented and present alternative remedies that, while not adhering to the five-year rule proposed in this Comment, would be an improvement on the current standard.

I. BACKGROUND

A. The Path to Revolution

Embodied in the debates of the Constitutional Convention is the idea that apportionment of seats in the House of Representatives must accurately reflect the population in the several states.[16] In assuring that an accurate count of the population was maintained for apportionment purposes, Edmund Randolph proposed a periodic census to ensure "fair representation of the people."[17] The Constitution thus contained such a provision requiring a census to be conducted within the first three years of the first meeting of Congress and "within every subsequent Term of ten years, in such Manner as they shall by Law direct."[18] The Constitution allowed the states to determine the time, place, and manner by which senators and representatives would be elected, but explicitly reserved the right of Congress to make or alter such regulations—except in regard to the place of choosing representatives.[19] Therefore, states were free to decide whether electives would be chosen at large or by any

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[16] Wesberry v. Sanders, 376 U.S. 1, 10 & n.16, 11 (1964).

[17] *Id.* at 13.

[18] U.S. CONST. art. I, § 2, cl. 3. This enumeration was to be an adding of free persons excluding indentured servants, Indians not taxed, and only three-fifths of all other persons (slaves). *Id.*

[19] U.S. CONST. art. I, § 4, cl. 1.

number of districting systems, how those districts would be formed, and how frequently they would be redistricted.

From the ratification of the Constitution until the mid-nineteenth century, the federal government allowed the states to freely determine how their representatives were chosen.[20] Through their individual constitutions, statutes, and independent means of gathering population, states determined how their congressional delegations and state legislators were selected.[21] When citizens brought suit for the failure of a state to redistrict in accordance with state or federal law, the Supreme Court repeatedly deferred to the states and found claims arising under the Equal Protection Clause or Article I as lacking.[22]

B. The Revolution: Baker*,* Wesberry*, and* Reynolds

In 1962 the Supreme Court decided malapportioned districts or the failure to redistrict were not simply political questions inappropriate for consideration by federal courts, but were in fact justiciable issues under the Fourteenth Amendment's Equal Protection Clause.[23] Plaintiff Charles Baker asserted that since the Tennessee General Assembly had not redistricted since 1901, in deliberate violation of Tennessee law, urban areas which had experienced increased population growth during the ensuing decades were now underrepresented in the Tennessee General

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[20] As late as 1842, seven states elected representatives at large. *Wesberry*, 376 U.S. at 9 n.11. In 1967 Congress enacted legislation requiring that districts be established for purposes of electing representatives and that no district should send more than one representative to Congress, but left the boundaries of such districts to be determined by the individual states. 2 U.S.C. § 2(c) (2006).

[21] For historical background on state censuses and developments in the timing of state redistricting, see Richard Gladden, *The Federal Constitutional Prohibition Against "Mid-Decade" Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133 (2005); Justin Levitt & Michael McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO L.J. 1247 (2007).

[22] Colegrove v. Green, 328 U.S. 549 (1946) (ruling that under Article I only Congress could determine whether individual state legislatures had fulfilled their duties pertaining to fair and equal representation); Wood v. Broom, 287 U.S. 1 (1932) (ruling that because the Reapportionment Act of 1929 did not require districts be compact or contiguous, as did the Reapportionment Act of 1911, the Court would not override the intent of Congress).

[23] Baker v. Carr, 369 U.S. 186, 198-99 (1962).

Assembly.[24] The Court's landmark decision, siding with Baker, opened the door for citizens to assert their claims to equal protection of voting rights in federal court.[25]

In 1964 the Supreme Court built upon the foundation of justiciability it laid in *Baker* by issuing its decisions in *Wesberry v. Sanders* and *Reynolds v. Sims*.[26] *Reynolds* is particularly relevant to this Comment because it was in that case the Court addressed the question of how frequently redistricting must occur in order to pass constitutional muster. The Court stated that at a minimum, redistricting must occur at least once every ten years, and that any redistricting occurring with less frequency would be "constitutionally suspect."[27]

In *Wesberry*, the Court, relying on Article I, Section II of the Constitution, required that congressional districts be constructed so that each would be equal in population as "nearly as is practicable."[28] Similarly, the *Reynolds* Court applied the same "practicable" mandate to the redistricting of state legislatures and also found that the Fourteenth Amendment's Equal Protection Clause required that population be the primary factor in determining legislative districts.[29]

C. After the Revolution: The Voting Rights Act, The Rise of the Gerrymander and Narrowing "Practicable"

Although the Court's "one person, one vote" canon focused on equality of population in legislative and congressional districts,

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[24] *Id.* at 192-93.

[25] The *Baker* decision did not grant declaratory relief to the plaintiff but remanded with instructions back to the district court. The decision is monumental because the Supreme Court for the first time stated that issues regarding legislative redistricting could now be heard by federal courts. The specific doctrines which would arise out of the "one person, one vote" canon would be developed in subsequent cases.

[26] Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[27] *Reynolds*, 377 U.S. at 584.

[28] *Wesberry*, 376 U.S. at 7-8.

[29] *Reynolds*, 377 U.S. at 577. The Alabama legislature also proposed that, based upon the model of the federal government, it was permissible to allow the state house of representatives to be based upon population and the state senate to be comprised of one or two senators per county. *Id.* at 571-72. The Court declared that each house of a state legislature must be based upon population. *Id.* at 573. Although these two cases dealt with congressional and state legislative districts, the Court applied the population standard on all public elections including school board, city council, and judicial elections. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970).

three subsequent issues, sometimes overlapping with one another, came to dominate election litigation over the next several decades: (1) the Voting Rights Act, (2) political gerrymandering of districts, and (3) the narrowing and defining of the practicability standard of equality between districts under *Reynolds*.[30]

Regardless of the Court's pronouncements that each citizen's vote should be given equal voice, they were not enough to prohibit states from circumventing the law and systematically disenfranchising the rights of minorities.[31] Seeing the need for an aggressive legislative response to these actions, Congress passed the Voting Rights Act (VRA) in 1965, which ensured the permanence of majority-minority districts by requiring that states with a history of racial prejudice submit redistricting plans to the Justice Department for approval or face the prospect of the federal judiciary creating districts for them.[32] Over the last forty-five years since the VRA was passed and subsequently reauthorized, many cases have been brought either challenging its validity or claiming that a state or locality is in violation of the statute.[33]

Similarly, as states were compelled to redistrict on a regular basis, districts began to take on very awkward shapes with the purpose of solidifying the influence of one party or another in a given district. Subsequently, lawsuits were filed claiming that such overtly political "gerrymanders," created with the goal of prohibiting one group from acquiring power, were unconstitutional.[34]

The third issue on which election law litigation has focused is the practicability standard first promulgated in *Wesberry*, and

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[30] CHARLES L. ZELDEN, THE SUPREME COURT AND ELECTIONS: INTO THE POLITICAL THICKET 40-86 (2010).

[31] *Id.* at 283.

[32] 42 U.S.C. § 1973 (2006).

[33] *See generally* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Morse v. Republican Party of Va., 517 U.S. 186 (1996); Holder v. Hall, 512 U.S. 874 (1994); McCain v. Lybrand, 465 U.S. 236 (1984); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[34] For a discussion of the development of gerrymandering after the mid-1960s, s*ee* CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA (2010).

then applied to state legislative redistricting in *Reynolds*.[35] As precision in counting the populace has increased with technological advancements over the ensuing decades since these two cases were decided, the Court has narrowed the definition of what is an acceptable deviation in population between both congressional and state legislative districts under this standard.[36]

D. The Federal Courts Decline to Revisit the Question of Frequency

At present, only five federal court cases have directly addressed the question of redistricting frequency in isolation from other issues.[37] Ironically, even though the foundational cases of *Baker, Wesberry*, and *Reynolds* focused attention on the relation between redistricting frequency and the population equality between districts—and the three cases are cited in virtually all redistricting cases which have made their way through the federal courts—plaintiffs have very rarely made arguments for increased frequency to obtain equality in population between both state legislative as well as congressional districts.

The first two cases in which plaintiffs did so involved redistricting on the municipal level. In both *Ramos v. Illinois* and *French v. Boner*, the plaintiffs asserted that city elections taking place in 1991 were unconstitutional because the more accurate 1990 census data was available.[38] Even though 1990 census data was available, the municipalities were holding elections under districts created by reliance on 1980 population statistics because the municipalities claimed there was not enough time after

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[35] Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("[W]e mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) ("We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

[36] *See infra* Part II.B.

[37] *See* LULAC v. Perry, 548 U.S. 399 (2006); NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LF-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011); Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993); French v. Boner, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd*, 963 F.2d 890 (6th Cir. 1992); Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff'd*, 976 F.2d 335 (7th Cir. 1992).

[38] *French*, 786 F. Supp. at 1329; *Ramos*, 781 F. Supp. at 1354.

release of the data to redistrict before the scheduled elections.[39] Thus, officials would be governing in 1995 based upon fifteen-year-old census data.

The Sixth and Seventh Circuits, respectively, upheld the rulings of the district courts and their interpretation of the ten-year minimum as promulgated by *Reynolds*.[40] In both instances, the courts stated that although the Census Bureau released the 1990 census data before the 1991 elections, such an occurrence did not require a special judicial remedy every time jurisdictions did not receive data in time for a scheduled election.[41] Additionally, the Sixth Circuit cited the "settled expectations of voters and elected officials" and the costs of elections as reasons to affirm the lower court's decision.[42] The former is not a reason explicitly enumerated by *Reynolds* as an acceptable factor in determining whether to provide a judicial remedy, and the latter is explicitly proscribed.[43]

The third case is *Fairley v. Forrest County*, arising from the Southern District of Mississippi. In this instance, the district court relied on the *Reynolds* standard as in the previous two cases, but also took into account the fact that the county board of supervisors attempted to redistrict before elections in 1991, but was unable to do so because the Justice Department refused to pre-clear the new plan.[44] Even so, the district court relied on the reasoning of the *Boner* and *Ramos* courts and refused to grant any judicial relief to make the districts more equal in population.[45] It would not be

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[39] *French*, 786 F. Supp. at 1333; *Ramos*, 781 F. Supp. at 1357.

[40] *Ramos*, 976 F.2d at 341; *Boner*, 963 F.2d. at 892.

[41] *Id.* These cities had very similar voting cycles so that every twenty years, those elected would begin four-year terms of office based on data collected more than ten years earlier.

[42] *Boner*, 963 F.2d at 892.

[43] *Reynolds*, 377 U.S. at 579-580 ("But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.").

[44] Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993). As in the *Boner* and *Ramos* cases, plaintiffs filed suit claiming that the 1991 elections were based on 1980 data and thus diluted the voting strength of African Americans in Forrest County. *Id.* at 1328. Ironically, the delay in pre-clearance under the VRA caused the 1991 elections to be held under the 1980 plan and resulted in the type of African American vote dilution the VRA was designed to prevent.

[45] *See infra* note 62 and accompanying text.

until 2006 that the Supreme Court would consider the question of frequency.

The fourth instance of plaintiffs asking the courts to look at the frequency of redistricting involved both a claim of an unconstitutional gerrymander as well as a claim that a mid-decade redistricting itself was unconstitutional.[46] However, the frequency question in *LULAC v. Perry* was secondary to the primary issue of whether the Texas Legislature created an unconstitutional gerrymander under the Court's test in *Davis v. Bandemer*. Nevertheless, this is the only case to reach the Supreme Court since *Reynolds* that dealt directly with the question of frequency in isolation from other issues. The main difference between *LULAC* and the previous three cases where plaintiffs were advocating for more frequent redistricting, is that the plaintiffs in *LULAC* asked the Court to rule a mid-decade redistricting *unconstitutional*.

The plaintiffs in *LULAC* claimed that Texas failed to meet the Court's test for gerrymanders it created nearly twenty years earlier.[47] In 1986 the Supreme Court recognized that political gerrymandering claims were justiciable under the Equal Protection Clause, but established that a plaintiff must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" for a gerrymander to be deemed unconstitutional.[48] Since the Court issued its *Bandemer* test not a single federal court on any level has declared a redistricting plan to be an unconstitutional gerrymander.[49] Critics of the *Bandemer* test believed that when the Court granted certiorari to hear *LULAC*, the best chance of finding such a gerrymander unconstitutional presented itself.[50]

LULAC v. Perry was unique to gerrymander litigation because it involved a dominant party (the Republicans) deciding to redistrict in 2003 or "mid-decade," just after obtaining a majority in both houses of the Texas Legislature as a result of the 2002

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[46] LULAC v. Perry, 548 U.S. 399 (2006).

[47] *Id.* at 400.

[48] Davis v. Bandemer, 478 U.S. 109, 127 (1986).

[49] Alex Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 213 (2009).

[50] *LULAC*, 548 U.S. 399.

elections.[51] Plaintiffs alleged that mid-decade redistricting solely initiated by political motivation was sufficient to meet the *Bandemer* burden.[52] However, Justice Kennedy writing for the Court stated:

> The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.[53]

While the focus of the *LULAC* decision was on whether gerrymanders were constitutional, the Court's validation of mid-decade redistricting at any time initiated a host of mid-decade redistricting efforts for political purposes in many states by giving its blessing to redistricting.[54] Although the Court addressed whether a mid-decade redistricting *could* occur, it is important to note that the Court did not revisit the constitutionality or practicality of the ten-year minimum. The importance of *LULAC* for this Comment is that the Supreme Court affirmed the right of a state to redistrict mid-decade, and in doing so, triggered a new wave of political gerrymanders around the country.

The final case in which plaintiffs directly addressed the timing of redistricting was decided by the United States District Court for the Southern District of Mississippi in *NAACP v. Barbour*. This case differs from the four previous federal cases in that the first three were concerned that due to time constraints, caused either by Justice Department approval or simply the timing of elections, voters were electing officials before it was feasible to redistrict based on new data; and *LULAC* dealt with

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[51] *Id.* at 399-400.

[52] *Id.* at 416-17. Plaintiffs also made a VRA claim which the Court reversed and remanded in part and affirmed in part. *Id.* at 400. However, as VRA claims are irrelevant to the focus of this Comment, discussion on those claims has been omitted.

[53] *Id.* at 418-19. After the 2000 election, Republicans controlled the state senate but not the state house of representatives. *Id.* at 411. Consequently, the legislature could not agree on a redistricting plan based on 2000 census data and a court-ordered plan was put in place until the 2003 redistricting in question. *Id.*

[54] Levitt & McDonald, *supra* note 21, at 1248. Colorado, Georgia, New Hampshire, North Carolina, and South Carolina drew new congressional or state legislative district boundaries while others made inroads into doing the same. *Id.*

redistricting within the ten-year window. Conversely, in *NAACP v. Barbour*, the Mississippi State Legislature received census data in February of 2011, and the Standing Joint Legislative Committee on Reapportionment created a redistricting plan which both houses of the legislature had ample opportunity to modify and pass; yet the legislature failed to pass identical plans through both chambers.[55]

The plaintiffs alleged that such action, causing 2011 elections to then be held under 2000 census data, was unconstitutional and requested interim judicial relief.[56] The three-judge court, finding that since it had been only nine years since Mississippi previously redistricted itself, relied on the *Reynolds* ten-year minimum and declined to issue an interim redistricting plan.[57] As a result, Mississippians voted for state legislators in November 2011 based upon data from the 2000 census. Therefore, as these newly elected officials serve their respective terms in office, Mississippi will be governed by officeholders which were elected based upon data that will eventually be fifteen years old at the end of their terms in 2015.

II. ARGUMENT

It is true that in the few instances where the lower federal courts have considered the possibility of a judicial remedy for elections held outside the ten-year window, they have uniformly failed to provide one. This is not an issue on which the federal courts are split. Nevertheless, the antiquated current minimum dilutes the voting strength of citizens throughout the country, and the Supreme Court should revisit the issue. Since 1964 Congress has created a new mid-decade census, the computer age has simplified and streamlined the redistricting process, and what the Court considered common practice by the states no longer holds

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[55] No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222, at *3-4 (S.D. Miss. May 16, 2011).

[56] *Id.* at *5. The result of holding elections in 2011 under 2000 census data would be the same as that in *Ramos* and *Boner*.

[57] *Id.* at *1-2. The Mississippi Constitution provides that within two years of the state's receiving the federal census data, the legislature must redistrict itself. MISS. CONST. art. 13, § 254. Since the previous redistricting took place in 2002, the court held that the legislature was within its self-imposed ten-year window and its ability to redistrict sooner was moot. *NAACP*, 2011 WL 1870222, at *1-2.

true. This Comment seeks not to overturn *Reynolds* as a whole or claim that the Court's original decision was misguided, but to urge the Court to revisit the ten-year minimum and apply the same reasoning to its revision as it has for other aspects of the one person, one vote doctrine.

With the Court's increasing intolerance over even the smallest of disparate population differences between districts, combined with advances in technology, a new mid-decade federal census, easy utilization of data by the states and the likelihood of an increase in mid-decade redistricting since *LULAC*, it is time for a reassessment of the ten-year minimum.

This Comment proposes that the best standard to adopt is a reduction of the constitutional minimum from ten years to five accompanied by strict prohibitions on ad hoc redistricting at other times.

A. Fulfilling "One Person, One Vote": The Lower Courts' Misinterpretation of the Reynolds *Decision*

The inevitable result of adhering to the ten-year minimum is that in the decade between redistricting, the mobile citizenry makes the previous districting plan gradually less equal, thereby granting more weight to the votes of citizens in less populous districts for each election held during the ten-year window between censuses. The Court has called this ever-increasing disproportionate impact on the equality of votes the "legal fiction" that districts are constitutionally apportioned throughout the decade.[58]

For instance, in *Fairley* the district court sanctioned the use of an admittedly unconstitutional malapportioned redistricting plan—which was purely the result of shifts in population over the previous decade—as the basis for new elections even though new census data was available.[59] In that case the county board of supervisors attempted to redistrict based upon new 1990 census data in time for the 1991 elections, but the plan was not approved by the Justice Department under the VRA.[60] Both parties agreed

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[58] *LULAC*, 548 U.S. at 421 (quoting Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003)).

[59] Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993).

[60] *Id.*

there was a population deviation of over twenty-five percent in 1991 under the old plan, which jurisprudence makes clear is constitutionally prohibited under the Equal Protection Clause.[61] Yet, the district court refused to order a special election because it viewed the deviation—though admittedly unconstitutional—as "de minimis," and because the Forrest County Board of Supervisors acted in good faith and were bound by the VRA.[62]

Although the Supreme Court clearly believed in 1964 that the ten-year minimum was acceptable even if it led to "some imbalance in the population of districts toward the end of the decennial period,"[63] the Court said nothing about elections held *outside* the decennial period. It seems the Court did not recognize that due to four-year election cycles in many states and localities, every twenty years—due to the timing of the release of census data—such a locality would hold elections based on census data more than a decade old even though more recent data was available.[64] Further, with many states allowing themselves a two-year timeframe in their state constitutions in which to redistrict themselves, it is not uncommon for states to hold elections outside the decennial period, just as occurred in Mississippi in 2011.[65]

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[61] *Id.* at 1336 (citing Connor v. Finch 431 U.S. 407 (1977); Mahan v. Howell, 410 U.S. 315 (1973)).

[62] *Fairley,* 814 F. Supp. at 1345-46. The district court found that since courts have consistently held that the extent of the deviation and other equitable considerations should be taken into account when deciding whether or not a districting scheme was unconstitutional, the circumstances of this case, particularly the size of the deviation and the amount of time needed by the board to comport with the provisions of the VRA, allowed the twenty-five percent deviation to stand. *Id.* at 1330. The court also erroneously relied on the reasoning of the *Boner* and *Ramos* courts for its conclusion that special elections are not needed every twenty years for those jurisdictions which hold elections in the first odd-numbered year after census data is collected. *Id.* at 1343. In those cases the jurisdictions did not have access to the new data in order to draw new districts before the elections, which is clearly not the case here.

[63] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

[64] *See* LULAC v. Perry, 548 U.S. 399 (2006); NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011); Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993); French v. Boner, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd*, 963 F.2d 890, 891 (6th Cir. 1992); Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff'd*, 976 F.2d 335 (7th Cir. 1992). The Supreme Court cannot be completely blamed for this occurrence. The law that standardized the release of census data to the states and created the mid-decade census was not enacted for over a decade after the decision in *Reynolds*.

[65] *See supra* Part I.C.

With its noted concern about disproportionate voting strength within the ten-year window, it seems that elections being held outside the window would not comport with the Court's mandate. Yet, by allowing states to tie the minimum to when they redistrict and not to the point in time when they receive census data, the lower courts have expanded the original meaning of ten years to include any intervening time between a state's receiving and utilization of the data.[66]

Though the Court set a strict standard of ten years for mandatory redistricting of state legislative seats, it recognized that what counted as constitutionally equal populations between state legislative districts was different than the standard for congressional districts: "Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation."[67]

The Court recognized that variations in legislative district shape among the states and the larger number of legislative seats compared to those of a state's congressional districts required some flexibility for the judiciary to administer the Court's practicability standard on a case-by-case basis.[68] However, when cases such as *Fairley* and *NAACP v. Barbour* involving redistricting frequency have come before the courts, the judiciary has failed to apply the practicability standard to the facts before it, even when the courts have initially believed some judicial intervention to be necessary.[69] Thus, the lower courts have not tailored the standard on a case-by-case basis as the Court envisioned in *Reynolds*.

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[66] *See supra* Part I.C.

[67] Reynolds v. Sims, 377 U.S. 533, 578 (1964) (stating that, in regard to state legislative apportionment, more flexibility should be allowed in determining what is practicable population disparity between districts); *see also supra* Part I.C.

[68] *Reynolds*, 377 U.S. at 578.

[69] *NAACP*, 2011 WL 1870222, at *2 ("We initially expressed our inclination to impose an interim remedy, ordering the Mississippi Legislature to redistrict."). The district court seems to have been initially inclined to present a judicial remedy to the petitioners because Mississippi voluntarily declined to redistrict before the 2011 elections, but in the end the court relied on the fact that it had only been nine years since Mississippi had last redistricted. *Id.* at *1.

B. The Need for the Courts to Recognize the Impact of Frequency on the Practicability Standard

In *Wesberry*, the Court stated, in reference to selecting members of the House of Representatives, that "chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[70] Further, the Court concluded:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[71]

The Court applied this practicability standard to redistricting of state legislatures as well in *Reynolds*:

> By holding . . . both houses of a state legislature must be apportioned on a population basis, we mean the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable*.[72]

It is important to note that this standard of practicability has also been recognized by Congress. Although Congress enacted legislation requiring a practicable standard by which districts were to have equal populations as early as 1872, these equitability requirements were either not enforced, as seen in the opinions of the landmark cases, or were simply omitted all together in future apportionment statutes.[73]

The practicability standard as applied to population equality between districts is one that has flowed consistently though the

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[70] Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964).

[71] *Id.* at 18.

[72] Reynolds v. Sims, 377 U.S. 533, 577 (1964) (emphasis added).

[73] Levitt & McDonald, *supra* note 21, at 1252.

case law.[74] To be sure, this standard is one of *practicability* and not *possibility*, as indicated by the *Reynolds* opinion.[75] The Court has, however, taken into account what is now technologically possible in narrowing the practicable standard. As increases in data collection and the ability to synthesize and count individuals has increased, so have the lengths to which states must go to meet the practicability standard.[76]

For example, in *Karcher v. Daggett* the Supreme Court invalidated New Jersey's 1982 congressional redistricting plan—which contained a combined deviation of 0.698%—because, the Court reasoned, even minimal deviations in population must result from a good faith effort to achieve equality and be necessary to achieve a "legitimate state objective."[77] The Court relied on this precedent when in *Vieth v. Pennsylvania* it found a nineteen-person deviation between congressional districts was sufficient enough to warrant adjudication by the federal courts.[78]

While the practicability standard for state legislative districts is not as high as that for congressional districts, it also

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[74] *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 54 (1970) ("This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's."); Richard L. Engstrom, *Missing the Target: The Supreme Court, "One Person, One Vote," and Partisan Gerrymandering*, *in* REDISTRICTING IN THE NEW MILLENNIUM 313 (Peter F. Galderisi ed., 2005); Richard L. Engstrom, *The Post-2000 Round of Redistricting: An Entangled Thicket within the Federal System*, 32:4 PLUBIUS: J. FEDERALISM 51 (2002).

[75] *Reynolds*, 377 U.S. at 577 ("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.").

[76] Although *Reynolds* allowed more flexibility in population equity for state legislative districts than congressional districts, the practicability standard for both has become far more rigorous. Engstrom, *Missing the Target*, *supra* note 74, at 319-21.

[77] Karcher v. Daggett, 462 U.S. 725, 741 (1983).

[78] Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002), *appeal dismissed sub nom.* Jubelirer v. Vieth, 537 U.S. 801 (2002). The Republican Caucus of the Pennsylvania House of Representatives appealed the decision of the district court on two claims: (1) the partisan gerrymander was unconstitutional and under *Bandemer* produced an actual injury to a particular group of people; and (2) the population disparity of nineteen persons violated the Equal Protection Clause. The Court dismissed the gerrymander claim but stated that the population disparity should be adjudicated at the trial level. A trial was held and the jury found that a nineteen-person deviation in population did indeed violate the Equal Protection Clause. *Vieth*, 195 F. Supp. 2d at 675.

has been narrowed by the Court. After a series of cases in the 1970s and early 1980s which attempted to define the limits of this flexibility,[79] the Court stated as a general rule that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations . . . . A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[80] Even if a plan does not exceed the ten percent threshold, a plaintiff is still able to rebut the presumption that the plan is constitutional.

As recently as 2004, the Supreme Court upheld a three-judge court finding that a plan with a combined deviation of 9.98% violated the Equal Protection Clause.[81] Using the criteria enumerated by the Court in *Karcher*, the three-judge court found that the Georgia legislature had not redistricted in a manner using the traditional criteria as stated in *Karcher*, or in a manner which furthered a legitimate or rational state interest.[82] For redistricting of both congressional and state legislative districts, the Court has not only narrowed the scope of what a state may call a "practicable" discrepancy in deviation from population equality, but it has also placed a burden on the state to justify those acceptable levels of deviation.

Although the Court has narrowed "practicable" in terms of population equity isolated from the question of redistricting frequency, it is anathema that with the development in data collection and synthesis that the Court would narrow what is "practicable" in terms of population inequality between districts, but not recognize that the infrequency in redistricting is a direct cause of such unconstitutional deviations. The same reasoning

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[79] *See* Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973).

[80] Brown v. Thomas, 462 U.S. 835, 842-43 (1983). The practical meaning of this 10% rule is that no two districts when combined may have a combined deviation of more than 10%. For example, if district X has a 4.99% negative deviation from the ideal district, and district Y has a 4.99% positive deviation from the ideal district, this would not be a prima facie case of unconstitutional redistricting.

[81] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D Ga. 2004), *aff'd sub nom*. Cox v. Larios, 542 U.S. 947 (2004).

[82] *Larios*, 300 F. Supp. 2d at 1350-54. The *Karcher* Court listed the goals of making districts compact, respecting municipal boundaries, preserving the cores of previous districts, and avoiding contests between incumbents that might justify discrepancies in population equity. Karcher v. Daggett, 462 U.S. 725, 740 (1983).

which led the Court to reject the notion, in light of technological advancements, that "[m]athematical exactness or precision is hardly a workable constitutional requirement"[83] should also lead the Court to conclude the practicability and ease of redistricting, which was not present in 1964, demands that the ten-year minimum be reassessed. The frequency standard should be updated analogous to how the Court has treated the practicable standard in light of technological and census-taking advances.

C. The Role of Technology in Redistricting

The *Reynolds* Court recognized that redistricting is not a static procedure bound by the restrictions of the nineteenth century, but that the appropriate form of redistricting is directly related to technological capabilities: "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can validly be based solely on geographical considerations."[84] Further, in *Karcher*, the Court recognized: "The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."[85] Since 1964 there have been major advancements in the collection and synthesis of data and the use of computer technology in counting the population, and the Court has continuously included these considerations in determining whether a redistricting plan is constitutional.

1. Congress Creates a Mid-Decade Census

First, Congress and the Census Bureau have made extreme changes in how and when population data is collected in the nearly half century since *Reynolds* was decided. In 1976 Congress enacted legislation that standardized the process by which the Census Bureau would reapportion the House of Representatives.[86]

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[83] Reynolds v. Sims, 377 U.S. 533, 577 (1964).
[84] *Reynolds*, 377 U.S. at 580.
[85] *Karcher*, 462 U.S. at 733.
[86] 13 U.S.C. § 141(d) (2006).

Additionally, this legislation required the Census Bureau to conduct a mid-decade census which would be used for all federal program administration and allocation of funds, except reapportionment or redistricting of congressional seats.[87] The flexibility in the statute has allowed the Commerce Department to develop collection methods which operate throughout the year and disseminate such information to the states and localities on a regular basis.[88] Although Congress periodically adopts census legislation, most of this legislation pertains to funding the Census Bureau and ensuring that it has the resources necessary to fulfill its mandate. Congress has not materially altered the method by which the Census Bureau collects information or apportions House seats since enactment of the 1976 statute.[89]

Although this act passed in the 1970s, it was an idea which had been debated in Congress for over one-hundred years.[90] The act requires that in the administration of any federal program, the most recent of the two censuses should be relied upon for the basis of distributing resources: "[T]he determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used."[91]

Yet, the very next section prohibits the use of the mid-decade census data from being employed by the states in prescribing congressional districts or the reapportionment of representatives in Congress among the states.[92] It is odd that Congress realized the need for a more frequent population count and believed the accuracy of a mid-decade count to be such that every federal program should rely on its numbers, except that of

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[87] *Id.*

[88] *American Community Survey: When to Use 1-Year, 3-Year, or 5-Year Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/guidance_for_data_users/estimates/ (last visited Apr. 18, 2012).

[89] Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 337-38. Although the majority of the current census act became positive law in 1954, the last major alteration to the law was the 1976 act. Pub. L. No. 94-521, § 7(a), 90 Stat. 2461 (Oct. 17, 1976) (originally enacted on Aug. 31, 1954, ch. 1158, 68 Stat. 1019; codified as amended at 13 U.S.C. § 141(d) (2006)).

[90] President Grant communicated such an idea to Congress in his Fifth Annual Message to Congress. Gladden, *supra* note 21, at 1140 n.30.

[91] 13 U.S.C. §141(e)(1)(B) (2006).

[92] 13 U.S.C. §141(e)(2) (2006).

reapportionment and redistricting of congressional seats.[93] In crafting the ten-year minimum the *Reynolds* Court noted that since reapportionment occurred every ten years based upon the decennial census data, it was a rational approach to redistrict a state legislature in a ten-year cycle as well.[94] It only goes to reason that with a new mid-decade census, just as accurate as the decennial census, the Court would find it rational for a narrowing of the frequency standard to reflect such changes in data collection and availability.

2. New Advances in Collecting and Utilizing Data

Second, in addition to receiving more reliable and accurate census information from the federal government, states have now fully integrated their redistricting with new computer technology which can allow pin-point precision in drawing lines, tabulating new votes, and synthesizing data. Although redistricting computer systems existed in the 1960s, they did not have the capabilities necessary to quickly analyze changes in district boundaries.[95] In the mid-1990s only some states had redistricting programs running on mainframe computers or state-of-the-art workstations.[96] The software development and compilation of data cost an average of $500,000 with some states spending millions of dollars on new systems.[97] Today, all fifty states use redistricting software, and the majority use commercially available programs capable of running on the common desktop.[98]

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[93] The natural counterargument to this proposition is that the Constitution requires an "actual enumeration," thereby prohibiting the use of any statistical sampling in reapportionment of congressional seats among the several states. The House of Representatives attempted to have this very question answered in *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). However, the Court resolved the issue through statutory interpretation and declined to address the constitutional issue. *Id.* at 343. Even if the Court were to side with the House in this matter and rule that such sampling cannot be used for apportionment, it does not mean the mid-decade census could not still be used for redistricting purposes because the Constitution leaves the method of selecting representatives to the states.

[94] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

[95] Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting,* 5 DUKE J. CONST. L. & PUB. POL'Y 69, 78 (2010).

[96] *Id.*

[97] *Id.* at 78-79.

[98] *Id.* at 79.

The advent of geographic information system (GIS) software has allowed the elimination of all deviations by linking population with geography.[99] Before the computer age, states would employ cartographers to manually draw lines on large maps, which due to constraints on time and resources would allow only so many drafts of a redistricting plan, with the cartographer frequently working with precincts—containing somewhere between 1000 to 2000 voters—as the smallest political unit.[100] Conversely, GIS technology uses the census block as the smallest political unit, which in some cases is no larger than one city block, typically contains less people than a precinct and is easily divisible if need be.[101] With the federal government's constant collection of data and the easy access to highly sophisticated computer software of all fifty states—both of which did not exist at the time *Reynolds* was decided—it seems that were the Court to revisit the issue, these factors would support a narrowing of the ten-year minimum, just as they have for a narrowing of the equal population practicability standard.

D. Increases in Mid-Decade Redistricting and Political Instability in the Wake of LULAC

The *Reynolds* Court recognized in crafting the ten-year standard that it would not be practical or efficient to impose a constitutional requirement of annual or biennial redistricting.[102] Limitations on such frequency are justified in the interest of political stability.[103] Though states did not tend to redistrict themselves that frequently in 1964, such redistricting is on the rise nation-wide after the Supreme Court condoned such action in 2006. Adoption of a five-year minimum with limitations on ad hoc redistricting at other times would eliminate the increase in political instability that comes with redistricting that is too frequent.

After Republicans took control of both houses of the Texas Legislature in the 2002 elections, the new majority set about

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99 BULLOCK, *supra* note 34, at 39.

100 *Id.*

101 *Id.* at 40.

102 Reynolds v. Sims, 377 U.S. 533, 583 (1964).

103 *Id.*

redistricting the state's congressional districts in order to solidify the Republican domination of the delegation in future elections.[104] The Supreme Court held that such action, motivated primarily by political desires to entrench a majority in power, was in fact constitutional and did not meet the burden of unconstitutionality as set forth in *Bandemer*.[105] As a result, several states around the country began to initiate redistricting efforts.[106]

The Court's decision shifted the responsibility of determining how often within the ten-year minimum a state may redistrict to the states themselves. These types of redistricting battles will now be fought in state courts and depend heavily on the wording of state constitutions and statutes.[107] With the decision in *LULAC*, a state could hypothetically redistrict five times in ten years if the majority in the legislature changed with every biennial election, leading to the kind of political instability discouraged by *Reynolds* and not advocated for in this Comment.[108]

If such action seems to be unlikely, it is not without precedent. When the Speaker of the U.S. House of Representatives, Samuel Randall, encouraged his home state of Ohio's Democratically-controlled legislature to gerrymander its congressional seats mid-decade so as to leave the delegation firmly in Democratic hands, it did so.[109] Consequently, when the Republicans took over the legislature, they immediately tried to reverse the Democrats' redistricting scheme with their own partisan gerrymander.[110] The continuous partisan turnover of the legislature resulted in seven mid-decade redistrictings between

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[104] *See supra* notes 51-52.

[105] *See supra* notes 52-53 and accompanying text.

[106] *See supra* note 54 and accompanying text.

[107] Levitt & McDonald, *supra* note 21, at 1249. On the same note, the *LULAC* decision all but assured that there will be no plaintiff or claim that can successfully meet the *Bandemer* test because of the Court's disagreement over which substantive standard to apply to determine justiciability; and Justice Kennedy explicitly states the opinion will not attempt to clarify that dispute. LULAC v. Perry, 548 U.S. 399, 400 (2006) (plurality opinion).

[108] *Reynolds*, 377 U.S at 583. ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system . . . . [I]n substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.").

[109] Gladden, *supra* note 21, at 1139.

[110] *Id.*

1878 and 1892, with six consecutive congressional elections conducted under new districting plans.[111]

Unfortunately, the language used by the states which dictates when redistricting of both congressional and legislative seats is to occur, more times than not, is ambiguous and leaves open the possibility of redistricting at any time and, consequently, increased amounts of litigation.[112]

Although both cases were decided before *LULAC*, the events in Nebraska and Colorado illustrate what can occur when this type of ambiguity exists. The Colorado General Assembly redrew the state's congressional districts in 2003 to replace a court imposed plan just as the Texas Legislature had done the very same year.[113] There the Colorado Supreme Court looked to the language of the state constitution and decided that when a time frame is specified for redistricting (in this case every ten years), the implication is that it may not occur at other times.[114]

In Nebraska, the Douglas County election commissioner announced plans to redraw Omaha City Council districts before the April 2001 primary elections using 1990 census data because 2000 census data would not be available until March—which would be too close to the elections to use for redistricting purposes.[115] The Nebraska Supreme Court relied on the following statutory language governing districting of political subdivisions:

> [S]uch districts shall be substantially equal in population as determined by the most recent decennial federal census. Any such political subdivision . . . shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the

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111 *Id.*

112 For a thorough comparison of state constitutional language, see generally Levitt & McDonald, *supra* note 21.

113 David J. A. Bargen, Note, *The Frequency of Redistricting in Nebraska and the Balance Between One Person, One Vote and Electoral Stability: How Often is Too Often?*, 82 NEB. L. REV. 575, 577 n.4 (2003).

114 *Id.*

115 *Id.* at 579-83.

> legislative bill providing for reestablishing legislative districts.[116]

In light of there being no specific language in the statute prohibiting more frequent redistricting, the Nebraska Supreme Court, in contrast to the Colorado Supreme Court, saw the six-month language following an enabling act as setting a minimum amount of redistricting, not a provision for a once-in-a-decade mandate.[117] Although the Colorado decision dealt with congressional districts, and the Nebraska courts were dealing with the redistricting of internal political subdivisions, these cases illustrate the instability for redistricting across the board that will only now escalate after *LULAC*.

Further, only fourteen state constitutions mention the timing of congressional redistricting with some of those explicitly allowing redistricting at any time.[118] Although, as in the case with Nebraska, the Kentucky Supreme Court followed suit and interpreted the absent restrictive language to allow redistricting at any time, this leaves thirty-four states without provisions governing the timing of *congressional* redistricting which, without remedy, will surely become the new legal battlegrounds with the rise of mid-decade redistricting.[119]

In contrast to the timing of congressional redistricting, every state except Michigan has language regarding the timing of state legislative redistricting. But again, the language is often ambiguous.[120] Although some states explicitly through their constitutions allow their respective legislatures to redistrict at any time[121] the majority of the remaining states contain the same type of ambiguous language that neither explicitly denies nor permits redistricting more than once per decade.[122] Additionally, on the rare occasions when attorneys general or state supreme courts

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[116] *Id.* at 585.

[117] *Id.* at 587.

[118] Levitt & McDonald, *supra* note 21, at 1258-59. The South Carolina and Wyoming constitutions make it clear that congressional districts may be redrawn at any time the legislature sees fit. *Id.* at 1146 n.53.

[119] *Id.* at 1259.

[120] *Id.* at 1258.

[121] Mississippi, Tennessee, South Carolina, and Vermont. *Id.* at 1259 n.54.

[122] *Id.* at 1266. Only ten states have unambiguous constitutional language that clearly restricts redistricting to once per decade. *Id.* at 1260.

have interpreted these ambiguous provisions, states have been split between those states which view ambiguous language to be implicitly restrictive or permissive in nature.[123] A new five-year standard with strong prohibitions on annual, biennial, or other arbitrary redistrictings will eliminate the uncertainty of when elections may occur while allowing each citizen's vote to be counted more equally.

E. The Court's Reliance on State Practices: A Second Look

It is important to note that the *Reynolds* Court looked to the constitutions of the several states in determining that ten years was the constitutional minimum by which states must redistrict. The Court stated:

> Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance . . . .[124]

This analysis deserves some attention because the ten-year minimum now applies to both congressional as well as state legislative redistricting, and states with "silent" provisions on redistricting can no longer be viewed as one homogenous group as the Court viewed them in 1964.

Although the ten-year minimum, as written in *Reynolds*, dealt with redistricting of state legislatures—which is why the Court only analyzed state *legislative* reapportionment provisions among state constitutions—the standard has been understood to apply to both congressional and state legislative redistricting. A federal statute now requires decennial reapportionment by the Census Bureau, but the statute is silent with regard to how the

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[123] Louisiana, Nebraska, and Georgia have adhered to the permissive interpretation while Colorado, California, New Hampshire, South Dakota, and Wisconsin have viewed the provisions as more restrictive. *Id.* at 1263-65. It is important to note that these courts and attorneys general are not interpreting static language in each case. Each state constitution is, of course, worded in a way which is unique unto itself. Therefore, it is very difficult to identify a national trend in which way courts are leaning in the matter.

[124] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

states are to construct their districts or how frequently they can be modified; thus, the method of selecting the congressional delegation is left to the states.[125] Therefore, since the ten-year minimum is now understood to apply to both federal and state redistricting, it is appropriate to assess not only state constitutional provisions governing legislative reapportionment and redistricting, as the *Reynolds* Court did, but provisions regarding *congressional* redistricting as well.

First, the Court's assertion that forty-one states follow the practice of tying their redistricting efforts to the federal census in 1964, while facially valid, is also somewhat misleading. For example, states like Tennessee, South Carolina, and Vermont contained explicit language allowing their respective legislatures to redistrict at any time, yet were included in the court's group of forty-one.[126] Additionally, the majority of state constitutions in 1964, as today, did not proscribe redistricting more than once per decade, but were simply silent on the issue.

Second, since there have been multiple attempts in many of these "silent" states which the court initially included in its count of forty-one to redistrict mid-decade, it seems that these states can no longer be placed in the once-per-decade column. Although the state courts have split over whether or not such action is permissible under their respective state laws, it is an indicator that the legislatures in several of the states the Court included in its count did not take the same limiting view as the Court did. In fact, today only nineteen states, either through constitutional language or by state court ruling, are explicitly prevented from redistricting their legislature mid-decade, while eleven states have explicitly permitted it through the same mechanisms.[127] With twenty states remaining silent on the issue, it is no longer appropriate to say the majority of states tie their redistricting efforts exclusively to the decennial federal census.

Last, since the majority of states have deliberately chosen not to tie their congressional redistricting to the federal census as some have with legislative redistricting, the Court should look to this fact as an indicator of what a new minimum standard should

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[125] *See supra* Part I.A.

[126] *See supra* text accompanying note 124.

[127] *See* Levitt & McDonald, *supra* note 21.

be.[128] It is also of interest that even in some states which have explicitly prohibited redistricting more than once per decade, many of them have taken the opposite view when considering the redistricting of congressional seats.[129] In light of the developments in redistricting both for congressional and legislative districts, the Court should consider that the forty-one state majority it relied on in *Reynolds* no longer exists.

F. Answers to Possible Concerns

The two natural objections to such a new standard are (1) cost concerns and (2) an increase in political instability or disconnect between an elected representative and his or her constituency because of more frequent adjusting of legislative borders.

To the first point, the Supreme Court made it clear in *Reynolds* that economic interests cannot be relied upon to justify disparities in population-based representative government.[130] Although there may be administrative overhead in implementing this new standard, it would pale in comparison to costs imposed on states in the wake of the *Reynolds* decision in 1964. States were compelled to redistrict, often for the first time in decades, which required the hiring of cartographers and specialized experts for an extended period of time.[131] Further, the *Reynolds* court required states not to simply spend the money once, but every ten years as well. If that financial burden was not onerous enough to make the Court curb its pronouncement, the one which would result from adoption of the rule proposed in this Comment certainly would not rise to that standard.

Further, from a policy perspective, the administrative cost would be minimal. With the use in all fifty states of precision-point software usable on any given consumer laptop, and its ability to adjust borders quickly, there is no need for states to hire additional specialists simply because they would be required to

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[128] *See supra* text accompanying note 115.

[129] New Hampshire, North Carolina, Illinois, and New Mexico either redistricted in the wake of *LULAC* or expressed interest in the possibility. Levitt & McDonald, *supra* note 21, at 1248.

[130] *See supra* note 43 and accompanying text.

[131] *See supra* Part II.B.

redistrict twice as often as today.[132] The largest costs associated with adoption of a five-year minimum would be for the given election official to give notice to those citizens affected by any shift in borders.

To the second point of increased political instability or disconnect between the elected official and the citizenry, there are several ways in which such a new minimum standard would not only fail to increase instability, but may actually strengthen the connection between a citizen and his or her elected officeholder.

First, redistricting every five years will minimize the impact of redistricting by the very fact that population has not shifted as greatly in five years as it naturally has in ten. It is common sense to assume that there will be greater changes in population equality between districts over a ten year period than over one of only five years. Therefore, a redistricting that takes place after only five years will result in much less dramatic changes in district boundaries than one that takes place after ten.

Second, much of the problem regarding the dramatic changes in district boundaries, with or without the adoption of this proposed new standard, is the fault of gerrymandering. It is this practice which keeps districts from being compact and community centered, not the frequency by which the boundaries are redrawn. If jurisdictions were to alter the way in which they draw districts so as to make the process less political, the issue of disconnect between voter and officeholder would be mitigated drastically and alteration of boundaries would be far less dramatic. In a less politicized district map with subtler boundary changes due to a more frequent redistricting standard, it only goes to reason that voters would have more connection with their representative when realizing their votes are counted more equally and that their district is not created for the benefit of one political party but for the benefit of the citizens themselves.

Finally, no federal or state legislative office has a term longer than four years.[133] Therefore, no elected office would always be

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[132] *See supra* Part II.B.

[133] *Number of State Legislators and Length of Terms (in years)*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=22258 (last visited Apr. 18, 2012). Senators of course are elected to six-year terms, but as they are elected to represent an entire state, redistricting is not relevant to that body.

subject to redistricting within every term, thus maintaining political stability in the election process. Although some state legislative offices elected to four-year terms would occasionally receive increased redistricting as a result of such a standard, any drawbacks of such a slight increase in instability would be outweighed by the benefits of increasing the equality in weight of each citizen's vote.

III. PATHWAYS TO REFORM: THE COURT, CONGRESS, AND THE STATES

A. Implementation

There are five possible ways by which such a five-year minimum could be implemented: (1) The Court could reassess the standard on its own by hearing an appeal similar to that of *NAACP v. Barbour* and requiring a new rule for both congressional and legislative redistricting; (2) Congress, through its Article I power, could implement such a new minimum standard which would apply to congressional redistricting; (3) Congress could enact legislation requiring states to use the new data to redistrict their legislatures; (4) states could amend their state constitutions to adopt a new standard for both congressional and legislative districts; or (5) state supreme courts could require the new minimum for the redistricting of state legislatures by interpreting a state's refusal to do so when more accurate data is available as a violation of the Fourteenth Amendment's Equal Protection Clause or as a violation of state constitutions which contain equal protection clauses.

To the first option, the Court would need to hear an appeal from a three-judge court. Since the standard as discussed applies to both congressional and legislative redistricting, the Court would need to distinguish both *Reynolds* and *Wesberry* just as it has when the Court has narrowed the practicability standard regarding equal population between districts. The Court may establish the same standard for both, or give state legislative redistricting more flexibility as it has with the practicability standard.

Option two, although unlikely given the House of Representatives' response to using the mid-decade census for

redistricting, would be the easiest way to adopt a new standard for congressional redistricting.[134] Such authority is clearly evident in Article I, Section 4. This action would also naturally include a repeal of the provision prohibiting use of the mid-decade census for redistricting.

The restriction on states present in the statute also raises constitutional concerns. If, for example, a state wanted to redistrict five-years into the decade and use the most current federal census data available to it, the state would be proscribed by law from doing so. Therefore, if Congress believes—as it most certainly does as evidenced by the statute—that the more recent of the decennial or mid-decade census is most accurate in its reflection of population information at a given time, yet denies its use for congressional redistricting, it can be argued that Congress is depriving citizens of equal protection under the Fifth Amendment, thus triggering a strict scrutiny analysis of the statute.[135] The Census Bureau has used its authority under the statute to expand its data collection and dissemination with use of the American Community Survey which releases five-year, three-year, and one-year estimates.[136]

Option three is slightly more complex. For Congress to assert such control over the state legislatures would certainly give rise to litigation regarding the rights of the states to determine for themselves the redistricting policies of their legislative bodies. Congress would need to show that, in exercising its power under Section 5 of the Fourteenth Amendment, the burden of a newly imposed rule would be proportional and congruent to the injury sought to be prevented.[137] Since the injury of vote dilution is made plain by the evidence and there is ample means to remedy such

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[134] *See supra* notes 86-92 and accompanying text.

[135] *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (articulating the idea that the Fifth Amendment's Due Process Clause imposes on the federal government the same equal protection standard as the Fourteenth Amendment). The Court most recently reiterated its adherence to this doctrine in *Adarand Constructors, Inc. v. Pena.* 515 U.S. 200, 217 (1995) ("Equal Protection analysis under the Fifth Amendment area is the same as that under the Fourteenth Amendment." (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976))).

[136] *American Community Survey: When to Use 1-Year, 3-Year, or 5-Year Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/guidance_for_data_users/estimates/ (last visited Apr. 18, 2012).

[137] City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

dilution, it would be within Congress's power to enact such legislation.

Regarding unilateral state action, such a mid-decade congressional redistricting would only achieve the goals discussed in this Comment if Congress were to repeal the prohibition on using mid-decade data for redistricting purposes. Otherwise, like Texas in *LULAC*, a state would be redistricting based on the decennial data and would accomplish nothing in terms of making new districts truly equal in population. If Congress did not repeal the statute, a state could supplement the federal census data with its own state administered data collection. There is a long history of states enumerating their citizens in addition to the federal census data.[138] Although in the current economic climate of strained budgets in many states, this avenue seems unlikely.

With the rise of mid-decade redistricting and the resulting increase in litigation at the state level, the final option of state supreme courts asserting such a rule for their jurisdictions is a very real possibility. The only constitutional concern is whether a state supreme court can develop a redistricting standard pertaining to electing members of Congress apart from the legislative branch since Article I, Section 4 gives power to the "legislatures" and not the states in general.[139] Justice Stevens recognized this mechanism as being possibly unconstitutional in his dissenting opinion in *California Democratic Party v. Jones*, and the majority opinion did nothing to contradict this assertion.[140] However, in light of the Court's decision in *LULAC*, which gave all but exclusive jurisdiction to the states in determining the ultimate timing of redistricting within each decade, it seems likely that the Court would defer to a state

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[138] A state census was not unheard of earlier in the country's history. Tennessee, although admitted in 1796 as the sixteenth state in the union, began enumerating its citizens in the late nineteenth century. Baker v. Carr, 369 U.S. 186, 189 n.4 (1962). Only Maine, New Hampshire, New York, and Ohio now explicitly allow supplementation of the census data with a state census. *See* Levitt & McDonald, *supra* note 21, at 1258 n.48. Additionally, both New York and Pennsylvania enumerated their respective citizenries and redistricted mid-decade as early as the nation's founding. *See* Gladden, *supra* note 21, at 1148.

[139] U.S. CONST. art. I, § 4, cl. 1.

[140] 530 U.S. 567, 602 (2000) (Stevens, J. dissenting) ("[I]t is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.").

court's judicial pronouncement, especially if issued through the lens of a state constitution's equal protection clause.

B. Alternative Standards for Improving Frequency Standard

Although this Comment proposes a five-year minimum as the ideal standard by which states must redistrict, other less dramatic approaches, while not as potent, would be an improvement from the current standard.

The most basic alteration would be to link the *Reynolds* ten-year minimum for state legislative redistricting to the collection or dissemination of federal census data by requiring states to redistrict within the first year of receiving the data instead of the present and more arbitrary rule of linking the standard to the last time the state redistricted. If that were the standard, cases like *NAACP v. Barbour* would never arise because the Mississippi legislature could not simply refuse to redistrict, as it did in 2011; otherwise a federal court would draw the district boundaries itself or require new elections.

Several state constitutions, like that of Mississippi, allow the legislature years to redistrict following the federal census.[141] If states were bound to redistrict as quickly as practicable after receiving the census data, it would reduce greatly the occurrence of electing officeholders according to eleven or twelve-year-old data as exemplified in *Fairley v. Forrest County*, *French v. Boner*, *Ramos v. Illinois*, and *NAACP v. Barbour*. Further, a legislature's voluntarily choosing not to redistrict in the first year, given that states have the technological ability to do so in an expeditious manner, does not seem to comport with the Court's practicability standard pronounced in *Reynolds*.

A second option would be for the states to develop a redistricting standard somewhere between five and ten years. Such action is certainly not without historical precedence. It was not uncommon at the time *Reynolds* was decided for states to redistrict more frequently than once every ten years.[142] And, as

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[141] MISS. CONST. art. 13, § 254. Maine allows its legislature three years to redistrict. ME. CONST. of 1968, art. IV, pt. 1, § 2.

[142] THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 58-62 (2010). Arizona, Colorado, Indiana, Kansas, and Ohio all had redistricting laws which required

evidenced by legislation in the wake of *LULAC*, many states have already begun to do so for congressional districts. In 1973, Hawaii required state legislative redistricting every eight years.[143] However, such redistricting is only useful in promoting equality between districts if the mid-decade census data is used or if the state supplements the decennial census data with its own state census.

CONCLUSION

In the years since *Reynolds v. Sims* was decided, increases in technology, communications, federal data collection, the mobility of citizens, and the number of states redistricting mid-decade has produced a need for the Supreme Court to revisit, for the first time since 1964, the question of how frequently a state should redistrict its congressional and legislative districts. Although a ten-year minimum made sense in 1964, developments in these areas, upon which the Court originally relied when addressing issues of population equality, make such a standard antiquated and in need of revision. As states begin to redistrict on an almost unpredictable basis to solidify political power since *LULAC v. Perry*, a newly imposed five-year standard with clear prohibitions on annual or biennial redistricting will maintain stability in the political process while realizing more fully the promise of one person, one vote.

Grant C. Mullins[*]

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redistricting more frequently than once per decade and Vermont and Minnesota gave precedence to their respective state censuses over the federal decennial census. *Id.*

[143] Levitt & McDonald, *supra* note 21, at 1254 n.30.

[*] J.D. Candidate, The University of Mississippi School of Law, 2013; M.P.P., The College of William and Mary, 2008; B.A., Lipscomb University, 2006. The author wishes to thank Professor Jack W. Nowlin and Professor Christopher Green for their guidance in writing this Comment.