The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 7 | Number 1 Article 5

9-1-2004

We Got Next: Will Texas Redistricting Dictate a Definitive Answer by the Supreme Court on Minority Aggregation under Section 2 of the Voting Rights Act.

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COMMENT

"WE GOT NEXT": WILL TEXAS REDISTRICTING DICTATE A DEFINITIVE ANSWER BY THE SUPREME COURT ON MINORITY AGGREGATION UNDER SECTION 2 OF THE VOTING RIGHTS ACT?

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I. INTRODUCTION[1]

A butterfly flapped its wings in Colorado and Texas felt the breeze. Republicans and Democrats in both Colorado and Texas found themselves in the middle of a redistricting battle over new congressional maps. On one side, the Colorado Democrats opposed the new map, contending it violated the Colorado Constitution.[2] According to the Democrats, the Constitution prohibited redrawing any map unless it was redrawn after each census and before general elections.[3] Democrats further argued that the judiciary overstepped its bounds because a district judge drew the map in dispute.[4] On the other side, Republicans contended that the new map was only a temporary remedy and Colorado's legislative body, the General Assembly, would complete the official redistricting.[5] The Colorado Supreme Court, however, rejected the Republicans' arguments in a decision that has national effects.

The ruling is a coup for Colorado Democrats, as they will gain two of the five seats controlled by Republicans.[6] Additionally, the decision will aid Democrats on a national level because the party is fighting to gain twelve additional seats in the House of Representatives.[7] Colorado Democrats are counting on the same to result in Texas. The Colorado Supreme Court, however, had an answer within its own constitution, which prohibited mid-centennial redistricting.[8] Texas, on the other hand,

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1. The subject of minority aggregation under Section 2 of the Voting Rights Act is not new. Its current importance derives from the Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993). *Shaw*, discussed later in this comment, was decided under the same political circumstances that Texas faced at the start of 2004—a period in which Republicans were once again poised to take control of both the House of Representatives and the Senate. *See* Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 726 ("The concentration of predominately Democratic African American and Hispanic voters in majority-minority districts tends to place more Republicans in surrounding districts.").

2. *Colorado Court Rules Redistricting Unconstitutional*, DALLAS MORNING NEWS, Dec. 1, 2003, *available at* http://www.dallasnews.com/sharedcontent/dallas/nation/stories/120103dnnatredistricting.5c8ada39.html (last visited Sept. 24, 2004).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Seven of the twelve seats Democrats are pushing for will come out of Texas if the Republican-backed remap is overturned. *Id.*

8. *Colorado Court Rules Redistricting Unconstitutional*, *supra* note 2. COLO. CONST. art. V § 44 states:

> The General Assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the

is standing on the threshold of a history-making event. Its redistricting battle could force the Supreme Court to make a definitive decision on whether minority-voting may be combined for purposes of drawing congressional lines.[9]

For their part, Texas Democrats face a huge obstacle. Unlike Colorado, no State constitutional provision exists that denies the legislature the right to remap more than once between decennial censuses. Thus, Texas Republicans and Democrats have to fight their battle using arguments centered on racial and political gerrymandering.[10] Accordingly, each party will have to plead its case using the same case precedents.

Redistricting is both racial and political,[11] and has the potential to fracture minority votes. Texas' fight over redrawing congressional districts is ripe to come before the United States Supreme Court and carries the possibility of reshaping future redistricting. This fight also has the potential to put minority voters in a position of power. Minority voters do not have to wait about the periphery as others decide how best to use their voting power—regardless of how a potential Supreme Court battle between Texas Republicans and Democrats ends. In the past, the minority vote was important for the purposes of vote dilution claims under the Voting Rights Act (VRA).[12] Growth of the Hispanic population in the United States, however, calls for minorities to use the provisions of the VRA not as a claim for vote dilution, but as a political tool to aggregate

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United States for the election of one representative to congress from each district. When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.

Salazar v. Davidson, No. 03SA133 & No. 03SA147 (Colo. Dec. 1, 2003) (en banc), http://www.cobar.org/opinions/opinion.cfm?opinionID=3975 (last visited Oct. 30, 2004). In an advance opinion consolidating two cases, the Colorado Supreme Court reasoned that the constitutional provision places a restriction on redistricting saying, "[A] new apportionment is a 'condition' for redistricting . . . [and] redistricting must take place after and ***only*** after a census." *Id.* (emphasis added).

9. *See* Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. Ill. L. Rev. 441, 442 (1995) (discussing the Supreme Court's refusal to address minority aggregation).

10. Pete Slover, *Remap Trial Won't Linger, but Outcome Could*, Dallas Morning News, Dec. 8, 2003, *available at* http://www.dallasnews.com/s/dallas/tsw/stories/120803dntexremap.1baed.html (last visited Oct. 29, 2004).

11. Sebastian Geraci, Comment, *The Case Against Allowing Multicultural Coalitions to File Section 2 Dilution Claims*, 1995 U. Chi. Legal F. 389, 389 (1995).

12. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988 & Supp. V (1993)) (2003).

groups protected under the VRA and use the political combination to gain representation within their districts.[13]

Redistricting is an extremely complex topic that involves statutes, politicking, and limitless number-crunching. Thus, the focus of this comment is to address the issue of future Hispanic and African-American politics.[14] Specifically, how will redistricting affect the future of minority politics in Texas? In sum, this comment recommends that Hispanics and African-Americans take advantage of the new redistricting war and manipulate it for the benefit of minority-rich districts.

Part II reviews the relatively brief history surrounding majority-minority districts, the external threat that they face, and the cases that have affected redistricting outcomes.

Part III explains the current agenda of Texas Republicans and Democrats and the importance of catering to majority-minority districts. It notes the possible legal stances each party might take in light of the history of redistricting when race is a factor. Part III also addresses how Hispanics and African-Americans can use minority coalitions and unpredictable voting as control measures against majoritorian manipulation.

Finally, Part IV concludes that, regardless of the legal approach presented by the Republicans and Democrats, and the internal matters concerning Hispanics and African-Americans, a decision by the Supreme Court will prove to be monumental to future redistricting efforts.[15] Once again, "the lines being drawn mark the boundaries of voting districts, and the weapon of choice is the Voting Rights Act."[16]

II. SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

In 1965, Congress passed the VRA to eradicate the use of literacy tests and other devices that hindered African-Americans from exercising their right to vote under the Fifteenth Amendment.[17] Congress extended the

13. Schulte, *supra* note 9, at 442 (discussing how the VRA was originally intended for African-Americans, but its failure to directly address minority aggregation allows for the interpretation that minority groups may combine in order to oppose vote dilution).

14. This comment focuses on the two largest minorities in America today. It seeks in no way to diminish the importance of other minorities.

15. As of this printing, the U.S. Supreme Court ordered the "controversial congressional map passed by the Texas Legislature" to be reviewed by an East Texas district court to determine whether "partisan politics played and excessive role." *Supreme Court Rules On Redistricting Case*, *available at* http://www.kxan.com/Global/story.asp? S=2445023 (last visited Oct. 30, 2004).

16. Schulte, *supra* note 9, at 442.

17. 2 MARSHA J. TYSON DARLING, RACE, VOTING, REDISTRICTING AND THE CONSTITUTION: ENFORCING AND CHALLENGING THE VOTING RIGHTS ACT of 1965 246 (2001); KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS of MINORITY REPRESENTATION 15 (1998).

scope of the VRA in 1975 to include other minorities, such as Hispanics. In 1982, Congress made a significant alteration to Section 2 of the VRA. The new language "prohibit[ed] any State practice 'which result[ed] in' members of a racial or language minority having 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[18] Thus, the 1982 amendment completely altered the focus of the Act.

A. *Movement From "Intent Test" to "Effects Test"*

Prior to the 1982 modification, Section 2 had focused on the *intent* behind the creation of districts. Thereafter, the focus was on the *effects* of minority representation within new districts.[19] The "effects test," unlike the "intent test," did not require proof of discriminatory intent to establish a Section 2 violation.[20]

The intent test arose from the Supreme Court's decision in *Mobile v. Bolden*.[21] The plaintiffs in *Bolden* alleged that the multimember voting system unfairly diluted the voting power of the African-American citizens under Section 2 of the VRA.[22] Multimember districts were generally districts in which the same voters elected multiple representatives to serve one physical area.[23] The same area could be divided into several districts, each with its own representatives.[24] Many viewed the multimember district as another device to thwart the African-American vote.[25]

Before *Bolden*, it was believed that Section 2 could be violated simply by showing that it had been possible to elect a minority candidate.[26] As the Plaintiffs in *Bolden* contended, intent was unnecessary because the minority population's candidate of choice would hardly ever win an election due to the majority-dominated vote.[27] However, the Court disagreed, reasoning that the voting practice was conducted in such a way as to not rely on race because the intent behind the redistricting had been facially neutral.[28] Further, according to the Court, "[A] jurisdiction such

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18. DARLING, *supra* note 17, at 352.
19. *Id.* at 300.
20. *Id.* at 353.
21. *See generally* Mobile v. Bolden, 446 U.S. 55 (1980).
22. DARLING, *supra* note 17, at 249.
23. George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Act of 1965*, 66 ALB. L. REV. 11, 11 (2002).
24. *Id.*
25. *Id.*
26. *Id.* at 20.
27. Smith, *supra* note 23, at 12; *accord* Cynthia Kurz, Note, *Shaw v. Reno: Defining the Constitutional Parameters of Racial Reapportionment*, 1994 DET. C.L. REV. 239, 248 (1994).
28. DARLING, *supra* note 17, at 250.

as Mobile, Alabama, though possessed of a significant minority population, could not be found to have violated the Fourteenth or Fifteenth Amendment (or Section 2) unless its election machinery, including the procedures which accompanied it, were conceived or operated with a discriminatory intent or purpose."[29]

History had proven, however, that multimember districts had been used to dilute the minority votes.[30] Thus, the legislative reaction to *Bolden* resulted in Congress spending two years revising the language of Section 2 of the VRA,[31] which ultimately produced the 1982 change.

Motivated by that change, state and local legislatures began to create single-member districts. Single-member districting allows a district to be split into smaller sections so that the candidate elected is likely to be the candidate of choice for the voters within the district.[32] Moreover, these single-member districts provide a safe harbor for states under Section 2 of the VRA.[33]

The most widely implemented single-member district, however, was safe-districting, or "majority-minority districting," which focused primarily on minority representation.[34] In an at-large system, a single district can elect more than one representative.[35] Nonetheless, in a district that is predominately White, a minority candidate is almost never elected.[36] "The [Supreme] Court's eventual solution to this problem was to invalidate at-large districts as 'diluting' minority votes and to replace them with single-member districting plans that give minority voters a majority in one or more districts."[37]

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29. DARLING, *supra* note 17, at 249; *accord* Smith, *supra* note 23, at 20.

30. Smith, *supra* note 23, at 12-13.

31. *See generally* DARLING, *supra* note 17 (discussing the first proposed amendment to the language of Section 2 in 1980 until the passing of the much compromised proposal in 1982).

32. Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 145 n.11 (1982) [hereinafter *Alternative Voting Systems*].

33. Race-neutral districting, for example, is a type of single-member redistricting in which special masters divide the at-large system into single-member districts and race is not taken into account. *Id.* at 145. *But see* James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal* Context, 26 RUTGERS L. J. 517, 519 (discussing Justice Souter's dissent in *Shaw* in which he stated that the use of race cannot be circumvented in the districting process).

34. *Alternative Voting Systems*, *supra* note 32, at 146.

35. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1672 (2001).

36. *Id.* at 1673.

37. *Id.*

B. *Majority-Minority Districting*

Majority-minority redistricting "ensure[s] that the minority groups achiev[e] an effective electoral majority in single-member districts."[38] The main purpose of the majority-minority districts was to protect "African-Americans and particularly 'language minorities' . . . from districting arrangements that systematically dilute voting strength."[39] A majority-minority district, however, is not automatically created because a minority group claims to have been discriminated against in the voting process. Plaintiffs claiming vote dilution per Section 2 of the VRA must pass the three-prong test set out in the Supreme Court case, *Thornburg v. Gingles*.[40] The three-prong test requires 1) "a [multimember] electoral system [that] diluted the minority vote; 2) [the] minority group was politically cohesive, sufficiently large, and geographically compact to form a majority in a single-member district; and 3) [the minority group] was opposed by a White-majority voting bloc often enough that the minority-preferred candidate usually lost."[41] State legislatures responded to *Gingles* by drawing majority-minority districts before a minority group could bring suit under Section 2 of the VRA.[42] The trend continued well into the early 1990s, making it necessary to rearrange other districts where this had not been the case.[43]

Unfortunately, majority-minority districting plans were not always effective. Legislatures could still draw district lines that allowed White constituents to be the majority.[44] Newly drawn district lines either "packed" minorities into a district or "fractured" minorities so that their combined

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38. *Alternative Voting Systems*, *supra* note 32, at 146.

39. Steve Bickerstaff, *Effects of the Voting Rights Act on Reapportionment and Hispanic Voting Strength in Texas*, 6 TEX. HISP. J.L. & POL'Y 99, 102 (2001); Theane Evangelis, Note, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. REV. 796, 797 (2002).

40. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *accord* Geraci, *supra* note 11 (supporting belief that the use of minority aggregation to meet *Gingles* requirement would cause unwanted consequences); *cf.* Christopher E. Skinnell, Comment, *Why Courts Should Forbid "Minority Coalition" Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363 (2002) (arguing that the first prong of *Gingles* was created to prevent mandatory proportional representation and still allow vote dilution claims).

41. BYBEE, *supra* note 17, at 25 (referring to the three prongs set out in *Gingles* that established how to determine if a minority vote had been unfairly diluted).

42. MARK E. RUSH & RICHARD L. ENGSTROM, FAIR AND EFFECTIVE REPRESENTATION?: DEBATING ELECTORAL REFORM AND MINORITY RIGHTS 10 (2001).

43. *Id.*

44. Gerken, *supra* note 35, at 1674.

votes were ineffective.[45] Thus, the trend led to the creation of minority coalitions in order to meet the second *Gingles* requirement.

C. *Safety In Numbers: Use of Minority Aggregation to Meet Requirements of Gingles*

Minority coalitions are generally created to meet the first and second requirements of the three-prong *Gingles* test: political cohesiveness and sufficiently large and geographically compact.[46] Minorities aggregate their district numbers with another minority within the same multimember district and bring the case as one plaintiff. Aggregation is a powerful political tool that has been successful in the past. The cases of *League of United Latin American Citizens v. Clements* ("*LULAC III*")[47] and *Campos v. Baytown*[48] are two of the leading aggregation cases that came out of the Fifth Circuit.[49]

LULAC III, the culmination of two other cases, *LULAC I*[50] and *LULAC II*[51], involved the aggregation of African-Americans and Hispanics in West Texas. The case, and its predecessors, focused on the dilution of the minority vote in local school board elections. Opponents claimed that aggregation went against the purpose of Section 2 of the VRA and that groups had mutually exclusive interests.[52] The court further stated that the aggregation of the African-Americans and Hispanics satisfied the first prong of the *Gingles* factors because the groups' goals were compatible.[53] The Fifth Circuit reasoned that both groups shared common past discrimination and had identical political goals. However, the court never addressed whether this aggregation violated Section 2 of the VRA.[54]

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45. *Id.* at 35, at 1675.

46. *Gingles*, 478 U.S. at 89-90.

47. 986 F.2d 728 (5th Cir. 1993).

48. Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (discussing Baytown's violation of § 2 of the Voting Rights Act of 1965 by causing dilution of the minority vote). *Contra* Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (refusing to allow aggregation because it did not support the purpose of the VRA).

49. Geraci, *supra* note 11, at 396-97; *accord* Schulte, *supra* note 9, at 443 (noting that the Fifth Circuit decided the first cases that allowed for minority aggregation).

50. League of United Latin Am. Citizens, Council 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494 (5th Cir. 1987) ("*LULAC I*") (agreeing that African-Americans and Hispanics may combine to form one cohesive entity under the VRA).

51. League of United Latin Am. Citizens, Council No. 4384 v. Clements, 986 F.2d 620 (5th Cir. 1990) (Jones, J., concurring) ("*LULAC II*").

52. Geraci, *supra* note 11, at 396.

53. *Id.*

54. *See id.*, at 396-97 (citing League of United Latin Am. Citizens v. Clements, 986 F.2d 728 (5th Cir. 1993)) ("*LULAC III*").

The *Baytown* case furthered the Fifth Circuit's rationale in *LULAC I*.[55] The *Baytown* court reasoned that Section 2 of the VRA did not specifically prohibit aggregation and that neither African-Americans nor Hispanics qualified separately as a majority-minority district. Therefore, it was unlikely that any minority would be able to elect a representative.[56] Thus, *Baytown* was in agreement with the *LULAC* decisions in that it was permissible to aggregate in order to meet the *Gingles* requirements. But, the victory in *Baytown* left the question open as to whether two minority groups could "aggregate themselves into one substantial minority coalition for purposes of challenging voting systems and practices under Section 2 of the VRA."[57]

D. *Opposition to Minority Coalitions*

Opposition to minority coalitions presents several viable arguments. First, the creation of minority coalitions to meet the *Gingles*' requirements would create undesirable consequences such as coalitions becoming a redistricting "sword" that can be manipulated by both opponents and proponents of majority-minority districts.[58] An opponent would likely claim that not enough minorities are represented individually to require a majority-minority district. In contrast, a proponent would argue that enough minorities exist to create one cohesive majority-minority district. Either position may dominate a congressional floor depending on the needs of the legislative body.

Second, the consequence of minority coalitions is that it would not "provide[ ] states and municipalities [a] reliable means of structuring their voting systems to avoid either lawsuits or liability."[59] Currently, under Section 2 and the *Gingles* criteria, legislators have at least some guidelines to follow to prevent a Section 2 challenge. But with minority coalitions, the chances of warding off all possible claims is extremely low because the legislature cannot discern which minorities might aggregate and how that aggregation would affect the voting outcome of another minority group within a district.[60] The uncertainty leaves open too many doors not only for Section 2 claims, but also for administrative failure.[61]

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55. *See Baytown*, 840 F.2d 1240.

56. *Id.* at 1242.

57. Skinnell, *supra* note 40, at 363. Predictably, the Supreme Court offered little help when it stated that it refused to decide whether minority coalitions were constitutional. *Id.*

58. *Id.* at 372 (construing *LULAC I*, 812 F.2d at 1504 (1986) (Higginbotham, J., dissenting)).

59. *Id.* 385.

60. *See id.* at 387 (discussing how conflict increases as the number of possible plaintiffs increases).

61. *Id.*

A third unwanted consequence of aggregation is "the bad faith actor."[62] Corrupt jurisdictions could use aggregation as a way "to defend themselves from challenges by a single minority group."[63] "In other words, if blacks or Hispanics challenged a voting practice or system, would proponents of aggregation be willing to accept as a defense the claim that 'minorities' constituted majorities in enough districts that the individual group has no cause to complain?"[64]

A final argument against the use of aggregation to meet the *Gingles* criteria is that, under Section 2, aggregation crosses the line between protection of minorities and the mandating of proportional representation.[65] Section 2 prohibits requiring proportional representation.[66] Essentially, minority groups could evade the *Gingles* requirement by never actually having to prove the requirements because no one group would have to singularly qualify.[67]

E. *Force of Nature: The Constitutional Challenge to Majority-Minority Districts*

> One of the things that was going on in the 1990[s] litigation was the notion of reverse discrimination in redistricting. This idea reflects a belief that the minority community has gained enough power . . . and if you draw affirmatively minority districts then you will violate the U.S. Constitution. This notion has persisted regardless . . . of the fact that every other political interest group has nothing that keeps it from leveraging its clout with the legislature to draw benefits on its behalf. . . . [T]he redistricting process and the litigation process in the 1990s involved trying to hold onto your gains and not losing anything.[68]

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62. Skinnell, *supra* note 40, at 388. *Contra* Schulte, *supra* note 9, at 466 (arguing that claims presented by an aggregated minority group should be decided on a case-by-case basis, including political cohesiveness).

63. Skinnell, *supra* note 40, at 388.

64. *Id.*

65. *Id.*

66. 42 U.S.C. § 1973(b) (2003) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); *accord* Skinnell, *supra* note 40, at 388.

67. *See* Skinnell, *supra* note 40, at 389 (contending that, even if minorities came together to form one cohesive group, courts would be unable to determine if the coalition was permanent or just temporary until both groups' needs were met).

68. Symposium, *Drawing lines in the Sand: The Texas Latino Community and Redistricting 2001*, 6 TEX. HISP. J.L. & POL'Y 1, 10 (2001); *see also* MAURICE T. CUNNINGHAM, MAXIMIZATION WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 94-5 (2001) (discussing civil rights interest groups and their political agendas).

The creation of majority-minority districts meant that a greater number of legislative seats, whether local or State, were available to minorities.[69] The result of creating new minority seats was the loss of White liberal representation.[70] The backlash of these majority-minority districts came in the form of White allegations of racial gerrymandering.[71] Generally, "gerrymandering refers to discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another."[72] In the case of racial gerrymandering, White voters claimed that African-Americans and Hispanics were using the drawing of new majority-minority districts as another affirmative action quota system, and this in turn diluted their right to vote.[73] The main contentions raised by White complainants were that the new district plans were oddly-shaped and that they were derived from non-traditional district criteria.[74] The traditional district criteria identified by the Supreme Court are "contiguity, compactness, respect for political subdivisions, and recognition of communities of interest."[75]

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69. RUSH & ENGSTROM, *supra* note 42, at xii-xiii.

70. *Id.* at xiii.

71. *Id.* at 4.

72. *Id.*

73. *Id.* at xiii.

74. *Id.* at 4; *cf.* Gomillion v. Lightfoot, 364 U.S 339, 347 (1990) (arguing that the twenty-eight-sided district shape allowed white voters to substantially negate African-American voting power).

75. *See Shaw*, 509 U.S. at 637-51; RUSH & ENGSTROM, *supra* note 42, at 19; David M. Guinn, et al., *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 228 (1999) (discussing how racial gerrymander claim can arise if legislature does not consider traditional districting principles); *see also* RICHARD K. SCHER ET AL., VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING 149, 153, 155-167 (1997). "Contiguity" refers to district where all territory within the district is part of the district. *Id.* "A district is contiguous if it is possible from any part of the district to reach any other part without crossing the boundary." *Id.* "Compactness" refers to districts that are closely packed and orderly. *Id.* The phrase "political subdivisions" refers to areas, such as counties or sub-state regions, that can be grouped together or separately. *Id.* Last, a "community of interest" is a phrase that incorporates the culture, history, and tradition, and even geography, of a group of people in a geographical area. *Id.* These are some factors that legislators will consider during redistricting, but opponents to majority-minority districts claim that these factors are not considered and that majority-minority districts are given an unconstitutional exception. *Id.*

F. *Seminal Cases of Current Majority-Minority Districting Law: Shaw I, Miller, and Shaw II*

Arguably the most significant civil rights bill ever passed, the VRA has brought in a flood of criticism.[76] In 1993, the Court, in *Shaw v. Reno* (*Shaw I*), transformed its doctrinal analysis of voting rights by applying strict scrutiny.[77] Essentially, the Court held that race-based districting was no different from any other type. Moreover, this new reasoning spurred a mass of cases filed by White complainants challenging majority-minority districts under the Fourteenth Amendment, citing the Equal Protection Clause.[78] The plaintiffs only had "the burden to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within and without a particular district."[79] The plaintiffs, unlike minority plaintiffs alleging violations under Section 2, did not have to prove actual harm.[80] Rather, they had to prove only that "dilutive [racial] gerrymandering . . . [had] harmed a set of districts in that their group's opportunity to elect candidates of its choice [is] negatively affected by the district boundaries."[81]

The *Shaw* decision held that raced-based districting was the same as other types of discriminating State action,[82] and that decision was carried over into the companion case of *Shaw v. Hunt (Shaw II)*.[83]

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76. Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After Shaw v. Reno and its Progeny*, 25 FORDHAM URB. L.J. 641, 652 (1998); *c.f.* Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L. J. 271, 273-74 (1995) (arguing that *Shaw* and the cases following will undo the gains that have been made in minority voting).

77. 509 U.S. 630 (1993).

78. *See Shaw*, 509 U.S. at 643, 658 (discussing racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment); *accord* Guinn, et al., *supra* note 75 at 230.

79. RUSH & ENGSTROM, *supra* note 42, at 18 (discussing the extension of the *Shaw* doctrine in Miller v. Johnson, 515 U.S. 900 (1995)); *see also* Sue T. Gilgore, *Between the Devil and the Deep Blue Sea: Courts, Legislatures, and Majority-Minority Districts*, 46 CATH. U.L. REV. 1299, 1305 (1997) (discussing the "predominant factor standard" articulated in Miller v. Johnson, 515 U.S. 900 (1995)).

80. RUSH & ENGSTROM, *supra* note 42, at 16.

81. *Id.* at 16; *c.f.* 3 MARSHA J. TYSON DARLING, RACE, VOTING, REDISTRICTING AND THE CONSTITUTION: ALTERNATE REDISTRICTING, REGISTERING, AND VOTING SYSTEMS 24 (2001) ("Any elections depending on districts is subject to gerrymandering and dilution of a minority group's voting power.").

82. DARLING, *supra* note 81, at 265.

83. Wickline, *supra* note 76, at 652; *c.f.* McDonald, *supra* note 76, at 273-74.

Initially, the States decided issues of whether or not to create majority-minority districts.[84] For the most part, the Supreme Court appeared disinterested. Specifically, it reasoned that under the Equal Protection Clause, no injury existed for plaintiffs who claimed that race was the governing factor in the creation of new majority-minority districts.[85] The irony within *Shaw I*, however, was that the issue of whether a majority-minority district actually violated the rights of the predominately White community was never argued.[86] *Shaw I* was based primarily on the *shape* of the majority-minority districts.[87] The irony is two-fold: (1) plaintiffs have generally brought voting rights claims to redress minority grievances; and (2) the action was not brought under Section 2 of the VRA.[88] Section 2 requirements would be almost impossible to prove for White plaintiffs. Instead, White plaintiffs presented their constitutional challenge "under 42 U.S.C § 1983, which provides that any person [acting under color of] any statute that causes deprivation of any right secured by the Constitution is liable to the injured party in law or equity."[89]

Following *Shaw I*, the Court faced another equal protection challenge brought by White plaintiffs in *Miller v. Johnson*.[90] *Miller*, like *Shaw I* and *II*, was decided under a strict scrutiny standard.[91] The Supreme Court reasoned that the district had been created with race as the predominant overriding factor and the district had not been "narrowly tailored to serve the state's compelling interest."[92] "Litigation by White voters, following *Shaw* [*I*] and *Miller*, raise[ed] the odd situation in which a state that [had] previously been cited for discriminatory practices against minority voters [had to] show a compelling state interest to draw [majority-minority] districts for [minority] voters."[93]

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84. Wickline, *supra* note 76, at 650.

85. *Id.* at 651; *accord* CHRISTOPHER M. BURKE, THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT 92 (1999) ("Since *Thornburg v. Gingles*, the VRA had contemplated the race-conscious drawing of single-member districts to remedy the persistence of racial bloc voting.").

86. SCHER ET AL., *supra* note 75, at 94.

87. *Shaw*, 509 U.S. at 633-34.

88. SCHER ET AL., *supra* note 75, at 182.

89. *Id.* at 183. White plaintiffs need only show that race was a predominant factor, circumventing the requirements that would have to be used if a complaint was brought under Section 2. *Id.*

90. Miller v. Johnson, 515 U.S. 900, 904 (1995) (discussing Fourteenth Amendment challenge to Southern District of Georgia's congressional redistricting plan).

91. TINSLEY E. YARBROUGH, RACE AND REDISTRICTING: THE SHAW-CROMARTIE CASES 141 (Peter C. Hoffer & N.E.H. Hull eds., 2002).

92. *Id.*

93. SCHER ET AL., *supra* note 75, at 183.

In *Miller*, proponents of a majority-minority district, admittedly created through racial gerrymander, argued on appeal to the Supreme Court that "under *Shaw I* a racially motivated district was subject to strict scrutiny only if its shape was so bizarre that it was unexplainable on any basis other than race."[94] In a five to four decision, the Supreme Court disagreed. Writing for the Court, Justice Anthony Kennedy stated:

> The essence of the equal protection claim recognized in *Shaw [I]* is that the State has used race for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens [into different voting districts] on the basis of race in public [facilities], so did we recognize in *Shaw [I]* that it may not separate its citizens into different voting districts on the basis of race. . . . When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'.[95]

Despite Justice Kennedy's interpretation, this was not how the Court decided *Shaw I*.[96] *Shaw I* held that a district's shape, combined with other factors, could give rise to an equal protection claim.[97] Thus, the *Miller* and *Shaw* decisions leave much to be desired because they seem to cut off all avenues for State legislation to ensure that its minority citizens have a fair vote. Although majority-minority districting seemed to be a straightforward remedy,[98] increasing litigation by White voters essentially ousted the potential remedies offered by the VRA.[99]

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94. YARBROUGH, *supra* note 91, at 140; *c.f.* Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 45 (1995) ("If shape is the crucial factor, the legislature may engage in race-conscious districting, rely on its own stereotypes concerning racial voting behavior, and create districts dominated by one race or another—and surely an elected politician will understand his or her district's racial demographics even if the general public is less informed—so long as the legislature uses traditionally shaped districts that leave the public blissfully ignorant of the legislature's intentional use of race.").

95. YARBROUGH, *supra* note 91, at 140.

96. *Id.*

97. *Id.*

98. Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When it Comes To Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1245 (1993).

99. BRUCE E. CAIN, VOTING RIGHTS AND DEMOCRATIC THEORY: TOWARD A COLOR-BLIND SOCIETY?, *reprinted in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 270 (Bernard Grofman & Chandler Davidson eds., 1992).

Supporters of *Shaw I* and decisions following believe that the decisions have been glorified.[100] They state that *Shaw* should be viewed "as a judicial effort to draw the highly contestable line that plagues all civil rights policies, the line between . . . 'nondiscrimination' and 'affirmative action'."[101] They contend that minorities "do not have to be represented by their own kind to be well represented."[102] Rather, they claim that the only effect the remedial voting measure has is that it allows some racial and ethnic groups to have special representational advantages, which in turn fosters racial tensions.[103] Essentially, creating majority-minority districts for the sake of racial justice will not increase voter representation. It will only limit the ways in which minorities may be represented.[104] This type of limitation would defy American democratic voting because only certain types of candidates would be allowed to compete.[105]

Opponents of majority-minority districts further contend that the true purpose behind Section 2 of the VRA was to prevent discriminatory voting practices from causing dilution of the minority vote.[106] The way the VRA has been implemented and enforced, however, may undercut the benefits by creating lasting ethnic divisions.[107] [The VRA] "promote[s] excessive factionalism by further encouraging racial and ethnic group identities [because] . . . laws bestow political or material advantages upon people because they belong to a particular demographic group, the mere condition of belonging may acquire greater political significance than it would otherwise."[108] Minorities and the legislatures presumed that majority-minority districts were constitutional.[109] But the counter argument

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100. Richard H. Pildes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L. J. 2505, 2509-10 (1997) (claiming "the Shaw doctrine is neither a broad attack on Section 2 of the VRA nor an assault on all intentional race-conscious districting").

101. *Id.* at 2510.

102. CAIN, *supra* note 99, at 265.

103. *Id.* at 267.

104. *Id.* at 266.

105. *Id.* at 267. The Court presented the problem as if only racial issues cause fractionalization within districts. In POLITICAL GERRYMANDERING AND THE COURTS, however, Grofman discusses how fractionalization occurs within districts when Republicans and Democrats manipulate districting in order to "compact" or "fracture" constituencies based on the number of votes needed to win an election.

106. CAIN, *supra* note 99, at 273; *see also* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (discussing political agendas of incumbents when redrawing district lines).

107. CAIN, *supra* note 99, at 269 (Bernard Grofman & Chandler Davidson eds., 1992).

108. *Id.* at 270.

109. *See* Johnson v. Degrandy 512 U.S. 997, 1024 (1994) (upholding a districting plan that allowed for a Hispanic and Black majority-minority district).

is that they are actually a benign form of racial discrimination. Nothing in Section 2 of the VRA entitled racial minorities to proportional representation.[110] Now, State legislation finds itself in a bind because it creates majority-minority districts to avoid litigation under Section 2 of the VRA, while at the same time trying to avoid litigation from minorities under the Equal Protection Clause of the Fourteenth Amendment.

It is under this umbrella of precedents that Texas Republicans and Democrats may have to formulate their respective arguments. It is almost definite that an appeal will be made to the Supreme Court regardless of who wins because the federal ruling will have an extreme impact on the national stance of Republicans and Democrats. The likely flaw to appear in both parties strategies is the assumption that their minority constituencies, namely the Hispanic and African-American voters, will vote in a predictable fashion and only use the tool of minority aggregation as a remedial measure.

III. "TURNING AND TURNING IN THE WIDENING GYRE"[111]: DEMOCRATIC/REPUBLICAN AGENDA IN TEXAS

President Bush should hope that the courts rescue him from going down in history as the president whose Justice Department gutted the Voting Rights Act and sacrificed up to 3.6 million minority Texans.[112]

Two conclusions may be drawn from the fight between Texas Democrats and Republicans: 1) the fight is not about protecting minority voting rights, even though some will argue otherwise; and 2) the fight need not impede the expansion of minority voting rights.

In sum, the fight is a classic power struggle, but in this scenario, Democrats stand to lose the most.[113] Texas Democrats already lost one battle

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110. YARBROUGH, *supra* note 91, at 1.

111. William Butler Yeats, *The Second Coming*, *at* http://www.well.com/user/eob/poetry/The_Second_Coming.html (last visited Oct. 29, 2004).

112. Robert T. Garrett & Pete Slover, *Agency Backs Remap: Court Could Still Reject GOP Play Approved by Justice Department*, DALLAS MORNING NEWS, Dec. 19, 2003, *available at* http://www.dallasnews.com/sharedcontent/dallas/washington/topstory/stories/122003dntexremap.1116a.html (last visited Oct. 28, 2004). This statement was made by Martin Frost, currently the Democratic U.S. Representative for Arlington, after he learned that the Department of Justice had approved the new districting map proposed by the Republicans. *Id.* Frost's constituency, District 24, is one of the main districts that will be dismantled if the current map is allowed to stand. *Id.*

113. Associated Press, *Colorado Court Rules Redistricting Unconstitutional*, DALLAS MORNING NEWS, Dec. 1, 2003, http://www.dallasnews.com/sharedcontent/dallas/nation/stories/120103dnnatredistricting.5c8ada.html (last visited Aug. 22, 2004) (on file with author).

when the Fifth Circuit found mid-decade remapping lawful.[114] Democrats had first used the argument that mid-census redistricting was illegal. The second argument pointed directly to the VRA. What better way to make a strong statement than to play the race card? It was a strategic move by the Texas Democrats.

First, the move immediately halted any action the Republican Party might make while the case was pending.[115] Second, by incorporating a federal statute, the Texas Democrats circumvented any hindrances that the Texas Constitution might impose. Accordingly, the next phase for Republicans and Democrats is to prepare legal arguments that will withstand *Shaw I* and its progeny.

A. *Doctrinal Context: The Voting Rights Act Revisited*

The Democrats should argue strictly on the merits of Section 2 of the VRA and contend that the new map is racial gerrymandering. Under Section 2, the Democrats need only show that the minority vote will be affected. Presenting such evidence should not be a problem. For example, the new map splits District 24—what was a prime source of African-American votes for Democrats—and divides its parts among Republican territory.[116] The result is that a once strongly Democratic district, represented by African-American voters, is now predominantly Republican.[117]

Although Republicans are quick to point out that District 24 is the only district that is severely affected by the new map, outside of this, their argument is weak. The effects of the remap may not be substantial. Nonetheless, they appear sufficient to call into question Section 2 of the VRA.

First, Democrats should turn directly to the *Shaw* doctrine. Specifically, they should contend that the new map was designed strictly on the basis of race—*i.e.*, Republicans took note of the large minority popula-

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114. Garrett & Slover, *supra* note 112; *accord* Robert T. Garrett, *Panel: Mid-decade Redistricting OK Under State Law*, DALLAS MORNING NEWS, Dec. 19, 2003, *available at* http://www.txcn.com/sharedcontent/dallas/politics/state/stories/121903dntexredistricting.ba0ca3ac.html (last visited Oct. 28, 2004) (discussing the federal court's ruling that legislative redistricting has not been proven to be illegal).

115. Slover, *supra* note 10 ("The redistricting case [is] actually a number of cases rolled into one.").

116. Gromer Jeffers, Jr., *Road to D.C. Depends on Remap*, DALLAS MORNING NEWS, Dec. 16, 2003, *available at* http://www.txcn.com/sharedcontent/dallas/politics/columnists/gjeffers/stories/121603dnmetjeffers.a72bfcb1.html (last visited Sept. 27, 2004); Slover, *supra* note 10.

117. *See* Slover, *supra* note 10 (noting that remap has significantly diluted democratic-minority-vote in District 24).

tion and formulated a new map based on racial assumptions. Surely these racial considerations could not pass muster under the *Shaw* doctrine.

Conversely, Republicans should focus strongly on the VRA cases that have come before the court in the last decade. These cases are fresh and immediately identifiable to the current Justices on the Supreme Court. Furthermore, the trend now seems to be leaning toward invalidating anything that appears to rely heavily on affirmative action.[118] The Republicans can make a case for the previous map to be an affirmative action measure that handicaps minority voters by assuming they will all vote in harmony.

The possible arguments of racial gerrymandering and unneeded affirmative action are viable. But both parties are assuming that majority-minority districts will continue to vote in a predictable fashion—the predictable fashion being minorities for Democrats and non-minorities for Republicans. In light of national developments, these assumptions appear flawed.[119]

B. *The Element of Surprise: Using the Growing Unpredictability in Voting Patterns As a Weapon Against the Political Pigeonhole*

In California, Cruz Bustamante lost the gubernatorial special election to Arnold Schwarzenegger.[120] The irony of the election loss centers on the fact that 1) Bustamante is the Democratic grandson of Mexican immigrants and is currently the Lieutenant Governor of California; 2) California is a Democratic State in which Democratic candidates generally win 70 percent of the Hispanic vote; and 3) Arnold Schwarzenegger is a White Republican immigrant who sits on the board of the U.S. English organization—an organization that believes English should be the official language of the United States.[121]

The campaign results were further shocking because polls revealed that while 65 percent of African-Americans voted for Bustamante, only 52

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118. *E.g.*, Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003) (invalidating the undergraduate admissions policy that made race a dominating factor).

119. Over 40 percent of Hispanics voted for Republican Arnold Schwarzenegger or Tom McClintock, the Republican Senator. Kathryn Jean López, *Independence Day*, HISP., Dec. 2003, at 24-25 (interpreting the result of the California gubernatorial election outcome in how it represents the changing dynamic of Hispanic politics). Ironically, neither candidate made an attempt to attract the Hispanic vote, assuming the Democrats already held it. *Id. Contra*, James G. Gimpel, *Losing Ground or Staying Even?: Republicans and the Politics of the Latino Vote,* BACKGROUNDER (Ctr. for Immigration Studies), Oct. 2004, at 1 ("Latinos have remained remarkably stable in their political views, preferring Democrats over Republicans by a margin of two to one nationally and in most states.").

120. López, *supra* note 119, at 24-25.

121. *Id.*

percent of Hispanics voted for him.[122] Furthermore, Bustamante ran his campaign primarily on the basis that he was Hispanic.[123] Many theories were espoused as to why Bustamante lost the election, such as his past as a racial separatist, but the end result was that Hispanics will not be politically pigeonholed just because they are Hispanic.[124]

In Washington D.C. four Hispanic congressmen have left the Democratic Congressional Hispanic Caucus and created Republican Congressional Hispanic Conference. The Congressional Hispanic Conference was formed in March 2003 because the founding members felt the Congressional Hispanic Caucus only supported Hispanics if the Hispanics supported liberal politics.[125] The change in politics should not be so surprising. It is inevitable that the growth of the Hispanic population would lead to broadening of political views. On the other hand, African-Americans are content to remain predominately Democratic. Their battle is not so much political, as it is a battle to maintain the political power that has been gained over the years—a losing proposition if African-Americans continue their exodus out of predominately African-American districts.

Furthermore, Hispanic voters are a far more diverse majority than other minorities.[126] Their vote is not reliably Democratic, and they are more than willing to join forces with Republicans if the platform fits their needs.[127] The immense potential for diversity in the Hispanic population is reflected by its response to the 2000 census.[128] At least 50 percent of Hispanics viewed themselves as Mayan, Mestizo, or Tejano.[129] This type

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122. *Id.* at 25.

123. *Id.* at 24.

124. *Id.* at 25 (claiming that Hispanics are not necessarily supporting Republicans but are looking for representation that did not come from within California, which has been viewed as politically corrupt).

125. Kathryn Jean López, *Power Struggle*, HISP., July/Aug. 2003, *available at* http://www.hispaniconline.com/magazine/2003/july_aug/Features/power.html (last visited Oct. 29, 2004). The founding members of the Congressional Hispanic Conference are Henry Bonilla (R-TX), Lincoln Diaz-Balart (R-FL), Mario Diaz-Balart (R-FL), and Ileana Ros-Lehtinen (R-FL). *Id.* The issue that caused the separation concerned the Hispanic Caucus' refusal to support confirmation of Miguel Estrada, a Bush nominee, to serve on the District of Columbia Court of Appeals. *Id.*

126. Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other'*, N.Y. TIMES, Nov. 9, 2003, at A1. In the 2000 census, forty-eight percent of Hispanic-respondents identified themselves as white. Two percent of Hispanic-respondents identified themselves as African-American. *Id.*

127. Maria Elena Salinas, *California Dreaming*, HISP., Dec. 2003, at 26. For example, in October 2003, 46 percent of Hispanics approved the removal of Democrat Gray Davis, then-governor of California. *Id.*

128. Navarro, *supra* note 126, at A1.

129. *Id.*

of diverse identification likely spreads the Hispanic vote in a myriad of political areas, even outside of the Democrat-Republican dichotomy. Stated differently, Hispanics are cohesive by their Spanish language, not by their politics.[130]

This type of unpredictability is a tool that can continue to keep politicians guessing. It is also a tool that can be used to combine Hispanic and African-American political power. A Hispanic and African-American coalition could change and manipulate the political arena because neither Republicans nor Democrats could use the groups as predictable pawns to add to poll statistics.

C. *De Facto Aggregation: State Action Need Not Apply*

> *We were ahead of our time. The Latino community in the 1970s and '80s was neither a threat nor an asset to the African-American community. We can talk about idealism, but that's why coalitions are formed—[by a] threat or [by] the possibility of a gain. I think we are both [a threat and an asset] now.*[131]

Majority-minority districts affected by the new map should not aggregate to mount an appeal against the federal court's ruling. Rather, minorities should strive to create an influential minority coalition without the State becoming involved.

Twenty years ago, The National Council of La Raza, a non-profit organization, pushed for a Hispanic and African-American coalition as a way to combine power and have a strong political presence.[132] According to Raul Yzaguirre, the president of the organization, the attempted coalition failed due to a lack of support in the African-American community.[133] Other attempts at an African-American and Hispanic coalition, however, have been successful.

During the 1998 Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund (MALDEF), the National Urban League, the National Association for the Advancement of Colored People (NAACP), and the National Council of La Raza (NCLR)

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130. Tim Chavez, *Rethinking Diversity: End the Racial Spoils System and Bring On True Empowerment*, HISP., Dec. 2003, at 80 (discussing the growth of the Hispanic population and the self-segregation of Hispanics and African-Americans in defeat of trying to find common ground); *accord* Salinas, *supra* note 127, at 26 ("[The] Hispanic vote is not homogenous. Even if most are Democrats, there is a difference between the way the more loyal native-born Hispanics vote and the more swayable naturalized citizens.").

131. Megan Twohey, *Role Reversal Jolts Blacks, Hispanics*, 33 NAT'L J. 1122 (2001) (quoting Raul Yzaguirre, president of the National Council of La Raza).

132. *Id.*

133. *Id.*

joined to make certain that Hispanics and African-Americans would be accurately counted during the 2000 census.[134] African-Americans and Hispanics have even come together to demand more representations of minorities on major television networks.[135] The down side to this paradigm, however, is that once a goal is reached for one group the other does not continue to lend as much support, and the result is tension that shatters the coalition's cohesiveness.[136] What is on the political, social, or economic agenda for African-American leaders does not always equate to what is a top priority for Hispanic leaders, and vice-versa. Yzaguirre expresses the idea that, "[i]n the competition for jobs, there's a sense that the gatekeepers for minorities are Black, that affirmative action and diversity officers as well as the community affairs folks in government, business and nonprofit sectors are all African-American."[137]

While the agenda may be different for both races on a variety of issues, it is the political sector that will feel the most tension from the idea that African-Americans are "minority gatekeepers."[138] In the past, the Hispanic voter bloc has been dubbed the "sleeping giant"[139] because it has not always flexed its political muscle. But the enormous growth of the Hispanic population within the last decade has caused Republicans to intensely pursue the Hispanic vote, and caused Democrats to use immigration to significantly increase its voting-base.[140]

The huge population growth of Hispanics would seem to equal more political power, especially during voting,[141] and is a reason why so many

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134. *Id.*

135. Twohey, *supra* note 131, at 1122; *see also* Kathryn Jones, *The New, New Henry C.*, TEXAS MONTHLY, July 2000, at 47 (discussing how large companies such as AT&T, MCI, and MSN are spending enormous amounts of money to advertise in Hispanic markets).

136. Twohey, *supra* note 131, at 1122.

137. *Id.*

138. Matthew I. Pinzur, *Looking for a Better Choice: Latinos Are Playing a Key Role in Promoting School Voucher Programs*, HISP., Dec. 2003, at 29 (expressing that Hispanics and African-Americans face the challenge of dealing with urban neighborhoods and low school performance).

139. Kathleen Conti, *Push on to Increase City's Latino Vote Ballot Question, Races Spur Interest*, BOSTON GLOBE, Sep. 5, 2002, at 6.

140. *See* James G. Gimpel & Karen Kaufmann, *Impossible Dream or Distant Reality?: Republican Efforts to Attract Latino Voters*, BACKGROUNDER (Ctr. for Immigration Studies) Aug. 2001, at 1 ("Democrats lead Republicans by a comfortable margin in the partisan identification of Latino voters. The gap is wider among immigrant Latinos who have not yet become citizens.").

141. David R. Ayon, *A New Way of Cutting Up the Pie: Skilled Management Will Be Needed to Mitigate Potential Conflict as Mexicans and Other Latin Americans Challenge African-Americans at the Voting Booth*, L.A. TIMES, Apr. 10, 1994, at 23.

Hispanic leaders have promoted citizenship.[142] Unfortunately, this is not always the case. The redistricting and the 2001 elections seemed to indicate Hispanics lack the political clout carried by African-Americans.[143] The problem is Hispanic voters in states with a high Hispanic population, like California and Texas, are geographically more dispersed than African-Americans.[144] Hispanics face the challenge of harnessing their political power, while African-Americans risk losing their political power if they refuse to join with other minority groups.

African-Americans seem to be blind to the political growth of Hispanics.[145] Possibly, African-Americans are still focused on their political battles with mainstream White America.[146] The criticism is that the African-American-White paradigm is no longer a meritorious concept in the political debates.[147] If anything, it is a hindrance to other minorities in the country who receive little attention because of the belief that African-Americans are the oppressed group.[148] Other critics argue that the issue is not only moot, but should be replaced by a multicultural view.[149] For example, Deborah Ramirez, in her article, *Multicultural Empowerment: It's Not Just Black and White Anymore*, states:

> Creating a multiracial category would dilute the statistical strength of established minority groups. As the number of people claiming multiracial identity increases, membership in existing minority groups would necessarily decrease. This statistical change would have an enormous impact on matters immensely important to minority communities: electoral representation, the allocation of governmental benefits, affirmative action, and federal contracting rules.[150]

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142. *Id.*

143. Richard E. Cohen, *Hispanic Hope Fades*, 34 NAT'L J. 1, 1 (2002).

144. Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 46 (2002).

145. *But see* James G. Gimpel, *Latinos and the 2002 Election: Republicans Do Well When Latinos Stay Home*, BACKGROUNDER (Ctr. for Immigration Studies), Jan. 2003, at 1. "There is no 'Latino' voting bloc, as such—after controlling for party identification, income, and education, there is no difference between Latino voting and the voting pattern of non-Hispanic whites. . . . This is not true of African Americans, who are a distinctive voting bloc. . . ." *Id.*

146. Symposium: *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 960 (1995) [hereinafter *Multicultural Empowerment*].

147. Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61, 68-69 (1997).

148. *Id.*

149. *Multicultural Empowerment*, *supra* note 146, at 960.

150. *Id.* at 968.

Neither Hispanics nor African-Americans desire that their individual voices become diluted. For example, African-Americans have begun to separate themselves from different cultures.[151] Over the last decade there has been an increase in enrollment for Historically African-American Colleges and Universities, in African-American-owned businesses, and in "spiritually rejuvenated black boulevards of urban America."[152] There has also been an extensive intra-metropolitan movement to leave the inner cities.[153] This deliberate self-segregation of African-Americans may result in diluting the political clout that exists because the movement away from these cities has decreased African-Americans' political impact on traditional African-American districts.[154] It may also lead to pitting African-Americans against Hispanics, instead of using Hispanic-growth as an added power against unfair politics.[155]

On the other hand, Hispanic populations have grown at a much faster rate than African-American populations and are more geographically concentrated in certain states.[156] As one commentator notes, "It is inevitable that [Hispanic] electoral representation will increase. . . . The most important question then is how will greater [Hispanic] electoral representation be achieved? Will it be achieved at the expense of African Americans or at the expense of white progressive elected officials?"[157] In sum, how Hispanics and African-Americans interact in the future will determine the success of minority coalitions and the Republican and Democratic agendas.

IV. CONCLUSION

Texas Republicans and Democrats have laid the path for the U.S. Supreme Court. If the Republican redistricting map is upheld, the Supreme Court may be implying that affirmative-action measures for minorities are becoming obsolete. If the Supreme Court sides with Texas Democrats, it may be indicating that minority issues are still a talisman that can manipulate politics at any political party's whim. Either way, Hispanic

151. Wil Haygood, *Race in American Life: Ideals Giving Way to Reality*, BOSTON GLOBE, Sep. 14, 1997, at A1.

152. *Id.*

153. Symposium: *Panel I: New Demographics and the Voting Rights Act: Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C.L. REV. 1283, 1285 (2001) [hereinafter *New Demographics and the Voting Rights Act*].

154. *Id.*

155. *See* John Yemma, *America's Changing Face: South Central Los Angeles Exemplifies the Melting Pot of the 1990s*, BOSTON GLOBE, Sep. 17, 1997, at A1.

156. *New Demographics and the Voting Rights Act*, *supra* note 153, at 1286.

157. *Id.*

and African-American voters are not required to fall in line with the role Republicans and Democrats want them to play. Minorities do not have to act as a single-dimensional voting tool that can be swayed solely on the basis of a candidate's cultural background. Moreover, minorities possess the power to come together as they choose and segregate as they see fit. They may voluntarily aggregate as a proactive measure rather than a remedial measure that falls under the multi-interpreted strictures of Section 2. In other words, their political future need not depend on whether the U.S. Supreme Court will uphold the elimination of majority-minority districts.