

# Increasing the Quantity and the Quality of the African-American Vote:

## Lessons for 2008 and Beyond

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Elections for state and congressional representatives are often referenda on the national presidential election, and African-Americans have, at times, been the swing vote in these contests. One notable example is the contentious presidential election campaign of 1800 between Thomas Jefferson and John Adams. This election marked the first time that political parties played a decisive role in the outcome and also the first time that power switched hands from one party to another—from the Federalist Party to Thomas Jefferson's Democratic-Republicans. Because of Aaron Burr's brilliant organizational skills on behalf of the Democratic-Republican party in the spring elections for the New York state legislature, Jefferson's victory can ultimately be traced to New York City's Sixth Ward, which primarily consisted of African-Americans and poor European immigrants.<sup>2</sup> These groups accounted for the entire margin of the Democratic-Republican victory in the state legislature, which guaranteed the election of a Democratic-Republican president in the fall.<sup>3</sup> Consequently, Adams lost the presidential election because he could not overcome the loss of New York's twelve electors.<sup>4</sup>

The time is ripe to revisit the potential that African-Americans have to be politically influential and increase the responsiveness of state and national

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2. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 103-04 (2007); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 30 (2002) (discussing Justice Curtis' dissent in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which noted all of the states where African-Americans could vote during the founding era including New Hampshire, Massachusetts, and New York). Most of these states later disenfranchised African-Americans, including New York in 1820. *Id.*

3. LARSON, *supra* note 2, at 103-04.

4. *Id.* at 239, 250.

elected officials to their discrete interests. For too long, court intervention in redistricting disputes, as a method for increasing the responsiveness of elected officials, has proven to be a risky venture for African-Americans, the long-term effects of which are even more pertinent for the 2008 presidential election and future elections. The 2008 presidential election is historically significant, but is of particular importance for minority groups because the election is the first to involve politically viable minority candidates.<sup>5</sup> This historic election raises an important question, the answer to which has both short and long-term implications for African-American voters: what is the best way to increase the quality and the quantity of this community's political power so that it can influence not only the election of 2008, but future elections as well? Simply put, what is the best way to maximize the representation of African-American interests nationally? The solution to this quandary involves two related concepts: first, employing court intervention under Section 2 of the Voting Rights Act of 1965 to force state legislatures to create majority-minority districts, or districts that have a majority African-American voting age population, to protect African-American interests. And second, whether this strategy reduces the ability of African-Americans to influence national elections.

Section 2 prohibits states from imposing any voting practice, standard, or procedure that results in the denial or abridgement of the right to vote on the basis of race or color.<sup>6</sup> This paper argues that African-Americans should focus less on using Section 2 litigation to force legislatures to create majority-minority districts because these districts, when combined with other methods of voter disenfranchisement, have the effect of depressing voter turnout. From a practical standpoint, such districting can undermine the ability of the group to influence the election of a President and Vice-President who feel accountable to African-Americans.<sup>7</sup>

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5. At the time of the writing of this article, Hilary Clinton (a woman) and Barack Obama (an African-American man) are the frontrunners for the Democratic nomination for President of the United States. Paul Steinhauser, *Iowa Caucuses Get More Attention Than Ever*, Dec. 3, 2007, CNN, <http://www.cnn.com/2007/POLITICS/12/03/iowa.state.of.play/index.html>.

Bill Richardson, the governor of New Mexico and a Latino, was also competing for the Democratic nomination, but recently dropped out of the race. John King, Candy Crowley, & Mark Preston, *New Mexico Gov. Richardson Drops Out of '08 Race*, Jan. 10, 2008, CNN, <http://www.cnn.com/2008/POLITICS/01/09/richardson.out/index.html?iref=newssearch>.

6. 42 U.S.C. § 1973(a) (2007). Congress amended Section 2 in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which required that plaintiffs alleging vote dilution show that the legislature had a discriminatory purpose in drawing the district lines.

7. The Bush Administration has been particularly unresponsive to minority interests, which is reflected in its very low approval rate in these communities. Lydia Saad, *Minority Reports: The Bush Presidency*, June 25, 2002, <http://www.gallup.com/poll/6277/Minority-Reports-Bush-Presidency.aspx> (noting that Bush's approval rate among minorities was twenty-five percent lower than his approval ratings among whites); *Hear the Issues: Bush Caucasian House and Minorities*, <http://www.heartheissues.com/bushwhitehouse&minorities.html> (in 2005, 16% of

As the Supreme Court once observed, “the true test of voting power is the ability to cast a tie-breaking or ‘critical’ vote.”<sup>8</sup> Thus, in 2008 and subsequent elections the prerogative of the African-American community has to be increasing voter registration, voter education, and voter turnout through coalition building and political mobilization with the objective of increasing the accountability of elected officials. This goal can be achieved by focusing efforts on majority-minority districts in states where traditionally no presidential candidate has majority support, such as Ohio, Florida, Arkansas, and Virginia.<sup>9</sup> These are states where an increase in the turnout of African-American voters is likely to carry the most weight in garnering influence with lawmakers and other elected officials. Votes are political currency, and the future of minority political strength must come from building “wealth” the old fashioned way, through political activism.

This political activism must be tailored to address specific problems that can undermine progress. The focus for 2008 and beyond, as with all elections, should be on defeating the mechanisms that hamper minority voting strength. This election cycle, the most obvious culprit is the voter identification laws recently upheld by the Supreme Court.<sup>10</sup> There is another, non-obvious concern that is the focus of this paper: the effects of decennial redistricting on voter turnout. Despite the fact that 2008 is not a year of constitutionally mandated congressional redistricting,<sup>11</sup> this factor should still be taken into consideration in plotting strategy for maximizing minority interests in the upcoming election cycle.<sup>12</sup> The political science literature indicates that

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blacks approved of Bush compared to 47% of whites). By 2007, Bush’s approval rating across all demographics was 28%. See *The Harris Poll: Bush Approval Rating Falls to 28%, Lowest Level So Far*, WALL ST. J., Apr. 26, 2007, available at [http://online.wsj.com/article/SB117752895118782401.html?mod=politics\\_primary\\_hs](http://online.wsj.com/article/SB117752895118782401.html?mod=politics_primary_hs).

8. *Whitcomb v. Chavis*, 403 U.S. 124, 146 (1971).

9. Florida and Ohio proved decisive in the 2000 and 2004 elections respectively with Bush winning in both states by a very small margin. Arkansas is a conservative state, but the Democratic party is powerful there and has emerged victorious in recent state elections. Bill Clinton won Arkansas in the 1992 and 1996 elections, but the state’s electoral votes went to Bush in the 2000 and 2004 elections. Similarly, Virginia was once reliably Republican, but Democrats have emerged as victors in the state’s most recent gubernatorial and U.S. Senate elections.

10. *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008) (upholding Indiana’s voter identification law on the grounds that Indiana has a legitimate interest in preventing voter fraud, despite the law’s potential burden on the voting rights of individuals from lower socio-economic backgrounds).

11. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned substantially on a population basis”); U.S. CONST., art. IX, §198.

12. In fact, several states, including Colorado and Georgia, have passed mid-decade redistricting plans, indicating the ever pressing need for African-Americans to always be prepared for a political battle. See Mitchell Berman, *Commentary; Putting Fairness on the Map; The High Court Has A Chance to Ease Flagrant Partisan Gerrymandering*, L.A. TIMES, May 28, 2004, available at [http://reclaimdemocracy.org/articles\\_2004/supreme\\_court\\_gerrymandering.html](http://reclaimdemocracy.org/articles_2004/supreme_court_gerrymandering.html); *U.S. House, 2008: Who Has Got the Money in the Southern Races*, N.Y. TIMES, July 16, 2007, available at [http://www.nytimes.com/cq/2007/07/16/cq\\_3095.html?pagewanted=all](http://www.nytimes.com/cq/2007/07/16/cq_3095.html?pagewanted=all).

majority-minority districting may not be the best means of protecting minority voting rights in all circumstances.<sup>13</sup> Due to the confines of doctrine, the Supreme Court is, for the most part, unable to determine when this type of districting is necessary for minority political advancement. In *Shaw v. Reno* (“*Shaw*”),<sup>14</sup> the Supreme Court held that redistricting based primarily on race violates the Equal Protection Clause of the Fourteenth Amendment, a holding that renders majority-minority districting inherently suspect. The *Shaw* line of cases introduced the idea that court challenges to legislative redistricting plans that do not maximize majority-minority districts may no longer be the best use of finite resources. The Court’s recent decision in *League of United Latin American Citizens v. Perry*<sup>15</sup> (“*LULAC*”) further denotes the Court’s unsatisfactory method of ascertaining when the interests of African-Americans are adequately represented.

African-Americans should not abdicate to the courts the sole responsibility of “interpreting” their voting patterns and using this as a proxy to determine their political interests as a group. Instead, they should politically mobilize in order to define their own agenda, even in districts that are considered “safe” minority districts because any increase in voter turnout in these districts can be crucial if they are located in swing states. African-Americans focus on creating these districts with the hopes of obtaining responsive representation for their local interest, but this justification overlooks the effects of these districts on state and national representation as a whole.<sup>16</sup> Thus, the lesson of *Shaw* and its progeny becomes very simple when put in context: African-Americans must rely on the old-fashioned methods of voter registration, coalition building and grassroots movements to increase their electoral influence in national elections. They must stop relying on the judicial

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13. See Kimball Brace, Bernard Grofman & Lisa Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169 (1987). See also Thomas Brunell, David Lublin, Bernard Grofman, and Lisa Handley, *Do We Still Need the VRA? In A Word: ‘YES’* (2007), Center for the Study of Democracy, University of California-Irvine, available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1134&context=csd>; David Lublin & D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 AM. J. POL. SCI. 792 (2000); DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 99* (1997) (“Reducing the number of democratic districts harms black substantive representation substantially more than drawing a new 40 percent black district increases it.”).

14. 509 U.S. 630 (1993).

15. 126 S.Ct. 2594 (2006) (invalidating portions of the Republican mid-decade redistricting plan that dismantled Latino majority-minority districts in order to protect an incumbent that Latinos were posed to vote out of office, but finding that African-Americans in an influence district had not stated a cognizable claim under Section 2 of the Voting Rights Act because they had not shown that they were able to elect the representative of their choice under the old plan).

16. Scholars have detailed the toll that these districts have taken on African-American substantive representation. See, for example, LUBLIN, *PARADOX OF REPRESENTATION* 99, 101, *supra* note 13, (“Enforcement of the Voting Rights Act has concentrated far more on improving the descriptive representation of African-Americans through the creation of new majority black districts than on the underlying goal of enhancing black substantive representation.”).

system, which has become an obstacle instead of an asset because of the courts' inability to secure substantive representation for African-Americans through its doctrine.<sup>17</sup>

Part I of this article starts by discussing the strategic behavior of elected officials. This provides a context for understanding the remainder of Part I, which explains the interplay between *Shaw*, the Court's most recent decision in *LULAC*, and the instant proposal that African-Americans should focus on political mobilization to increase their electoral strength and the subsequent accountability of elected officials. *LULAC* illustrates that the Court has made a false distinction between race and political affiliation in the interest of ensuring that minorities have, at the very least, descriptive representation. However, the *LULAC* decision ignores the rent-seeking behavior of political actors, a consideration that is integral to understanding the substantive representation that minorities seek from the political process.

Part II looks at specific majority-minority districts and suggests that the African-American community can maximize the response of the national executive to its political interests by increasing voter turnout in these districts. This part analyzes specific majority-minority districts in Florida and Ohio, and concludes with the suggestion that coalition building and political mobilization are the best ways to increase voter turnout in these districts. These strategies are especially important in light of current efforts to disenfranchise minority voters through voter identification laws.

## PART I: INCREASING THE QUALITY OF THE MINORITY VOTE

### *A. The Theory: Votes as Currency*

Implementing successful strategies for increasing African-American political strength is intricately tied to the political gains that African-Americans expect to make from exercising their right to vote. At a base level, there is some desire for descriptive representation, which Professor Carol Swain describes as "the statistical correspondence of the demographic characteristics of representatives with those of their constituents."<sup>18</sup> More pejoratively, descriptive representation entails African-American communities being

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17. Others argue that there is an unwillingness of courts to aid minorities that stems from reasons other than doctrine. See Pamela S. Karlan, *The Right to Vote: Some Pessimism about Formalism*, 71 TEX. L. REV. 1705, 1731 (1993) (noting that there is "an emerging sense that courts often serve as an obstacle, rather than the solution, to problems of minority political empowerment [in part because of]. . . . [T]he politicization of the federal judiciary, which threatens to saddle us with conservative activists in the federal courthouse...").

18. CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS 5 (2006).

represented by African-Americans. What is most important, however, is the desire and need that African-Americans have for substantive representation, which requires more than simply descriptive representation and mandates that there be some “correspondence between representatives’ goals and those of their constituents.”<sup>19</sup> While there is certainly overlap between substantive and descriptive representation, in that the goals of the African-American community and African-American representatives often coincide, the two are sometimes mutually exclusive.<sup>20</sup> Thus, true substantive representation can only be guaranteed by electing accountable leadership. When the goals of the community and that of the representative diverge, the constituency must have the ability to vote out or threaten to vote out a representative with whom they no longer have shared goals.

Accountability was at one time one of the central premises of voting rights jurisprudence.<sup>21</sup> In fact, *Shaw’s* concept of “representational harms” which, in the Supreme Court’s view, warrants strict scrutiny for race-based districting, is premised on accountability: “[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”<sup>22</sup> Yet, accountability no longer remains a concept of primary importance in Supreme Court jurisprudence,<sup>23</sup> and its reinstatement into the political arena is what

19. *Id.* See also HANNAH PITKIN, *THE CONCEPT OF REPRESENTATION* 65, 84 (1967) (describing descriptive representation as “talking rather than acting, deliberating rather than governing” and arguing that a representative must be “capable of effective action”).

20. SWAIN, *supra* note 18, at 5.

21. Accountability, as a concept, is the same premise as the elected official’s “responsiveness” to minority communities. See *Whitcomb*, 403 U.S. at 135 (upholding the district court’s finding that “[t]he voting strength of this racial group has been minimized by Marion County’s multi-member senate and house district because of the strong control exercised by political parties over the selection of candidates, the inability of the Negro voters to assure themselves the opportunity to vote for prospective legislators of their choice and the absence of any particular legislators who were accountable for their legislative record to Negro voters”); *White v. Regester*, 412 U.S. 755, 769 (1973) (upholding the district court’s finding that the legislature was insufficiently responsive to Mexican-American interests); *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982) (“Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.”). *But see* *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (“without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group”); *LULAC*, 126 S.Ct. at 2624 (failing to credit testimony that Representative Frost was responsive to the needs of his African-American constituents).

22. *Shaw*, 509 U.S. at 648.

23. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1868 (1992) (“In the case law prior to the 1982 amendments to the Voting Rights Act, the issue of ‘nonresponsiveness’ of elected bodies to the needs and interests of the minority community was a central focus of the litigation. The inquiry into a ‘significant lack of responsiveness on the part of elective officials to the particularized needs of the members of the minority group; was carried forward as part, albeit a

prompts the current proposal. The reintroduction of the concept of ensuring the accountability of elected representatives as a principle has to come from political mobilization in those areas where the minority vote will carry the most weight. Voting rights has evolved beyond groups suing when they are disgruntled with the outcome of the legislative redistricting processes. Modern day voting rights concern "governance," or the practice of decision-making through representatives.<sup>24</sup> This concept has little meaning for the voter if there is a wide berth between the representative and his constituency, creating a system in which the representative is doing all of the decision-making with no input from his constituency but never suffers for his irreverence.<sup>25</sup>

The concept of accountability does not operate in a vacuum and should dictate the behavior of political actors, which includes elected representatives, interest groups, and voters. There are generally two views that are pertinent here in deconstructing the behavior of political actors: the economic and sociological perspectives. The economic perspective posits that the primary purpose of political behavior is to win elections for the purpose of extracting wealth from the office acquired, and that voters exchange their votes for favors from the elected representative.<sup>26</sup> Much of this perspective derives from public choice theory, which describes this quest to extract wealth from the elected office as "rent-seeking behavior," and it has been applied in other contexts as well.<sup>27</sup> This view of political behavior is based on the idea that legislators are self-interested individuals who barter their power in exchange for support in their reelection campaigns from rent-seeking groups, who are also economically driven. This economically-centered view of politics as involving an exchange between voters and the representative is not new, for scholars have previously defined the legislative process "as an arena for fundamentally self-serving behavior as legislators trade off votes on specific legislation to advance

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subordinate part, of the statutory standard of amended Section 2 of the Act until *Gingles* effectively discarded it."). See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1095-96 (1991). Professor Guinier aptly noted:

The linchpin of pre-1982 constitutional dilution challenges had been unresponsiveness. But unresponsiveness, an obvious metaphor for political exclusion, was elusive as an evidentiary tool and almost as difficult and divisive as proving discriminatory purpose.

Arguably, accountability or "responsiveness" no longer has a place in Section 2 analysis.

24. Karlan, *supra* note 17, at 1717.

25. *Id.*; See also *Whitcomb*, 403 U.S. at 141 ("representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies") (internal citations omitted).

26. Dwight Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 196 (1988).

27. See WILLIAM J. GRIMSHAW, BITTER FRUIT: BLACK POLITICS AND THE CHICAGO MACHINE 1931-1991, 4 (1992) (discussing the economic, political, and sociological perspectives of machine politics and how this affects African-Americans).

their prospects of re-election.”<sup>28</sup> Because legislators are self-interested, there is a need for accountability in order to curb their impulses to maximize their own personal welfare as opposed to that of their constituencies. From this perspective, legislation is essentially a “product of the rent-seekers” and is encouraged by incumbency, the lack of competitive elections, and the continual exchange of votes for favors.<sup>29</sup>

In contrast, the sociological perspective focuses on the behavior of voters and interest groups. It uses the concept of coalition building to explain the behavior of these political actors because a polity is made up of sub-units, each of which has its own discrete interests. Unlike the economic approach, which focuses only on profit maximization, the sociological perspective is premised on the idea that voters are united by common themes though they still possess diverging interests.<sup>30</sup> From this perspective, districts are made up of sub-groups of voters, coalitions of which can increase the accountability of elected representatives who can ultimately work across district lines to increase the responsiveness of a larger body of state and federal officials.<sup>31</sup> The sociological perspective focuses on the aggregation of voters across groups united by their complimentary interests, which increases their ability to bargain for favors. Notably, this concept of “unity by common interests” also accounts for the role that ideology plays in the political spectrum by joining divergent communities based on common interests, thereby forcing elected officials to be responsive to a diverse group of constituents.<sup>32</sup>

28. Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649-50 (1998); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 537 (2004) (opining that if the court is concerned that minority legislators are self-interested in drawing district lines, it may be useful to analogize them to corporate directors that engage in self-interested transactions).

29. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) (“democracy is defined primarily by the accountability of the elected to the electors, an accountability that is in turn shaped through competitive elections”).

30. GRIMSHAW, *supra* note 27, at 6-7.

31. As Professors Riker and Weingast aptly note:

In modern political science, on the other hand, electoral majorities are seen as evanescent, and the legislator himself as a placeholder opportunistically building up an ad hoc majority for the next election. The effect of this opportunism on legislation is that legislators do not mechanistically transmit majority opinion. Rather, they calculate the intensity of opinion, choosing their positions in such a way as to maximize the probability of subsequently garnering citizens' votes. By and large, legislators build coalitions of minorities, each one of which is especially concerned with a particular subset of issues. This almost certainly does not result in legislation that is a coherent will of the people.

William H. Riker and Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 396 (1998). Accordingly, coalition building is part and parcel of the legislative process. Legislators also have to form coalitions within Congress in order to pass legislation; thus, “blacks cannot become an effective political majority without legislative allies.” Guinier, *supra* note 23, at 1116.

32. Ideology is a tricky concept, and oftentimes it is more important to the voter rather than

The economic perspective is necessarily in tension with the second, sociological approach because it ignores the relationship between the representative and his constituency *as a whole*, and is premised on the notion that the official seeks only to capitalize on his office by focusing on those constituents willing to “pay” for his services who in turn are seeking to extract “rents” from the office.<sup>33</sup> This proposal accounts for these two competing theories of political behavior in formulating a realistic approach for increasing African-American influence in upcoming national elections. This is, of course, subject to the caveat that these two theories cannot encompass all of the motivations that explain the behavior of political actors.<sup>34</sup>

Before applying these principles, a word or two should be said about incumbency. By focusing on increasing voter turnout in majority-minority districts in swing states, the proposal accounts for the harmful effects that incumbency has on both voter turnout and “democracy” because it seeks to hold policymakers accountable for their decisions in a manner that realistically makes their chance of reelection dependent upon their behavior while currently in office.<sup>35</sup> Incumbents, consistent with rent-seeking behavior, focus their efforts on pleasing those who have put them in office and not on the traditionally marginalized voters, even if these voters outnumber the rent-seekers. The current proposal does not discourage incumbency as a principle, but suggests it is imperative that more individuals hold the incumbent responsible for legislative decisions. In some cases, coalitions of individuals will be able to increase incumbent accountability, consistent with the sociological perspective, which translates to more substantive representation.<sup>36</sup>

Competitive elections also have the ability to reduce rent-seeking behavior by elected officials. In the absence of competition, increased voter awareness and mobilization may have this affect by forcing long-favored interest groups to form coalitions with African-American voters in districts where African-Americans can serve as the swing vote. Or in the alternative, the lack of competition should (in theory) force African-American voters to form

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the politician. Lee, *supra* note 26, at 196 (“Not all political actors will elevate ideology to a dominant role, for the simple reason that for some it is more costly to do so than it is for the individual voter.”).

33. See, e.g., William H. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

34. Abner J. Mikva, *Symposium on the Theory of Public Choice: Foreword*, 74 VA. L. REV. 167, 169 (1988) (stating that the “motivations of politicians are far too mixed to be understood through the generalizations that . . . public choice theorists formulate about political behavior”).

35. Issacharoff, *supra* note at 29, at 623.

36. SWAIN, *supra* note 18, at 72-73. Representatives with the “electoral security” that comes as a result of incumbency in an overwhelmingly democratic district tend to “become complacent, not consulting their constituents as frequently as representatives from other kinds of districts do” and are more likely to view themselves as “trustees,” capable of deciding by themselves what is in the best interests of their communities, rather than as “delegates” with “interests to be derived” from their constituents. *Id.*

coalitions with Caucasian, Latino, or other minority voters in order to see more accomplished by their representative. These connections between groups are imperative because multi-racial coalitions accomplish more than one single, homogenous group. Moreover, African-American representatives have to form allies in Congress in order to pass any legislation and these ties are more easily formed when a representative is supported by a multi-racial coalition.<sup>37</sup>

The increase in voters and political activity within majority-minority districts located in swing states will translate to power in national elections, where candidates will be forced to solicit support from these voters, facilitating the exchange envisioned by the economic perspective, but across a wider spectrum of voters, consistent with the sociological perspective. Thus, increasing voter turnout enhances the community's ability to exchange their votes for favors, which is necessary if African-American communities are to have a "quality" vote. Keeping this framework in mind, we turn to a few of the key voting rights cases, illustrating that excessive court intervention is inconsistent with the idea of "votes as currency" and accountable representation because the Supreme Court's jurisprudence has evolved to focus more on descriptive representation, rather than the voter's ability to barter votes for substantive gains.

### *B. The False Dichotomy between Race and Partisan Affiliation and the Pitfalls of Descriptive Representation*

Section 2 of the Voting Rights Act of 1965 is the primary vehicle used by African-Americans and other minority groups to advocate for the creation of or challenge the dismantling of majority-minority districts.<sup>38</sup> Section 2 requires that courts determine based on "the totality of circumstances," whether racial or ethnic minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."<sup>39</sup> In *Thornburg v. Gingles*,<sup>40</sup> the Court established a three-part test for plaintiffs to establish impermissible vote dilution under Section 2: plaintiffs have to demonstrate that their bloc was "sufficiently large;" "geographically compact to constitute a majority in a single-member district;" and "politically cohesive... [and] that the white majority votes sufficiently as a bloc to enable it... usually to

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37. Guinier, *supra* note 23, at 1124 ("electoral coalitions affect the ability of representatives to govern").

38. See Adam Cox & Thomas Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008) (80% of the dispositions in their study of every published federal case decided under Section 2 since its 1982 amendment included at least one African-American plaintiff). See also *Holder v. Hall*, 512 U.S. 874 (1994) (where six African-American registered voters challenged the single-commissioner system used in Bleckley County, GA); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (Latino and African-American voters brought a Section 2 challenge against Florida's state senate and house districts).

39. 42 U.S.C. § 1973(b).

40. 478 U.S. 30 (1986).

defeat the minority's preferred candidate."<sup>41</sup>

In decisions following *Gingles*, courts have treated "race" in a manner that undermines a group's ability to define its own political autonomy that arises by virtue of that particular shared characteristic and also their ability to protect the political interests that are incidental thereto.<sup>42</sup> Courts have also cast racial groups into the role of political interest groups in order to subject their claims to the essentially non-justiciable nature of partisan gerrymandering claims under the Equal Protection Clause,<sup>43</sup> to increase their evidentiary burden under Section 2,<sup>44</sup> or as in *LULAC*, to remedy an egregious use of political power without re-visiting the issue of what standards are appropriate for partisan gerrymandering claims.<sup>45</sup> Furthermore, the outcome of these cases often depends on the characteristics of the judges who are deciding the case, leaving even more room for uncertainty.<sup>46</sup>

The *Shaw* decision, which calls into question the idea that majority-minority districts can adequately further the interests of African-Americans at a cost that does not unduly burden the rights of others, illustrates the risk and

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41. *Id.* at 51-52.

42. *See, e.g.*, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 92 (D D.C. 2002), *vacated and remanded*, 539 U.S. 462 (2003), *overruled by* 42 U.S.C. § 1973(c) (2007) (citing *Whitcomb* for the proposition that "a plan that protects Democratic incumbents and a Democratic majority is necessarily a plan that does not retrogress with respect to African-American voting strength. . . . The Voting Rights Act was not enacted to safeguard the electoral prospects of any particular political party."). *See also* Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261 (2005).

43. *Compare* *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion finding that the petitioner's claim that the legislature drafted districts' lines based solely on partisan considerations was a non-justiciable political question) *with* *LULAC*, 126 S. Ct. at 2623 (finding that Latinos had stated a cognizable Section 2 claim because their district was dismantled right when they were posed to vote against the incumbent). The Court's somewhat confusing analysis reveals that the Latinos' claim was, in reality, a partisan gerrymandering claim cognizable under the Equal Protection Claim, and not a Section 2 racial vote dilution claim. Instead of avoiding the Equal Protection claim, the Court could have held that there were no manageable standards to resolve the Latinos' claim as to their district, as it did when it discussed the plan as a whole because the dismantling of the district was partisan and not racial. The Court opted, however, to go in the opposite direction. It is clear that the Court has a lot of freedom to play with the racial and political elements that are often present in these cases, a fact that African-Americans should be cognizant of. *See id.* (rejecting a similar vote dilution claim made by African-Americans but on different grounds).

44. *See, for example*, *LULAC v. Clements*, 999 F.2d 831, 859-60 (5<sup>th</sup> Cir. 1993) (refusing to decide whether "plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus [rather than partisan politics] in the white electorate" but finding that "such a requirement could be inferred from the text of § 2").

45. *See* Part I(C), *infra*.

46. Professors Cox and Miles looked at numerous voting rights cases and noted, not only the declining rate of success, but also that there is a correlation between the judge's race and partisan affiliation with the manner in which he or she votes, which makes the outcome of these cases largely dependent upon the composition of the panel deciding the case. Cox & Miles, *supra* note 38.

corresponding uncertainty of litigation.<sup>47</sup> This decision, followed by decisions in *Miller v. Johnson*<sup>48</sup> and *Shaw v. Hunt* (“*Shaw II*”),<sup>49</sup> indicates that race based districting, although a political reality, is problematic. The Court, by framing the debate in this manner, implicitly asserts its ability to distinguish race from politics, laying the groundwork for its later decision in *LULAC*.

In *Shaw*, the Court resolved the constitutionality of North Carolina’s twelfth district, finding that its shape was so bizarre on its face that it was “unexplainable on grounds other than race.”<sup>50</sup> In an opinion written by Justice O’Connor, the Court found that this type of redistricting demanded “the same close scrutiny that we give other state laws that classify citizens by race.”<sup>51</sup> The holding, however, completely ignored that the district’s bizarre shape could be explained for a reason other than race: partisan affiliation. The overlap between race and politics was and is a political reality in North Carolina, leading Professor J. Morgan Kousser to opine that the Court’s *Shaw* decision “bore little relation to the reality of [the] state’s experience... [and] the majority of the court... invented social and political ‘facts’ to justify its radical decision.”<sup>52</sup> The Court, somewhat disingenuously, concluded that “nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.”<sup>53</sup> Despite the Court’s belief that majority-minority districting perpetuates stereotypes by assuming that members of the same racial group have similar views, in North Carolina the stereotype was, for the most part, true.<sup>54</sup>

It wasn’t until the Court’s 1997 decision in *Easley v. Cromartie* that the

47. *Shaw*, 509 U.S. at 647 (arguing that majority-minority districting reinforces the perception that members of the same racial group have the same interests and sends a message to elected officials that “their primary obligation is to represent only the members of that group, rather than their constituency as a whole”). See also Smith, *supra* note 42, at 270 (noting that Shaw and its progeny began “a disorderly retreat from the effort to prevent the dilution of minority votes and promote the election of minority officials.”) (internal citations omitted).

48. 515 U.S. 900 (1995) (finding that Section 2 does not require that the legislature draw the maximum amount of majority-minority districts possible, and further, that Georgia’s redistricting plan violated the Equal Protection Clause because the legislature subordinated traditional redistricting criteria to racial considerations).

49. 517 U.S. 899 (1996) (finding that North Carolina’s redistricting plan violated the Equal Protection Clause because race was the legislature’s predominant criteria in drawing its second majority-minority district, a district that was not drawn in a manner that was narrowly tailored to the state’s interest in avoiding liability under Section 2).

50. 509 U.S. at 527.

51. *Id.*

52. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 270 (1999).

53. *Shaw*, 509 U.S. at 650.

54. KOUSSER, *supra* note 52, at 273. Professor Kousser notes: “[w]hile it was true that both communities generally agreed on such issues as crime and that Caucasians in 1993 rarely asserted to statements that blatantly displayed traditional white supremacist beliefs . . . the gulfs between Blacks’ and Caucasians’ perceptions of discrimination and bias and the resulting differences in policy preferences were dramatically wide. . . . These are not stereotypes, but very real disparities of view.”

Court acknowledged “that [because] racial identification is highly correlated with political affiliation in North Carolina, these facts [the district’s shape, the plan’s splitting of towns and counties, and its high African-American voting population] in and of themselves cannot, as a matter of law, support the District Court’s judgment” that race rather than politics dominated the drawing of District 12’s 1997 boundaries.<sup>55</sup>

At the time the lines are drawn it is undisputed that race and politics play some unquantifiable role in the process. Courts have attempted to determine which factor “predominates,” but the legislature is more likely to rely on the fact that African-Americans almost always vote Democrat in drawing district lines rather than on the unpredictable voting behavior of Caucasian or Latino voters.<sup>56</sup> If anything, the presence of cross-over voting makes it even more difficult to tell which predominates, and more importantly, whether this determination is appropriate for court resolution.

*LULAC* is the heir apparent of *Shaw* and its progeny, in the sense that the decision subjects Texas’ 2003 mid-decade redistricting plan to the same dubious scrutiny applied to most state redistricting plans in the 1990s, and it also reinforces the Court’s belief that it can easily distinguish race from politics.<sup>57</sup> The *LULAC* dispute stems from the 1990 census, which resulted in a 3-seat increase over the 27 seats previously allotted to the Texas congressional delegation.<sup>58</sup> Although the Democratic Party initially controlled 19 of the 27 seats, as well as both state legislative houses and the governorship, they were losing power. The Republican Party received 47% of the 1990 statewide vote to the Democrats’ 51%.<sup>59</sup> In 2003, Texas Republicans gained control of both houses of the legislature and enacted a new congressional districting map, Plan 1374C, which led to a Republican landslide in the 2004 congressional elections.<sup>60</sup>

The plaintiffs challenged the Republicans’ mid-decade redistricting plan as an unconstitutional partisan gerrymander in violation of the Equal Protection

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55. 532 U.S. 234, 243 (2001) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996) (reversing the district court’s finding that race rather than politics was a predominant factor in the state legislature’s congressional redistricting plan).

56. See Timothy G. O’Rourke, *Shaw v. Reno and the Hunt for Double Cross-Overs*, PS: POLITICAL SCIENCE AND POLITICS, 37 (March 1995) (“Ostensibly ‘compelled’ by the Justice Department to draw two majority-black districts, the North Carolina legislature threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race.”).

57. Doctrinally, one could also call *LULAC* the heir apparent of *Whitcomb*, which found no vote dilution where minorities had an opportunity to participate in the political process, despite evidence that legislators were not responsive to minority interests. Although the *Whitcomb* plaintiffs sued under the Fifteenth Amendment rather than Section 2, *Whitcomb* is one of the first manifestations of the Court’s attempt to distinguish race from politics, by finding that the plaintiffs were unsuccessful because they are Democrats, not because they are African-Americans.

58. 126 S.Ct. 2605.

59. *Id.*

60. *Id.*

Clause, and also alleged violations of the First Amendment and Section 2. The Court did not reach the plaintiff's First Amendment claim and it rejected the partisan gerrymandering claim, concluding that the plaintiffs had not established any legally impermissible use of political classification.<sup>61</sup> Although the Court declined to find that the plan, as a whole, was an unconstitutional partisan gerrymander, it found that the dismantling of the majority-Latino district violated Section 2 of the Voting Rights Act by diluting the Latino's voting power.<sup>62</sup> The incumbent, Henry Bonilla, had been steadily losing Latino support so Republicans shifted some Latino voters out of District 23 and added Caucasian voters. The Court concluded that because Latinos were set to elect the candidate of their choice pre-redistricting and had indicated their disapproval of Bonilla by not voting for him, the new plan violated Section 2 because it took away the Latinos' opportunity to exercise their vote as intended.<sup>63</sup> The state's creation of District 25 to offset the loss of Latino power in District 23 did not remedy the Section 2 violation because the new district failed to meet the *Gingles* requirement of compactness.<sup>64</sup>

In contrast, District 24, an African-American influence district, was dismantled under the mid-decade plan, but the Court found there was no Section 2 violation because it was not clear that African-Americans had been able to elect the candidate of their choice under the old plan. In the proceedings below, the district court had found that African-Americans could not elect their candidate of choice in the primary.<sup>65</sup> In so finding, the court relied on testimony that District 24 was drawn for a Caucasian Democrat, Martin Frost; the fact that Frost had no opposition in any of his primary elections since his incumbency began; and District 24's demographic similarity to another district where an African-American candidate lost when he ran against a Caucasian candidate.<sup>66</sup>

The Supreme Court upheld the district court's findings that it was more likely that African-Americans in District 24 could not control the outcome of the election. Specifically, the Court found that, "[t]he fact that African

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61. *Id.* at 2612.

62. *Id.* at 2613.

63. *Id.* at 2622-23.

64. To ensure compliance with Section 5 of the Voting Rights Act, which requires states to seek preclearance from the Justice Department or the courts prior to implementing any changes in their voting schemes to ensure that the changes do not have the purpose or effect of denying or abridging the right to vote, 42 U.S.C. § 1973c, Republicans created another Latino district – District 25 – to make up for the loss of District 23. However, District 25 was oddly shaped, and the Latinos had diverging interests and needs. See *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) (stating that a plan is nonretrogressive if the covered jurisdiction can show that the gains in the plan as a whole offset the loss in a particular district). But see Brunell et al., *supra* note 13, at 6 (questioning whether *Ashcroft* is still good law after the 2006 amendments to the Voting Rights Act).

65. 126 S. Ct. at 2624.

66. *Id.*

Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice”, but “[i]n the absence of any contested Democratic primary in District 24 over the last 20 years, no obvious benchmark exists for deciding whether African Americans could elect their candidate of choice.”<sup>67</sup> Although Latino voters were able to successfully show that they suffered a harm cognizable under Section 2, the manner in which the Court granted relief to the Latino voters as well as its ultimate rejection of the Section 2 claim of African-American voters are indicative of the hazards of Section 2 litigation overall.

### *C. Life after Shaw and LULAC: Lessons from the Court*

What is the lesson of *LULAC* and other Supreme Court decisions that purport to “protect” the right to vote? African-Americans have to avoid the courts and increase the responsiveness of the major political parties to their interests through political as opposed to judicial activism. In recent years, courts have been less willing to find Section 2 liability,<sup>68</sup> and the Supreme Court’s jurisprudence has placed legislatures in an untenable position as they attempt to comply with both statutory and constitutional mandates during redistricting. First, note that the creation of majority-minority districts may constitute a Fourteenth Amendment violation if race “predominates” in the drawing of the lines. Alternatively, it may also violate Section 2 if a “replacement” district designed to comply with Section 5 of the Voting Rights Act, which prohibits “proposed voting changes that will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,”<sup>69</sup> fails to comport with traditional districting principles. So while the creation of majority-minority districts might suffice to ensure compliance with Section 5, the Court, in *Miller*,<sup>70</sup> rejects the argument that a failure to engage in race based districting violates this section.

Additionally, in *Shaw II*, the Court held that under the Fourteenth Amendment, majority-minority districts can be used to remedy the effects of past discrimination, but only where it is clear this discrimination is identifiable.<sup>71</sup> This is in stark contrast to the *LULAC* Court’s finding of vote

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67. *Id.*

68. Cox & Miles, *supra* note 38, at 12, 20 (noting that since 1994 courts have been less willing to impose liability and also stating that, depending on the practice challenged, the judicial appointees of Democratic presidents find liability at rates that are no longer significantly higher than those judges appointed by Republican presidents).

69. 126 S. Ct. at 2667.

70. 515 U.S. at 922; *see also Shaw II*, 517 U.S. at 911.

71. *Compare Shaw II*, 517 U.S. at 908-09 (“‘While the States and their subdivisions may take remedial action when they possess evidence’ of past or present discrimination, ‘they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.’ A generalized assertion of past discrimination . . . is not adequate.”) (citations omitted) *with Gingles*, 478 U.S. at 47 (“The essence of a § 2 claim is that a certain electoral law,

dilution under Section 2 because Latinos were “historically” discriminated against in exercising their right to vote.<sup>72</sup> Finally, *Shaw* and the later voting rights cases have to be read in conjunction with another case decided by the Court, *Voinovich v. Quilter*,<sup>73</sup> all of which send mixed signals regarding the use of majority-minority districts to both the legislature and to voters.<sup>74</sup>

In sum, the Court’s failure to establish standards to resolve constitutional partisan gerrymandering claims under the Fourteenth Amendment does not prevent it from finding (or not finding) that the same gerrymander has diluted a minority group’s vote under Section 2, as in *LULAC*. This doctrinal incoherence leaves legislative representatives with little to guide them in constructing districts, other than their own self-interest, as they try to comply with both statutory and constitutional mandates. If there is any confusion on the part of the legislature in how to proceed in order to avoid liability under Sections 2 and 5 of the Voting Rights Act and the Fourteenth Amendment, then African-American voters are at an even greater disadvantage in trying to cultivate a litigation-centered strategy to maximize their political strength. This quagmire is complicated by the Court’s unwillingness to look at the political realities of each case, particularly when the evidence does not fit safely within the contours of the *Gingles* test.

African-Americans run the risk that they will be worse off when litigation is brought to challenge any particular voting scheme. *LULAC* exemplifies the false dichotomy that the Court uses to distinguish race from partisan affiliation. The Court found that the legislature’s redistricting of Latino voters out of District 23 bore the “mark of intentional discrimination that could give rise to an equal protection violation”, but does not delineate whether this intentional

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practice, or structure *interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives”) (emphasis added).

72. 126 S. Ct. at 2621-22 (“The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.”). Of course, the issue in *LULAC* was the dismantling of a majority-minority district rather the creation of such a district, which was the issue in *Shaw II*, but there is little to justify the difference in the standards employed by the court.

73. 507 U.S. 146, 154-55 (1993). *Voinovich*, decided three months before *Shaw* and also authored by Justice O’Connor, evinces a sort of love hate relationship with majority-minority districts, stating:

[The creation of] majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districting. On the other hand, the creation of majority black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore ‘safe’ majority ensures that they are able to elect their candidate of choice. Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.

74. In fact, in establishing majority-minority districts to avoid Section 2 liability, legislatures gave Caucasian voters submerged in majority-minority districts an automatic *Shaw* claim.

discrimination was based on race or partisan affiliation.<sup>75</sup> Although Section 2 speaks only of vote dilution based on race, the Court's language seems to suggest that its reach also extends to partisanship because had the Latinos in District 23 voted Republican then they would not have been drawn out of the district.<sup>76</sup> Thus, the confusion comes when the Court employs Equal Protection partisan gerrymandering rhetoric through the vehicle of Section 2 analysis. Otherwise the Court would have to establish a definitive test to resolve partisan gerrymandering claims under the Equal Protection Clause, a step it has refused to take in the past.<sup>77</sup> The Court is notorious for employing this type of legal fiction in the voting rights context, a strategy that has been aptly termed by Professors Issacharoff and Karlan as "first and second order judicial review," or addressing the harm that is the focus of one doctrine indirectly through the use of a related doctrine in the interest of legal formalism.<sup>78</sup> In *LULAC*, the Court addresses what is essentially a Fourteenth Amendment partisan gerrymandering claim, specifically with regards to District 23, through the racial vote dilution principles of Section 2.<sup>79</sup> This results in more uncertainty in the doctrine and makes it difficult for political actors to adjust their behavior accordingly.

The Court's treatment of District 24 shows that the only time that the Court can ascertain whether African-Americans have elected their representative of choice in the absence of a competitive election is when that candidate of choice is an African-American. Indeed, if this is the Court's rationale or belief as it applies to African-Americans having adequate

75. 126 S.Ct. at 2622. The Court simply states that "[e]ven if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23." *Id.* (internal citation omitted).

76. *See id.* at 2666 (Scalia, J., dissenting) (finding that the district court "cited ample evidence supporting its finding that the State did not remove Latinos from the district because they were Latinos" including the fact that the new District 23 is more compact than the old). *See also* Guy Uriel-Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1197 (2007) ("The fact that those votes [taken out of District 23] were voters of color was fortuitous. It served to underscore the problem; it provided the Court with a statutory and doctrinal hook for articulating its concerns; and it shielded the Court from accusations that it was further enmeshing itself into the political thicket.").

77. *Vieth*, 541 U.S. 267.

78. As Professors Issacharoff and Karlan noted:

Thus, while *Vieth* essentially cuts off first-order political gerrymandering claims—that is, plaintiffs cannot get a plan struck down simply by showing that it constitutes an excessively partisan gerrymander—*Cox v. Larios* restores an opportunity for second-order judicial review of political gerrymanders: if a plan contains any population deviations, a court may decide that the deviations are caused by impermissible partisanship and strike the plan down as a formal matter for failure to comply with one person, one vote.

Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567-68 (2004).

79. *Cf. Vieth*, 541 U.S. at 285-86 (rejecting the idea that partisan gerrymandering claims can be resolved using a *Shaw* like test because there are significant differences between race and politics, including the fact that districting based on race is unlawful and uncommon but districting based on politics is lawful and expected).

representation, and it appears that it is,<sup>80</sup> then this may have some startling implications if Obama wins the 2008 presidential election. There will likely be a substantial decrease in the success of Section 2 litigation, possibly more of a decline than we have seen in recent years, because of a sense by the Court, possibly legislatures, and maybe even the public at large, that African-Americans can no longer complain about their status as voters because after all, the President of the United States is an African-American. This outcome would be consistent with the rationale employed by the Court in other racially charged areas, specifically affirmative action.<sup>81</sup> So while the election of Obama would be a boon for African-Americans, it will also come with substantial collateral damage by giving the Court ammunition to undermine the salience of race in politics through its doctrine, a possibility that is further indicative of the need for an alternative strategy to litigation in order to protect the African-American vote.<sup>82</sup>

Despite the troubling aspects of the Court's decision in *LULAC*, if viewed from an institutional competency perspective the Court did not necessarily decide the case incorrectly, a factor which, surprisingly, supports the instant proposal.<sup>83</sup> Based on the Court's reasoning, if African-Americans are represented by an individual of the same race, the Court knows at the very least that the group has descriptive representation, which is more than the group had for a large segment of its history in this country. Furthermore, there has to be an overlap between descriptive and substantive representation in some instances, a possibility that likely brings the Court comfort. While we know that descriptive representation is not enough to protect African-American interests,<sup>84</sup> the Court has to maintain what has essentially become a legal

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80. *LULAC*, 126 S. Ct. at 2650 (Souter, J., concurring in part and dissenting in part) (criticizing the plurality for its willingness to "accept the conclusion that the minority voters lost nothing cognizable under § 2" by "placing great weight on the fact that Martin Frost, the perennially successful congressional candidate in District 24, was white")

81. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) ("The requirement that all race-conscious admissions programs have a termination point 'assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.' (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989))).

82. See Smith, *supra* note 42, at 275 (viewing *Shaw* as the Court's attempt to reduce the role of race in politics).

83. Issacharoff, *supra* note 23, at 1884 (noting that the "polarized voting inquiry emerged in large part as an evidentiary proxy for the cumbersome examination of the responsiveness of governmental institutions to the needs of all citizens"). Similar to the way in which racial bloc voting is a proxy for governmental responsiveness, race has become a proxy for accountable representation.

84. See LUBLIN, THE PARADOX OF REPRESENTATION, *supra* note 13, at 69-70. Professor Lublin argues that African-American legislators are generally more liberal than their Caucasian counterparts, and that they can attempt to use their influence towards the passage of liberal legislation. However, conservatives usually do not compromise with African-Americans on legislation because they view it as futile, and if there is opposition by African-Americans to bills proposed by their own parties, this may also make it more difficult for bills that they support to

fiction—that the *Gingles* factors can effectively elicit circumstances in which minorities have been denied a true opportunity to make their vote count. This façade is necessary because outside of a competitive election, the representative's skin color is the only indicator that the Court can use to ensure that minority votes have actually counted in a “meaningful” way.<sup>85</sup> Given the substantial decrease in competitive elections generally and the low success rate of vote dilution claims, this brings little comfort to the voter.<sup>86</sup>

The idea that a meaningful vote is limited to either descriptive representation, or non-descriptive representation legitimized by a competitive election, is problematic if voting rights jurisprudence is supposed to be about accountability, a proposition that has itself been in question in recent years.<sup>87</sup> In criticizing the Court's prioritization of electoral competition in *LULAC* over other democratic values, Professor Kang insightfully notes that

[i]f other democratic values deserve service at all, then advocates of electoral competition must justify the tradeoffs against those values required by the promotion of electoral competition. There may be times when the goals of participation or deliberation should trump the promotion of electoral competition.<sup>88</sup>

Despite our preference for participation and deliberation over electoral competition, it is not clear, however, that there are any other obvious benchmarks for a court to measure whether African-Americans have cast a “quality” vote. In some states, having a meaningful vote may entail being able to elect a candidate of color. In others, it may require being able to obtain the greatest return on your investment by electing a Caucasian representative. In

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pass. *Id.* at 70. Thus, the successful implementation of legislation favorable to African-Americans requires political savvy as opposed to simply the right skin color.

85. Scholars have determined that other races can also represent African-American interests. See SWAIN, *supra* note 18, at 30 (finding that Republicans are less responsive to black interests than are Democrats, but concluding that “[b]lack representatives are . . . not the only source of black representation in Congress white Democrats also appear to represent blacks well.”). See also David Epstein and Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority Minority Districts*, 43 AM. J. POL. SCI. 367, 371(1999) (proposing that minorities have elected their candidate of choice if “1) in no election was a significant negative correlation observed between black voter turnout and votes for that candidate, at the precinct level; and 2) The candidate must be: a) a minority candidate, or elected from a majority minority district”). Based on this definition, Frost would not have been the African-American voter's candidate of choice because District 24 was not a majority-minority district, despite the overwhelming support of that Frost had from these voters during the primary. *Id.*

86. Sam Hirsch, *The United States House of Representatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (June 2003).

87. See Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 229-30 (1995) (noting that in both *White v. Regester* and *Zimmer v. McKeithen*, one of the elements of the totality of the circumstances test in assessing vote dilution claims was the responsiveness of elected officials to the specific concerns of minority constituents and “single member districts . . . cemented the ties between constituents and elects officials and thereby held out the promise of real constituent services”).

88. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 757 (2008).

fact, there was testimony in *LULAC* that African-Americans in District 23 felt that Rep. Frost had been responsive to their interests, and that he had long worked to curry favor with his constituency. Consistent with the economic perspective regarding the behavior of elected officials, it was in his best interest to do so. Thus, one could consider him an accountable representative capable of providing substantive representation, even if he was technically “non-descriptive representation” as a result of a “noncompetitive process.”<sup>89</sup>

The lack of competition in Frost’s district highlights the constraints on the Court in identifying meaningful representation, but it also emphasizes the doctrinal importance of competition in Section 2 analysis as a means of ensuring that the political process is actually working.<sup>90</sup> Competitive districts are desirable,<sup>91</sup> but judicial intervention in the districting process necessarily constrains African-Americans to this principle since it is the most obvious measure of an effective process.<sup>92</sup> It may not always be wise, for this reason, to have court involvement where the process might be working in a sense that minorities have the ability to elect the candidate of their choice, despite the lack of competition, and where candidates are not necessarily of the same race as the constituency.<sup>93</sup>

Thus, *LULAC* provides the primary reason why African-Americans have to stop relying on the courts to shape the contours of their vote: at most the courts can only ensure descriptive representation.<sup>94</sup> As mentioned previously,

89. SWAIN, *supra* note 18. In the Court’s view, the opportunity to elect one’s candidate of choice involves being able to run your own candidate, not settle for “second best.” *LULAC*, 126 S. Ct. at 2624. It is not clear, however, that Frost was “second best.” What is likely going on is that the Court viewed Frost’s race with enough suspicion to discredit his black supporters.

90. See Ellen Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1139, 1179 (2007) (“Majority-minority districts are invariably also noncompetitive districts, given that minority voters typically vote for Democratic candidates. As *LULAC* suggests, these districts offer a form of political participation that is less than optimal, even absent the racial considerations that prompted the Court to describe them as ‘second best’”).

91. Issacharoff and Pildes, *supra* note 28, at 646 (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”).

92. Issacharoff & Karlan, *supra* note 78, at 548 (noting that all of the early vote dilution claims arose in the one party South or in urban areas similarly monopolized by one party because “tacitly . . . courts seemed prepared to immunize jurisdictions that provided meaningful bipartisan competition from claims of vote dilution”).

93. See Kang, *supra* note 88, at 741 (“ . . . if the Supreme Court is interested in promoting political participation and civic engagement consistent with a theory of democratic contestation, then its handling of the Texas districts in *LULAC v. Perry*, may be entirely wrong”).

94. See Epstein and O’Hallaran, *supra* note 85, at 370 (stating that no test has ever been developed to separate out whether minorities have elected their candidate of choice other than race). See also Pamela S. Karlan and Daryl J. Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race Conscious Redistricting: Why Voting is Different*, 84 CALIF. L. REV. 1201, 1212 (1996) (noting that the Court struck down Georgia’s, Texas’, and North Carolina’s reapportionment plans without reference to any findings that the representatives elected from the majority-black and Latino districts ignored the needs of their white constituents).

there may be some overlap between descriptive and substantive representation,<sup>95</sup> but the Court's doctrine does not accommodate those instances where the two are mutually exclusive. Descriptive representation may not be enough to offset the strides that minorities must make in the coming election. Additionally, it is inadequate, in and of itself, to ensure that African-American interests are sufficiently represented.<sup>96</sup> As Professor Guinier noted in her seminal article explaining the "tokenism" that results when the focus is solely on electing black representatives: "the status of blacks as a discrete, disadvantaged minority cannot be addressed simply by mobilizing blacks to turn out on election day to elect more black candidates. Black representatives are not necessarily effective advocates for legislative responsiveness."<sup>97</sup>

In fact, there are some clear trade-offs that African-Americans have to consider before advocating the creation of more majority-minority districts in order to elect more African-American representatives. Scholars have noted the "ghetto" effect of these districts, arguing that they "cut[ ] off both voters and candidates from any possible across-the-board coalition forming, and guarantee[ ] that the remaining white districts will dominate the resulting elected body."<sup>98</sup> Furthermore, redistricting plans that create more African-American legislative seats necessarily create more Republican seats, which come at the expense of white Democratic seats, thereby limiting minority influence to a few safe districts and minimizing it elsewhere.<sup>99</sup> Most

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In contrast, *LULAC* represents the Court's refusal to protect a district where there is evidence that the representative was responsive to the needs of his constituents, evincing the Court's ode to the superficial: "descriptive" representation and "special representational harms." The use of race can constitute the injury and the solution.

95. See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628 (1999). But see Charles Cameron, David Epstein, and Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive African-American Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996).

96. Descriptive representation is consistent with a passive view of the legislature, one that is not so much about governance and accountability, but more about "reflecting" the identity of constituents and rubberstamping. See PITKIN, *supra* note 19, at 89.

97. Guinier, *supra* note 23, at 1101-02. Professor Guinier captures the essence of the problem of seeking only descriptive representation as a means of furthering the interests of African-American:

Black electoral success theory defines descriptively black representation as a meaningful empowerment goal of structural reform legislation and litigation. . . . [but the] model fails to provide a realistic enforcement mechanism for establishing either leadership accountability within the black community or representational effectiveness within the legislative deliberation and coalition-building process. The theory marginalizes black leadership and leads to token representation. . . .

*Id.* See also Claudine Gay, *The Effect of Black Representation on Political Participation*, 95 AM. POL. SCI. REV. 589 (2001).

98. See, for example, Lani Guinier, *The Representation of Minority Interests: the Question of Single Member Districts*, 14 CARDOZO L. REV. 1135, 1163 (1993) ("majority minority districts quarantine poor blacks in inner-city ghettos").

99. Brace et al., *supra* note 13, at 170, 176 ("to create a majority black district, we must create a district which is overwhelmingly Democrat---thus "wasting" Democratic voting strength .

importantly, these districts have also promoted the sense that African-American representatives are more responsive than Caucasians to the needs of the African-American electorate.<sup>100</sup> As the next section shows, if majority-minority districting is used in an appropriate manner, this does not have to be the case.

#### *D. Life after Shaw and LULAC: Lessons from Political Science*

The political science literature has debunked many of the arguments used to justify majority-minority districts. There is a threshold number of minorities within a particular district that will increase the likelihood that their interests will be represented, and it is not a majority amount. One study noted, for example, that outside of the southern United States, African-American representation is maximized by distributing these voters equally across districts.<sup>101</sup> Other scholars have argued that in the South the ideal number is 47% African-American voting age population in each district, less than the greater than 51% amount that most scholars and courts previously thought necessary in order for minorities to elect the candidate of their choice.<sup>102</sup> A more proportional dispersal of African-Americans across districts arguably gives “black representatives a substantial chance of winning office (though not assuredly so), while supporting minority influence in other districts.”<sup>103</sup>

Other empirical evidence has shown that the use of majority-minority districts to protect black representation is best done in a way that is somewhat counterintuitive. As Professors Cameron, Epstein, and O’Hallaran noted, “under a Democratic surge scenario, to maximize black representation, minority districts should be more concentrated than before, up to about 55% [black voting age population]. Under a Republican surge scenario, the optimum would be less concentrated districts, on the order of 40% [black voting age population].”<sup>104</sup> Thus, the ideal composition of majority-minority

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. . . Analogously, to create a majority Republican district, we must create a district which is overwhelmingly white, thus wasting the voting strength of white Democrats as compared to black Democrats.”). LUBLIN, *THE PARADOX OF REPRESENTATION*, *supra* note 13, at 72, 91 (“creating majority-minority districts may make individual representatives more responsive to blacks and Latinos, but reduce the aggregate responsiveness of the House of Representative to minorities”). See generally Cameron et al., *supra* note 95, at 798, 804-805.

100. See generally Guinier, *supra* note 23; David Lublin, *Racial Redistricting and African-American Representation: A Critique of ‘Do Majority Minority Districts Maximize Substantive Representation in Congress?’*, 93 AM. POL. SCI. REV. 183, 185 (1999) (noting that “five white Democrats who were elected from black majority districts between 1972 and 1994 had liberal voting records”).

101. Cameron et al., *supra* note 95, at 807.

102. *Id.* at 808. See also LUBLIN, *THE PARADOX OF REPRESENTATION*, *supra* note 13, at 89 (suggesting that responsiveness to African-Americans increases once a district reaches the 40%, not the 50% mark). Professor Lublin does not limit this finding to Southern states.

103. Cameron et al., *supra* note 95, at 808.

104. *Id.* at 809.

districts depends on the party that is in power, and belies the need for the packing that tends to come at the expense of limiting African-American influence without any guarantee of more substantive representation.

For this reason, establishing majority-minority districts through court intervention does not necessarily maximize African-American representation.<sup>105</sup> While the election of African-American representatives in these districts was once necessary to achieve more racial and political equality, the Supreme Court is no longer at the forefront of ensuring adequate political representation through the creation of these districts, or in protecting those that already exist. Continued reliance on majority-minority districts to exclusively represent African-American interests means that this group will remain a one party constituency, subject to mistreatment when the opposition is in power. The discussion regarding the limits of majority-minority districts frames an important question for the next election: whether the candidate of choice, in order to adequately represent African-American interests, has to be African-American. *LULAC* seems to suggest that the answer to this question is yes; however, we know that this must be wrong given that Obama and Clinton have shared almost equal support in the African-American community.<sup>106</sup> Yet each time that a minority turns to the Court for relief, it must be with the realization that the Court cannot ensure accountable representation, only descriptive representation — only the African-American community has the power to ensure that their votes go to the candidate that best represents their interests.<sup>107</sup>

The dubious legal position of majority-minority districts also brings attention to another consequence of this form of districting: majority-minority districts depress voter turnout. When viewed in conjunction with the Court's rocky jurisprudence regarding when such districting is appropriate, it is clear that the discussion must be framed in a manner that accounts for the unique circumstances regarding the district's demographics, political and racial

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105. See Guinier, *supra* note 23, at 1102 (“the prejudice and hostility facing blacks within the political process cannot be eradicated by creating majority-black single-member districts from which black candidates can be elected. Black legislators, especially those representing geographically segregated districts, may be victims of prejudice. Thus, if racially polarized voting results in electoral market failure, then the concept of political empowerment must also address failed legislative decision-making. Minority empowerment requires minority legislative influence, not just minority legislative presence. In other words, blacks must develop explicit mechanisms for overcoming majority prejudice in the governing policymaking body.”).

106. Scott Helman, *Obama, Clinton in a Tight Battle for Black Vote*, THE BOSTON GLOBE, July 13, 2007, available at [http://www.boston.com/news/nation/articles/2007/07/13/obama\\_clinton\\_in\\_a\\_tight\\_battle\\_for\\_black\\_vote/](http://www.boston.com/news/nation/articles/2007/07/13/obama_clinton_in_a_tight_battle_for_black_vote/). But see *Strong Black Vote Gives Obama Big Boost*, ASSOC. PRESS, Jan. 26, 2008, <http://www.msnbc.msn.com/id/22859978> (noting that Obama won a landslide victory in the South Carolina democratic primary because 8 out of 10 African-American voters supported Obama in a state where they make up 55% of the Democratic electorate).

107. See Guinier, *supra* note 23, at 1093 (“within contemporary voting rights jurisprudence, mere electoral control by black voters over their representatives has come to satisfy the Act's conception of representation”).

history, and specific voting patterns. Where voting is racially polarized, majority-minority districting might be appropriate, but is it the best strategy to advocate for the creation of these districts in swing states, especially if the district is one in which the congressional representative does not necessarily need a majority African-American constituency to win? Not necessarily. Because these districts are a safe haven for minority legislators, these individuals tend to run unopposed in consecutive elections, making the act of voting futile. This effect of majority-minority districting can have serious consequences if the presidential election of 2008 resembles the 2000 and 2004 contests, where in both the winner prevailed by a very small margin.

## PART II: FROM VOTE DILUTION TO AN ELECTORAL SOLUTION?

### *A. Majority-Minority Districts: Necessary Evil?*

Majority-minority districts have the potential to change the political landscape but creating more districts does not necessarily correspond to a better outcome for African-American voters. Nevertheless, these districts are not always undesirable. In the 1990s, they were responsible for sending the greatest number of African-Americans to Congress since Reconstruction.<sup>108</sup> As African-Americans approach the 2008 election year, however, another consequence of majority-minority districting becomes important—how these districts decrease the ability of African-Americans to cast an effective vote for this country's President and Vice President. Initially, the opposite was true. Majority-minority districts often mobilized African-American voters and spurred voter turnout in droves.<sup>109</sup> Scholars and commentators have noted, however, that turnout in these districts has decreased due to the lack of competitive elections, a fact which exacerbates the traditionally low voter turnout among African-Americans generally.<sup>110</sup> In fact, the Republican

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108. Brunell et al., *supra* note 13, at 2 (“[A]lthough there is some evidence to suggest that minorities are beginning to win election from non-minority districts, the overwhelming number of minority legislators continue to win election from majority-minority districts”). See also Guinier, *supra* note 98 at 1156 (“black districts enable blacks to get elected and then reelected, leading to positions of seniority and status within the elected body”).

109. See John Meacham, *Voting Wrongs-Racial Reapportionment*, WASH. MONTHLY, Mar. 1993 (stating that the new majority-minority districts “led to increased Democratic voter turnout--a turnout which, without question helped the Democrats capture the White House.”). See also Patrick T. Brandt, *The Consequences of Majority Minority Districts for Representation: Evidence of Partisan Mobilization, Countermobilization and Demobilization*, prepared for the 93<sup>rd</sup> meeting of the American Political Science Association, available at [polmeth.wustl.edu/retrieve.php?id=409](http://polmeth.wustl.edu/retrieve.php?id=409).

110. See Michael P. McDonald, *The Competitive Problem of Voter Turnout*, WASH. POST, Oct. 31, 2006 available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/30/AR2006103000712.html> (noting that the national voter turnout rate for 2008 will likely be less than 1994 and fall shy of 40 percent because of the lack of competitive state elections).

strategy during the 1990s round of redistricting was to pack these districts with African-Americans and not run a Republican candidate in order to ensure low minority and Democratic turnout in statewide races.<sup>111</sup> The effect of noncompetitive majority-minority districts on voter turnout matters in so called “swing states” where the state is not consistently Democrat or Republican and the winner of its electoral votes could be potentially determined by less than 5% of the state’s total vote.<sup>112</sup>

The method in which the President and Vice President of the United States are chosen, combined with the contentiousness of the state redistricting process, presents special problems for the African-American voter. There is no direct method of electing the President; instead, each political party proposes a slate of electors. An individual votes for the party’s slate of electors rather than an individual candidate. Thus, a vote for the Democratic Party is a vote for that party’s slate of electors.<sup>113</sup> The number of electors given to each state corresponds to its representatives in the House plus two electoral votes for each of its two Senators.<sup>114</sup> Following the election, each elector casts their respective votes for their candidate according to party lines. Forty-eight states use the “unit rule” of apportioning its electoral votes among candidates, meaning that a candidate can receive all of a state’s electoral votes by winning only a plurality of the individual votes. In rare cases, the candidate with the majority of the popular vote has lost the election to the candidate who won the majority of the states’ electoral votes, as was the case when Rutherford B. Hayes defeated Samuel Tilden in 1876 and Al Gore lost to George W. Bush in 2000.<sup>115</sup>

While African-American votes mean significantly less in states that are overwhelmingly Republican,<sup>116</sup> their votes are more valuable in swing states.

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111. Symposium, *Panel II: Enfranchising the Disenfranchised*, 9 J.L. & POL’Y 249, 253 (“Packed districts and a number of the heavily majority-minority districts [are so safe that they really are uncontested by and large], which subsequently suppresses voter turnout among minorities. The reason is that, when a district is so safe that the incumbent is running unopposed, the minority voters tend not to vote because there is no real need to vote in an uncontested election to insure that the black or Hispanic incumbent is reelected.”).

112. During the 2000 election, Bush led Gore by a little over 500 votes in Florida. Ford Fessenden & John M. Broder, *Examining the Vote; The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, available at <http://www.nytimes.com/2001/11/12/politics/12VOTE.html?ex=1196917200&en=d4c4dbd4841a6943&ei=5070>. During the 2004 election, he led John Kerry by a larger, but still slim, margin in Ohio of a little over 100,000 votes. CNN.com Election 2004 results, <http://www.cnn.com/ELECTION/2004/pages/results/states/OH/P/00/index.html> (last visited Jan. 29, 2008).

113. William Josephson and Beverly Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 147 (1996).

114. *Id.* See also Matthew J. Fiesta, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099 (2001).

115. This also happened in the elections of 1824 and 1888.

116. Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, The Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 879, 915

Recognizing this strategic value, voter registrars often go into these states, hoping to register individuals to vote. These energies can be more focused once we appreciate the unintended, but still very real, negative impact that noncompetitive majority-minority districts can have on voter turnout. Such votes may be crucial in the next election, as 2008 is by no means a guaranteed victory for either party.

The tenuous legal position of majority-minority districting derives from the Court's inability to distinguish those circumstances in which majority-minority districting is necessary from those in which the districts might hamper African-Americans' political progress.<sup>117</sup> As discussed in Part I, the determination of whether majority-minority districting is in the best interests of African-American voters is not one that should be left to the courts, to be decided based on the false dichotomy between race and politics. It is a decision that African-American voters must make for themselves, by embracing majority-minority districting where warranted, but in other situations, changing strategy to account for the setbacks caused by these districts. Quantitative data, as opposed to court intervention, provides a better idea of when these districts are ideal,<sup>118</sup> specifically, whether these districts will result in electing accountable state leadership, and if so, what steps African-Americans must take to account for its negative impacts on the ability to elect accountable national executives.

It is difficult to know with any certainty if majority-minority districting affects the ability of African-American voters to influence the outcome of presidential elections. Most states do not break down voter turnout by race at the district level, forcing most political scientists to infer voter turnout based on race using regression techniques, inferences, and Monte Carlo simulation methods.<sup>119</sup> Additionally, there are so many factors that can affect voter turnout—the weather, convenience to the polls, family obligations, personal preferences, etc.—that cannot be accounted for when looking at the data that is available. The absence of certainty, however, is not a shortcoming for this

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(2002).

117. See generally LUBLIN, THE PARADOX OF REPRESENTATION, *supra* note 13; Cameron, *supra* note 95.

118. See Brunell et al., *supra* note 13, at 1 (stating that “political scientists can make a valuable contribution to the debate over race-conscious redistricting by providing information that will permit the judiciary to make a more empirically informed decision about the continued value of the VRA and the consequences of districting designed to affect the likelihood of minority electoral success.”).

119. See Kevin Hill, *Are Majority Minority Districts “Rotten Boroughs?”: Turnout, Polarized Voting, and Competitiveness in the 1996 House Elections* (1999) (discussing the breakthrough techniques designed to address the “ecological inference” problem of inferring voter turnout by race based on the percentage that a district is African-American), <http://drhill.tripod.com/pdf/rotten.pdf>. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1404 (2001).

research because the data available informs the debate of how African-Americans should concentrate their efforts in the next election.<sup>120</sup> For example, the three majority-minority districts in Florida saw a huge increase in voter turnout in 2004 as compared to 2000; nonetheless, the numbers show the turnout in the districts was still not as high as in other, non-majority-minority districts within the state.

In the face of this data, one can comfortably opine that there is a correlation between majority-minority districting and depressed voter turnout. Specifically, many of the majority-minority districts created in the 1990s round of redistricting and subsequently challenged by *Shaw* and its progeny had the lowest voter turnout of any district in their respective states. For example, the two majority-minority districts created in Georgia during the 1990 round of redistricting had the lowest voter turnout of any district in the state.<sup>121</sup> In District 2, represented by incumbent Sanford Bishop since 1992, approximately 150,000 votes were cast in the 1992 election,<sup>122</sup> and in District 11, represented by Cynthia McKinney, approximately 164,000 votes were cast.<sup>123</sup> The average for the other nine districts was 212,000 votes cast in that election.<sup>124</sup> Currently, turnout in District 2 remains lower than other districts, with 194,000 and 130,000 votes cast in the 2004 and 2006 elections respectively,<sup>125</sup> as compared to District 11, which had 210,000 and 166,000 voters turnout in the same elections.<sup>126</sup> District 4, which is the majority-minority district created by the Georgia legislature following *Miller*, has been more contested and competitive in recent years, resulting in a turnout of over 240,000 voters in the 2004 elections.<sup>127</sup>

Other majority-minority districts, some of which were also challenged in the Supreme Court, were among the lowest in voter turnout in their state during the 1990s. In 1992, Districts 1 and 12 in North Carolina were the second and

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120. Economists call this the "identification" problem, which has presented difficulties for scholars studying any type of voting behavior. See, for example, Cox & Miles, *supra* note 38, at 14-15.

121. CONG. Q. ALMANAC, Vol. XLVIII (1992), Election 92 Results at 37-A.

122. *Id.*

123. *Id.*

124. *Id.*

125. Currently, District 2 is no longer a majority African-American district. The district is 44.8% African-American, 51.5% Caucasian, and 3.5 % Latino. *Georgia, District 2 Census Data, Election 2006*, WASH. POST., available at <http://projects.washingtonpost.com/elections/keyraces/census/ga/district-2/> (last visited Feb. 4, 2008). However, the district also has a relatively low median income—\$29,354; only 13% of the district's residents have college degrees; and Bishop has been the incumbent in the district for the last 16 years, these factors combined contribute to low voter turnout.

126. MICHAEL BARONE AND RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 466-47, 488 (2008). District 11 is not longer a majority-minority district because of the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995).

127. Barone, *supra* note 126, at 471.

third lowest districts, respectively, in the state.<sup>128</sup> It was the creation of District 12 that was at issue in the *Shaw* cases.<sup>129</sup> Texas's majority-minority districts also suffered from low turnout—Districts 18, 29, and 30 were the fifth, first, and eighth lowest districts, respectively.<sup>130</sup> These districts still remain among the lowest, although Districts 18 and 30 are no longer majority-minority districts, with the African-American population hovering around forty percent.<sup>131</sup> District 29 in Texas is currently majority Latino, and its voter turnout has also been depressed.<sup>132</sup>

Florida and Ohio are of particular note, for they proved to be the decisive states in the 2000 and the 2004 elections, and there is some indication that majority-minority districting affects the rate of voter turnout in these states for different reasons. After the 1990 round of redistricting, scholars analyzed homogeneous precincts in Florida (at least 90% African-American or Latino) to see whether turnout changed after the creation of a majority-minority district.<sup>133</sup> They found that initially turnout increased in the new congressional districts by 8%, but a study by Professor Weber indicated that turnout in these districts ultimately dropped, and did not remain as high as turnout was prior to redistricting.<sup>134</sup> During the 1992 elections, the lowest voter turnout district in Florida was District 23, a majority-minority district won by impeached former federal district court judge Alcee Hastings; District 3, a majority-minority district represented by Corrine Brown, was the second lowest district in the state.<sup>135</sup>

In Florida's District 17, a majority African-American district, there have only been two representatives in the last decade or so, both of whom are Democrats—Kendrick Meek, the current representative, and his mother, Carrie Meek, who preceded him.<sup>136</sup> In 1996, Carrie Meek received 114, 638 votes.<sup>137</sup>

128. CONG. Q. ALMANAC, Vol. XLVIII (1992), Election 92 Results at 40-A. Approximately 173,000 people voted in the First District and 180,000 in the Twelfth. The lowest was the Seventh District, with approximately 162,000 voters. The remaining districts averaged about 222,000 in voter turnout. *Id.* The low turnout in the First and Twelfth districts was replicated in the 1994 elections as well. CONG. Q. ALMANAC, Vol. L, at 588-89.

129. *See* Shaw I; *see also* Shaw II, 517 U.S. at 902-03 ("the district's 'unconventional,' snakelike shape, the way in which its boundaries split towns and counties, its predominately African-American racial make-up, and its history, together demonstrated a deliberate effort to create a 'majority-black' district in which race 'could not be compromised,' not simply a district designed to 'protect Democratic incumbents'").

130. Election 92 Results at 42-A.

131. BARONE, *supra* note 126, at 1587, 1617.

132. *Id.* at 1615.

133. Lisa Handley, Kimball Brace, Richard Niemi, and Harold Stanley, *Minority Turnout and the Creation of Majority-Minority Districts*, 23 AM. POLITICS Q. 190 (1995).

134. *Id.*; Ronald E. Weber, *Redistricting and the Courts Judicial Activism in the 1990s*, 23 AM. POLITICS Q. 204 (1995).

135. Election 92 Results at 37-A.

136. MICHAEL BARONE AND RICHARD E. COHEN, ALMANAC OF AMERICAN POLITICS (1998), available at <http://nationaljournal.com/pubs/almanac/1998/f117.htm>.

137. *Id.*

In 2006, her son received 90,663 — or almost 25,000 fewer votes than his mother did ten years earlier. This difference is notable, for there were more than 40,000 more registered Democrats in the district in 2006 than there were in 1996.<sup>138</sup>

Similarly, District 23 saw a decrease in voter turnout, from 102,000 in 1996, to 89,000 in 2000, to a slight increase to 96,000 in 2002. However, when compared to the number of registered Democrats in the district (177,000 in 1996; 183,000 in 2000; and 194,000 in 2002), it is clear that almost 100,000 registered Democrats did not come out to vote during those cycles where Hastings faced minimal opposition. It is even more likely that the number of individuals who registered but did not vote was substantially higher during those years in which he ran unopposed.<sup>139</sup> These numbers are notable because in the 2000 election, approximately 500 votes separated Bush and Gore in Florida.<sup>140</sup> Additionally, in the months leading up to the November 2000 presidential election, local election supervisors in Florida purged 57,700 voters from the registries, individuals who were allegedly ex-cons and therefore not allowed to vote in Florida. Of those individuals on the list, 90% were not ex-cons and more than half—about 54%—were African-American or Latino.<sup>141</sup> Thus, low voter turnout combined with efforts to disenfranchise minority voters can have a significant impact on the political power of African-Americans, particularly in those states where they can serve as the swing vote. Districts 3, 17, and 23 have traditionally had the lowest voter turnout in the state of Florida, and the vote has been so close in past elections to suggest that any efforts at

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138. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, *County Voter Registration By Congressional District* (2006), available at <http://election.dos.state.fl.us/voterreg/index.shtml> (last visited Jan. 29, 2008).

139. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, *County Voter Registration by Congressional District* (2006), available at <http://election.dos.state.fl.us/voterreg/index.shtml> (last visited Jan. 29, 2008). Similarly, Corrine Brown, representative of the 3<sup>rd</sup> Congressional District in Florida and the remaining majority-African-American district, was supported by a substantially low proportion of the registered Democrats in her district. In 2000, a presidential election year, she received 102,000 votes compared to the 189,000 registered Democrats in her district. *Id.*

140. *How We Got Here: A Timeline of the Florida Recount*, Dec. 13, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/12/13/got.here/index.html> (last visited Jan. 29, 2008). If one compares voter turnout in majority-minority democratic districts to majority Caucasian districts, this is another indication of: low voter turnout among minorities generally and the effects of majority-minority districting. For example, in Florida's second congressional district, which is a competitive Democratic district represented by Rep. Allen Boyd, who is white, most of the 239,000 registered Democrats in the district turned out to vote on election day in 2004. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, *County Voter Registration By Congressional District* (2006), available at <http://election.dos.state.fl.us/voterreg/index.shtml> (last visited Jan. 29, 2008). In Meek's noncompetitive Seventeenth District, there are more than 100,000 fewer registered voters. *Id.* It is clear that, even in a presidential election year where voter turnout is at its highest, turnout in noncompetitive majority-minority districts is not as high as it could be.

141. Gregory Palast, *Vanishing Votes*, THE NATION, May 17, 2004, available at <http://www.thenation.com/doc/20040517/palast>.

political mobilization in these districts could have a dramatic effect.<sup>142</sup>

While it is difficult to predict which state, if any, will be the state on which the outcome of the election may depend, increased voter registration in states that have traditionally been outcome-determinant will have the benefit of forcing elected officials to take note of African-American voters because of their potential to be the “swing” vote. Even in Ohio, where low voter turnout as a result of majority-minority districting may be less of a problem because there is only one majority-minority district, political mobilization within the state is still very important because it prevents elected officials from ignoring the African-American community.

In any event, there still may be some discernible impact on voter turnout from majority-minority districting in Ohio; there are also significant concerns regarding efforts to disenfranchise minorities within the district due to their potential to be the swing vote.<sup>143</sup> Stephanie Tubbs Jones, congresswoman from District 11, has run unopposed in several election cycles, and faced minimal opposition in the most recent 2006 election. Tubbs lodged a formal complaint maintaining that Ohio’s electoral votes in the 2004 presidential election should not count, citing voting irregularities that denied hundreds and perhaps, thousands of individuals in her district and in the greater Cleveland area, the opportunity to have their vote count.<sup>144</sup> Voter turnout in Tubbs’ district in 2004, however, was the highest that it had been in her ten year career.<sup>145</sup>

142. Unlike in 2000, Bush was the overwhelming winner of the state of Florida in 2004. CNN Election Results 2004, <http://www.cnn.com/ELECTION/2004/pages/results/states/FL/P/00/> (last visited Feb. 4, 2008). Bush won by a little less than 400,000 votes. *Id.* However, it is unclear which political party will prevail in the state in 2008. See McDonald, *supra* note 110 (noting that turnout will suffer in 2008 in states like Florida, Illinois, Michigan, and Pennsylvania because of largely uncompetitive statewide races).

143. The negative impact of majority-minority districting tends to be less severe in the North where voting is less racially polarized and other minorities offset the losses caused when African-Americans are packed in these districts. LUBLIN, *THE PARADOX OF REPRESENTATION*, *supra* note 13, at 92-3.

144. Stephanie Tubbs Jones and Barbara Boxer, Election Reform: 109<sup>th</sup> Congress, <http://tubbsjones.house.gov/common/popup/popup.cfm?action=item.print&itemID=105> (last visited Jan. 29, 2008). James Dao, *The 2004 Campaign: Ohio; GOP bid to Contest Registrations is Blocked*, N.Y. TIMES, Oct. 28, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D06E0DB123DF93BA15753C1A9629C8B63> (federal judge blocked GOP efforts to knock tens of thousands of registered voters off of the rolls). But see James Dao, *In Ohio Vote, Woes, Yes, Fraud No*, June 23, 2005, N.Y. TIMES, available at <http://www.nytimes.com/2005/06/23/politics/23voting.html?adxnnl=1&adxnnlx=1196788510-TBLkYYz89VDS0D8H7XWghA> (discussing a Democratic National Committee study that found that one in four Ohio voters had problems at the polls during the 2004 election, but concluding that this did not contribute to Bush’s narrow victory in the state).

145. BARONE, *supra* note 126, at 1303-04. The high voter turnout may also have resulted because of other competitive elections in Ohio. See McDonald, *supra* note 110 (noting that Ohio’s competitive Senate race and some House races might also draw voters to the polls). However, if Obama wins the Democratic primary, this might result in an increase in voter turnout. When he won the Iowa Democratic caucuses on January 3, 2008, voter turnout was 227,000, almost double what it was in 2004. *Huckabee, Obama Enjoy Huge Night In Iowa Caucuses*, Jan.

Furthermore, a recent study on voter turnout in Ohio from 2002 to 2006 has shown that African-Americans in Ohio voted at a greater rate than the national rate for African-Americans.<sup>146</sup> While majority-minority districting may not have the same effect of depressing voter turnout in Ohio as it does in Florida, this form of districting likely instigated the voting irregularities and attempts to disenfranchise minority voters in District 11 of which Tubbs complained, practices that could certainly impact voter turnout in the 2008 election. Thus, Ohio and Florida evoke different concerns regarding majority-minority districting, but these concerns can be addressed by political mobilization, with its corresponding increase in voter awareness and education.

Besides the data that can be obtained about individual majority-minority districts verifying the low voter turnout, the larger body of political science literature also cannot rule out, and indeed in some cases suggests, that majority-minority districting precipitates low voter turnout. In fact, prior to the groundbreaking work by Professor Bernard Grofman, the idea was that these districts should consist of approximately 65% African-American in order to account for low voter turnout,<sup>147</sup> but the reality is that there is a significantly negative relationship between the percentage that a district is African-American and its voter turnout figures. For example, one commentator noted that outside of the South each one percent rise in the African-American population leads to a 1/3 of 1% drop in voter turnout.<sup>148</sup> This must be considered in tandem with the research that has indicated that minority representatives can win in districts that have far fewer minority voters.<sup>149</sup>

Over the last decade, scholars have tested whether majority-minority districts depress minority voting, and the results are largely inconclusive.<sup>150</sup> In

2, 2008, <http://www.cnn.com/2008/POLITICS/01/04/iowa.caucuses/index.html#cnnSTCText> (last visited Jan. 29, 2008); *Obama Wins Iowa As Candidate For Change*, Jan. 4, 2008, <http://www.cnn.com/2008/POLITICS/01/03/iowa.dems/index.html#cnnSTCText> (last visited Jan. 29, 2008).

146. Benjamin Spears, *Ohio Votes: Civic Engagement in the Buckeye State, 2002-2006* 9 (2008), available at [http://projectvote.org/fileadmin/ProjectVote/Publications/Ohio\\_Votes/OhioVotesReport.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Ohio_Votes/OhioVotesReport.pdf).

147. Grofman et al., *supra* note 119; Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1241 (1999) (noting that “only in Florida may a sixty-five percent rule be necessary” but concluding that they are likely unnecessary because “blacks have consistently won in three districts in which the population is less than sixty-five percent black”).

148. See Hill, *supra* note 119, at 15.

149. See discussion Part I(D), *supra*; Bullock & Dunn, *supra* note 147, at 1211-12 (following Shaw the concern was that these decisions would result in “the ultimate bleaching of the U.S. Congress’ and other collegial bodies” but “[d]espite the dire predictions, all but one incumbent successfully sought re-election in the reconfigured congressional districts”).

150. Low voter turnout among African-Americans is assumed by scholars. See, for example, Lisa Handley and Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH 338 (Chandler Davison and Bernard Grofman eds., 1994) (stating that “black majority districts were not quite as polarized as white ones

assessing voter turnout in the South during the presidential elections from 1968 until 1996, Professor John McNulty noted that because southern African-Americans are generally lower in socio-economic status, more rural, and younger than the average Southerner, their turnout tends to be lower.<sup>151</sup> Another scholar concluded that majority-minority districting mobilizes minority voters, but this conclusion was reached by studying mayoral campaigns.<sup>152</sup> Professor Claudine Gay has indicated that greater involvement in electoral politics results when districts are majority African-American and Latino, but this study was limited to California.<sup>153</sup> Another study shows some correlation between voter turnout and majority-minority districting in Florida, but could not effectively conclude that the creation of majority-minority districts had an effect on turnout because the data suggested both increases and decreases in turnout over time.<sup>154</sup> In contrast, Professor Kevin Hill, who studied the 1996 congressional elections, found that “these districts in and of themselves have little independent effect on voter turnout or racially polarized voting one way or the other. However, relative concentrations of African-Americans and Latinos within certain districts do have some important, measurable effects on turnout and polarized voting which are not limited to whether or not a district is simply above or below 51% minority.”<sup>155</sup> Thus, scholars largely have been unable to eliminate majority-minority districting as a factor in low voter turnout among minorities, and the results have varied depending on the election, the state, the minority group, and the time period studied.

Additionally, competitiveness influences voter turnout, and as illustrated above, these districts, long represented by incumbents, trail their white counterparts in voter registration and turnout.<sup>156</sup> Many scholars have noted the “immunizing” effect of incumbency, which is at least partly responsible for the

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probably stemmed from the relatively low black turnout in black districts” but suggesting that turnout increased when the actual electorate became majority African-American).

151. John McNulty, *Partisan Effects of Voter Turnout: Turnout Effects by Race and Region*, 28 AM. POL. RES. 408-429, 12 (2000), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1027&context=igs>. Claudine Gay, *The Effects of Minority Districts and Minority Representation on Political Participation in California* 19 (Public Policy Institute of California 2001), [http://www.ppic.org/content/pubs/report/R\\_601CGR.pdf](http://www.ppic.org/content/pubs/report/R_601CGR.pdf) (noting that the “African-American community as a whole has higher concentrations of young, undereducated, and low-income individuals,” factors which discourage electoral involvement). On a related issue, another scholar noted that majority-minority Latino districts tend to increase voter turnout among Latinos, but this finding was made without any consideration of the effects of incumbency and competitiveness and was also limited to voter turnout in five Southern California counties. Matt A. Barreto, Gary M. Segura, and Nathan D. Woods, *The Mobilizing Effect of Majority Minority District on Latino Turnout*, 98 AM. POL. SCI. REV. 65 (Feb. 2004).

152. Brace et al., *supra* note 13.

153. Gay, *supra* note 151, at vi.

154. Handley et al., *supra* note 133.

155. Hill, *supra* note 119, at 12-13.

156. Gay, *supra* note 151, at 34.

low voter turnout in majority-minority districts.<sup>157</sup> For example, Professors John Petrocik and Scott Desposato studied the Democratic congressional losses in 1992 and 1994, and noted that the key difference between Democratic wins in the 1980s and their losses in the early part of the nineties is that “the pro-GOP tides of the nineties followed a redistricting that left many Democratic incumbents with districts in which 40% or more of the constituents were new to the incumbent and “unimmunized” by incumbency.<sup>158</sup> It is apparent that, given the difficulty of unseating incumbents and the effect of incumbency on voter turnout, incumbency must be taken into consideration when gauging the impact of these districts.<sup>159</sup>

Thus, the best way of increasing the likelihood that African-American voters will be instrumental in determining the outcome of the next election and of future elections is to politically mobilize in noncompetitive majority-minority districts in swing states, thereby forcing the next administration to take an interest in issues that affect this community. As the next section shows, this type of grassroots political mobilization has proven effective in the past, and can serve the interests of African-American voters in the next election.

#### *B. Protecting the Quantity of the African-American Vote: Grassroots Movements, Coalitions, and Voter Disenfranchisement*

Thirty years ago, the U.S. Commission on Civil Rights noted that the great increase in minority registration and voting since the passage of the Voting Rights Act of 1965 “has meant that politicians can no longer afford to ignore minority voters.”<sup>160</sup> The increase in minority voters led to legislative redistricting that took advantage of this increase, but the current situation is one in which there is a jurisprudential attack on race-conscious redistricting and the disappointing number of registered African-American voters does not reflect the potential for greater African-American influence on politics. The focus must change to alternative means of protecting the quality of the African-

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157. See Hirsch, *supra* note 86, at 204 (“Districting plans that combine extreme partisan bias with record levels of incumbency protection undermine political competition not only at the level of districts, where elections become foregone conclusions, but also at the institutional level, by effectively barring one political party from taking control of the legislative body even if it repeatedly garners a majority of the popular vote.”).

158. John R. Petrocik and Scott W. Desposato, *The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994*, 60 J. OF POL. 618 (Aug. 1998).

159. Gay, *supra* note 151, at iii (noting that “turnout among minority voters is high wherever they are able to play a meaningful role in political life”). This is not to say that incumbency, in and of itself, is problematic, just that its effects have to be accounted for. See LUBLIN, *THE PARADOX OF REPRESENTATION*, *supra* note 13, at 61-62 (noting that seniority in the House correlates to committee chairmanships).

160. See U.S. Comm’n on Civil Rights, *The Voting Rights Act: Ten Years After* at 155 (Jan. 1975) (“In many areas the great increase in minority registration and voting since the passage of the Voting Rights Act in 1965. This has brought about a significant decline in racial appeals by candidates and has made incumbents and candidates more responsive to minority needs”).

American vote, by increasing the number of voters through coalitions and grassroots movements. The old adage that there is power in numbers still holds true, although it has been largely forgotten in the litigation-centered approach asserted by minorities in the last two decades.

Grassroots campaigns have been successful in increasing voter turnout in local, state, and national elections. Consistent with the sociological perspective of the behavior of political actors, discrete groups of voters can combine their voting strength in order to further the interests of each sub-unit and the group as a whole by focusing on one common goal. For example, Harold Washington was elected as the first African-American mayor of Chicago as a result of the greatest grassroots movement that the City of Chicago had ever experienced—individuals with somewhat diverging political interests knocked on doors, transported people to polling stations, and encouraged others to vote in both the primary and general election because they were united by the common goal of ensuring Washington's election to the office of mayor.<sup>161</sup> Professor Grimshaw characterized Harold Washington's campaign as "three campaigns rolled into one" because it included the formal Washington campaign organization and also interest groups ranging from "Artists for Washington to Women for Washington, and just about everything else in between: labor, education, business, and of course, students" as well as the "Sound and Light Show," consisting of black nationalists whose techniques often clashed with those of the more formal campaign.<sup>162</sup> The voter registration drive initiated by these groups produced an additional 125,000 African-American voters in the primary alone, which ultimately convinced Washington to forget about his congressional campaign and run for mayor.<sup>163</sup>

Undoubtedly, Obama has the same ability to produce a substantial increase in minority voters. Obama, in particular, is running under a strategy similar to the one that Washington used in the 1980s by chanting the mantra of change.<sup>164</sup> This movement can be transferred to majority-minority districts in swing states because the importance of increasing the quantity of the minority vote is clear. Minorities have to utilize their votes as currency to be exchanged for competent representation by taking this problem in hand rather than trying to curry favor with the courts. Consistent with the economic perspective, legislators must believe that it is in their self-interest to respond to the discrete interests of this constituency, which is something that voters, and not the courts, can make happen. Pulling back from their traditional reliance on the courts to protect the quality of the African-American vote will be difficult.

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161. GRIMSHAW, *supra* note 27, at 163, 171.

162. *Id.* at 172.

163. *Id.* at 163.

164. Barack Obama, *Remarks of Senator Barack Obama: A Change We Can Believe In* (Nov. 3, 2007), available at [http://www.barackobama.com/2007/11/03/remarks\\_of\\_senator\\_barack\\_obam\\_30.php](http://www.barackobama.com/2007/11/03/remarks_of_senator_barack_obam_30.php) (last visited Jan. 29, 2008).

However, the Supreme Court's most recent decision in *LULAC* mandates that African-Americans revert back to increasing voter turnout and registration in key communities to elect their representatives of choice. This shift should translate into power and momentum in future elections.

With coalitions, minorities can elect the candidate of their choice in districts where this would otherwise be impossible. For example, in 1992 seven of the thirteen African-American representatives elected to the U.S. House of Representatives were elected from districts in which African-Americans and Latinos comprised 55% or more of the voting age population.<sup>165</sup> Coalitions have played an important role in most elections in which African-American candidates won in majority Caucasian districts; between 1972 and 1994, African-Americans won 72 of the 5,079 elections held in majority Caucasian districts and 45 of these victories occurred in districts where African-Americans and Latinos formed a voting majority.<sup>166</sup> Professor Gay has suggested that there should be more African-American/Latino, multi-ethnic districts in the next round of redistricting because African-American voter turnout is higher where coalitions are formed than when their votes are submerged by a Latino or Caucasian majority.<sup>167</sup> The advent of coalitions may ultimately lead to reduced dependence on vote dilution claims and majority-minority districting to achieve political equality. However, African-Americans have to be willing to invest in their political capital at the cost of losing at least some elections in the short-term. As Professor Nelson has noted, "in this circumstance [where African-Americans have lost an election] the African-American community would presumably be in a stronger political position having built strategic, multiracial alliances and coalitions than if it had simply lost the district to a white candidate without building those relationships."<sup>168</sup>

Difficulties arise because Latino and African-American voters tend to have different policy preferences, and Latino voters often vote similarly to Caucasian voters.<sup>169</sup> However, in studies of both African-American and Latino majority-minority districts, the reoccurring theme is that if there is no political mobilization because of non-competitive elections, then there will be low voter

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165. Lublin, *supra* note 100, at 183.

166. *Id.* at 184.

167. Gay, *supra* note 151, at viii.

168. Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1312 (2007).

169. Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 99 (2006) ("For Latinos, unlike with black and white voters, economic status is a reliable predictor of partisan loyalties. A low-income Latino predictably can be expected to vote Democratic, just as a high-income Latino is likely to vote Republican. Perhaps Latino voters, many of whom are immigrants who have lived outside of the dominant, tortured racial narrative of black-white opposition in the South, feel free to vote their economic interests.").

turnout leading to less substantive representation.<sup>170</sup> Oftentimes, African-American voters can form coalitions with Caucasian voters where they share similar policy preferences.<sup>171</sup> Coalitions between the two groups can force elected officials to be more responsive, make minorities feel invested in the election process, and decrease the dangers inherent in low voter turnout. Low voter turnout increases the probability that there will be an unresponsive local, state, or national executive. While the goal is to ensure that both parties will be responsive to minority interests, we are far from that reality. Increased political activism, however, still remains the best long and short-term solution for minorities. Initially, African-Americans have to start simple: vote and register others to vote. Gains in African-American representation therefore will not come at the expense of other minority interests within the state by the “packing” necessary to create majority-minority districts

The notion of political mobilization is consistent with the approach followed by minorities in the early 1980s in the face of a hostile Supreme Court.<sup>172</sup> This strategy increases the ability of these communities to effectively lobby the state legislatures and Congress to pass favorable legislation since the Supreme Court’s jurisprudence is increasingly dominated by an adherence to “legal fictions” and ignorance of political realities.<sup>173</sup>

*Crawford v. Marion County* is an example of the legal fiction that perpetuates much of the case law. *Crawford* upholds a voter identification law that likely burdens the voting rights of minorities, and the state’s justification, addressing voter fraud, is at best speculative and also addressed by other state laws. In *Crawford*, the Seventh Circuit found that Indiana’s voter identification law was a valid exercise of the state’s interest in preventing voter fraud.<sup>174</sup>

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170. Gay, *supra* note 151, at vi (“Latino and African-American voter participation is highest in congressional districts where [these groups] are able to play prominent roles in deciding political outcomes”).

171. Melissa Harris Lacewell, *Are Blacks Returning to the Party of Lincoln?*, <http://melissaharrislacewell.com/docs/blacksgopoped.pdf>. (“Many Americans have wrongly assumed that all black people are Democrats. Under this assumption, the existence of several hundred black Republicans on the convention floor seems like a shocking new development. But 10 percent of the African-American vote has been solidly and stably Republican since the end of the New Deal. Although the vast majority of the black vote goes to the Democratic Party, the Republican minority has been a consistent reminder that not all African-Americans think alike politically.”).

172. See discussion of *Mobile*, *supra* note 6.

173. Issacharoff, *supra* note 23, at 1891 n. 291. Professor Issacharoff notes: [M]inorities have had notable success in overturning adverse Supreme Court decisions through legislation, as with the 1982 Voting Rights Act amendments, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1988)) (overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980)), the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a (1988)) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)), and the Civil Rights Act of 1991, Pub. L. No. 102-166 (overturning in whole or in part eight adverse Supreme Court employment discrimination decisions).

*Id.*

174. 472 F.3d at 951 (7<sup>th</sup> Cir. 2007), *aff’d*, 128 S.Ct. 1610 (2008).

Judge Posner, who authored the opinion, noted that it is “no doubt most people who don’t have photo identification are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates.” However, he finds that the state has a legitimate interest in reducing voter fraud and this law will only disenfranchise a few voters.<sup>175</sup> This opinion is remarkable for its honesty—Judge Posner concedes that no one has been convicted of voter fraud in Indiana, but speculates that this could be because of under enforcement of minor criminal laws. It is unclear why a state can pass a law that likely burdens voting rights (which, admittedly, is a contention that is speculative in and of itself) in order to combat a problem that it is already addressed by laws that Indiana does not enforce, a fact that is more troubling than the speculative nature of the harm. In fact, most voter fraud comes from absentee voting as opposed to voter impersonation at the polls.<sup>176</sup>

In other words, one does not have to speculate about the legislature’s motivation in passing this law, and indeed this is what is most troubling about the majority’s decision to uphold it because this law is clearly more than a strike at voter fraud. As Judge Evans pointed out in dissent, “The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>177</sup> After the recent Supreme Court ruling, the voter-identification law still stands.<sup>178</sup>

The *Crawford* decision is a natural extension of *LULAC*, which is grounded in the same type of legal fiction but under the rubric of electoral competition. In a recent debate, scholars have questioned whether the decision will have any impact at all, since most Americans have valid ID; indeed, Judge Posner notes this fact as well.<sup>179</sup> It is likely, however, that this law will be an added burden on the ability to vote, for no longer can a person go exercise the franchise in Indiana and provide a utility bill or a work id or some other form of identification in order to prove his identity.<sup>180</sup> Thus, there will be fewer voters

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175. *Id.* at 952.

176. Carolyn Tuft, *Dead Woman Votes in StL Primary*, ST. LOUIS POST-DISPATCH, Jan. 30, 2008, available at <http://www.stltoday.com/stltoday/news/stories.nsf/stlouiscitycounty/story/3121BD9112533D27862573E000521D94?OpenDocument>; Nick Werner, *Delaware County Voting Investigated*, THE INDIANAPOLIS STAR, Feb. 1, 2008, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=2008802010487>.

177. *Crawford*, 472 F.3d at 954.

178. 128 S.Ct. 1610 (2008).

179. Debate between Professors Bradley Smith and Edward B. Foley, *Voter ID: What’s At Stake?*, available at <http://www.pennumbra.com/debates/debate.php?did=12>; *Crawford*, 472 F.3d at 952.

180. Todd Rokita, Indiana Secretary of State, *PhotoID.IN.gov*, <http://www.in.gov/sos/photoid/> (last visited April 21, 2008) (stating that in order to vote, Indiana residents have to present government issued identification that meets four requirements: it must display the individual’s photo; it must display the same name that is on the individual’s voter registration record; it must display an expiration date and be current (or have recently expired); and it must have been issued by the state of Indiana or the federal government).

because of the higher transaction costs of voting.<sup>181</sup> These laws may have minimal effect where a person's vote does not correspond to any significant change in the outcome of an election, but will have greater impact in those states where minority votes could potentially be outcome-determinative. Since the Indiana law has been upheld, it is possible that other Republican-dominated state legislatures in swing states may follow suit and pass similar laws.<sup>182</sup> Minorities will then be more likely to be disenfranchised, or face "vigorous" enforcement of a state's voter identification law in those areas where their votes are crucial.<sup>183</sup> The voter identification laws are especially pertinent because the presidential election of 2008 could possibly be a close and contentious race, where the margin of votes in any particular state can make a difference in the outcome of the entire election.

#### CONCLUSION: THE ULTIMATE LESSON FOR 2008 AND BEYOND

The lesson for 2008 is that the African-American community should not have the courts decide the contours of their vote, or dictate how African-Americans have defined themselves politically. The courts have a skewed view of politics, political behavior, and of what constitutes adequate representation. African-Americans must dictate their political future, and this is especially true as we stand on the brink of a historical election, potentially resulting in the election of the first minority President of the United States. African-American voters must politically mobilize in order to achieve the very purpose for which the Voting Rights Act was passed, the purpose for which the Supreme Court has no longer proven able to bring about: the ability of African-Americans to elect accountable representation.

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181. Lee, *supra* note 26, at 194 ("The general implication of economic analysis is that if the cost of engaging in an activity goes up, people will engage in it less, and vice versa.').

182. *Crawford*, 2007 WL 4351592 (amicus curiae brief of Texas, Florida, Alabama, Colorado, Hawaii, Michigan, Nebraska, Puerto Rico, and South Dakota in support of Indiana and its voter identification law).

183. Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C. L. REV. 1283, 1292 (2001) ("while minority electoral empowerment has typically focused on voter registration, voter education, and get out the vote efforts, the Florida experience demonstrates that equal attention has to be given to monitoring disparities in balloting and mechanisms for counting ballots").