RACE, PARTISANSHIP, AND THE VOTING RIGHTS ACT (VRA): AFRICAN-AMERICANS IN TEXAS FROM RECONSTRUCTION TO THE REPUBLICAN REDISTRICTING OF 2004

By: Monet Clarke*

I. INTRODUCTION

Understanding the failures of partisan battles during Reconstruction sets a framework to understand the necessity of the Voting Rights Act of 1965 (VRA), and the impact of partisanship upon African-Americans in modern Texas politics after the VRA. Since the passage of the VRA of 1965, African-American representation can be seen as a sophisticated power arrangement as opposed to the racially charged battles of over a century ago. While reconstruction-era political battles between the Republican Party and Southern Democrats in many ways mirror today's partisan battles, the current ideological views are essentially reversed. Today, the Republican Party woos minority voters by claims of "compassionate conservatism." This is a far cry from the Republican Party that led the fight to end slavery and the racist institutions of the South. Texas serves as a case study for an analysis of African-American political incorporation. Politicians and their electorate both must form relationships based upon common goals rather than those established solely upon racial or ethnic backgrounds. The most effective multi-racial coalitions will affirm group identity while working to further the efforts of the VRA.

I will attempt to prove that coalition politics based upon common goals (especially common economic background, rather than skin-color or ethnic origin) is the optimal way for African-Americans to win a political contest against a dominant elite. In this paper, I compare the history of African-American disenfranchisement with present day racial politics to show that the failure to organize an effective coalition has left political parties, and minorities within those parties, without a political voice. First, I will

* Juris Doctor, University of Texas School of Law, 2005; B.A., Barnard College, 2001; Clerk for the Honorable Bernice Donald in the Western District of Tennessee for the 2005-2006 term.

explain a concept called the Southern Realignment that explains how, in the period following Reconstruction, Texas pioneered a movement away from elite control over the political process which, in the South, perpetuated neutrally-designed policies that discriminated against African-Americans in operation. From this point, I explain how these discriminatory policies necessitated the VRA and its resulting jurisprudence. I use the recent Texas redistricting as a case study to show how party in-fighting within the Texas legislature mirrors Reconstruction-era power grabs. Lastly, I will explore new case precedent in the area of partisan gerrymandering claims and show its relation to VRA claims against recent Texas redistricting.

II. THE ANTICIPATION OF THE SOUTHERN REALIGNMENT: V. O. KEY'S PROGNOSIS FOR TEXAS

Political power obtained before the Civil War enabled Southern elites to rein in the formation of class-based coalitions between former slaves and poor whites during Reconstruction.[1] Because only African-Americans were enslaved at this time, the conservative rich could convince poor whites that both groups benefited from slavery.[2] Thus, the elites utilized racist attitudes to prevent poor whites from seeing their commonality with enslaved blacks,[3] even though both groups were oppressed by the elite planter class since neither group had a share of political and economic power as great as the elites did.[4] These manipulative efforts had unified Southern whites for the cause of slavery, even though the economic climate could have fostered political bonds between blacks and poor whites.[5] Instead, despite their common economic goals, neither blacks nor poor whites had the political skill and unifying strength of the planters.[6] Racism against blacks thus obscured the apparent class differences between rich and poor whites, and it removed threats to the political and economic power of the white elite.[7]

In Texas before the Civil War, the planter class controlled the distribution of resources through politics for their own benefit.[8] Ultimately, the planter class influenced the government to enact "laws and ordinances that allowed the cotton farmer to thrive."[9] For

1. *See* CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 5 (1990).
2. *See id.*
3. *Id.* at 5–6.
4. *See id.*
5. *See id.* at 5.
6. DAVIDSON, *supra* note 1, at 5–6.
7. *Id.* at 6.
8. CARL H. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 8 (1980).
9. *Id.*

example, nominal property taxes were assessed, laws were established to maintain the slave labor force, the state underwrote the bonds of private railroad companies, and funds were diverted from public school appropriations to support these money-making endeavors that benefited the planter class.[10] The politics of this time was comprised mostly of a "struggle among sectional elites over the allocation of resources, rather than a conflict of differing classes."[11] The absence of inter-class contest to the allocation of power was attributed to a "feeling of commonality among all classes of white farmers."[12] Agriculture, though the dominant economy in Texas, was not the sole source of wealth.[13] Notably, manufacturing industries also served as a significant employer for many Texans.[14] The opportunity to obtain wealth and status from hard work reduced the incentive to disrupt the status quo of the cotton economy, and it prevented bonds between blacks and poor whites based upon common economic interests.[15]

When blacks became enfranchised voters after the Civil War, the Texas Reconstruction-era Republican Party struggled between the unwanted imposition of financing concessions to blacks and the necessity of courting black voters to win elections.[16] The contention between conservatism and radicalism resulted in a Republican party "that could never marshal its full strength against its opponents."[17] The Democratic Party thus dominated Texas for many years after Reconstruction.

In 1949, V. O. Key, Jr., an Austin, Texas native and Harvard political scientist, wrote a book entitled *Southern Politics in State and Nation*, predicting that an alignment of blacks and poor whites could foster a strong representational political coalition. Surveying Texas's history and its application to current politics, Key's basic theory of politics was premised upon class differences: "Politics generally comes down, over the long run, to a conflict between those who have and those who have less."[18] Key claimed the dominance of the upper class created a hegemonic political force over the have-nots and inhibited the have-nots from forming a strong political alliance.[19] Strong coalitions among the poor of all races would counteract the divide-and-conquer strategy employed by the rich.

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10. *Id.*
11. *Id.* at 9.
12. *Id.*
13. MONEYHON, *supra* note 8, at 5.
14. *Id.* at 4.
15. *Id.* at 9.
16. *Id.* at 196.
17. *Id.*
18. DAVIDSON, *supra* note 1, at 4 (quoting V. O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 307 (1949)).
19. *See id.* at 5–7.

Key characterized the power of the elites as "'one-partyism' which in many southern states . . . was equivalent to the absence of a party system altogether."[20] As a result of this one-partyism, the poor had no way to voice their concerns. The politics of disorganization inherent in one-partyism made for only short-lived success for opposition parties: a political party could win the present-day election, but the lack of a stable political base prevented it from instituting any substantive long-term agendas.[21] In antebellum Texas, one-partyism prevented poor whites from marshalling their strength against elites to channel the proceeds from the slave economy towards endeavors like a public school system.[22]

To further Key's theory, class issues, rather than race, prevented the formation of a solid political base and in effect left the underclass of blacks and poor whites unrepresented in state politics.[23] As Key noted, "the issue of Negro suffrage [was] a question not of white supremacy but of the supremacy of which whites."[24] The poll tax, used to deny the enfranchisement of blacks, was often aimed at poor whites as well, and it had its intended effect.[25] The planting elites used race as a distraction from the inherent discrepancy between the politically mobilized rich and disorganized poor.[26] Barriers to the voting booth led to the denial of representation for both blacks and poor whites.[27] The absence of competitive two-party politics resulted in candidates ignoring the needs of the nonvoting population, whether black or white.[28]

According to Key, the end of one-partyism would only occur by a shift from race-infused politics to a focus on fundamental class issues.[29] In light of the social climate in Texas, Key was optimistic about the emerging political system of "modified class politics."[30] Texas had the lowest proportion of blacks among the eleven southern states. In 1940, 69.9% of Mississippi's whites lived in counties that were 30% or more black.[31] In contrast, 7.8% of white Texans lived in counties with similar percentages.[32] Whites in Texas therefore had less reason to perceive blacks as a threat to their

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20. *Id.* at 6.
21. *Id.* at 7.
22. *See* MONEYHON, *supra* note 8, at 8.
23. *See* DAVIDSON, *supra* note 1, at 8.
24. *Id.* (quoting V. O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 646 (1949)).
25. *See id.* at 23.
26. *See* MONEYHON, *supra* note 8, at 10–11.
27. DAVIDSON, *supra* note 1, at 23.
28. *Id.*
29. *See id.* at 9–10.
30. *Id.* at 12.
31. *Id.* at 10.
32. DAVIDSON, *supra* note 1, at 10.

livelihood,[33] and this could have promoted the fostering of ties between blacks and poor whites in Texas.[34] This was in contrast to states such as Mississippi, where whites utilized politics to contain any prospect of insurgency from a critical mass of oppressed former slaves.[35]

Thus, according to Key, despite the despotic institution of slavery that dominated politics, the economy, and racial attitudes in the pre-Civil War South, some optimism existed regarding the formation of cross-racial political coalitions. Because slightly different economic and racial conditions existed in Texas, there was a unique possibility for such coalition-building.

III. THE PREDOMINANT FACTOR OF RACE IN THE IMPLEMENTATION, AUGMENTATION, AND EVENTUAL RETRACTION OF THE VOTING RIGHTS ACT OF 1965

Federal action in the 1960s began to ameliorate the racial antagonisms that plagued life and politics in Texas and throughout the South.[36] The Reconstruction era ended in 1877 when Rutherford B. Hayes removed the occupying United States military troops from the war-ravaged South,[37] allowing southern white elites to institute Jim Crow policies aimed at suppressing the new-found political freedom of African-Americans and poor whites.[38] Key attributed the disenfranchisement of both poor blacks and whites to "one-partyism," but some of the facially race-neutral laws had a disproportionate impact on black voters.[39] The Jim Crow barriers to the ballot box included residency requirements, poll taxes, and literacy tests. However, other tactics such as the all-white primary and the grandfather clause "could be taken advantage of only by illiterate whites."[40] The grandfather clause, for example, which allowed one to vote if one's grandfather voted, disproportionately impacted the descendents of former slaves.[41]

To counter the racial discrimination of Jim Crow, the VRA provided "direct federal action to enable African-Americans in the

33. *See id.*
34. *See id.*
35. *Id.* at 5.
36. *See id.* at 53.
37. *Id.* at 251.
38. *Id.* at 6, 251.
39. DAVID T. CANON, RACE, REDISTRICTING AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 62 (1999).
40. *Id.* (quoting V. O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 538 (1949)).
41. *Id.* at 62 & n.2.

South to register and vote."[42] Before 1965, court battles for enforcement of the Fourteenth and Fifteenth Amendments of the U.S. Constitution were ineffective in combating neutral laws that disproportionately suppressed black voter turnout.[43] President Lyndon B. Johnson realized the "jurisdiction-by-jurisdiction" fight was costly, time-consuming, and ultimately futile.[44] Because a multi-racial, predominantly poor, working-class constituency elected the Texas Democrat to his former U.S. Senate office, Johnson saw the political advantages of gaining the support of the political underclass. Perhaps Johnson understood that the denial of rights to minorities served as a proxy to disenfranchise all voters who were less affluent and did not have the advantage of effective political organization.

The most important provisions of the VRA are Section 2 and Section 5. Section 2 prohibits any method employed by a state or political subdivision used "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[45] It was later amended in 1982 to include those who have "membership in a language minority group."[46] Section 5 of the Act is a particular application limited to "covered" jurisdictions which must seek authorization or preclearance before any change is made to any statewide or local plan.[47] There are two ways to obtain preclearance: administratively or through litigation.[48] An administrative request is made via a submission of the proposed plan to the United States Attorney General.[49] A litigation or judicial preclearance requires a declaratory judgment from the United States District Court for the District of Columbia.[50] Most jurisdictions take advantage of the more expedient administrative preclearance method.[51] Nine states are covered under Section 5 because of their long history of voter suppression: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.[52] For the same reason, Section 5 also covers portions of California, New York, Michigan, North Carolina, New Hampshire, Florida, and South

42. Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 685 (2003).
43. *See id.*
44. *See id.*
45. 42 U.S.C. § 1973 (2005).
46. 42 U.S.C. § 1973b(f)(2) (2005).
47. 42 U.S.C. § 1973c (2005).
48. *Id.*
49. *Id.*
50. *Id.*
51. CANON, *supra* note 39, at 63.
52. 28 C.F.R. app. pt. 51 (2005).

Dakota.[53] The VRA provides minority voters a powerful statutory means to make sure that redistricting is effected without discrimination."

After the VRA's 1965 adoption, subsequent jurisprudence added vote dilution as a cause of action and eliminated the burden of proving discriminatory intent from the Section 2 claim. These expansive measures struck down any districting scheme that prevented blacks from aligning politically on the basis of race, regardless of discriminatory intent. In 1969 the Supreme Court held in *Allen v. State Board of Elections* that the VRA included vote dilution claims.[54] Congress later codified *Allen* in the Voting Rights Act of 1982, thus preventing any state or political subdivision from using a procedure that would result in a "denial or abridgement of the right of any citizen of the United States to vote."[55] Denial or abridgment of the right to vote, based on the "totality of the circumstances," occurs if election or districting schemes are not "equally open to participation" by a member of a protected class.[56] Thus, even subtle measures giving minorities "less opportunity than other members of the electorate to participate in the political process to elect representatives of their choice" are a violation of the Act, as would be overtly racist barriers to the voting booth.[57] However, the determination of intent on the behalf of the legislature was irrelevant; it only mattered whether black votes were excessively diluted. The Supreme Court continued its expansive reading of the VRA in *Thornburg v. Gingles* where it established a three prong test for proving voting abridgement without a showing of discriminatory intent: (1) the minority group is significantly large and geographically compact to constitute a majority in a single member district, (2) the group can show its political cohesiveness, and (3) the white majority votes as a bloc to defeat the group's preferred candidate.[58] The Court's line of jurisprudence during this time recognized the tendency of minority voters to vote in correlation to group status.

In addition to seeking the Supreme Court's broad interpretation of the VRA, many African-Americans left the party of Abraham Lincoln and aligned with the Democratic Party.[59] The

53. *Id.*

54. 393 U.S. 544, 569–70 (1969). At issue in *Allen* was the change to at-large elections in a Mississippi and a Virginia districting scheme. *Id.* at 550, 553.

55. 42 U.S.C. § 1973 (2005).

56. *Id.*

57. *Id.*

58. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). The Supreme Court found under Section 2 of the VRA that a 1982 districting scheme prevented black voters in North Carolina from electing the candidate of their choice because white voters did not vote for black candidates. *Id.* at 80.

59. DAVIDSON, *supra* note 1, at 230.

passage of the VRA helped Texan Democrats elect Barbara Jordan to the U.S. House of Representatives in 1972, who along with Democrat Andrew Young of Georgia were the first two black representatives from the South since Reconstruction.[60] During the 1990s, majority-minority districts burgeoned as Democrats controlled state legislatures, the House of Representatives, and the Senate, which viewed such districts as requisite in keeping congressional control. "Rooted in the tremendous loyalty that black voters show for Democratic candidates," many Section 5 preclearance plans passed muster under the *Gingles* test.[61]

However, the partisan alignment of blacks and the Democratic Party also faced major Supreme Court challenges from white Republican voters, who brought a series of racial gerrymandering claims during the 1990s. In 1993, the Court held in *Shaw v. Reno* that an oddly shaped North Carolina majority-minority district violated the equal protection of white voters' rights.[62] The Republican National Committee supported the white North Carolina appellants in an amicus brief while the Democratic National Committee did the same in support of the majority black district.[63] Justice Sandra Day O'Connor labeled the creation of the district as "political apartheid," going on to state in her majority opinion:

> It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[64]

Two years later, supported in part by an amicus brief from the appellants that prevailed in *Shaw*, the Court held in *Miller v. Johnson* that in the absence of compactness and contiguity, the unconstitutionality of a majority-minority district would be found if

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60. CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 159–160 (1993).

61. CANON, *supra* note 39, at 73.

62. *See* Shaw v. Reno, 509 U.S. 630, 658 (1993). North Carolina voters challenged a majority black district that ran the length of the interstate highway which was also the length of former tobacco plantations. The Supreme Court held that the district was only created for the purpose of separating on the basis of race and thus violated the Equal Protection clause of the Fourteenth Amendment. *Id.*

63. *See* Shaw, 509 U.S. 630.

64. *Id.* at 647.

race was used as a predominant factor for creating the district.[65] Even if the Department of Justice precleared a majority-minority district, *Miller* held that the Supreme Court would abrogate the Department's authority on the basis of Equal Protection.[66] This illustrates an overall conservative shift in VRA jurisprudence that would ultimately lead the Supreme Court to hold in favor Equal Protection arguments advanced by the Republican Party against the race affirmative provisions of the VRA.

The Supreme Court imposed the same color-blind standard it had developed for Fourteenth Amendment Equal Protection Clause claims on its interpretation of Section 2 and Section 5 of the VRA instead of focusing on the effective representation of African-Americans aligned with the Democratic Party. Ignoring the legislative history of the VRA, the Court analyzed voting dilution claims and racial districting schemes solely on the basis of strict scrutiny and struck down any use of race in the absence of a compelling reason.[67] The Court differentiated dilutive voting discrimination under Section 5 from access to the ballot mandated by Section 2 of the VRA, even though *Allen* had held that a dilutive election scheme violated Section 2.[68] In the 1994 case of *Holder v. Hall,* black voters in Georgia instituted a suit on the basis of Section 2 rather than Section 5, claiming that the change to a multi-member county commissioner demanded that members should be elected from districts instead of county-wide and that one of the single member districts be mapped as a majority-minority district to ensure minority representation on the commissioner board.[69] In his concurrence, Justice Clarence Thomas invoked strict scrutiny to argue that the scope of the VRA was limited to barriers at the voting booth:

> [I]n pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so,

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65. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995). In light of the holding of *Shaw v. Reno*, the shape of an oddly drawn district in Georgia could only be explained by race so it was found to violate the Equal Protection Clause of the Constitution. *Id.* at 917.

66. *Id.* at 922.

67. *Id.* at 903.

68. *See* Holder v. Hall, 512 U.S. 874, 929–30 (1994). Black voters challenged the election scheme of a multi-member commissioner board in Bleckley County, Georgia on the basis of Section 2 of the VRA. Since blacks comprised 20% of the county, the plaintiffs charged that county-wide elections for commissioner would amount to impermissible vote dilution and thus called for a switch to district-based voting with a provision for a majority black district. The court held that the plaintiffs' dilution claim was standardless and the absence of a majority black district did not violate the VRA. *Id.* at 876, 877–885.

69. *Id.* at 878.

> we have collaborated in what may aptly be termed the racial 'balkanization' of the Nation.[70]

In the majority's holding against the plaintiffs, the idea of racial separation was considered more troubling than the abridgement of Georgia voters' right to elect a member that represented their concerns. The court failed to note and build upon the nexus between the voters' race and its role in the creation of collective action, particularly since a nation-wide African-American organization, the National Association for the Advancement of Colored People (NAACP) had joined the plaintiffs.[71] As a result, the jurisprudence of minority voting rights has compromised the positive deterrent effect of Section 5 of the VRA. Jurisdictions may now choose to avoid recognizing communities defined both by race and "actual shared interests," since the Fourteenth Amendment has been given more teeth than enforcement of the VRA.[72] The diminished enforcement of the VRA compromises the political incorporation of minorities that the Act was intended to foster.

It is important to view the VRA in light of the Fifteenth Amendment, passed alongside the Thirteenth and Fourteenth Amendments to ensure the equal voting rights of African-Americans following the Civil War.[73] Despite the Fourteenth Amendment's guarantee of equal protection under the laws, the Fifteenth Amendment protects one's effective representation, even if it infringes on another's rights. Ken Gormley, a professor of law and member of the 1991 Pennsylvania Redistricting Committee, argued that the current Court overlooks the Fifteenth Amendment in VRA jurisprudence and no longer ensures its provisions.[74] Under the Fifteenth Amendment, citizens are guaranteed that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[75] It also grants Congress "power to enforce this article by appropriate legislation."[76] Thus the compelling need for the Fifteenth Amendment's enforcement power surpasses strict scrutiny and allows jurisdictions to use race as a factor in consideration of districting

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70. *Id.* at 892 (Thomas, J., concurring).

71. *See id.* at 876.

72. Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, *in* RACE AND REDISTRICTING IN THE 1990S 80, 96 (Bernard Grofman ed., 1998).

73. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

74. *See* Ken Gormley, *Racial Mind-Games and Reapportionment: When can Race be Considered (Legitimately) in Redistricting?* 4 U. PA. J. CONST. L. 735, 738 (2002).

75. U.S. CONST. amend. XV, § 1.

76. U.S. CONST. amend. XV, § 2.

issues. The effect of so-called "reverse discrimination" is inevitable under the Fifteenth Amendment's guarantee and should be considered rather than circumvented by the Fourteenth Amendment.[77] Rather than setting a ceiling for how race can be used in redistricting, the Court should recognize that the discretion to use race is permissible and premised upon a guarantee within the Constitution.[78]

In spite of Constitutional guarantees and VRA legislation, claims premised upon partisan objectives still may be able to overcome the strict scrutiny of the Fourteenth Amendment. In 2001, the Supreme Court held in *Easley v. Cromartie* that a North Carolina redistricting plan in favor of majority-minority districts did not violate the Constitution's guarantee of equal protection.[79] In *Easley,* the District Court considered statistical evidence showing excluded white precincts were not as "reliably" Democratic as the African-American precincts within the majority-minority districts.[80]

Notably in 2000, black voters were consistent Democratic voters in national politics across all age groups.[81] In the 2004 presidential election, despite Republican efforts to court their vote, ninety percent of African-Americans voted for Democratic candidate Senator John Kerry.[82] Dr. Ron Walters of the University of Maryland African American Leadership Institute commented on the issues important to black voters, issues also important to the Democratic Party.[83] For instance, he noted that about eleven percent of blacks are unemployed as opposed to about five percent of whites.[84] It would only follow that blacks would be more drawn to the Democratic Party's emphasis on the working class. Other liberal platforms, such as education and health care, are also of pressing concern to blacks.[85]

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77. *See* Gormley, *supra* note 74, at 776–77.

78. *Id.* at 783.

79. *See* Easley v. Cromartie, 532 U.S. 234 (2001). A federal district court ruled against a North Carolina districting scheme after it determined that race was used as a predominant factor. *Id.* at 237. The district court based its judgment in light of appellants' evidence showing that, of voters registered as Democrats, African-Americans vote Democrat 95-97% of the time, as opposed to white registered Democrats who vote Democrat only 30-40% of the time. *Id.* at 245. The Supreme Court reversed, finding that the districting was based on political rather than racial motives. Id. at 257–58. It found the appellees' argument in favor of racial balance unpersuasive. *Id.* at 258.

80. *Id.* at 247.

81. Interview by Darlissa Crawford with Dr. Ron Walters, Director, African American Leadership Institute at University of Maryland (Mar. 3, 2004), *available at* http://usinfo.state.gov/archives/display.html?p=washfile-english&y=2004&m=March&x=20040303151526yddrofwarc0.7470209&t=xarchives/xarchitem.html.

82. E. A. Torriero, *Jesse Jackson Says Kerry Ignored Key Democratic Blocs*, CHI. TRIB., Nov. 6, 2004, at C12.

83. Interview by Darlissa Crawford with Dr. Ron Walters, *supra* note 81.

84. *Id.*

85. *Id.*

Yet in spite of their common objectives, more black voters are becoming dissatisfied with the Democratic Party. While sixty-three percent of blacks in the United States identified themselves as Democrats in 2002, this number is down from the seventy-four percent that did so in 2000.[86] Walters attributed this to the growing number blacks identifying themselves as Independents.[87] Walters cited the significance of black candidates, specifically Al Sharpton, who foment political leverage for black voters seeking to have their issues acknowledged in national campaigns.[88] Some argue that the reluctance on the part of white leaders to acknowledge black voters contributed to Senator Kerry's loss in the recent presidential election. Prominent African-American civil rights leader Jesse Jackson faulted the Democratic Party for failing to energize its base of black voters and other groups that have traditionally aligned with the Democratic Party in search for the votes in swing states.[89] Even though the turnout of black voters rose by three million since the last presidential election, Jackson has claimed the Kerry campaign "didn't get it" and "was slow in getting the black community involved."[90] Notably, Jackson served as Senior Advisor on the Kerry Campaign "in name only" because the campaign ignored his guidance on the moblilization of students and poor voters outside of battleground states.[91]

In spite of the Supreme Court's retraction of the VRA provisions and partisan bickering, the VRA has improved voting rights for African-Americans since the era of Jim Crow by federally regulating state districting schemes and by helping to ensure that minorities are able to elect candidates of their own choice.[92] Enacted to give teeth to existing Constitutional amendments, the VRA helped combat neutral provisions that disproportionately prevented African-Americans from voting. Originally, the Supreme Court broadly interpreted the VRA, making it relatively easy to bring Section 2 and Section 5 claims.[93] During the 1990s, however, as blacks aligned with the Democratic Party, Republicans successfully challenged racial gerrymandering under the VRA and the strict scrutiny of the Equal Protection Clause of the Fourteenth Amendment.[94] Today, African-Americans continue to align with Democrats to ensure their own effective representation, despite

86. *Id.*
87. *Id.*
88. Interview by Darlissa Crawford with Dr. Ron Walters, *supra* note 81.
89. E. A. Torriero, *supra* note 82.
90. *Id.*
91. *Id.*
92. CANON, *supra* note 39, at 62–63.
93. *See Voting Rights Act of 1965*, 1966 DUKE L.J. 463, 475–79 (1966).
94. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995).

emerging dissatisfaction with white Democrats reluctant to support African-American interests.

IV. BENEFIT OR BACKPEDALING: RACE AND REDISTRICTING IN CURRENT TEXAS POLITICS

This section explains how recent redistricting in Texas has hampered efforts by minorities to build broad-based coalitions. The advent of a Republican-dominated executive branch and legislature has tested African-American ties to the Democratic Party. Nationwide, Republican Party officials have seen majority-minority districts as advantageous to their political agenda.[95] Having a greater numbers of blacks concentrated within majority-minority districts results in more majority-white districts.[96] This translates to African-Americans having a choice between "descriptive representation," such as race, and "substantive representation," which implies overall political clout.[97] While the Democratic Party has a history of supporting issues important to blacks, many black democrats now feel that minority issues are suppressed in the attempt to re-attract moderates who have left for the Republican Party.[98] In Texas, Democrats must propose an agenda that recognizes commonality and yet also prioritizes the issues of its most loyal supporters. Continued fragmentation will only serve to diminish the Democratic Party's impact in the coming years.

Over the last decade, Texas has experienced a conservative trend in local and statewide party politics. In 1991, Texas had a Democratic governor, nineteen Democrats in the U.S. House of Representatives, and an overwhelming majority of Democrats in the State's House and Senate.[99] As of 2001, before the last round of redistricting, Republicans almost equaled Democrats in the State's House and Senate. While seventeen Democrats still outnumbered the thirteen Republicans in the U.S. House, the State's governor and both of its U.S. senators were Republicans.[100]

Attempting to capitalize upon this conservative momentum, Texas Republicans pursued a redistricting plan in 2001 to increase their representation in both the state and U.S. legislature, but it was not enacted until 2003. Much to the chagrin of the Democrats in the Texas legislature, Tom DeLay, the Majority Leader of the U.S.

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95. SWAIN, *supra* note 60, at 205.

96. *Id.*

97. *Id.*

98. *See* James T. Campbell, *Second Black Seat Tests Uneasy Coalition*, HOUSTON CHRON., Mar. 15, 2004, at A18.

99. Fair Vote, *Texas' Redistricting Information*, *at* http://www.fairvote.org/redistricting/reports/remanual/tx.htm (last visited June 5, 2005).

100. *Id.*

House of Representatives, came to Austin to personally advance the redistricting bill late in the 2003 legislative session.[101] Pursuant to the Texas Constitution, the Texas legislature must redistrict both the Texas House of Representatives and the Texas State Senate after the republication of the federal decennial census.[102] The legislature also redistricts the State's United States congressional districts at this time. In 2001, the Seventy-Seventh Legislature failed to adopt any of the three submitted redistricting schemes.[103] As a result, the Legislative Redistricting Board, comprised of five state office-holders, convened to adopt a plan.[104] The five ex-officio members of the board were Republicans, including Lieutenant Governor David Dewhurst and Speaker of the Texas House of Representatives Tom Craddick. Pursuant to Section 5 of the VRA, the Legislative Redistricting Board submitted the plan to the Department of Justice.[105] After it was passed by a vote in the Texas Senate during a third special session called by the governor in October of 2003, the Department of Justice approved only the Senate plan in that year.[106] The Texas House and Congressional plans were approved by a federal judge on January 6, 2004 after a court battle.[107] In opposition to the House plan, fifty-five Democrats in the Texas House fled in May of 2003 to Oklahoma, Mexico, and secret locales in Texas to prevent the quorum necessary to pass the plans.[108] The Republican redistricting plan pitted Democrats not only against Republicans, but also against other Democrats.[109] Some Democrats did not join their party-mates. African-American Representatives Harold Dutton, Ron Wilson, Al Edwards, and Sylvester Turner decided not to leave, favoring African-American interests over partisan interests.[110] The struggle was intensified because Texas acquired two new seats in the U.S. House of Representatives in 2001 to bring its total to thirty-two,[111] and the Republican plan decreased the sixteen districts Democrats previously held to an anticipated ten.[112]

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101. *Texas Monthly Puts DeLay on Worst-Lawmakers List; Magazine Critical of Him for Messing with State Business*, HOUSTON CHRON., June 20, 2003, at A34.

102. TEX. CONST. art. III, § 28.

103. *Legislature Avoids Redistricting Again*, CHI. TRIB., Aug. 27, 2003, at C15.

104. Texas Secretary of State Roger Williams, *Frequently Asked Questions Regarding the Census and Redistricting*, *at* http://www.sos.state.tx.us/elections/voter/faqcensus.shtml (last visited June 5, 2005).

105. *Id.*

106. *Id.*

107. Session v. Perry, 298 F. Supp. 2d. 451, 457 (E.D. Tex. 2004) (per curiam).

108. John Williams, *Dems Who Stayed See Racial Divide*, HOUSTON CHRON., June 2, 2003, at A11.

109. *Id.*

110. *Id.*

111. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT: CENSUS 2000 BRIEF (2001) (Karen M. Mills), *available at* www.census.gov/prod/2001pubs/c2kbr01-7.pdf.

112. Campbell, *supra* note 98.

Republicans expected to take control of twenty-two of the newly drawn districts in the fall of 2004.[113] Some Democratic African-American legislators supported the Republican Congressional plan, since it created a third African-American majority district located in the Houston Area.[114] Ron Wilson, a Democratic State Representative from Houston, was the only African-American House member to vote for the plan.[115] His disloyalty to the Democratic Party factored into his loss in his own Democratic primary bid in the subsequent election cycle.[116] He lost to Alma Allen after serving his district for twenty-six years. The traditionally neutral Chairman of the Texas Democratic Party, Charles Soechting, supported Allen.[117]

Although Texas Democrats turned their backs on Republican Party sympathizers like Wilson, questions remain as to whether party unity was maintained to the detriment of minority interests. Anglo-Democratic incumbents were expected to lose out under Republican redistricting. The new redistricting plan cut U.S. Representative Lloyd Doggett's former Austin-area Tenth District into three pieces.[118] In March of 2004, Doggett won the Democratic primary for the Twenty-Fifth District against former state judge Leticia Hinojosa.[119] The majority Hispanic district favored re-electing the incumbent Congressman over the potential of sending the first Hispanic woman to the U.S. House from Texas and breaking an important gender and racial barrier.[120] Doggett's incumbency and "two million dollar war-chest" may have swayed Twenty-fifth District voters or minority voters may have simply felt he was the best representative for their interests.[121] In addition, U.S. Representative Chris Bell lost to former president of the Houston NAACP Al Green in the Ninth District Democratic primary.[122] Even though the Ninth District was created as a majority African-American district, Chairman Soechting backed Bell's primary bid,

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113. *Id.*

114. R. G. Ratcliffe, *Hearing Scheduled on Remap*, HOUSTON CHRON., Dec. 19, 2003, at A41.

115. *Id.*

116. *See* Guillermo X. Garcia, *Demos Who Spoke up for Speaker Shunned*, SAN ANTONIO EXPRESS-NEWS, Mar. 11, 2004, at 11A.

117. Ken Herman, *House Democrats in Primary Fight; Party Loyalty—or Lack Thereof—is Cited in New Challenges to Wilson and Ritter*, AUSTIN AMERICAN-STATESMAN, Jan. 6, 2004, at B1.

118. Mike Clark-Madison, *Lloyd's Friends at the Lege*, AUSTIN CHRON., Jan. 30, 2004, *available at* www.austinchronicle.com/issues/dispatch/2004-01-30/pols_naked3.html.

119. Guillermo X. Garcia, *Doggett, Klein Win in Pair of Walks*, SAN ANTONIO EXPRESS-NEWS, Mar. 10, 2004, at 13A.

120. *See* Peggy Fikac, *Remap Making for Racial Races; Anglo Democrats See Themselves as Targets for Political Extinction*, SAN ANTONIO EXPRESS-NEWS, Mar. 7, 2004, at 1B.

121. *Id.*

122. Campbell, *supra* note 98.

making it unclear to many whether he considered minority interests in his selection.[123] Jonathan Grella, spokesperson for U.S. Representative Tom DeLay, accused former Representative Bell's bid as an assertion of his own self-interest over the opportunity to "give minorities a shot."[124]

The conflicting interests amongst longstanding Anglo liberals and African-American and Hispanic Democrats harkens to the Reconstruction-era rift in the Texas Republican Party. Pre-Civil War Conservative Republicans defected from Radical Republicans comprised of African-Americans and rural West Texas farmers who favored sweeping social changes such as compulsory education,[125] and this disquietude of Republican interests created an open door for elites to squelch the political incorporation of former black slaves and poor farmers.[126] Some accuse the modern Republican Party of playing upon the racial aversion of Anglo voters to "put a minority face on the Democratic Party to make the GOP more attractive to Anglos."[127] Minority legislators faced accusations of Faustian bargains with Texas Republicans. State House Speaker Tom Craddick appointed Represenative Ron Wilson as the chairman of the influential House Ways and Means Committee.[128] Wilson rationalized this opportunity as the realization of the political influence within the Republican Party, which now has its first House majority since Reconstruction, in absence of a similar chance for influence within the Democratic Party: "So [do] I sit on the side, or do I try to get some of my folks on the train[?]"[129] Questioning the motivation of Anglo Democrats, Wilson advocated promoting the interests of black constituents specifically, rather than the party's position as a whole.[130] All of this underscores the need for Anglo liberals and minority Democrats to strike some accord in order to further minority issues as part of the party's overall interests in the coming years. Regardless of the acquisition of a new majority-minority Congressional district, the 2003 Texas Republican Congressional plan leaves the eleven Texas Democrats that remain in Washington, D.C. essentially powerless.[131]

Majority-minority Congressional districting is not the only means of access to political representation. Although a third district

123. *Id.*
124. Fikac, *supra* note 120.
125. MONEYHON, *supra* note 8, at 83–84, 90.
126. *See id.* at 10.
127. Fikac, *supra* note 120.
128. Herman, *supra* note 117.
129. Ratcliffe, *supra* note 114.
130. *Id.*
131. Gebe Martinez, *Texas Newest Congressmen Stampede into D.C.*, HOUSTON CHRON., Nov. 14, 2004, at A4.

gives African-Americans, who comprise 11.5% of the population of Texas, proportional representation in the U.S. House of Representatives, the Republican plan also diminished the number of African-Americans in other districts.[132] Gary Bledsoe of the Texas NAACP served as an attorney for the plaintiffs before a federal court that on January 6, 2004 found in favor of the defendants' Republican redistricting plan.[133] One of the plaintiffs' claims was that the Republican Congressional plan was unconstitutional under the VRA.[134] Bledsoe was not concerned about who would run the district, but rather whether minority dilution would affect the community's ability "to elect the person of their choice."[135] The Ninth Congressional District, located in Houston, now has twice the African-American population it once had under previous districting.[136] According to Bledsoe, this increased concentration in the Ninth District impacts the blacks in East and Central Texas.[137] Blacks in those regions were formerly represented by white Democrats, but under the new redistricting plan, several of those white Democrats were to be unseated by Republicans.[138] Representative Ron Wilson opposed Bledsoe's clients, testifying that blacks and Hispanics are better served by representatives of their own background: "They call them 'minority influence districts.' I call them 'begging and pleading, step-and-fetch-it districts.'"[139] Wilson's allegations run contrary to the history of the majority-minority district held by Representative Sheila Jackson Lee, D-Houston. Her Eighteenth District, once represented by Barbara Jordan (1973–1978) and Mickey Leland (1979–1989) is a notably diverse district.[140] During the 1980s, the Eighteenth District's eligible black voters numbered thirty-nine percent, while Hispanic voters numbered twenty-seven percent.[141] Leland's priority of hiring a diverse staff, rather than one that was entirely black, partly contributed to his electoral support.[142] Considering Jordan and

132. John Williams, *Sparks Fly During Fervid Redistricting Hearing; Partisan Houston Crowd Boos GOP-Friendly Plan,* HOUSTON CHRON., June 29, 2003, at A29.

133. *See* Session v. Perry, 298 F. Supp. 2d 451, 456 (E.D. Tex. 2004).

134. *Id.* at 457.

135. Fikac, *supra* note 120.

136. Williams, *supra* note 132.

137. *Id.*

138. *Id.*

139. John Moritz, *Architect of Politically Driven Map Defends Its Constitutionality*, FORT-WORTH STAR-TELEGRAM, Dec. 19, 2003, at 1.

140. CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: BLACK MEMBERS OF THE UNITED STATES CONGRESS, 1870–2004, at 19–21 (2004) (Mildred L. Amer), *available at* http://www.senate.gov/reference/resources/pdf/RL30378.pdf; Carol M. Swain, *Not "Wrongful" By Any Means: The Court's Decisions in the Redistricting Cases*, 34 HOUS. L.REV. 315, 319 (1997).

141. SWAIN, *supra* note 60, at 99.

142. *See id.* at 105.

Leland's immortality as community and state heroes, substantive representation through multi-racial coalitions undeniably proved successful despite the absence of "authentic" black representation.

Ron Wilson's argument in favor of authentic black representation seems particularly unfounded considering the last Congressional race in Chris Bell's former racially heterogeneous Twenty-Fifth District. Even though Chris Bell originally won in a Democratic primary run-off against a black candidate in 2002, some evidence suggests that a minority could have won in the Twenty-Fifth District before it was redrawn into the majority-minority Ninth District.[143] An argument can be made that Republicans utilized the creation of a third African-American district as a pretextual motive to serve its own excessively partisan goals.

After winning the Democratic primary in March 2004, Al Green won the Congressional seat in the Ninth District on November 2, 2004.[144] Republican redistricting pitted incumbent Congressman Chris Bell against Green in a newly-created majority African-American District. However, Bell's Twenty-Fifth District was already an influential district where as much as forty percent of registered Democratic voters were African-Americans.[145] In 2002, as a former Houston City Council Member, Bell ran against another council member and professor of law at Texas Southern University, Carroll Robinson, a black candidate.[146] However, one of Robinson's biggest setbacks was that he had not solidified the African-American community, causing former Mayor Lee Brown, Houston's first African-American mayor, to endorse Bell and offer help to his campaign.[147] Perhaps if Green had run in 2002, as Houston NAACP president and with the endorsement of Brown, Texans would have had a third black Congressional Representative without Republican redistricting. This would have supported Bledsoe's claims that the current redistricting plan was unnecessary and diminished African-American influence statewide.

Conversely, Wilson's advocacy for authentic black representation raises valid concerns for black voters increasingly dissatisfied with representation in the hands of white Democrats. Justice O'Connor labeled districting solely on the basis of race as "pernicious" and "antithetical to our system of representative

143. R. G. Ratcliffe, *GOP-Drawn Maps Putting Bell on Block*, HOUSTON CHRON., Jul. 23, 2003, at A17.

144. Martinez, *supra* note 131.

145. *See* John Williams, *4 Democrats Run in Diverse 25th District; Political Expert Says Each Has 'Real Chance,'* HOUSTON CHRON., Jan. 28, 2002, at A15.

146. Tim Fleck, *The Immigrant's Song: Carroll Robinson Has Been Running for Something Ever Since He Arrived in Houston. Now He May Be Nearly Out of Track*, HOUSTON PRESS, Apr. 4, 2002.

147. *See id.*

democracy."[148] She also claimed that elected representatives in a district carved out for a particular racial group would be "more likely to believe that they should represent only the members of that group, rather than their constituency as a whole."[149] While it can be agreed that political affiliation on the basis of race alone is detrimental to the formation of coalitions based on economic and social aims, it is equally pernicious to passively accept white liberal lip-service paid to minority constituents. David T. Canon advocates for a "politics of commonality" via the "supply side" effects of redistricting on elected representatives; in short, he shows that politicians should cater to all of their "supply," or reliable supporters, rather than ignoring them and trying to attract voters who are not as reliable.[150] Canon conducted statistical analysis of the effectiveness of white and black elected officials' response to the majority-minority constituencies that elect them.[151] Black elected officials have been able to form responsive yet politically moderate cross-racial coalitions.[152] Canon sees the Federalist ideal of commonality emerging within majority black districts.[153] Black officials do not create the factionalism feared by the Supreme Court. Instead, black officials respond to their constituencies by forming durable coalitions. Perhaps in the long run the model set by black representatives will form the foundation of a dynamic democratic representation sensitive to the demands of both minority and majority constituents.

In all, the question of whether substantive or authentic representation is best for minority voters remains unanswered in Texas. What is known is that the Republican Party now dominates the Senate, the House, and comprises a majority of the congressional delegation that Texas sends to Washington, D.C. The Texas Democratic Party must resolve its own intra-party conflict, especially with its base of minority voters, if it wants to effectively contend with Republicans.

V. NEW PARTISAN GERRYMANDERING CASE PRECEDENT AND HOW IT WILL AFFECT FUTURE VOTING RIGHTS ACT CLAIMS IN TEXAS

The future of VRA claims could be determined by the direction that the Supreme Court decides to take on partisan gerrymandering.

148. Shaw v. Reno, 509 U.S. 630, 648 (1993).
149. *Id.*
150. CANON, *supra* note 39, at 136–39.
151. *Id.*
152. *Id.* at 136–37.
153. *Id.* at 4.

On October 18, 2004, in five separate cases,[154] the Supreme Court vacated the three-judge District Court's January 6, 2004 decision on the Texas congressional redistricting map and remanded the cases for further consideration in light of the ruling in *Vieth v. Jubelirer*, a partisan redistricting case decided on April 28, 2004. The plaintiffs in *Vieth v. Jubelirer* were registered Democrats in Pennsylvania who challenged the Republican congressional redistricting plan, claiming that the statewide plan was unconstitutional on the grounds of political gerrymandering.[155] In a plurality decision, the Supreme Court affirmed the lower court's decision to dismiss the plaintiffs' claims,[156] finding excessive partisanship in redistricting was unconstitutional[157] but noting a lack of any judicially manageable standard to review it.[158]

Before being attacked in *Vieth,* the original standard for partisan gerrymandering claims was based on a test put forward in *Davis v. Bandemer*.[159] In *Bandemer*, the Court first reasoned that a challenge to an Indiana reapportionment plan was justiciable under the Equal Protection Clause of the U.S. Constitution.[160] Justiciable causes of action are those that have judicially administrative standards that a court can implement or a textually "demonstrable constitutional commitment of the issue to a coordinated political department."[161] Following institutional concerns, the Supreme Court abstains from involvement in political disputes; however in *Bandemer*, the Court determined that the dispute over dilution of Democratic House and Senate seats was justiciable.[162] In turn, the Court rationalized that a *prima facie* political gerrymandering claim on Equal Protection grounds requires proof of both intentional discrimination of an identifiable political group and actual discriminatory effect upon that group.[163] It held against the plaintiffs because they were unable to prove their burden of actual discriminatory effect from the results of only one election.[164]

Although the claims rely upon the same doctrine, VRA claims remain a separate cause of action from partisan gerrymandering claims mainly because proving discriminatory intent on the basis of

154. Jackson v. Perry, 125 S. Ct. 352 (2004); Am. GI Forum v. Perry, 125 S. Ct. 352 (2004), Lee v. Perry, 125 S. Ct. 352 (2004), Travis County v. Perry, 125 S. Ct. 352 (2004); Henderson v. Perry, 125 S. Ct. 351 (2004).

155. *See* Vieth v. Jubelirer, 541 U.S. 267, 272 (2004).

156. *Id.* at 306.

157. *Id.* at 293.

158. *Id.* at 287.

159. *See* Davis v. Bandemer, 478 U.S. 109, 132–33 (1986).

160. *Id.* at 124–25.

161. Baker v. Carr, 369 U.S. 186, 217 (1962).

162. *Id.*

163. *Id.* at 127.

164. *Id.* at 135.

race in a VRA claim is an easier standard to manage than proving discriminatory intent on the basis of political party pursuant to *Bandemer*. In the plurality opinion of *Vieth*, Justice Scalia distinguished the immutable characteristic of a person's race from the changeability of a person's politics.[165] Thus, the plaintiffs in *Vieth* could not use the same standard used for Section 2 of the Voting Rights Act to challenge the Pennsylvania congressional redistricting plan because, unlike race, political party affiliation can change from election to election.[166] In addition, racial gerrymandering claims are normally based upon the mapping of single districts rather than statewide plans. The predominant discriminatory intent on the basis of political party proven in a single district evaporates when applied in a statewide districting plan.[167] This is because the Court allows partisan considerations for incumbent politicians and redistricting to create partisan influence in new districts.[168] In contrast, a district or districting scheme that can only be explained on the basis of race and race alone is unconstitutional. The future of VRA claims remains nebulous in light of *Vieth* and the preclearance provision that makes the state of Texas a covered jurisdiction. Justice Kennedy provided the swing vote to constitute the plurality.[169] He agreed that there is currently no workable standard and that the courts should continue to look for one; though, he added that the courts should order relief "[i]f workable standards do emerge."[170] The final Texas Congressional plan that the district court approves will have to satisfy Justice Kennedy to be affirmed by the Supreme Court. One avenue that Democrats opposing the plan may take is to show that the existing plan is excessively partisan because it denies protected minorities a voice in politics statewide under the VRA. A combination of a partisan gerrymandering and a VRA claim may be more viable in Texas redistricting challenges since Pennsylvania is not a covered jurisdiction and is not required to have its redistricting plans pre-cleared. Democrats must also prove that minorities vote reliably Democratic in Texas but not to the extent that a minority vote for a candidate can only be explained on the basis of race. Perhaps showing returns from Democratic primaries, such as Chris Bell's former Twenty-Fifth District, where minority registered Democrats voted on the basis of politics rather than race, will help the claim survive strict scrutiny under the Fourteenth Amendment.

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165. *See* Vieth v. Jubelirer, 541 U.S. 267, 287 (2004).

166. *Id.*

167. *See* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 803–04 (2005).

168. *Id.*

169. *Id.* at 799.

170. *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring).

VI. CONCLUSION

Partisan coalition politics played an important role for African-Americans before the passage of the VRA. The guarantees of the VRA do not negate the necessity of durable coalitions amongst politically cohesive groups. The increasingly conservative trends in Supreme Court decisions and the legislature work to undermine the continued implementation of the Act. To curb this movement, liberals and African-Americans must find new solutions to old problems. Group identity should not be compromised for disingenuous promises. Rather, African-Americans should work within the two-party system and alongside other groups to make it equally advantageous for all parties involved. The lack of an effective multi-racial coalition will only serve to weaken political strength. As in the case of Texas, self-interested actors within a fragmented party will only serve to further the goals of the opposing side.