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# Race and Redistricting

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## Keywords

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## Abstract

This review examines the role of race in the decennial process of redistricting. I review the scholarly literature on three related questions: What role should racial redistricting play in the representation of racial interests, how may racial redistricting be used, and what is the connection between racial redistricting and the substantive representation of racial minorities? The review briefly examines the normative question of racial representation and then focuses on the last two topics: empirical research on how racial interests are represented in legislatures and legal questions concerning the use of redistricting to produce descriptive representation. Racial redistricting enhances the representation of racial interests in legislatures, and the legal status of the districts is complex; therefore, litigation will proceed on a heavily fact-based, case-by-case basis in which political scientists will continue to play a vital role with their research on racially polarized voting and representation.

## INTRODUCTION

Racial issues have figured prominently in recent American politics in connection with the nationwide protests in the wake of the George Floyd murder, Black Lives Matter, criminal justice reform, critical race theory, immigration politics, so-called woke capitalism, and cancel culture. One other issue may not have captured as many headlines or viral social media attention but is vitally important: the role of race in the decennial process of redistricting.

The scholarly literature on this topic has examined three related questions: What role should racial redistricting play in the representation of racial interests, how may racial redistricting be used, and what is the connection between racial redistricting and the substantive representation of racial minorities? This review briefly examines the normative question of racial representation and then focuses on the last two topics: empirical research on how racial interests are represented in legislatures and legal questions concerning the use of redistricting to produce descriptive representation. I begin by defining some key terms.

## DEFINING RACIAL REDISTRICTING AND DESCRIPTIVE REPRESENTATION

Every 10 years, the US Census determines how population shifted and grew in the previous decade. Based on these changes in population, some states gain House seats and others lose seats (reapportionment), but all states must engage in redistricting to redraw legislative district lines to account for population shifts within the state (both for state legislatures and the US House of Representatives). The term racial redistricting simply refers to redrawing district lines to advantage one racial group of voters over another. The earliest examples of racial redistricting involved attempts by White politicians to restrict the voting power of African Americans by dividing concentrations of Black voters across multiple districts or simply removing them from a voting jurisdiction. For example, in 1957, the Alabama state legislature changed the shape of the boundaries of Tuskegee from a square to "an uncouth twenty-eight-sided figure" (*Gomillion v. Lightfoot* 1960, p. 339) in order to remove all but four or five of the Black voters from the city (while not affecting any White voters). The Supreme Court ruled that this was unconstitutional because it restricted the rights of Black voters.

More recently, racial redistricting refers to creating legislative districts in which a majority of the voters are racial minorities to increase the number of minorities in elective office. The most important example was in 1992, when state legislatures created 15 new US House districts that were specifically drawn to help elect Black representatives and 10 districts that were drawn to provide an opportunity to elect new Latino members. The 1992 elections produced a 51% increase in the number of Blacks and Latinos in Congress (from 37 to 56)—the largest infusion of new minority members in the history of Congress. However, as I discuss below, the Supreme Court has viewed this type of racial redistricting with great skepticism.

Efforts to increase the number of minority office holders is linked to descriptive representation, i.e., having representatives who mirror the demographic characteristics of their constituents. At the individual level, in a descriptively representative legislature, Black constituents would be represented by Black representatives, Whites by Whites, Latinos by Latinos, and so on. At the institutional level, a descriptively representative Congress would look like America: That is, it would have about the same demographic profile as the nation.

## SHOULD DESCRIPTIVE REPRESENTATION BE A GOAL OF REDISTRICTING?

Debates about the value of descriptive representation are closely linked to normative theories of racial identity and racial politics. Space limitations preclude a full discussion of that literature, but I outline the range of positions as they relate to descriptive representation and racial redistricting. There are two basic areas of debate. The first concerns the value of descriptive representation itself, and the second explores the connection between descriptive and substantive representation.

Those who see distinct value in descriptive representation point to the importance of role models and note the benefits that come from the simple fact of being represented by someone who shares something as fundamental as racial identity. The intangibles of descriptive representation and the role models that help create greater trust in the system are important. Even Thernstrom (1987, p. 239), a strong critic of Black-majority districts, sees the advantages of having racially diverse political bodies. She writes:

> Whether on a city council, on a county commission, or in the state legislature, Blacks inhibit the expression of prejudice, act as spokesmen for Black interests, dispense patronage, and often facilitate the discussion of topics (such as Black crime) that Whites are reluctant to raise. That is, governing bodies function differently when they are racially mixed, particularly where Blacks are new to politics and where racially insensitive language and discrimination in the provision of services are long-established political habits.

This same logic has produced a strong commitment to racial diversity in corporate America, in higher education, and in the public sector. Proponents of this view are likely to support racial redistricting because they see inherent value in descriptively representative legislatures.

Mansbridge's (1999) classic article shows that descriptive representation has value unrelated to substantive representation. First, it improves the quality of deliberation by enhancing communication in a context of mistrust and by providing "innovative thinking in contexts of uncrystallized, not fully articulated, interests" (Mansbridge 1999, p. 628). Descriptive representation also creates a "social meaning of 'ability to rule'" (p. 628) for historically excluded groups and promotes the legitimacy of the political system by addressing the effects of past discrimination.

Critics of this view argue that the nation needs to move beyond race and adopt a color-blind view. From this perspective, racial redistricting is nothing more than affirmative action for Black politicians, or worse, as Justice Sandra Day O'Connor argued, a form of "political apartheid" that racially segregates voters (*Shaw v. Reno* 1993). The simple act of racial classification is bad, no matter the context. While recognizing that there may be some value in descriptive representation, this perspective argues that more damage is done to long-term race relations by continuing to focus on racial differences.

The second area of normative debate examines the linkages between descriptive and substantive representation; that is, should the race of a representative make any difference for how responsive he or she is to voters' interests across a range of issues? The dividing line is between those who view this question in terms of the politics of difference and those who see it as the politics of commonality (Canon 1999, ch. 1). Those who view politics through the lens of race and require representation of distinctive minority interests by minority representatives are practicing the politics of difference. Descriptive representation becomes critical if inherent differences are recognized in terms of identities and shared experiences rather than ideas and opinions (Guinier 1995, Phillips 1995, Hawkesworth 2003, Young 2012). Recent work has extended the idea of the politics of difference to show how identity politics helps shape American foreign policy (Chua

2018), Native American identity (Montgomery 2017), and White identity (Jardina 2019). From this perspective, White politicians cannot provide substantive representation for minorities because they cannot understand what it means to be Black or Latino, despite their best intentions and efforts. However, descriptive representation does not guarantee substantive representation. Advocates of this view argue that in their legislative roles, Republican politicians such as Tim Scott (R-SC) do not provide substantive representation for African Americans. Thus, the politics-of-difference perspective would see descriptive representation as a necessary but not sufficient condition for substantive representation of racial and ethnic interests.

Shifting to the opposite end of the spectrum, the extreme version of the politics of commonality is the deracialization, or color-blind, perspective (Thernstrom & Thernstrom 1997, Thernstrom 2009). This perspective holds that the race of a member of Congress does not matter because racial issues are no longer central (or at least should not be central) to American politics. One variation of this view holds that while there still may be some issues that divide Americans along racial lines, politicians should attempt to find common ground and represent the interests of all their constituents. Furthermore, the race of the member is irrelevant in providing substantive representation because policy positions and ideas matter more than the color of one's skin. That is, descriptive representation is not a necessary condition for substantive representation.

A middle-ground approach is the balancing perspective of the politics of commonality. This conception of racial representation holds that there are distinct racial interests and that the optimal style of representation for a member of Congress recognizes those differences and tries to balance the various needs and interests of their constituency. In contrast, the politics-of-difference approach argues that minority representatives should focus on the needs of their minority constituents because their White constituents are represented by other members of Congress. The color-blind approach to commonality does not recognize the representational issues posed by racially heterogeneous districts because it ignores distinctive racial interests.

The balancing perspective produces a different policy focus and a more pragmatic approach to the legislative process than does the confrontational and symbolic approach adopted by some practitioners of a politics of difference, and it is more sensitive to distinctive racial interests than the color-blind approach. The balancing approach also values biracial coalitions in both the electoral and institutional contexts (Canon 1999). Descriptive representation is not a necessary condition for substantive representation; rather, this perspective poses an empirical question whether a representative's race has an impact on how they represent their constituents' racial interests.

Applying the different conceptions of racial representation and their views of the value of descriptive representation to racial redistricting is the next step. The color-blind perspective obviously rejects the legitimacy of racial redistricting. Justice O'Connor, in the most widely quoted passage of the landmark *Shaw v. Reno* decision, argued that racial redistricting "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes" (*Shaw v. Reno* 1993, p. 647).

Even some left-of-center scholars who embrace the importance of descriptive representation do not see racial redistricting as the answer. For example, the late law professor Lani Guinier (1991) argues that winning office in minority-majority districts amounts to a "triumph of tokenism" because minority politicians will never be able to have their voices heard in majority-rule legislatures. She argues for more radical changes in the legislative process, including "proportionate interest representation" (Guinier 1995, pp. 24–27) which would give minorities greater say over issues that are important to them.

Moderates have two concerns about using racial redistricting as a tool for descriptive representation. Some moderates are worried that what they consider wasted votes in supersaturated districts with more than 55% Black populations reduce the total number of potential districts Blacks can win. These critics would like to maximize the number of Blacks in Congress, but they do not see Black-majority districts as the most efficient means to that end. The more optimistic in this group argue that African Americans can win from constituencies that are less than 50% Black, therefore Black-majority districts are not necessary and may place an artificial ceiling on potential Black gains (Guinier 1991). The election of Barack Obama as president in 2008 led many to conclude that minority-majority districts were no longer necessary. However, very few minorities are elected to Congress in White-majority districts (Lublin 1997, Hicks et al. 2018, Lublin et al. 2020).[1]

The second concern is more pragmatic and partisan and argues that creating minority-majority districts diminishes the overall representation of minority interests by reducing the number of sympathetic White Democrats. Lublin (1997) argues that maximizing descriptive representation will reduce the substantive representation of racial interests; thus, racial redistricting poses a "paradox of representation." Hill (1995) shows that four Democratic incumbents lost in 1992 because of racial redistricting, and Lublin & Voss (2000) find that racial redistricting harmed Democrats in all southern states in the 1990s and cost them control of two statehouses. Overby & Cosgrove (1996) find that White Democrats who lost Black constituents to an adjacent Black-majority district were less supportive of racial interests. One study argued that the optimal percentage of African Americans in southern congressional districts to best represent Black interests was 43%. If the percentage is any higher, it reduces the probability of electing White Democrats in the surrounding districts and leads to a net drop in the substantive representation of Black interests (Cameron et al. 1996). The other critical assumption of this argument, that White representatives can effectively represent minority interests, is examined in the next section.

## IS RACIAL REDISTRICTING LINKED TO SUBSTANTIVE REPRESENTATION?

In general, two conditions must hold for racial redistricting to have an impact on the representation of minority racial interests. First, minority representatives must be more responsive to minority constituents than White representatives are. Second, at least some minority representatives must be elected through racial redistricting. Most research on the representation of racial and ethnic interests supports both conditions: Race matters in the House of Representatives and in state legislatures, both at the institutional and individual levels. Some legislators are elected in districts created with the intention of increasing minority representation. However, it should be noted that most minority legislators, at both the state and national levels, are not elected from districts created through racial redistricting (that is, a conscious effort to concentrate minority voters in specific districts), especially after the dismantling of many of the districts in the late 1990s. Rather, most minority state legislators and House members come from districts with high percentages of minority constituents due to segregated housing patterns (Hicks et al. 2018, Brown

[1]There are currently eight Black House members in White-majority districts, but there have only been four Black governors in the history of the United States—and one of those, Pinckney Pinchback, served as a governor of Louisiana for only 35 days (the others are Douglas Wilder, Deval Patrick, and David Paterson; see Brown & Atske 2021). Similar arguments can be made about Latino-majority districts, but the percentage of Latinos must be higher to provide an opportunity to elected Latinos because of the relatively high proportion of noncitizens among the Latino population.

& Atske 2021).[2] However, racial redistricting clearly has had an impact on racial representation in congressional and state legislative politics.

The first wave of research on racial redistricting and representation followed the 1992 round of redistricting, which produced a 51% increase in the number of minority House members. A first-order effect of the new districts was to stimulate the supply of Black candidates to take advantage of the new electoral opportunities (Canon et al. 1996). The racial composition of the pool of candidates in the Democratic primary often determined the nature of representation in that district: When a White candidate ran, a politics-of-difference Black candidate usually won, and when only Black candidates ran, a politics-of-commonality candidate usually won (Canon et al. 1996, Canon 1999). Subsequent research on the "supply side" of racial redistricting confirmed that Black candidates for the US House were most likely to run and win in districts with high percentages of Black constituents (Branton 2009). Shah (2014) finds the same pattern in local elections in Louisiana, and Juenke & Shah (2015) show that Latinos are also more likely to run for state legislative seats when there is a high percentage of Latino voters. However, they argue that supply-side considerations become a self-fulfilling prophesy, as Latino candidates shy away from running in White-majority districts where they actually have had some success.

At the institutional level, the new minority-majority districts created cohorts of members in the Congressional Black Caucus (CBC) and Congressional Hispanic Caucus (CHC) that are highly cohesive but increasingly diverse, as they include many new members from southern rural districts (as opposed to the traditional northern, urban bases). The CBC and CHC are strong supporters of minority interests while also being instrumental in helping mainstream Democratic Party positions succeed (Singh 1998). Lublin (1997, pp. 82–87) finds that House districts with at least 40% Black constituents are more responsive to Black interests, as measured by more liberal patterns of roll call voting. Some of this early research argues that White members of the US House can effectively represent Black interests (Swain 1993) or that the impact of descriptive representation varies (Whitby 1997). Whitby (1997, p. 104) finds that "race has an impact on civil rights proposals, but its impact is periodic; in other words, in some years it has a significant impact but not others." Like Swain, Whitby finds party and region to be much stronger predictors of roll call voting than the incumbent's race. However, in a subsequent analysis, Whitby & Krause (2001) conclude that Black members of Congress do represent Black interests better than White members when racial interests are concentrated, rather than diffuse (as with affirmative action policies). Hutchings et al. (2004) distinguish between Black interest legislation at the amendment and final vote stages; they find that southern Democrats are responsive to the size of their Black constituency on final votes, especially high-profile votes, but not on amendments.

Subsequent work has moved beyond roll call voting to examine other aspects of legislative representation. My research finds that CBC members provided the pivotal votes on crucial legislation in the 103rd Congress, served on a broader array of committees than non-CBC members did, and played an increasing role in the leadership (Canon 1999, ch. 4). Many of the House members elected in 1992 now are in leadership roles in the House.[3] Rocca et al. (2011) find that between the 101st and 108th Congresses, Black legislators attained leadership positions faster than White

[2] But see Lublin et al. (2009) for evidence that race-conscious redistricting plays a central role in creating minority-majority districts. Also see Stephanopoulos (2016) for evidence that more Blacks have been elected because of racial redistricting, especially in the South, but not Latinos.

[3] Most prominently, Jim Clyburn (D-SC) is the Assistant Democratic Leader, and the following committee chairs were all elected in 1992: Rep. Bennie Thompson (D-MS), Homeland Security; Robert Scott (D-VA), Education and Labor; Eddie Bernice Johnson (D-TX), Science, Space, and Technology. Bobby Rush (D-IL) and Sanford Bishop (D-GA) chair House subcommittees.

legislators did. I also find that in the 103rd Congress, CBC members' floor speeches touched on racial issues more frequently than those of Whites, their newsletters and press releases had more racial content, and their staffs were more racially diverse than those of White members who represented districts that were at least 25% Black. Furthermore, commonality-oriented Black members were more likely to serve both White and Black constituents by placing their district offices in both White and Black parts of the district rather than locating district offices only in White suburbs or inner-city areas (Canon 1999). Grose (2011, chs. 4 and 5) provides a more detailed analysis of the racial diversity of congressional staff and placement of district offices and largely confirms these findings. Grose (2011) also concludes that descriptive representation is crucial for constituency service (ch. 4) and providing district projects that are often described as pork (ch. 6).

Scholars have also examined the sponsorship and cosponsorship of legislation to see if descriptive representation matters. Rocca & Sanchez (2008) find that Black and Latino legislators sponsor and cosponsor significantly fewer bills in Congress than Whites and non-Latinos, respectively. However, the relationship is contingent on which party controls Congress: There are more minority bills sponsored in Democratic Congresses and fewer in Republican Congresses. Wallace (2014, p. 924) finds that Latino members cosponsor more bills on three high-salience issues (immigration, labor, and education) than do non-Latino members. My research finds that in the 103rd Congress, CBC members sponsored and cosponsored a far greater proportion of the bills with racial content. For example, 42% of the bills sponsored by CBC members had some racial content, compared with only 5% of bills sponsored by White members of Congress who represented significant African American populations (Canon 1999, ch. 4). Minta & Sinclair-Chapman (2013) demonstrate the importance of descriptive representation for agenda setting over a longer time period, showing that despite the decline of national attention to civil rights and social welfare issues since the 1960s, increased diversity in the House and to a lesser extent in the Senate is responsible for keeping minority interests on the congressional agenda.

Another dimension of racial representation in Congress is committee behavior and oversight. Gamble (2007) finds that Black members participate more in committee markups than White members do, especially on Black interest bills. Minta (2011, pp. 12–14) identifies the practice of "strategic group uplift" among African American and Latino members of Congress as they represent their constituents through legislative oversight. Rooted in the notion of shared fate or the "black utility heuristic" (Dawson 1994, pp. 61–68), strategic group uplift explains why John Conyers, a Democratic representative from Detroit, would spend time in a congressional committee hearing advocating for the interests of a Black farmer in North Carolina. Minta (2011, p. 125) adds to the debate about the importance of descriptive representation by explaining why "black and Latino legislators provide a voice that fellow Democrats, even liberal Democrats, may not systematically provide, at least as it relates to racial or ethnic issues." Minta analyzes 3,000 pages of congressional oversight hearing transcripts from the period 1993–2003, looking at the content of legislators' questions and the frequency of their comments on civil rights issues and social welfare issues. He finds that "black legislators invest the most time, energy, and resources in ensuring that bureaucracies implement civil rights and social welfare policies," followed by Latino representatives and then Whites (controlling for other institutional and constituent-based variables). Given that Woodrow Wilson's [1981 (1885), p. 69] observation, "Congress in session is Congress on public exhibition, while Congress in its committee rooms is Congress at work," still rings true today, Minta's focus on committee oversight deepens our understanding of the representation of racial interests in Congress. In subsequent work, Minta (2021) examines the other side of congressional hearings: advocacy by major Black and Latino civil rights organizations in Congress. Based on an analysis of survey data, group capacity, committee action on civil rights issues, and

testimony before congressional committees, Minta shows that these groups are effective because of the greater diversity of Congress.

Haynie (2001) examines many of these same issues in his comprehensive study of racial representation in state legislatures. He examines a broad range of political behavior, including committee assignments, bill introduction, and success in passing legislation. His index of political incorporation (Haynie 2001, ch. 4) is a useful tool for charting the gains made by Black politicians in state legislatures. The index not only has intuitive appeal but also had some success in explaining variation in policy outcomes, especially in the areas of health care and education expenditures. Gay (2007) also examines racial representation in state legislatures by using a novel data set on referenda and initiative voting to estimate constituency preferences in each of California's 80 Assembly districts. Challenging the view that racial redistricting has weakened representation by creating safe districts, she finds that representatives from minority-majority districts are just as responsive to constituent interests as those from White-majority districts. Juenke & Preuhs (2012) use data on the ideology of state legislators from all 50 states in 1999–2000 to show that Blacks and Latinos represent their districts more like trustees while Whites operate more as delegates. They conclude that White Democrats are not replacements for minority lawmakers. "It is not simply a matter of trading descriptive representation for minority influence in districts represented by White lawmakers. White lawmakers are ideologically different from minority lawmakers, with the latter not only providing responsiveness, but also acting as trustees for minority interests" (Juenke & Preuhs 2012, p. 714; also see Preuhs & Juenke 2011).

Lowande et al. (2019) use a unique data set from Freedom of Information Act requests of 88,000 records of communication between members of the US Congress and federal agencies during the 108th–113th Congresses to examine another aspect of member responsiveness to constituent interests: how members follow through on constituent requests with policy implementation. These authors find that descriptive representation matters. Women, racial/ethnic minorities, and veterans are more likely to work on behalf of constituents with whom they share identities. This empirical work supports experimental research showing racial bias in responsiveness to constituent communication and constituent requests (Butler & Broockman 2011; Broockman 2013, 2014).

Tate (2003) moves beyond a consideration of substantive representation to consider symbolic representation and links to the constituency. She concludes that "without Black members taking part in the legislative process, the symbolic interests, such as the [granting of] congressional medals to Rosa Parks, would not be there. . . . Martin Luther King's birthday becoming a national holiday symbolized the role he played in transforming the country into a true democracy" (Tate 2003, p. 110). While the evidence she presents on substantive representation is mixed, she shows that symbolic representation can be just as important. This is consistent with the argument of Grofman et al. (1992, p. 135): "Although we recognize that White liberal legislators may vote similarly to their Black counterparts on roll call votes, this does not mean that they have the same commitment to a leadership role on civil rights or on economic issues of concern to the Black community." Fenno's (2003) in-depth study of four congressional districts also concludes that symbolic and organizational connections are central to racial representation. He argues that "whenever institution building and political-empowerment efforts are highly valued by the black citizenry, only African American politicians can make and keep the requisite organizational connections with their supportive black constituents. Under those conditions, white politicians can neither lead nor represent" (Fenno 2003, p. 261).

Preuhs & Hero (2011) recognize that descriptive representation matters, but they want to understand *why* the differences in racial representation occur. What are the mechanisms of racial representation? They propose the idea of ideological cuing and argue, "By identifying diverging patterns of the advocacy cues across minority groups, we demonstrate the importance of group

diversity, and not just 'minority' inclusion, in legislative bodies. In other words, it matters that blacks represent blacks and Latinos represent Latinos since black and Latino representatives rely on differing cues for policy advocacy. Each group's descriptive representatives bring unique perspectives to the aggregate decision-making" (Preuhs & Hero 2011, p. 169).

Some research on racial representation focuses on Latinos in state legislatures and the US Congress. Hero & Tolbert (1995) find that a House member's party, rather than Latino identity, explains support for the roll call positions preferred by Latino advocacy groups. Bratton's (2006) study of seven state legislatures in 2001 finds that Latino members are more likely than non-Latinos to introduce bills concerning Latino interests (especially immigration). However, she does not find differences in committee membership, and there is some variation across the states. Casellas (2010) also finds that Latino state legislators are more active on issues that disproportionately affect Latinos, such as immigration and language policy (also see Kerr & Miller 1997 for similar findings).

In one of the most comprehensive studies of Latino representation, Rouse (2013) finds substantial evidence that Latino politicians provide better representation of Latino interests at the state level than non-Latinos do. Her study of seven state legislatures in six different years employs mixed methods (interviews and statistical analysis) in examining roll call votes, sponsorship of legislation, and committee participation. A strength of the book is its focus on legislation related to Latino interests. The standard approach of using general measures of ideology, such as NOMINATE (NOMINAl Three-step Estimation) or ADA (Americans for Democratic Action) scores, is limited, especially in the context of Latino interests and representation. As Rouse correctly points out, Latinos are liberal on fiscal matters but conservative on many social issues. To assume that Latino constituents are better represented by politicians who are generally liberal misses this important point.

The evidence for the impact of racial redistricting on racial representation considered thus far has been on the member side of the representation equation: Black and Latino legislators, overall, represent the interests of their constituents better than White members do, as indicated by their legislative behavior, staff, district offices, and constituency service (Canon 1999, Haynie 2001, Grose 2011). But what do constituents think about being represented by someone who shares their race or ethnicity? Using the National Black Election Study from 1996, Tate (2001, p. 623) finds "that blacks consistently express higher levels of satisfaction with their representation in Washington when that representative is black, even controlling for other characteristics of the legislators, such as political party." Using American National Election Studies data from 1980–1998, Gay (2002, p. 726) finds that "[a]fter controlling for the ideological differences among Democratic legislators, the race of a member of Congress continues to affect the likelihood that a White or black constituent has contacted that legislator. The average black Democratic constituent represented by a black legislator is almost twice as likely to have contacted her MC than a black constituent represented by a white Democrat (16.7% versus 8.8%)." However, Gay finds that descriptive representation is not related to overall trust in Congress, and only Whites have a general preference for descriptive representation. Based on surveys of more than 80,000 respondents, Ansolabehere & Fraga (2016) concur on the latter conclusion. Although they find that Whites, Blacks, and Latinos all prefer coethnic representation, after controlling for party and policy preferences they find that only Whites prefer to be represented by politicians of their own race. Bowen & Clark (2014) support Gay's conclusion on contacts by constituents. Using the 2008 Cooperative Congressional Election Study, they find that Black constituents who are descriptively represented are more likely to contact their member of Congress, to know the party of their member, to say they were satisfied with the contact they had with their member, and to recall a project brought back to their district (Bowen & Clark 2014, pp. 702–3). Tate (2003, p. 160) also finds that

Blacks are more knowledgeable about their representative when that representative is Black, but she points out, "The evidence that descriptive district-based representation empowers Blacks is slight. . . . [Blacks represented by Blacks] are neither more efficacious nor more likely to vote than Blacks represented by Whites."

I mention only briefly an area of research that is somewhat beyond the focus of this article: the intersectionality of race and gender. Bratton & Haynie (1999) examine six states in three years and find that Black legislators introduce more Black interest legislation than do non-Black legislators and that women introduce more legislation of interest to women than do male legislators. They also find that Blacks and women are more likely to support each other's legislation than men; that is, Blacks are more likely than Whites to introduce "women's interest" bills and women are more likely than men to introduce "Black interest" bills. However, while women are generally as likely as men to see legislation they introduce get passed, Blacks are, in three states, significantly less likely than Whites are to pass legislation (Bratton & Haynie 1999, pp. 667–71). Orey et al. (2007) find that Black women in the Mississippi state legislature are more likely to introduce progressive legislation than other members are, but theirs bills are less likely to be enacted into law. Reingold et al. (2021) expand on this research and demonstrate that looking only at race or gender in isolation ignores the impact of the interaction of the two: The presence of women of color in a state legislature has an impact on the legislative agenda and policy outcomes. They find that "on most policy dimensions examined here, the presence and power of (all) women in state legislatures seems to have made very little difference. The picture looks quite different, however, when viewed through an intersectional lens. Taking into account the intersecting gender and racial/ethnic identities of state legislators highlights both the contingent effects of gender and the pivotal role of women of color" (Reingold et al. 2021, p. 170). They go on to show that this impact varies by issue and by state, but the overall patterns are clear.

While the research on racial representation is mixed, several general conclusions may be made. First, general measures of legislator ideology based on roll call votes (such as NOMINATE, ADA, or Leadership Conference on Civil Rights scores) provide little evidence that White and minority legislators represent their constituents differently (Swain 1993, Hero & Tolbert 1995, Whitby 1997). However, when roll call votes with clear racial interests are examined, racial differences do appear (Canon 1999, Whitby & Krause 2001, Rouse 2013). Also, when broader measures of legislative behavior (Canon 1999, Haynie 2001, Gamble 2007, Grose 2011, Minta 2011, Wallace 2014), symbolic politics (Tate 2003, Fenno 2003), and links to the constituency (Canon 1999, Grose 2011, Lowande et al. 2019) are considered, descriptive representation clearly matters. Racial redistricting to create minority opportunity districts clearly improves the representation of racial interests. As Tate (2003, p. 155) summarizes, "Black members in Congress have been the most consistent spokespersons for and champions of Black interests."

While the empirical evidence for the link between racial redistricting and racial representation may be strong, what limitations have been placed on the practice by the courts, and how has political science research influenced those legal debates? The next section explores those questions.

## HOW MAY RACIAL REDISTRICTING BE USED?

### Evolution of the Law

The 1965 Voting Rights Act (VRA) and its amendments provide the legal context within which racial redistricting operates. Hailed as one of the most significant pieces of civil rights legislation in American history, the VRA permanently altered the political landscape of southern politics, which in turn had a significant impact on national and congressional politics. In 1975, Congress extended the Act to apply to certain linguistic minority groups—Asian Americans, Latinos, and

American Indians (Jones-Correa 2005). The central parts of the VRA for racial redistricting are Sections 2 and 5 (see Kousser 2008 for a review). The former prohibits any state or political subdivision from imposing a voting practice which "results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color" [VRA 1965, §10301(a)]. The latter was imposed only on "covered" jurisdictions, i.e., those with a history of past discrimination, which were required to submit changes in any electoral process or mechanism, including redistricting, to the federal government for approval (a step called preclearance).[4] In *Shelby County v. Holder* (2013), the Supreme Court struck down the coverage formula in Section 4(b) of the VRA to determine which jurisdictions are subject to the preclearance requirement of Section 5, which effectively ended the preclearance process. Section 5 was a more powerful part of the VRA for the portions of the country it covered because it could stop discriminatory voting practices before they were implemented, whereas Section 2 claims had to demonstrate a discriminatory effect after such practices were in place (Stephanopoulos 2014). Schuit & Rogowski (2017) examined one effect of Section 5 by analyzing every roll call vote related to civil rights in the House between 1959 and 1998. This approach allows both a before-and-after test for the covered states and a comparison between covered and noncovered states. They find that "legislators from districts subject to the preclearance provision had civil rights support scores 12 percentage points higher than legislators from districts that were not subject to preclearance" (Schuit & Rogowski 2017, p. 519).

In 1980, the Supreme Court initially weakened the VRA by requiring that challenges of a discriminatory electoral law or practice would have to prove that its *intent* was to dilute the voting power of minorities rather than to prove merely that it had that effect (*City of Mobile v. Bolden* 1980). Clearly, this would have made it much more difficult to prove that an electoral practice, such as racial redistricting, diluted the voting power of racial minorities. However, in the 1982 VRA amendments, Congress overturned that interpretation of the VRA and reinstated the "effects" standard for proving vote-dilution claims. The amendments also required that minorities have an equal opportunity to "elect representatives of their choice." The 1982 VRA amendments were passed by the Republican-controlled Senate and Democratic House and signed into law by President Ronald Reagan.

The 1982 amendments went into effect too late to affect the 1980s round of congressional redistricting, but there was one important development in 1986 that shaped the next round of drawing districts: a Supreme Court decision, *Thornburg v. Gingles*, that specified the conditions under which minority voters would have to be given an opportunity to elect representatives of their choice. Specifically, if minority voters were sufficiently compact in their geographic distribution, if they voted cohesively for candidates of their choice, and if Whites voted as a bloc to deny them an opportunity to elect candidates of their choice, minority voters could claim under Section 2 of the VRA that their votes had been diluted (*Thornburg v. Gingles* 1986). This decision, along with its interpretation by the Justice Department, created an expectation for the 1990s round of redistricting that states would create minority-majority districts whenever feasible. This expectation produced 25 new minority-majority districts and a 51% increase in the number of minority representatives in Congress, but it also drew the attention of the Supreme Court.

[4]The original "covered" jurisdictions were the six states of the deep South, Alaska, 26 counties in North Carolina, and one county in Arizona. States in which less than 50% of the voting-age population either registered or voted in the 1964 presidential election and had various discriminatory prerequisites for voting as of November 1, 1964, were subject to Section 5 preclearance. States and jurisdictions could "bailout" from coverage if they could prove the absence of discriminatory practices. The list of covered states evolved in the 1970, 1975, and 1982 Amendments with various bailouts and the addition of other jurisdictions. There were 22 states that had at least some covered jurisdictions before the *Shelby County v. Holder* decision in 2013.

As noted in the Introduction, the first wave of racial redistricting in the 1950s and 1960s was aimed at limiting the voting power of Blacks in the South. Voting rights advocates successfully used the VRA to get the courts to strike down some of those discriminatory maps. In the second wave of racial redistricting, maps were drawn to help elect racial and ethnic minorities to the US House and state legislatures, in many cases for the first time since Reconstruction. However, White plaintiffs challenged these districts with some success.

The landmark decision *Shaw v. Reno* (1993) held that "bizarrely-shaped" Black-majority districts violated the rights of White voters under the "equal protection" clause of the 14th Amendment if the districts were racially motivated and ignored traditional districting practices (Karlan 1993, Pildes & Niemi 1993). Subsequent decisions expanded the scope of judicial scrutiny. *Miller v. Johnson* (1995) established that congressional districts were unconstitutional if race was the "predominant factor" in their creation while moving away from the importance of the appearance of the district. *Miller* also held that compliance with Section 5 preclearance was not an adequate reason for creating a Black-majority district, even when the Justice Department insisted that additional Black-majority districts be added. *Abrams v. Johnson* (1997) upheld the dismantling of two of Georgia's Black-majority districts that followed the *Miller* decision, even though the state legislature had shown a clear preference for keeping one of those two districts during the redistricting process. *Bush v. Vera* (1996) established that protecting incumbents was not a strong enough reason to dislodge race as the predominant factor when both motivations were present (see Hasen 2016 for a good review of the *Shaw* line of cases).

The last case of the 1990s' round of redistricting, *Easley v. Cromartie* (2001), helped address one of the central ambiguities of the *Shaw* line of cases: While race could not be predominant, it was never entirely clear how much race could be considered. At issue was a reincarnation of the target of *Shaw*, the infamous I-85 district (the North Carolina 12th). This was the fourth time that the district had come before the Supreme Court. This version of the district had been pared back to a 47% Black voting-age population, but the federal district court still found that race was the predominant factor in the creation of the district. The Supreme Court disagreed, saying that the lower court decision was "clearly erroneous" (*Easley v. Cromartie* 2001, p. 1456) because it had not been proven that race (rather than partisan motivations) was predominant. The majority opinion pointed out that "racial identification correlated highly with political affiliation" and that the state legislature was attempting to create districts that protected incumbents and were reliably Democratic (*Easley v. Cromartie* 2001, p. 1453). Given that about 90–95% of African Americans in North Carolina register in the Democratic Party and vote Democratic, a district that may appear to have been created for racial reasons could have been drawn for partisan reasons. The entanglement of race and party as motivating factors in redistricting continued to vex the Court for the next 20 years.

Map makers in the 2001–2002 round of redistricting had to try to find the right balance, considering race enough to avoid getting sued by Black plaintiffs under Section 2 of the VRA but not enough to get sued by White plaintiffs using the *Shaw* line of cases and the 14th Amendment of the Constitution. One additional wrinkle for racial redistricting was the "retrogression" principle of Section 5 of the VRA, which prohibited eroding "the position of racial minorities with respect to their effective exercise of the electoral franchise" (VRA 1965, §10304). Defining this concept in the context of racial redistricting is very complex. If the percentage of African American voters is reduced in a given district, does that constitute retrogression even if the opportunity to elect candidates of choice may be enhanced in the adjoining districts? This is precisely the question that came up in several states with the evolving interaction between party and race.

The Supreme Court addressed this issue in *Ashcroft v. Georgia* (2003).[5] In this case, the district court upheld the US House districts and the districting of the lower house of the state legislature that were created in 2002, but it struck down the state senate district plan, saying that it failed the retrogression test by reducing large Black majorities to just under 50%. Political parties eagerly awaited the Supreme Court decision, as Democrats wanted to shore up some vulnerable White incumbents and Republicans preferred to keep the Black voting-age population as high as possible to help Republican incumbents in the adjoining districts. The Bush administration filed a brief against the state plan, but the Court surprised many experts by ruling 5–4 in favor of the Democratic plan, with the conservative five (Rehnquist, Thomas, Scalia, Kennedy, and O'Connor) voting against the liberal four (Souter, Stevens, Ginsberg, and Breyer). This was an instance in which racial consideration trumped partisan concerns on the Court; that is, opposition to districting plans that maximize Black representation was more important for the Court than the Republicans' partisan interests. It was not very often that the same five justices who gave George W. Bush the presidency in *Bush v. Gore* ruled against the Bush administration and the Republican Party when partisan issues were so clearly at stake.

However, before state legislatures and the lower courts had an opportunity to explore the nuances of trading off minority-majority and influence districts,[6] Congress overturned the *Ashcroft* decision. Parts of the VRA were set to expire in 2007, so Congress was eager to extend the law before the 2006 midterm elections. The House and Senate Judiciary Committees held 21 hearings over 10 months and heard testimony from more than 90 witnesses, building a voluminous record on a variety of questions. One of those issues was whether to restore the retrogression standard to its pre-*Ashcroft* state, the "*Ashcroft* fix" (Grofman 2006, Canon 2008). The fix was included in the final legislation, which passed unanimously in the Senate and by a 390–33 margin in the House; thus, any redistricting plan that would reduce the number of "ability to elect" or "opportunity" districts would be retrogressive in states covered by Section 5.[7] Scholars debated exactly how this would play out, but the consensus was that it did not mean that districts' percentages of minority voters were frozen into place (Persily 2007, Epstein & O'Halloran 2008). Instead, a state legislature was able to reduce the percentage of minority voters in a given district as long as the district still provided minority voters an equal opportunity to elect candidates of their choice.

In the last round of redistricting in 2011–2012, at first the court cases concerning racial redistricting became less frequent because redistricters started drawing more compact districts and the Justice Department was not quite as eager to bring cases in the Obama administration as it had been in the Bush administration (Hasen 2016, p. 372). However, in a series of cases starting in 2015, "racial gerrymandering doctrine morphed again and came roaring back to life" (Li 2019, p. 138), this time with Black plaintiffs claiming that their voting power was being diluted by being packed into safe districts that wasted their votes. This was a marked change from previous rounds of redistricting, in which Black Democrats often aligned with Republicans to create the maximum number of Black-majority districts, against the opposition of White Democrats who wanted to unpack Black-majority districts. In *Alabama Legislative Black Caucus v. Alabama* (2015), the Supreme Court ruled that states could not set a uniform Black population threshold (which could be artificially high, thus constituting "packing") but rather had to determine the threshold needed for

[5] Also see *Page v. Bartels* (155 F Supp 2nd 346, 2001).

[6] In influence districts, minority voters do not comprise a majority but still have some influence over determining the candidate who wins.

[7] In the language of the new law, any change in electoral law is retrogressive if it "has the purpose of or will have the effect of diminishing the ability of any [minority group]. . .to elect their preferred candidates of choice" [42 USC § 1973c(b)].

African Americans to maintain their "ability to elect" on a district-specific basis.[8] *Bethune-Hill v. Virginia State Board of Elections* (2017) made it easier to show that race predominated in creating packed districts by clarifying that a conflict with traditional redistricting principles is not a prerequisite for racial gerrymandering claims. In *Wittman v. Personhuballah* (2016), the Court dismissed, on standing grounds, an appeal of a lower court's decision that Virginia's congressional map was an unconstitutional racial gerrymander because it increased the percentage of Black voters in the 3rd congressional district, which was already majority Black.

The upshot of these cases was that supporters of minority voting rights had a new tool they could use against the dilution of minority voting power through packing. If an "ability to elect" district could be created with 45% Black voters and the state created a 60% Black district instead, that district could be challenged. However, lurking in the background was the issue from the 2001 *Cromartie* case that had never been fully resolved: the interaction between party and race (see Hasen 2018). Was it possible to pack minority voters into a district and claim that the motivation was partisan rather than racial? Recent large-scale behavioral game experiments find that partisanship and race are so enmeshed that they are impossible to disentangle because events that independently trigger one of these identities can also activate the other (Westwood & Peterson 2020).

However, the courts have to try. The North Carolina congressional district map provided the basis (yet again!) for an effort in 2017. In *Cooper v. Harris*, the Supreme Court ruled that the 1st and 12th House districts were unconstitutional racial gerrymanders in which race predominated. The lower court, following the *Alabama* line of cases, ruled that race predominated because Black voters were added to districts that already were performing districts. For example, the 12th district gained 35,000 Black voters while losing 50,000 White voters (*Cooper v. Harris* 2017, p. 1474). The state claimed that it was just trying to maximize the number of Republican representatives, but the court rejected that argument (Hasen 2017).

Again, it is hard to know how this will play out. Li (2019, p. 146) argues, "If, in fact, *Cooper* ends the ability to argue that political ends excuse disadvantaging minority voters, it will be a major tool for communities of color and, at the same time, a significant check in many states on the ability to do partisan gerrymanders." However, Hasen (2020, pp. 70–73) is less optimistic, arguing that the Court's "propartisan turn," combined with deference to the good intentions of state legislatures, means that states will be able to hide racial gerrymanders that dilute minority voting power as partisan gerrymanders. This is especially true given that the Supreme Court decided that the federal courts will no longer take partisan gerrymandering cases, ruling in *Rucho v. Common Cause* (2019) that they involve nonjusticiable political questions.

## Contributions of Empirical Political Science to the Legal Debates

Litigation concerning racial redistricting has produced a cottage industry of political scientists who serve as expert witnesses and, in some cases, as the special masters who actually draw the districts for the federal or state courts. The research related to this litigation is too large to summarize here, so I focus on two central topics that are most relevant for the current round of redistricting: measuring racially polarized voting and using computer algorithms to generate apparently neutral maps.

[8] Levitt (2016, p. 573) argues that this case reveals that "[j]urisdictions like Alabama have been applying not the Voting Rights Act, but a ham-handed cartoon of the Voting Rights Act—substituting blunt numerical demographic targets for the searching examination of local political conditions that the statute actually demands." He is concerned that this could weaken the reach of the VRA.

Analysis of racially polarized or racial bloc voting is at the center of all Section 2 vote dilution claims that minority voters are being denied an equal opportunity to elect a candidate of their choice. Technically, such claims are subjected to a multi-pronged totality of circumstances test, but racially polarized voting is the key. The concept is simple: Do different racial groups vote similarly within-group and differently between-group? Plaintiffs must show that White voter support for a minority-preferred candidate is generally lower if the candidate is of minority race or ethnicity (as opposed to White). Of course, because individual votes cannot be observed, redistricting litigants and their experts must infer racial voting patterns by examining precinct-level election returns combined with demographic information from the Census (Katz et al. 2006, Hood et al. 2017). The earliest analyses, in the 1970s, employed simple bivariate regression and homogeneous precinct analysis (Grofman et al. 1992), while more recent work uses some form of ecological inference (Greiner & Quinn 2010, Collingwood et al. 2016, Imai & Khanna 2016, Barreto et al. 2022).

While most empirical work on this topic tolerates the inherent problem of having to make inferences from aggregate data, adherents to the focus on causal inference that swept through the discipline in the last 15 years are not convinced that the courts recognize the futile handwaving that is involved. For example, Greiner (2008, p. 595) points out that " no multivariate mathematical inquiry, no regression equation, no properly specified model, no amount of common sense and intuitive assessment, and no (to borrow a favorite judicial phrase) examination of all the facts and circumstances can solve this problem. The difficulty stems from a failure to identify a plausible time for treatment assignment, and thus a failure to articulate a coherent question linked to available data." Greiner points out that by having a treatment application (the candidate's race) occur on election day, courts are assuming that a candidate's race has no effect on the other covariates that influence the vote, such as fundraising ability, party loyalty, campaign quality, or media access, while also assuming candidate race has an effect on votes cast.

But Greiner himself has published important contributions to empirical work on racially polarized voting. In one piece (Greiner 2011), he tackles the assumption typically underlying the ecological inference used to define racial bloc voting—that voting is biracial (Black and non-Black, in most cases). However, as the nation has become more multiracial and Whites are more likely to support minority-preferred candidates than in the past, the assumption of biracial bloc voting is not tenable. Greiner suggests an alternative method he developed with Kevin Quinn, called the GQ Method, but he notes trade-offs and problems associated with this method as well. In another paper, Greiner & Quinn (2010) draw inferences about racial voting patterns by using a combination of an exit poll and precinct-level ecological data.

Another approach to improve the quality of ecological inference is to use the eiCompare software package to implement surname matching and geocoding of the voter rolls to make more accurate inferences about racial bloc voting (Barreto et al. 2022). A federal district court and the Second Circuit endorsed this Bayesian Improved Surname Geocoding method in a case involving the East Ramapo Central School District. This approach shows promise in providing more precise estimates of racially polarized voting.

Others are less optimistic that new statistical techniques can ever solve the ecological inference problem and argue for an entirely different approach. Even if we can get accurate estimates of racially polarized voting, we are assuming the vote choice is what we are interested in, when, in fact, it is policy preferences and outcomes that really matter. Elmendorf et al. (2016, p. 687) argue, "There is an alternative to making strong, within-race homogeneity assumptions—but it requires individual-level data on vote choice and demographics, as might be generated through an exit poll or preelection survey. If one is able to draw a random sample of voters from the jurisdiction of interest and measure their political preferences through a well-designed instrument, then, in essence, no racial-homogeneity assumptions need to be made." Rather than assuming

that everyone who votes the same has the same preferences, we can estimate racial differences in political preferences more directly through surveys.

Finally, political scientists (as well as mathematicians and geographers) have developed algorithms to draw ensembles of maps that can provide a neutral baseline for comparing to existing plans. Chen & Stephanopoulos (2021) argue for a race-neutral algorithm that should be acceptable to the current Supreme Court, which has expressed support for color-blind approaches to a range of issues. They model voter preferences in 1,903 districts and evaluate 38,000 districting plans spanning 19 states to provide this race-neutral baseline. Chen & Stephanopoulos (2021, p. 778) find "that in most states, a nonracial redistricting process would yield substantially fewer districts where minority voters are able to elect their preferred candidates. . .[and] thus cause a considerable drop in minority representation. Second, we show that the minority opportunity districts that arise when lines are drawn randomly are quite different from the ones that now exist. They are less likely to pack minority voters and more apt to represent them through coalitions with White voters." They also find that the race-neutral approach would have the biggest partisan impact on helping Republicans in the South.

Duchin & Spencer (2021, p. 744) are deeply skeptical of this approach, arguing that "the authors' apparatus for measuring minority electoral opportunity failed every check of robustness and numerical stability that we applied. . . . But if we focus only on major technical flaws, we might miss the fundamental fact that race-blind districting would devastate minority political opportunity no matter how it is deployed." They go on to criticize the race-neutral approach for its "idiosyncratic use of ecological inference" (p. 746) and the "one-size-fits-all modeling approach" (p. 747) that ignores variation in election laws in the 19 states they examine. Duchin and colleagues provide an alternative ensemble of plans that respect the legal constraints of the VRA while using precinct-level returns from recent primary and general elections (Becker et al. 2021). This ongoing debate will remain an important topic of litigation and academic study going forward.

## CONCLUSION

Despite the continual flurry of litigation following the last round of redistricting, the legal disputes surrounding racial redistricting are starting to reach some uneasy equilibrium. Why? Part of the reason is that the state legislators who draw the district lines are adapting to the new legal standards. In the 1990s, state legislators did not think they were doing anything wrong by creating the Black-majority districts, so they did not attempt to hide their motivations. Indeed, many states believed they were compelled to create the districts based on the 1982 VRA amendments and *Thornburg v. Gingles*. But then the rules of the game changed in midstream, first with the *Shaw* line of cases and again in the most recent round with the elimination of Section 5 preclearance, the addition of the *Alabama* line of packing vote-dilution cases, and then the federal courts getting out of the partisan gerrymandering business. Now that state legislators are aware that race cannot be the predominant factor, it will be much more difficult for plaintiffs to prove that a district "is unexplainable on ground other than race" (*Shaw v. Reno* 1993, p. 631) for two reasons: States are no longer explicit about their racial motivations, and hiding racial intent as partisan may be easier now that the federal courts are no longer hearing partisan gerrymandering cases. However, given the lack of bright-line distinctions, congressional and state legislative districts will be decided on a case-by-case basis, and litigation in this field is not likely to dissipate any time soon.[9] Political

[9] Levitt (2017, p. 579) argues that the main principle of current redistricting law established by the *Cooper* case is "the uplifting of local detail and multifaceted consideration and the rejection of gross stereotype."

scientists will continue to play a vital role in these cases with their research on racially polarized voting and development of neutral, computer-based map-drawing that respects the VRA and protects racial representation.

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