1993

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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38J65W

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Voting Rights Reforms North and South: Life Becomes Tougher for Incumbents*

M. David Gelfand†

"'We're in the hands of professors and lawyers,' he said. 'You know what that means to a politician?' He laughed. 'We're dead.'"¹

"[A] decision that changes the entire structure of local government is hardly commonplace nor should it be. The existing councilmanic structure... has worked successfully for the past three decades."²

"'We will be sending some fresh faces to Washington,' said Bill Jones, Florida director of the citizen's lobby Common Cause. 'When somebody independent is drawing (new district) maps... it's one way to turn over Congress.'"³

I.
OVERVIEW

The first two quotations express the fears of incumbents facing the prospect of one-person, one-vote redistricting or racial vote dilution litigation that may disrupt their traditional constituency base. Indeed, as the third quotation explains, sometimes federal court intervention may result in substantial changes designed to increase political participation, especially on the part of minority groups. Yet, none of these reforms

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takes place in a vacuum; incumbents can often play a major role, even during the remedial stage of racial vote dilution litigation. As a result, voters and voting rights litigants often feel frustrated by the power of incumbents to redirect voting rights reform processes.

This Article analyzes the processes behind recent voting rights reforms in New York City and in Jefferson Parish, Louisiana. These two local governments represent radically different populations in terms of size and demographic characteristics and reflect different political histories, but their voting rights reform processes include many interesting parallels and some instructive contrasts. In order to refine and highlight the comparisons between the remedial processes in New York City and Jefferson Parish, references are also made to the congressional redistricting process just completed in Florida. The New York City Charter revision process resulted in abolition of the City's Board of Estimate and expansion of the City Council, with district boundaries later drawn by a new independent Districting Commission. The subsequent election produced a substantial increase in the number of African Americans and Hispanics on the City Council. The recent racial vote dilution litigation in Jefferson Parish ultimately produced a council district with an African-American voting age population majority. In the subsequent election, the first ever African American was elected to the Jefferson Parish Council. The Florida court-ordered redistricting plan created two congressional districts in which African Americans were a majority of the voting age population, a third in which they were a majority of the total population, and two districts in which Hispanics constituted a substantial majority of the voting age population. In the recent election, Florida voters sent a record three African Americans and two Hispanics to Congress from these districts.

Part II of this Article describes the background differences and provides a detailed chronology of the voting rights reforms in these three case studies. Part III then analyzes the similarities and differences in these reform processes. The roles of voting rights litigators, incumbents, the Justice Department, and the federal courts are discussed. Employing the information and insights derived from these case studies, Part IV analyzes the roles of incumbents under various institutional arrangements which might be employed for redistricting, e.g., the existing council, separate elected bodies, independent commissions, or courts. Finally, increased public participation through modern technology and alternative electoral arrangements are briefly explored in Part V.

I had the unusual opportunity of serving as a participant-observer, in differing capacities, in all three of the case studies described and ana-
alyzed in this Article. As a result, this discussion of voting rights reform in the North and South is based, at least in part, upon direct knowledge of and involvement in the reform processes themselves.

II.
CASE STUDIES IN ELECTORAL REFORM IN THE NORTH AND SOUTH

A. Jefferson Parish Council

Jefferson Parish is a medium-sized local government unit, equivalent to a county in other states. This parish, which has the second-largest population in Louisiana, is the principal suburb of the City of New Orleans. Its population is primarily white, but approximately 17.6 percent of the population is African-American. The Jefferson Parish Council is a rather new structure, created in 1957. Prior to the litigation discussed in this Article, members of the Parish Council were selected under a rather complex, mixed electoral system in which one member was elected at-large (throughout the parish), two members were elected from floterial districts (one denominated as the "East Bank district" and one as the "West Bank district"), and four were elected from fairly populous single-member districts. During the period considered here, the federal courts ruled that this structure violated Section 2 of the Voting Rights Act. Because Jefferson Parish is a local jurisdiction within the State of Louisiana (a state covered under Sections 4 and 5 of the Voting Rights

4. I was the lead consultant on voting rights issues for the New York City Charter Revision Commission; lead counsel for plaintiffs in the appellate and remedial stages of the Jefferson Parish litigation; and court-appointed Independent Expert in Florida's congressional redistricting case.


6. Each floterial district encompassed two single-member districts. The so-called "East Bank" district actually lay on both the east and west banks of the Mississippi River. The boundaries of the single-member districts were the product of a one-person, one-vote challenge to the system. See East Jefferson Coalition v. Parish of Jefferson, 691 F. Supp. 991, 994 (E.D. La. 1988) [hereinafter East Coalition I] (citing Floyd v. Parish of Jefferson, Civ. Action No. 86-0265 (E.D. La. 1987)). For a brief description of the Fourteenth Amendment's one-person, one-vote requirement, see infra note 12.

Act), the Parish is also a "covered jurisdiction." 8

B. New York City Board of Estimate

Unlike Jefferson Parish, New York City is multi-racial and multi-ethnic, with a wide variety of minority groups. 9 It is the largest city in the United States, composed of five boroughs, each of which is also a county. At the beginning of the period discussed in this Article, New York City was governed by the Mayor, City Council, and Board of Estimate. The Board of Estimate, whose origins dated from the nineteenth century, was an extremely powerful governmental body, possessing control over land use, governmental contracting, purchasing, financing, and certain aspects of budgeting. 10 It operated as a mixed electoral structure, with three at-large members (the Mayor, Comptroller, and City Council


9. According to the 1990 census, the total population of New York City is 7,322,564. There are 1,847,049 African Americans, 1,783,511 Hispanics, 489,851 Asians, and 39,028 persons from other minority groups. Therefore, non-Hispanic whites comprise only about 43.2% of New York's population. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMIN., 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS, NEW YORK 107 (1991).

10. Before the Board of Estimate was abolished, the New York City Charter provided that the Board had the duty to:

1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.
2. Make recommendations to the mayor or the council in regard to matters of city policy whenever requested or on its own initiative.
3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provision of law or whenever the public interest will be benefited thereby.
4. Have final authority respecting the use, development and improvement of city land.
5. Have authority to approve standards, scopes and final designs of capital projects.
6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.
7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency.

In 1989, the United States Supreme Court ruled that this electoral structure violated the "one-person, one-vote" requirement of the Equal Protection Clause of the Fourteenth Amendment. Until that time, City Council members were elected from 35 single-member districts. The 1989 Charter revisions abolished the Board of Estimate, increased the powers of the Mayor, expanded the size of the City Council to 51 members, and created an independent Districting Commission to draw the new councilmanic district boundaries. New York City is a partially covered jurisdiction, with three of its five constituent counties (Bronx, New York, and Kings counties) covered under the Section 4 and 5 formulas and requirements.

11. None of these officials was elected directly to the Board of Estimate, but the Charter provided that membership on the Board was automatic for the holders of these eight offices. See N.Y. CITY CHARTER § 61 (1977) (old charter). On most issues the three at-large members had two votes each, but on some budgetary matters the Mayor was not allowed to vote. Each Borough President had one vote. Id. at § 120. See generally M. David Gelfand & Terry E. Allbritton, Conflict and Congruence in One-Person, One-Vote and Racial Vote Dilution Litigation: Issues Resolved and Unresolved by Board of Estimate v. Morris, 6 J.L. & Pol. 93, 95-96 (1989) [hereinafter Gelfand & Allbritton, Conflict and Congruence].


13. This pattern emerged in response to a federal court decision that election of 10 members of the Council on a borough-wide basis, i.e., two per borough, violated the one-person, one-vote requirement because of the wide population variation among the boroughs. See Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981) (Neather, J.), aff'd mem., 688 F.2d 815 (2d Cir. 1982), aff'd sub nom. Giacobbe v. Andrews, 459 U.S. 801 (1982). When the 10 borough-wide seats (referred to in New York as the "at-large council seats") were abolished, only the 35 single-member district seats remained.

14. See infra notes 69, 88-90 and accompanying text.

15. See 28 C.F.R. § 51.4 & Appendix (1991). New York County and Kings County are more commonly referred to by their borough names—Manhattan and Brooklyn, respectively. For a description of §§ 4 and 5, see supra note 8.
C. Florida’s Congressional Districts

Between 1980 and 1990, Florida’s population increased by more than 3.2 million persons. As a result, Florida is now entitled to 23 members of Congress (an increase of 4). The 1990 census figures reflect that 13.6 percent of Florida’s population is African American and that 12.2 percent is Hispanic. There are important cultural and nationality divisions among Florida’s Hispanic communities (e.g., Cubans, Nicaraguans). No African American has been elected to Congress from Florida during the twentieth century, and the first ever Hispanic member of Congress from Florida was elected in a special election held in 1989. Five Florida counties are covered jurisdictions under Sections 4 and 5 of the Voting Rights Act.

The Florida Legislature is responsible for redrawing the congressional and state legislative boundaries within the state every ten years. After that Legislature failed to adopt a congressional redistricting plan, a specially convened three-judge federal court ordered “the state of Florida to conduct the 1992 congressional elections and congressional elections thereafter in districts as shown by plan 308 [the Independent Expert’s Plan], which this court deems the ‘1992 Florida Redistricting Plan.’” That redistricting plan had been recommended by the Special Master, previously appointed by the three-judge court. The Special Master’s recommendation, in turn, was based upon the plan proposed by the Independent Expert Witness, who had been appointed by the Special Master. That plan contained two congressional districts in which African Americans constituted a majority of the voting age population and two in which Hispanics constituted a substantial majority of the voting age population.

20. The Florida Constitution contains a procedure for judicial reapportionment of state legislative seats if the Legislature initially fails to act. See FLA. CONST. art. III, § 16. No such procedure is provided, however, if the Legislature fails to adopt a congressional plan. See DeGrandy, 794 F. Supp. at 1080, 1090.
21. DeGrandy, 794 F. Supp. at 1090; see also id. at 1081.
22. See id. at 1081. The Special Master was the Honorable C. Clyde Atkins, Senior District Judge for the U.S. District Court for the Southern District of Florida. A copy of his Report and Recommendation [hereinafter Special Master’s Report] is on file with the editors of LA RAZA L.J.
23. The author of this Article was appointed as the Independent Expert Witness, pursuant to Rule 706 of the Federal Rules of Evidence. The Report to the Special Master by the Independent Expert Witness [hereinafter Independent Expert’s Report] in DeGrandy, along with all exhibits and attachments, is on file with the editors of LA RAZA L.J.
age population. The plan also contained one "influence district," in which African Americans were a majority of the total population but constituted 45.7 percent of the voting age population.

This court-made plan was generally praised by African-American and Hispanic organizations and by newspaper editorials, but it was criticized by several incumbent Congressmen and state legislators planning to run for Congress. Because it was a court-made plan, preclearance by the Justice Department was not required. The fall 1992 elections are not completed, so a full evaluation of the effects of the plan is not yet possible. However, the September primary elections and October runoffs reflect successes by minority voters in the African-American majority and Hispanic-majority districts.

24. See Independent Expert's Report, supra note 23, at 36-37. The precise numbers are:
1. District 17—African-American voting age population of 54.0%;
2. District 3—African-American voting age population of 55.0%;
3. District 18—Hispanic voting age population of 67.5%;
4. District 21—Hispanic voting age population of 70.6%.

See id.; Independent Expert Exhibit 1 (color maps and statistics); Independent Expert Attachment G.


28. On September 8, 1992, Carrie Meek was elected as the Democratic Party's nominee from district 17, one of the African-American majority districts. See supra note 24. As she has no Republican opponent, she is the first African American woman ever elected to Congress from Florida (and the first African American this century). On October 1, State Representative Corrine Brown won the Democratic Party runoff in the other African-American majority district (district 3), defeating a white candidate. Also, in the October 1 runoff, Alcee Hastings was elected as the Democratic Party's nominee from the African-American influence district (district 23). See supra note 25. His opponent, Lois Frankel, had long enjoyed the support of African-American voters in her state legislative district. Candidates in both district 3 and 17 competed for African-American votes. Both Brown and Hastings face white Republicans in November's general election.

Similar successes occurred in the two Hispanic-majority districts. State Senator Lincoln Diaz-Balart, a named plaintiff in the DeGrandy case, was elected as the Republican nominee in district 21. See supra note 24. Because he has no Democratic Party opposition, he will be the second Hispanic elected to Congress from Florida. In the other Hispanic-majority district (district 18), Congresswoman Ileana Ros-Lehtinen faces a Democratic challenger, Magda Montiel Davis, in the November general election. See Karen Branch, Diaz-Balart Beats Colleague Souto, MIAMI HERALD, Sept. 9, 1992, at 15A; Election Review, MIAMI HERALD, Sept. 9, 1992, at 15A; Lucy Morgan, A Chair Awaits
III. SIMILARITIES AND DIFFERENCES IN THE REFORM PROCESSES

A. The Jefferson Parish Litigation: Reform Emerging from Party Negotiations Within the Context of a Judicial Forum

In Jefferson Parish, the liability phase of the racial vote dilution litigation primarily revolved around the question of whether a district containing an African-American majority could be drawn. This is the first of three “threshold” factors that must be examined in traditional redistricting cases under Section 2 of the Voting Rights Act, as interpreted by *Thornburg v. Gingles*, the definitive decision on the subject.

The District Court’s first opinion rejected plaintiffs’ proposed African-American majority district, ruling that it constituted an “unacceptable gerrymander.” Although this effectively meant that the first Gingles factor was not satisfied, District Judge Peter Beer nonetheless held that plaintiffs had established Section 2 liability and were entitled to an “influence” district as a remedy. Therefore, he required both parties to submit alternative redistricting plans.

During the next three years, this Jefferson Parish litigation followed a tortuous (some might say “torturous”) course. Plaintiffs submitted six proposed redistricting plans, each containing one district with an Afri-
can-American majority, and defendants submitted one plan. Defendants' plan, like the pre-litigation electoral system, contained one council member elected at-large and two elected from floterial districts, with the remainder elected from single-member districts. Under their proposed plan, however, the number of single-member districts would have been increased from four to six. The district with the largest minority percentage had an African-American voting age population of only 41.26 percent.

Deferring to the Parish government, Judge Beer approved the plan proposed by defendants, but only after requiring the elimination of the two floterial positions. (Interestingly, these positions were eliminated based upon one-person, one-vote concerns generated by the District Court's reading of one of the opinions in the litigation involving New York City's Board of Estimate.) Consequently, the plan, as modified by the District Court, would have created six single-member districts (none with an African-American majority) plus one at-large position.

Other procedural maneuvering during this period included: additional unsuccessful attempts by plaintiffs to persuade the District Court to require the creation of an African-American majority district; dismissal, by the U.S. Court of Appeals for the Fifth Circuit, of two appeals filed by defendants because they were procedurally improper; and rejection by the U.S. Attorney General of an attempted preclearance submission because it was procedurally improper. Eventually, defendants submitted their plan, as modified by the District Court, to the Justice Department. After preclearance was denied, the Fifth Circuit remanded defendants' (third) appeal to the District Court for imposition of a remedy.

Later, the Parish Council defendants, under protest, submitted a new plan, containing one district with an African-American majority of 51.21 percent of the district's total population and a bare African-American majority of 50.12 percent of the voting age population. Plaintiffs

34. See supra text accompanying note 6.
36. Id. (citing Morris v. Board of Estimate, 831 F.2d 384 (2d Cir. 1987)). The Morris litigation is discussed infra in notes 53-62 and accompanying text. The one-person, one-vote requirement is described supra in note 12.
38. The District Judge, sua sponte, had submitted the plan for preclearance, despite federal regulations requiring that submissions be made by the "chief legal officer . . . of the submitting authority or by any other authorized person." 28 C.F.R. § 51.23 (1991); see Letter from James Turner, Acting Assistant Attorney General for Civil Rights, to the Honorable Peter Beer 2 (June 30, 1989) (on file with the editors of LA RAZA L.J.).
found this plan acceptable, and the District Court approved it. In light of these statistics, and in response to urging by the Justice Department (as amicus curiae), the District Court reversed its prior finding regarding the first Gingles factor, holding instead that "the minority group is sufficiently large and geographically compact to constitute a majority within a single-member district." Defendants filed a new appeal, which, in turn, was consolidated with their prior, remanded appeal. They argued that the District Court was incorrect in ruling that the Parish council-manic structure violated Section 2 and in requiring them to submit a plan.

On appeal, the Fifth Circuit affirmed. That Court ruled that the first Gingles factor was fully satisfied, as demonstrated by defendants' ability to draw a district with an African-American majority. The Fifth Circuit also rejected defendants' other challenges to the liability determination and to the remedy approved by the District Court.

On remand plaintiffs, defendants, and the District Court were confronted with a new factual situation—the release of the 1990 census figures. Those figures revealed that the African-American majority district in the approved plan actually contained a 53 percent African-American voting age population, but that district had too small a total population to meet the one-person, one-vote requirement. These circumstances generated a new round of negotiations and litigation regarding the appropriate remedy.

Overarching negotiations between counsel for plaintiffs and defendants was the Justice Department rule requiring that "retrogression" for preclearance purposes be measured by the percentage of the minority population at the time the redistricting takes place rather than at the

41. See supra notes 32-33 and accompanying text.
43. The sentences quoted supra in the text accompanying note 2 are drawn from one of defendants-appellants briefs in that appeal.
45. When this district was drawn, only 1980 census figures were available. They reflected only a 50.12 percent African-American voting age population in the district. See supra text accompanying note 40.
time the plan was drawn.\textsuperscript{47} Hence, in any post-census plan, the African-American majority district had to have a 53 percent African-American voting age population.\textsuperscript{48} After weeks of negotiations, in which at least three members of the sitting Parish Council were directly involved at all times, the defendant Parish Council adopted a plan that included a rather unusually shaped and quite elongated district with a 60 percent African-American voting age population. Civic leaders, one council member, and others contended that the African-American district and several of the white-majority districts in the plan had been drawn by some incumbent council members in a manner that minimized the number of election contests between incumbents and preserved the constituency base of particular council members.\textsuperscript{49}

Plaintiffs found the defendant Parish Council’s proposed plan “not unacceptable” and entered into stipulations to implement that plan. Despite this rare accord between the elected officials of the Parish and the prevailing plaintiffs, District Judge Beer ruled that the plan was totally unacceptable, and he appointed his own Special Master to devise a new plan pursuant to his own criteria. The Special Master’s plan contained no district in which African Americans constituted a majority of the voting age population. Though defendants did not support the Special Master’s plan, and plaintiffs vigorously objected to it, the District Judge adopted the plan as his own.

On appeal, the Fifth Circuit rejected that court-made plan, instead requiring the adoption of the plan prepared by the Parish Council defendants and accepted by plaintiffs, which did include an African-American district.\textsuperscript{50} That plan was ultimately precleared by the Attorney General and approved by the District Court. The subsequent election resulted in the reelection of four incumbents (three of whom were involved in negotiating the final plan) and the election of the Parish Council’s first African-American member and first woman member.\textsuperscript{51}

In short, the Jefferson Parish litigation reflects district court confu-

\textsuperscript{47} See 28 C.F.R. § 51.54(b)(1)-(b)(2) (1991) (“benchmark” for measuring retrogression based upon circumstances at the time preclearance is sought).
\textsuperscript{48} See supra note 45 and accompanying text.
\textsuperscript{50} East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson, 940 F.2d 1531 (5th Cir. 1991) (unpublished opinion on file with editors of LA RAZA L.J.). Interestingly, Judge Beer had previously deferred to the elected Parish Council—when they proposed a “remedy” for the § 2 violation that did not contain an African-American majority district. See supra notes 34-37 and accompanying text.
sion followed by circuit court clarification regarding the first Gingles factor and the appropriate role of the district court. This litigation also reflects a rather substantial role played both by the Justice Department and, subsequently, by the incumbents in crafting key portions of the redistricting remedy.

B. The New York City Litigation: Reform Emerging from an Administrative Forum

The catalyst for reforming New York City’s government was a federal lawsuit challenging the constitutionality of the electoral structure of the Board of Estimate, but the reform was ultimately implemented by appointed commissions. In the federal case, plaintiffs (Brooklyn residents and voters) contended that assigning one vote on the Board to each borough (cast by its Borough President) violated the one-person, one-vote requirement because of the wide variation in the populations of the five boroughs. The District Court initially ruled for defendants (the City, Board, and Board members) on the ground that the Board of Estimate was not subject to the one-person, one-vote requirement. The U.S. Court of Appeals for the Second Circuit reversed and remanded for further findings.

American candidates and one white candidate ran for office in the primary in the African-American majority district. The runoff in that district involved two African-American candidates.

52. The proper allocation of authority between the Justice Department and the courts when dealing with a “covered” jurisdiction was later clearly articulated by the Fifth Circuit: once the plaintiffs have proven the liability phase of their case, the district court generally must allow the defendant local government the “first opportunity to devise remedies for violations of the Voting Rights Act.” Westwego Citizens for Better Gov’t v. City of Westwego, 946 F.2d 1109, 1124 (5th Cir. 1991). That plan must then be submitted to the Justice Department for preclearance before it can be considered by the district court. “If and when the plan is precleared, the district court [should] review the plan to determine whether it rectifies the current vote dilution and otherwise complies with the law.” Id. (emphasis added). The author represented plaintiffs-appellants in the Westwego case.

53. See supra note 11 and accompanying text.

54. See supra note 12 and accompanying text.

55. See Morris I, 551 F. Supp. at 653. At the time of the lawsuit, the 1980 census figures revealed that Brooklyn (Kings County) had a population of 2,230,936 persons and that Staten Island (Richmond County) had a population of only 352,121. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, ECONOMICS AND STATISTICS ADMIN., 1980 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, NEW YORK 8 (1982); CITY OF NEW YORK DEPT. OF CITY PLANNING, DEMOGRAPHIC PROFILE 6-17 (1983). For further discussion of the pre-Supreme Court stages of the Morris litigation, see Gelfand & Allbritton, Conflict and Congruence, supra note 11, at 95-102.

56. Morris I, 551 F. Supp. at 653, 655-56. The District Court relied upon Bergerman v. Lindsay, 255 N.E.2d 142 (1969) (Board of Estimate not sufficiently “legislative” to be covered by one-person, one-vote requirement), cert. denied, 398 U.S. 955 (1970), and Sailors v. Board of Educ., 387 U.S. 105 (1967) (indirectly elected, non-legislative boards are exempt from the requirement). See also cases described supra in note 12.

57. Morris v. Board of Estimate, 707 F.2d 686 (2d Cir. 1983). Specifically, the Second Circuit held that the one-person, one-vote requirement applied because membership on the Board of Estimate was automatic for all members upon election to their city-wide or borough-wide offices. Id. at
On remand, District Judge Edward Neaher found a deviation from population equality of 132.9 percent between the City's most populous borough, Brooklyn, and its least populous borough, Staten Island.\(^{58}\) He later ruled that the various governmental interests advanced by the City could not justify a structure with so great a deviation.\(^{59}\) Therefore, he held that the electoral structure of the Board of Estimate violated the one-person, one-vote requirement.\(^{60}\) Both decisions were later affirmed by the Second Circuit.\(^{61}\) The U.S. Supreme Court, in turn, unanimously affirmed most of the Second Circuit's decision.\(^{62}\)

In response to the District Court ruling, Mayor Edward Koch appointed a Charter Revision Commission, chaired by Richard Ravitch. Although the *Morris* case dealt only with the one-person, one-vote malapportionment of the Board of Estimate,\(^{63}\) the Charter Revision Commission also reviewed racial vote dilution issues and proposed far-ranging solutions.

Racial vote dilution issues arose when the Charter Revision Commission sought to evaluate "weighted voting" plans, proposed primarily by incumbents on the Board of Estimate.\(^{64}\) These proposals were

689; see *supra* note 11. The Second Circuit also ruled that the District Court's distinction between administrative and legislative bodies had been abandoned by the Supreme Court in this context. 707 F.2d. at 690 (quoting Hadley v. Junior College Dist., 397 U.S. 50, 55-56 (1970)).


62. *See Board of Estimate v. Morris*, 489 U.S. 688 (1989). However, a majority of the Supreme Court disagreed with the methodology employed by the lower courts to measure the one-person, one-vote deviation. For more detailed discussions of the Supreme Court stage of the *Morris* litigation, see Richard David Emery, *Weighted Voting*, 6 TOURo L. REV. 159, 165-67 (1989); Gelfand & Allbritton, *Conflict and Congruence, supra* note 11, at 102-07. Mr. Emery was lead counsel for plaintiffs-appellees in the *Morris* case.

63. *See Morris II*, 592 F. Supp. at 1465-66 (quoting plaintiffs' brief, which stated that their argument was not, "at this time, . . . a racial discrimination claim under the Equal Protection Clause"). *See generally* Gelfand & Allbritton, *Conflict and Congruence, supra* note 11, at 114 (speculating that plaintiffs had not included a racial vote dilution claim because the *Morris* case was filed before the 1982 Amendments established the "results" standard for proving a § 2 violation, see *supra* notes 30-31, and that civil rights advocacy groups were probably waiting until the remedial stage of the case to intervene).

64. In this context, "weighted voting" referred to the assignment of differential weights to the votes of representatives (borough presidents) elected from jurisdictions with widely different populations (the boroughs). For example, a plan originally proposed by then-Manhattan Borough President David Dinkins would have assigned votes as follows: Bronx borough president, 8; Brooklyn borough president, 16; Manhattan borough president, 10; Queens borough president, 13; Staten Island borough president, 3; and the mayor, comptroller, and city council president, 20 each. Under the proposals, the number of votes for each such representative would have been determined, at least in part, through use of the Banzhaf Index. Use of that Index is extremely questionable after the
designed to preserve the borough-based structure of the Board of Estimate, while still complying with the one-person, one-vote requirement. The Commission's voting rights consultants made it clear that weighted voting for the Borough Presidents would exacerbate the racial vote dilution already caused by the at-large positions. Therefore, they argued, it was unlikely the Justice Department would preclear any plan which included such an approach and even a precleared plan might face a serious challenge under Section 2 of the Voting Rights Act.65

After reviewing numerous independent reports that arrived at this same conclusion, and hearing objections from incumbent members of the Board of Estimate,66 Chairman Ravitch presented to the Charter Revision Commission several far-ranging proposals concerning the Board's structure. However, when the Supreme Court noted probable jurisdiction in the Morris case, the Commission delayed consideration of any proposals that would directly affect the powers of elected officials. Instead, they presented five proposals on other aspects of the Charter, all of which were approved by the voters in November 1988.67


65. The first such consultant report evaluated various weighted voting plans (both those proposed by elected officials and other plans which might be considered). That report warned:
Shifting to the use of "weighted voting" for borough representatives . . . would likely be viewed as retrogression by the Justice Department. Retrogression would occur because such a system (in order to meet the one-person, one-vote requirement) would need to grant relatively more votes than the present [pre-1990] system to representatives from Queens and Brooklyn, elected primarily by white voters.

Nearly all the proposed structural changes would be vulnerable to a suit under section 2 of the [Voting Rights] Act.

[W]eighted voting systems using boroughs (or the city as a whole) as the representational units appear to have innate deficiencies in terms of fair and effective representation for minority groups. It is not at all clear that a court would overlook these deficiencies of weighted voting, even if the current influence of citywide officials were reduced. Thus the specter of a successful voting rights challenge against any of these weighted-voting plans remains a very real possibility.

Id. at 74, 81. The statement quoted supra in the text accompanying note 1 was issued in response to the original Gelfand & Allbritton Report.

66. The original version of the Gelfand & Allbritton Report (described supra in note 65), along with concurring reports (subsequently written by other Commission consultants) and attempted responses supplied by lawyers hired by the Board of Estimate, are reprinted in Frank Mauro, Voting Rights and the Board of Estimate: A Compilation of Advisory Opinions, Memoranda, Correspondence and Related Materials (N.Y.C. Charter Rev. Comm'n 1988). Two of these other Commission consultants, Frank Parker and Katharine Butler, later represented plaintiffs-intervenors and amicus curiae, respectively, in the Florida congressional redistricting case described infra in notes 70-83 and accompanying text.

67. For further discussions of the Ravitch Commission's deliberations and proposals concerning racial voting rights, see Gelfand & Allbritton, Conflict and Congruence, supra note 11, at 109-10,
When the Charter Revision Commission’s term expired in November 1988, Mayor Koch appointed a new Commission with some new members and some overlapping membership. The new Commission, under the chairmanship of former City Corporation Counsel Frederick A. O. Schwarz, Jr., released its proposals after the Supreme Court’s decision in *Morris*. Those proposals called for abolition of the Board of Estimate and reallocation of its powers to other elected and appointed city officials. In particular, the City Council’s powers were to be increased and its membership expanded from 35 to 51 seats. The boundaries for the 51 single-member council districts were to be drawn by a restructured Districting Commission whose composition and mandate were designed to increase minority representation. These Charter revision proposals were approved by the voters in a November 1989 referendum and later were precleared by the Justice Department.

C. The Florida Congressional Redistricting Litigation: Reform Imposed by a Court

The Florida congressional redistricting plan was court-ordered, developing out of federal court litigation that operated on a tightly compressed time frame. On the first day of the 1992 Regular Session of the Florida Legislature, a member of the State House of Representatives and registered voters from around the state filed suit in federal court against various Florida legislative and executive officials. Their complaint challenged the state’s congressional and legislative districts under the Equal Protection Clause and the Voting Rights Act. This case, pending before a three-judge federal court, was later consolidated with a similar lawsuit filed by the Florida State Conference of the NAACP Branches.


68. The Chairman and three members were replaced. Richard Ravitch ran unsuccessfully for Mayor, Frank Macchiarola ran unsuccessfully for Comptroller, Father Joseph O’Hare became Chair of the Campaign Finance Board, and former Mayor Robert Wagner asked not to be reappointed. See Gerald Benjamin & Frank Mauro, *The Reemergence of Municipal Reform*, 37 *Proc. of Acad. of Pol. Sci.* 1, 6 (Fall 1989). These changes resulted in an increase (from 4 to 6) in the number of African-American and Hispanic members on the 15-member Charter Revision Commission. See Mauro, *Voting Rights*, supra note 67, at 68 n.5.


70. The one-person, one vote requirement of the Equal Protection Clause is described *supra* in note 12.

71. Section 2 of the Voting Rights Act is described *supra* in notes 30-31.
Numerous congressmen, state legislators, and minority voters were permitted to intervene as parties, and various interested groups were granted leave to participate as amici curiae. In the meantime, the Florida Legislature ended its regular session without adopting a congressional redistricting plan or a state reapportionment plan.

Confronted with this Legislative failure and a plethora of congressional redistricting plans proposed by numerous parties and amici, the three-judge court appointed a Special Master. The Special Master, in turn, appointed an Independent Expert Witness to evaluate the plans and to recommend one of them, or one of his own devise, for adoption by the court. Eleven statewide plans were considered. In order to facilitate wide participation by interested groups, the Special Master conducted five very full days of hearings. The parties and amici presented their plans in these rather formalistic (trial-type) hearings, complete with expert reports and affidavits, voluminous exhibits (maps, charts, statistics, computer runs), and expert and lay testimony (punctuated by objections and responses from two dozen lawyers). Next, the Independent Expert presented his Report, and then the parties and amici had the opportunity to cross-examine the Independent Expert on his Report.

Given this very formal structure, compressed time frame, and

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72. Plaintiff-intervenors were Gwen Humphrey, et al. (African-American voters), Darryl Reeves (state representative), Congressman Jim Bacchus, and Congressman Andy Ireland. Defendant Alzo Reddick (state representative) was a defendant-intervenor. Amici curiae included: Simon Ferro (chairman of the Florida Democratic party), Common Cause (a national public advocacy organization), Florida AFL-CIO, Congressman Craig James, Cuban American Bar Association, Coalition of Hispanic Women, and Daniel Webster. See DeGrandy v. Wetherell, 794 F. Supp. 1076, 1080 (N.D. Fla. 1992) (3-judge court). Many of these parties and amici proposed redistricting plans. See infra note 75.

73. A subsequent special session did produce a plan for the state House of Representatives and Senate. That state legislative plan has generated its own complex, not-yet-complete story, which is beyond the scope of this Article.

74. See supra notes 21-23 and accompanying text.

75. The plans are described in detail and evaluated both in the three-judge court's opinion, DeGrandy, 794 F. Supp. at 1085-87, and in the Independent Expert's Report, supra note 23, at 6-8, 18-34.

76. These frequently contentious hearings generally ran from 8:30 a.m. to 10:00 p.m., producing 2,198 pages of Transcript. Independent Expert's Report, supra note 23, at 3 n.2.


78. The Special Master was appointed April 6, 1992, and the parties and amici filed their plans (along with supporting expert reports and memoranda) on April 17. One week later, the Independent Expert Witness was appointed. On April 30, the three-judge court held that the existing congressional districting system (established in 1982) was unconstitutional.

The Hearings were conducted during the week of May 4. The Expert Witness filed his Report on May 14, and the Special Master filed his Report and Recommendation four days later. The three-judge court heard objections to the Special Master's Report and Recommendation on May 27, and
multiplicity of parties and lawyers, there was little opportunity for informal negotiations (like those conducted in the Jefferson Parish case). Furthermore, prior attempts to mediate disagreements within the context of the legislative arena had failed, so the parties' positions had solidified. Under these circumstances, a decision by an authoritative third party, the court, was necessary.

Despite this contentiousness, it was possible to narrow the disagreements on substantive issues. All the plans had at least one district in which a majority of the voting age population was African-American, plus two districts in which at least 64 percent of the voting age population was Hispanic. The Independent Expert Witness crafted his own plan that melded key elements of four of the proposed plans. After hearing cross-examination of the Independent Expert, and conducting his own review of the Record, the Special Master recommended this plan to the three-judge court, which later adopted it as the 1992 Florida Redistricting Plan. Because preclearance of this court-made plan was not required, the Justice Department played no part in the litigation. Both incumbents and various groups of voters were represented in the exten-

79. As one observer noted:
Progress in these hearings conducted much like a trial, is what you would expect when more than 30 attorneys and a handful of politicians gather in one room: It takes a lot of words to say anything.

"I object" is the most frequently heard phrase.... Lucy Morgan, 'I Object' is Battle Cry in Districting Fight, ST. PETERSBURG TIMES, May 5, 1992, at B1; see also id. at B6 (describing the discord that crossed racial and party lines). The discord was so great, even before the hearings began, that one observer correctly quipped: "Compared to redistricting, football is a sissy sport." Martin Dyckman, ST. PETERSBURG TIMES, Jan. 21, 1992; see also Hirth, Major Changes, supra note 3.

80. DeGrandy, 794 F. Supp. at 1085, 1086-87. The parties agreed that only a district with such a "supermajority" of Hispanic voting age population could be effective because of the large number of noncitizens and generally lower registration rates among Hispanics in South Florida. See id. at 1084.

81. See supra notes 21-25 and accompanying text. Though Judge Vinson joined in the opinion and judgment of the court, he expressed "serious reservations about the geographic shape and form of some of the districts in the plan we adopt," especially the district in northeast Florida. DeGrandy, 794 F. Supp. at 1090-91 (Vinson, J., specially concurring).

82. See supra note 27 and accompanying text. However, the Independent Expert, Special Master, and court did consider whether the plan would create retrogression. Though minority populations declined in some covered counties and increased in others, the Expert's statewide plan taken as a whole substantially increased electoral representation for Florida's racial and language minority groups. Retrogression was tested on a statewide basis, because four new districts had to be created, and all 23 districts had to have the same population. As a result, any change in a district necessarily affected minority representation in all adjoining districts, so no district could be considered in isolation. See DeGrandy, 794 F. Supp. at 1084, 1088.
sive hearings, and the plan adopted by the court directly reflected approaches taken by several of the parties.

IV.
WHAT ROLE SHOULD INCUMBENTS PLAY IN THE ELECTORAL REFORM PROCESS?

The Chair and the Deputy Counsel of the New York City Districting Commission recently observed: "Government, by its nature, does not yield easily to change . . . . Obvious beneficiaries of maintaining an established political system are the politicians who hold public office . . . . [I]ncumbents do not relish surrendering political office: they don’t like losing elections and they strongly resist reapportionment." As the descriptions of voting rights remedies contained in this Article reflect, both New York City Borough Presidents and Jefferson Parish Council members strongly resisted attempts to change the electoral structures that had placed them in office. Furthermore, many of the forms of resistance—both in closed negotiating sessions and in press or court statements—were closely parallel, at least in the early stages of the two reform processes. In later stages, however, the part played by incumbents in the New York City redistricting was substantially less than that played by the Jefferson Parish Council incumbents (who, therefore, had greater success in negotiating district boundaries that preserved many of their traditional constituencies). Other differences included the more limited participation by the Justice Department in the New York City reform (at least in the early stages), the greater cohesion and stability of the group seeking reform in Jefferson Parish, and the continuing confusion by the District Court in the Jefferson Parish case. In Florida, the Legislature’s inability to agree upon a congressional districting plan resulted in federal judicial intervention. The judicial hearings primarily focused upon disagreements about how best to enhance minority representation, and the eventual plan was assembled from four proposed to the court by parties and amici.

Both the similarities (in resistance to reform) and differences (in particular aspects of the reforms) in these three case studies raise questions about the appropriate role for incumbents in the redistricting process. The spectrum ranges from total control of redistricting by incumbents to their total exclusion from the process. As a result of the extended time frame and complexity of the New York City and Jefferson Parish case

83. See supra notes 26, 72, 76-77 and accompanying text.
85. See Special Master’s Report, supra note 22, at 3.
studies, they provide useful practical information about several different points on this spectrum. The more time-limited Florida case study provides useful data regarding the role of courts as a redistricting institution.

A. Incumbent Control

At one extreme of the spectrum is the near total control that incumbent local legislators had before Voting Rights Act considerations were part of the legal landscape. They were free, subject only to the one-person, one-vote requirement and possible adverse publicity, to draw new district lines which preserved their traditional constituency bases.

Jefferson Parish Council members did not have this extreme level of flexibility, because the East Jefferson Coalition lawsuit (ultimately) required that they create an African-American majority district. However, in the remedial stage of the litigation, several of the Parish Council incumbents apparently were able to orchestrate a successful rearguard action to maintain districts which included their traditional constituency base. Furthermore, the confidentiality inherent in litigation severely limited the level of publicity and public participation in the redistricting process. Though the District Court resisted the Parish Council's plan, the Fifth Circuit explained that the established caselaw requires deference to plans proposed by elected officials (providing they comply with the one-person, one-vote requirement and do not dilute the votes of racial minorities).  

B. Incumbent Exclusion

At the other extreme is the near exclusion of incumbents from the redistricting process. Typically, this would involve a permanent apolitical board or commission, like a boundary commission, to prepare new district lines on a decennial basis.

The final stages of the New York City redistricting described above operated fairly close to this independence (or incumbent-exclusion) pole of the spectrum. Though incumbent officeholders were heavily involved in the early stages of the process, their influence rapidly declined as the reform progressed. Thus, the Borough Presidents were able to delay the abolition of the Board of Estimate for many years through a well-financed defense of the Morris case all the way to the Supreme Court, and they were able to present their strongly held views to the quasi-independent Ravitch Charter Revision Commission. However, once the Supreme Court ruled that the traditional structure of the Board of Estimate was

unconstitutional and effectively scuttled the most likely method of preserving the basic Board structure—weighted voting—the Schwarz Charter Revision Commission began to direct the reform. Its members included former public officials but no current officeholders or persons seeking office in the immediate future.87

The Schwarz Charter Revision Commission proposals resulted in the abolition of the Board of Estimate and creation of a specially constituted, independent Districting Commission to draw the boundaries for City Council seats reflecting the 1990 census figures.88 Dr. Frank Macchiarola, the Chair of that new Commission, has frequently stressed—oral and in print—that it was denominated the "Districting Commission" not the "Redistricting Commission," as a means of emphasizing that it was intended to draw new councilmanic districts, not simply adjust the old boundaries.89 Indeed, the hierarchy of districting criteria mandated by the Charter gave priority to the equipopulous and racial fairness principles, but made no mention of incumbency protection.90 This attention paid to issues of racial fairness, by the Charter and the Districting Commission, produced immediate, tangible effects. The subsequent election resulted in a substantially more integrated City Council, with the percentage of racial and language minority members increasing by 15 percent (from 26 percent on the old 35-member Council to 41 percent on the new 51-member Council).91

87. The differences in membership on the Ravitch Commission and the Schwarz Commission are described supra in note 68.

88. See supra notes 68-69 and accompanying text. "A redistricting commission [had] been authorized by the Charter since 1975, but it was not until the present Commission that it—in practice as well as authority—became in reality what its creators had in mind." Macchiarola, supra note 69, at 6 [of the manuscript]. Five of the Commissioners were to be appointed by the majority party of the City Council, three by the minority party, and seven by the Mayor. The commissioners had to represent all five boroughs of the City, and no one political party could be represented by a majority of the members. See id. at 7 (citing NEW YORK CITY, N.Y., CHARTER § 50(a) (1989)). Furthermore, the Commission had to be composed of "members of the racial and language minority groups of New York City which are protected by the United States voting rights act of nineteen sixty-five, as amended, in proportion, as close as practicable, to their population in the city." NEW YORK CITY, N.Y., CHARTER § 50(b)(1) (1989). Recently, this method of appointment was held unconstitutional in a suit brought by the first chairman of the Charter Revision Commission, Richard Ravitch. See Ravitch v. City of New York, 1992 Lexis 11481 (S.D.N.Y. Aug. 3, 1992). Though this ruling will prevent the racially proportional appointment system from being used again for the next districting commission, in the year 2001, it does not affect the current boundaries or the recent City Council elections. See infra note 91 and accompanying text.

89. Macchiarola, supra note 69, at 2 n.3 [of the manuscript]. Dr. Macchiarola was a member of the Ravitch Commission, see supra note 68, and he is currently the Dean of Cardozo Law School.

90. See NEW YORK CITY, N.Y., CHARTER § 52.1 (1989) (present charter).

91. Indeed, the resulting diversity on the City Council may have exceeded expectations: Twelve African Americans (up from 6) and 9 Latinos (up from 3) were elected to the City Council. Previously no minority council member had ever represented a district where less than 80% of the voting age population was minority; after the 1991 election there were four . . . . [Furthermore,] the number of Republicans on the City Council increased from
C. Redistricting by Other Elected Officials

One approach between the two extremes of total incumbent control and total exclusion of incumbents is to place the redistricting of one body in the hands of officials elected to another governmental body. This is the method used in most states for congressional redistricting, with the state legislature redrawing the congressional district boundaries on a decennial basis. This approach may provide the local knowledge, political legitimacy, and political acumen of incumbent-based line-drawing, while distancing the process (to some extent) from the immediate self-interest of incumbents. However, as Florida's recent congressional redistricting experience demonstrates, political self-interest may reappear when key members of the state legislature are themselves intent upon running for office in some of the congressional districts they are drawing.

The situation in Florida was summarized by one newspaper commentator:

The House and Senate [of the Florida Legislature] passed separate congressional plans in February, but they failed to resolve their differences before the regular session ended on March 13—Friday the 13th.

The process broke down because lawmakers were preoccupied with their own districts, key legislative leaders were trying to create congressional districts for themselves, Republicans and Democrats were fighting for control of the congressional delegation, and blacks and Hispanic[s] were fighting for more seats.  

D. Courts as a Default Mechanism

Both the New York City and the Jefferson Parish reforms were prompted by federal court decisions that held that the existing local electoral structure was illegal. However, the New York City remedies were established by quasi-independent administrative bodies created by the City, while the Jefferson Parish remedy was negotiated within the confines of the original federal court proceeding. As noted, the latter approach allowed more involvement by incumbents in the remedial

one to five . . . and two openly homosexual men were also elected to the City's legislative branch.

Macchiarola & Diaz, supra note 84, at 1-2; see also Reinvigorating the Council, N.Y. DAILY NEWS, Nov. 7, 1991 (editorial) ("A major reason for revising New York City's Charter two years ago was to make an expanded City Council more reflective of the City's population. By that standard, Tuesday's election was a stunning success for minorities of every distinction.").


93. One portion of the New York City remedy, the mandated racial composition of the Districting Commission, was later invalidated by a federal court. See supra note 88. Thus, even independent commissions must operate within the parameters of federal and state constitutional and statutory law, and they often must face the threat of litigation.
outcome. In neither case was a judicial remedy imposed upon the local government, though general judicial guidelines had to be observed.

At times, however, the court will have to craft its own redistricting remedy. This may arise under various circumstances. For example, after the liability phase of a Section 2 case, the defendants may be unable or unwilling to propose a remedial plan that complies with Section 2 (or Section 5 if applicable). Even without prior litigation, the body charged with decennial redistricting may be unable to craft a plan, e.g., a deadlocked legislature unable to agree upon a congressional plan. In several states, this situation will trigger redistricting by the state court system, e.g., California. Alternatively, such a situation could end in federal court intervention as it did in Florida, when groups of plaintiffs challenged the prior systems on both one-person, one-vote and Section 2 grounds.94

Though the judicial arena can accommodate a variety of perspectives, once the remedies are in the hands of the federal court, incumbents and legislators become mere litigants — either as amici or as defendants. The law is clear that a legislative plan adopted by the elected body is entitled to substantial judicial respect.95 On the other hand, a plan that has not been adopted by the procedures required under the relevant state constitution (e.g., by both houses of the legislature) is to be treated like any other litigant’s plan before the court.96 In short, the precise role of the court will largely be determined by the structure of the suit and the extent to which the relevant redistricting body (incumbent city council, quasi-independent commission) can prepare a plan that passes constitutional and Voting Rights Act muster.

V.
CAN PUBLIC PARTICIPATION IN ELECTORAL REFORM BE INCREASED THROUGH ACCESS TO TECHNOLOGY OR THE USE OF ALTERNATIVE ELECTORAL ARRANGEMENTS?

A. Modern Technology

During the past decade, the technology available for redistricting has expanded and improved enormously. In jurisdictions with sufficient financial resources the time for maps drawn with colored pencils and calculations confirmed with an ordinary calculator has passed. If this new, very expensive technology is made available to concerned groups


95. The extent, and the limits, of this deference are described in cases cited supra note 86.

and interested members of the community, they can present their own plans to the elected body, commission, or court engaged in the redistricting process. Also, making the same technology available to all parties, as was done by the New York Districting Commission (on a very broad basis) and the Florida Legislative staff (to a more limited extent), facilitates comparisons of plans by the decision makers and validation of plan statistics by challenging parties.

B. An Alternative Approach

For those who have grown tired of all of the processes of redistricting described above, with or without new technology, alternative electoral systems, such as cumulative voting or limited voting, should be considered.

In simplest terms, a cumulative voting system involves allowing each voter to have as many votes as there are positions to be elected, but it removes the usual rule that the voter must cast only one vote for each candidate she favors. Instead, she can "plump" all her votes for one candidate, thereby expressing the intensity of her preference (or she can spread them among five candidates in the more traditional fashion). For example, if there were five city council members to be elected, each voter would have five votes and would be free to cast all of them for a single candidate or spread them among several candidates.97

By contrast, under a limited voting system, each voter has fewer votes than there are positions to be elected in the multimember election, and she may cast no more than one vote per candidate. For example, if five city council members were to be elected, each voter would have only two (or three) votes to cast.

Cumulative voting and limited voting systems allow voters to realign the constituent base of their representatives (the functional equivalent of redrawing the election boundaries) in each new election.98 Thus, the focus shifts from district line-drawing to the campaigns. These approaches operate most effectively for citywide or countywide multimember contests. (If new multimember legislative districts need to be

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97. In another setting, I described "plumping" as "single-shot voting with an attitude."
drawn, however, the same issues and disputes related to traditional redistricting will probably arise.)

VI. CONCLUSION

Redistricting, like any complex reform at the border between law and politics, can be approached from various perspectives and analyzed by a variety of methods. This Article has not attempted to review all of them; rather, it provides detailed empirical information about voting rights reform in two local governments. It has explored the variety of interests and institutions that interact in such a reform. These two case studies, highlighted by comparisons with congressional redistricting in Florida, have provided information about the implications of the two extremes of redistricting—incumbent control and incumbent exclusion—as well as some data about the likely role of the public, incumbents, the Justice Department, and the courts in these processes.

My own participation in these processes, followed by this Article about the lessons emerging from those experiences, reminds me that redistricting is like a storm at sea—easier, and more fun, to talk about afterward than during.99