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What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?

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In 1993, Shaw v. Reno created a doctrine of racial gerrymandering that has now been in existence for twenty-five years. This Article examines the doctrine's impact over that time—whether it has achieved the goals the Court set out for the doctrine in Shaw and whether it has had other consequences. This Article examines the doctrine's impact through the lens of the place where the doctrine first took root and has been most heavily litigated over the last twenty-five years—North Carolina's congressional districts. This Article also draws upon the existing empirical literature in its assessment of the doctrine's impact. In so doing, this Article represents the first comprehensive assessment of the doctrine. Ultimately, the Article concludes that while more research could and should be done in this realm, racial gerrymandering doctrine does not appear to have achieved the goals the Court set out for it. In addition, the doctrine has likely had little additional impact other than to make districts more compact and cost state governments money for litigation and compliance. For these reasons, the Article concludes that the doctrine should be abandoned absent additional research documenting a systematically meaningful positive impact on American democracy.

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INTRODUCTION

Twenty-five years ago the Supreme Court handed down the watershed decision of *Shaw v. Reno*.¹ *Shaw* involved a challenge to two congressional districts in North Carolina drawn for the purpose of allowing African-American voters the ability to control the outcome of elections in those districts.² A group of white plaintiffs challenged those districts, asserting a constitutional claim that had never before been recognized—a claim of racial gerrymandering.³ A narrow majority of the Supreme Court embraced the justiciability of such a claim.⁴ New constitutional doctrine was born.

The doctrine, which makes it unconstitutional to draw a single-member district using race as the predominant factor unless the district satisfies strict scrutiny,⁵ has had an interesting run so far. It spawned a wave of litigation during the 1990s involving congressional and state legislative redistricting plans.⁶ Indeed, it is not an exaggeration to say that racial gerrymandering doctrine was to election law what Nirvana’s “Nevermind” was to rock music during the 1990s—the groundbreaking moment of the decade. But as we moved past the millennium, the doctrine went dormant, with little activity of note during the Aughts.⁷ Then, the 2010 round of

1. *Shaw v. Reno*, 509 U.S. 630 (1993).

2. *Id.* at 634–37.

3. *Id.* at 636–37.

4. *Id.* at 658.

5. *See, e.g.*, *Cooper v. Harris*, No. 15-1262, slip op. at 2 (S. Ct. May 22, 2017).

6. The Supreme Court used racial gerrymandering doctrine to reject several congressional plans during the 1990s round of redistricting. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952 (1996) (Texas congressional); *Shaw v. Hunt*, 517 U.S. 899 (1996) (North Carolina congressional); *Miller v. Johnson*, 515 U.S. 900 (1995) (Georgia congressional). Lower federal courts also used racial gerrymandering doctrine to strike down congressional and state legislative redistricting plans in several states. *See, e.g.*, *Kelley v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala. 2000) (Alabama State House and Senate), *vacated for lack of standing sub nom*, *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (Virginia congressional); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (New York congressional); *Johnson v. Morthem*, 926 F. Supp. 1460 (N.D. Fla. 1996) (Florida congressional); *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (Louisiana congressional); *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (South Carolina State House and Senate). In a few instances, redistricting plans survived racial gerrymandering challenges. *See, e.g.*, *King v. Illinois Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (Illinois congressional), *aff'd*, 522 U.S. 1087 (1998); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (California congressional), *aff'd*, 515 U.S. 1170 (1995).

7. Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 151 (2009) (“[I]n each state subject

redistricting sparked a revitalization that included a major Supreme Court opinion involving the very same North Carolina congressional districts that spawned the doctrine's creation in the first place.⁸

When it conceived the doctrine of racial gerrymandering, the Court clearly articulated two goals for the doctrine—one involving its impact on voters and the other its impact on candidates. First, the Court expressed a view that the doctrine could foster a political environment with less racially polarized voting.⁹ Second, the Court thought the doctrine would lead to the election of government officials who would serve their constituency more holistically.¹⁰ In addition, the Court also expressed a third, more nebulous and vague concern about stereotyping.¹¹

After such a big run in the 1990s and with twenty-five years of implementation, one might expect the development of a rich literature assessing racial gerrymandering doctrine's impact on American democracy during its lifespan. But that hasn't happened. There appears to have been little, if any, systematic study about whether racial gerrymandering doctrine has achieved the goals articulated by the Court in 1993.¹² And there also does not appear to have been any systematic study of whether racial gerrymandering doctrine has led to other developments not articulated by the Court—such as reduced representation for minority voters or the enactment of less partisan redistricting plans.

This Article fills a hole in the racial gerrymandering literature by conducting a systematic review of the impact of the doctrine, and it does so in two parts. Part I tells the broad outlines of the story of racial gerrymandering doctrine in relation to North Carolina's congressional districts over the past quarter century. The story is a fascinating one in that the districts originally alleged to be racial gerrymanders in the early 1990s that sparked creation of the doctrine then faced the exact same allegations two decades later, playing a role in the doctrine's revival. Part II then uses North Carolina's congressional redistricting saga, along with existing empirical evidence, to assess the doctrine's impact.

to Section 5 preclearance there was not one single case in which a federal court found that a districting plan drawn after the 2000 Census violated [racial gerrymandering] doctrine.”)

8. *Cooper*, slip op. at 5. For other post-2010 racial gerrymandering opinions from the Supreme Court, see *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (challenge to state legislative districts in Virginia); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (racial gerrymandering challenge to Alabama state legislative districts). For a lower court decision rejecting several state legislative districts as racial gerrymanders, see *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017).

9. *Shaw*, 509 U.S. at 647.

10. *Id.* at 648.

11. *Id.* at 647.

12. As some of the only researchers to specifically study the impact of racial gerrymandering doctrine wrote in 2015: “To date, though, we are unaware of any attempt, like ours, to assess the empirical assumptions undergirding the *Shaw* theory of majority-minority districting and its psychological effects.” Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 N.Y.U. L. REV. 1041, 1046 (2015).

After engaging in this systematic review, the Article comes to the following conclusions:

- Racial gerrymandering doctrine likely has done little to advance the explicit goals articulate by the Court when it created the doctrine.
- The doctrine likely has had very little impact on the descriptive or substantive representation of minority voters.¹³ To the extent it has had an impact on descriptive representation, it may have reduced it slightly although there is no evidence that this slight reduction has led to much of an increase in substantive representation.
- The doctrine has likely done little to curb partisan gerrymandering.
- The doctrine has likely had little impact on individual voter participation.
- The doctrine has likely done little to advance state's rights, democratic legitimacy, or a "colorblind" constitution.
- The doctrine has likely led to more compact districts.
- The doctrine has likely increased litigation and compliance costs for state and local governments.

In the end, if this is what the doctrine does, the most tangible benefit¹⁴ of the doctrine—more compact districts—probably does not outweigh the increased costs to government of litigating such claims.

A caveat, though, before proceeding. While this Article concludes that racial gerrymandering doctrine likely has had little impact on American democracy during its twenty-five-year run, further study could prove some of the above conclusions incorrect. There has been relatively little *direct* empirical work on the doctrine's impact. Thus, while discussing the doctrine's impact, this Article will also point out areas where additional empirical research might be done. At the very least, though, this Article would seem to shift the burden to supporters of the doctrine to justify its practical utility.

I. THE STORY OF RACIAL GERRYMANDERING CLAIMS IN NORTH CAROLINA

The tale of racial gerrymandering involving North Carolina's congressional districts over the last quarter-century is incredible. Two districts drawn in the early 1990s sparked litigation resulting in *four* Supreme Court opinions, the first of which created a brand-new constitutional doctrine. Then, the same two districts were reconstructed in 2011, sparking yet another racial gerrymandering decision from the Supreme Court related to North Carolina's congressional districts. Because the level of racial gerrymandering activity has been amazing, North Carolina's congressional

13. For definitions of the terms "descriptive" and "substantive" representation, see discussion *infra* Part II.B.

14. Assuming it is a benefit, *see infra* notes 240-41 and accompanying text.

districts serve as a wonderful launching pad for discussing the doctrine's impact.¹⁵ What follows is a discussion of the two separate decades of litigation that intersperses electoral results from the myriad of congressional redistricting plans used in North Carolina over the past twenty-five years.

A. The 1990 Round of Racial Gerrymandering Litigation

The 1990 Census showed North Carolina's population had grown in such a way as to entitle the State to an additional Congressional district—it's twelfth.¹⁶ The Democratic Party controlled the redistricting process,¹⁷ and the State's first attempt at redistricting resulted in the creation of one majority-black district in the northeastern portion of the State. In the eyes of some, this district was constructed in a "contorted" manner for partisan purposes—to protect white Democratic members of Congress from potentially being defeated by Republicans, the latter of whom had been gaining strength in state politics over the previous couple of decades.¹⁸

The State's initial redistricting plan was denied preclearance by the United States Department of Justice under Section 5 of the Voting Rights Act.¹⁹ The Justice Department objected to North Carolina's redistricting because North Carolina had failed to draw two majority-black districts.²⁰ In the Justice Department's view, the State had engaged in impermissible purposeful discrimination by refusing to establish a second majority-black district.²¹ The Justice Department's denial of preclearance sent North Carolina back to the drawing board.

North Carolina's legislature responded to the Justice Department by enacting a redistricting plan with two majority-black districts—District 1 and District 12.²² District 1 was described as:

somewhat hook shaped. Centered in the northeastern portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the

15. As one commentator observed: "Few states have had as great an impact on the development of redistricting and election law as North Carolina." Benson, *supra* note 7, at 154. And that observation occurred *prior* to the litigation involving the post-2010 Census redistricting in North Carolina.

16. Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992).

17. *Id.* at 394. At the time, the Governor was a Republican; however, the Governor did not have veto power. *Id.*

18. *Id.* at 394; *see also* Thomas C. Goldstein, *Unpacking and Applying Shaw v. Reno*, 43 AM. U.L. REV. 1135, 1147 (1994) ("A . . . concern for the predominantly Democratic General Assembly was its partisan desire to see members of the Democratic party elected from the state by designing most of the districts to include a majority of Democratic voters."); Paul Gronke & J. Matthew Wilson, *Competing Redistricting Plans as Evidence of Political Motives*, 27 AM. POL. Q. 147, 152 (1999) (noting that North Carolina's redistricting process occurred in the context of a "state [that had] turned progressively more Republican").

19. Letter of John R. Dunne, Assistant Attorney Gen., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney Gen., State of N.C. (Dec. 18, 1991) [hereinafter "Dunne Letter"].

20. *Id.*

21. *Id.*

22. Shaw v. Reno, 509 U.S. 630, 634–35 (1993).

South Carolina border. District 1 has been compared to a “Rorschach ink-blot test” . . . and a “bug splattered on a windshield.”²³

District 12 was described as:

even more unusually shaped [than District 1]. [District 12] is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas “until it gobbles in enough enclaves of black neighborhoods.” Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to “trade” districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that “[i]f you drove down the interstate with both car doors open, you’d kill most of the people in the district.”²⁴

But eye-pleasing cartography did not matter to the Justice Department and, with a second majority-black district contained in the plan, the Justice Department was satisfied and granted preclearance.²⁵

Litigation ensued. But the initial litigation related to partisan, not racial, gerrymandering. A group of mostly Republican plaintiffs filed suit primarily alleging that North Carolina’s redistricting plan amounted to an unconstitutional *partisan* gerrymander.²⁶ A three-judge district court quickly dispatched the partisan gerrymandering claim, and the Supreme Court summarily affirmed that decision.²⁷

The next round of litigation, though, was anything but quick. A group of white plaintiffs filed a challenge, the “gravamen” of which was that the State “acted unconstitutionally in deliberately creating two congressional districts in which black persons constitute[d] majorities of the overall voting-age and registered voter populations.”²⁸ The most important of these claims was an Equal Protection Clause allegation of “racial gerrymandering,” focusing on the creation of Districts 1 and

23. *Id.* at 636 (citation omitted).

24. *Id.* at 635–36 (internal citations omitted).

25. *Id.* at 636.

26. *Pope v. Blue*, 809 F. Supp. 392, 394, 395 (W.D.N.C. 1992); Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 ALA. L. REV. 365, 369 (2015) (“In the 1990s round of state legislative redistricting in North Carolina, self-interested Democrats reacted to the DOJ’s demands to create an additional majority-minority legislative district by passing a plan that simultaneously created the required number of such districts, protected Democratic incumbents, and maximized the number of Democratic seats.”).

27. *Pope*, 804 F. Supp. at 396–99, *aff’d* 113 S. Ct. 30 (1992). A three-judge panel is convened whenever the constitutionality of a congressional redistricting plan is challenged. 28 U.S.C. § 2284 (2012). The district court decision then can be directly appealed to the Supreme Court. 28 U.S.C. § 1253 (2012).

28. *Shaw v. Barr*, 808 F. Supp. 461, 467 (E.D.N.C. 1992). The plaintiffs did not self-identify as “white voters” but the district court took judicial notice of that fact. *Id.* at 470.

12.²⁹ A three-judge district court rejected the plaintiffs' contentions because they had failed to state a claim upon which relief could be granted, with the district court supporting its reasoning primarily by relying upon Supreme Court precedent.³⁰

With both initial attempts at litigation unsuccessful at the district court level, the 1992 congressional elections were held using the redistricting plan that had been precleared by the Justice Department. The 1992 contests resulted in the election of eight Democrats and four Republicans.³¹ Importantly, two of the Democrats elected were African American, marking the first time since 1901 that African Americans from North Carolina would serve in Congress.³² Unsurprisingly, these two African-American members of Congress were elected from Districts 1 and 12.³³

After the 1992 election, the Supreme Court reviewed the district court's decision rejecting the plaintiffs' challenge to North Carolina's plan. In doing so, the Supreme Court created a new, "analytically distinct" cause of action of unconstitutional racial gerrymandering.³⁴ The Court's decision was limited to whether the plaintiffs had stated a cognizable claim, not whether North Carolina's two majority-minority districts were actually unconstitutional.³⁵ In the Court's view, the plaintiffs could state a claim "by alleging that the [redistricting] legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."³⁶

The Supreme Court remanded the case to the district court, and in 1994 the district court once again upheld North Carolina's plan.³⁷ The district court found that Districts 1 and 12 had been deliberately drawn so that African-American citizens had a voting majority and, therefore, subjected those districts to strict scrutiny.³⁸ But the district court then held that both congressional districts satisfied strict scrutiny because the state had a compelling interest in complying with the

29. *Id.* at 468, 473 (describing importance of Equal Protection claim and using the phrase "racial gerrymandering" to describe the claim).

30. *Id.* at 470–73 (relying heavily on *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977)).

31. MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS 782 (1998).

32. *Black-American Representatives and Senators by Congress, 1870–Present*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/> [<https://perma.cc/L6LK-NYGW>] (last visited Sept. 8, 2018) (list of African-American representatives that shows Rep. George White as serving North Carolina until 1901 and listing Reps. Eva Clayton and Mel Watt as being elected in 1992).

33. Goldstein, *supra* note 18, at 1151 ("In the 1992 congressional elections, North Carolina's first black representatives since Reconstruction were elected from district 1 and district 12.").

34. *Shaw v. Reno*, 509 U.S. 630, 652 (1993).

35. *Id.* at 634 ("The question before us is whether appellants have stated a cognizable claim.").

36. *Id.* at 649; *see also id.* at 642 (noting plaintiffs had objected to "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification").

37. *Shaw v. Hunt*, 861 F. Supp. 408, 475 (E.D.N.C. 1994).

38. *Id.* at 473–74.

Voting Rights Act and because the districts were narrowly tailored to serve that compelling interest.³⁹

Having withstood the constitutional challenge in the district court, the State once again held elections in 1994 using the plan that had been precleared by the Justice Department. The results of that election were the same as the 1992 election in terms of the delegation's racial composition, as two of the twelve candidates elected were African American.⁴⁰ However, the partisan composition of the delegation changed dramatically, jumping from four to eight Republican members, following the national trend of the so-called "Republican Revolution."⁴¹

Despite two elections being held, litigation continued over the plan and, for the second time, the Supreme Court considered North Carolina's districts from a racial gerrymandering perspective.⁴² The Court did not make a determination on the merits of the racial gerrymandering claim against District 1, holding that the plaintiffs lacked standing to challenge that district.⁴³ But, as to District 12, the Court held that race was the predominant factor in its construction because of the district's highly irregular shape, its demographics, and the State's own concessions that the principal reason for drawing District 12 was to create a majority-black district.⁴⁴ Despite the State's contention that other factors played a role in District 12's creation, the Court noted that "[r]ace was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."⁴⁵ The Court then held that District 12 flunked strict scrutiny for three reasons:

- First, District 12 was not designed to eradicate the effects of past racial discrimination, so eradicating the effects of past racial discrimination could not serve as a compelling interest.⁴⁶
- Second, Section 5 of the Voting Rights Act did not require drawing District 12 because the Justice Department was pursuing a "policy of maximizing the number of majority-black districts" and this "maximization policy" was not properly grounded in Section 5. Thus, compliance with Section 5 could not be a compelling interest.⁴⁷
- Third, Section 2 of the Voting Rights Act did not require drawing District 12 because a Section 2 plaintiff would have to demonstrate the minority group was "geographically compact" and District 12 was

39. *Id.* at 473–75.

40. DUBIN, *supra* note 31, at 793 (showing Reps. Eva Clayton, District 1, and Mel Watt, District 12, were returned to office).

41. *Id.* (providing election results).

42. *Shaw v. Hunt*, 517 U.S. 899 (1996).

43. *Id.* at 904.

44. *Id.* at 905–06.

45. *Id.* at 907.

46. *Id.* at 909–10.

47. *Id.* at 912–13.

not geographically compact. Thus, District 12 was not narrowly tailored to address any potential violation of Section 2.⁴⁸

The Supreme Court's decision occurred in June of 1996 but the district court allowed the 1996 elections to be conducted using the plan that the Supreme Court held to be unconstitutional.⁴⁹ At these elections, two African-American candidates were again elected from Districts 1 and 12.⁵⁰ Democrats, however, reclaimed a couple of seats from the Republicans, resulting in an even 6-6 partisan split of the State's delegation.⁵¹

While the district court allowed the 1996 elections to go forward using an unconstitutional plan, the district court also ordered the State to draw a new map for the 1998 elections.⁵² In 1997, the State enacted a new plan that redrew District 12.⁵³ The Supreme Court described the new District 12 as follows:

By any measure, blacks no longer constitute a majority of District 12: Blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. The new District 12 splits 6 counties as opposed to 10; beginning with Guilford County, the district runs in a southwestern direction through parts of Forsyth, Davidson, Rowan, Iredell, and Mecklenburg Counties, picking up concentrations of urban populations in Greensboro and High Point (both in Guilford), Winston-Salem (Forsyth), and Charlotte (Mecklenburg). (The old District 12 went through the same six counties but also included portions of Durham, Orange, and Alamance Counties east of Guilford, and parts of Gaston County west of Mecklenburg.) With these changes, the district retains only 41.6% of its previous area, and the distance between its farthest points has been reduced to approximately 95 miles. But while District 12 is wider and shorter than it was before, it retains its basic "snakelike" shape and continues to track Interstate 85.⁵⁴

A new lawsuit was filed against the 1997 plan and the district court enjoined use of that plan, finding it to be a racial gerrymander.⁵⁵ As a result of the district court's order, the state drew yet another plan to use at the 1998 elections that once

48. *Id.* at 914–18.

49. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium*, 58 WASH. & LEE L. REV. 227, 261 (2001) ("The district court permitted the State to hold the 1996 elections under the 1992 plan, but enjoined further use of the plan in future elections."); *Redistricting Archives*, N.C. GEN. ASSEMBLY, <https://www2.ncleg.net/RnR/Redistricting/Archives> [<https://perma.cc/R74Y-XVRT>] (last visited Sept. 8, 2018) (noting that the 1992 plan was used for elections from 1992 to 1996).

50. DUBIN, *supra* note 31, at 804.

51. *Id.*

52. *North Carolina Redistricting Cases: The 1990s*, MINN. SENATE, <https://www.senate.mn/departments/scr/REDIST/Redsum/ncsum.htm> [<https://perma.cc/4Z5U-CALD>] (last updated July 8, 2003).

53. *Hunt v. Cromartie*, 526 U.S. 541, 543 (1999).

54. *Id.* at 544 (citations omitted).

55. *Id.* at 545.

again modified the boundaries of District 12.⁵⁶ The 1998 elections again produced a delegation with two African-American representatives.⁵⁷ Republicans also gained a seat at the 1998 elections, leaving the State's delegation at a 7-5 split in favor of the GOP.⁵⁸

The district court's decision finding the 1997 version of District 12 unconstitutional rested on several grounds. First, the district was unusually shaped and lacked compactness.⁵⁹ Second, where cities and counties were split by District 12, the splits occurred along racial rather than political lines.⁶⁰ Third, racial motives predominated over political motives because District 12 excluded white Democratic precincts.⁶¹ Fourth, a statement by a leading Senator spoke of "racial and partisan balance" and an email from a line-drawer referenced sections of Greensboro as "Black."⁶² Finally, the State presented no compelling interest for drawing District 12 and, even if it had, District 12 was not narrowly tailored.⁶³

The district court's decision came in early 2000 (the timing may seem odd, see the footnote for an explanation),⁶⁴ but the 2000 elections were held using the 1997 plan that had been declared to be a racial gerrymander by the district court because the Supreme Court had issued a stay of the district court's judgment.⁶⁵ Yet the results using the 1997 Plan were exactly the same as the previous results using the 1998 Plan. Two African-American Democrats, three white Democrats, and seven Republicans were elected to Congress.⁶⁶

Even though the millennium had arrived with new census data set for release that guaranteed a new round of redistricting, litigation over North Carolina's District 12 continued. And the Supreme Court once again reversed the district

56. *Id.* at 545 n.1.

57. *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 33 (showing election of Reps. Clayton and Watt).

58. JEFF TRANDAHL, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 3, 1998, at 33 (1999), <http://history.house.gov/Institution/Election-Statistics/1998election/> [<https://perma.cc/G92R-5J51>].

59. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 418–19 (E.D.N.C. 2000).

60. *Id.* at 419.

61. *Id.*

62. *Id.* at 420.

63. *Id.* In the same opinion, the district court concluded that District 1 was not a racial gerrymander because even though it was drawn with race as the predominant factor, it was narrowly tailored to meet the compelling interest of compliance with Section 2 of the Voting Rights Act. *Id.* at 421–23.

64. A quick note about the procedural history. The district court initially ruled in April 1998 on summary judgment that District 12 was unconstitutional. *Id.* at 409 (describing procedural history). The Supreme Court reversed the grant of summary judgment and ordered that a trial be held. *Hunt v. Cromartie*, 526 U.S. 541, 554 (1999). The district court then held a trial and issued a second opinion in which it once again found District 12 to be an unconstitutional racial gerrymander. *Cromartie*, 133 F. Supp. 2d at 420.

65. *North Carolina Redistricting Cases: The 1990s*, *supra* note 53 (issuance of stay by Supreme Court); *Redistricting Archives*, *supra* note 50 (noting that the 1997 plan was used for the 2000 election).

66. JEFF TRANDAHL, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 7, 2000, at 48 (2001), <http://history.house.gov/Institution/Election-Statistics/2000election/> [<https://perma.cc/6QLR-H6NM>].

court.⁶⁷ In so doing, the Court held that the district court's finding of a racial gerrymander was clearly erroneous because the district court had incorrectly found that race rather than politics explained District 12's boundaries.⁶⁸ In contrast to the district court, the Supreme Court exhaustively catalogued the evidence and concluded that District 12 primarily resulted from a legislative attempt to create a safe Democratic seat and protect incumbent members of Congress.⁶⁹ Moreover, the Court held that plaintiffs challenging the district failed to present a feasible alternative plan:

[The District Court cited to evidence] that there are other ways in which the legislature could have created a safely Democratic district without placing so many primarily African-American districts within District 12. And we recognize that *some* such other ways may exist. But, unless the evidence also shows that these hypothetical alternative districts would have better satisfied the legislature's other nonracial political goals as well as traditional nonracial districting principles, this fact alone cannot show an improper legislative motive.⁷⁰

And with that decision, the first era of North Carolina congressional racial gerrymandering litigation came to a conclusion about a decade after it began.

B. The 2010 Round of Racial Gerrymandering Litigation

The 1990s witnessed a robust cycle of litigation involving racial gerrymandering and congressional districts; the 2000 redistricting cycle was the polar opposite. As it had in 1990, the State gained a congressional seat as a result of apportionment.⁷¹ The Democratic Party again controlled the redistricting process, drew two districts (Districts 1 and 12) to allow African-American voters to elect candidates of choice, and drew the newly added congressional district in such a way as to elect a Democrat.⁷² The result of the first election under that plan was a

67. *Easley v. Cromartie*, 532 U.S. 234, 237, 241 (2001).

68. *Id.* at 237, 243–44.

69. *Id.* at 244, 248.

70. *Id.* at 249. The lack of a viable alternative was re-emphasized at the conclusion of the Court's opinion:

We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at least that the legislature could have achieved its legitimate political objective in alternative ways that are comparably consistent with traditional redistricting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here.

Id. at 258.

71. *Table 1. Apportionment Population and Number of Representatives, by State: Census 2000*, U.S. CENSUS BUREAU (2000), <https://www.census.gov/population/www/cen2000/maps/files/tab01.pdf> [<https://perma.cc/ZLP7-8V9C>].

72. John Mercurio, *Between the Lines*, ROLL CALL (Dec. 10, 2001), <http://archive.fairvote.org/redistricting/reports/remanual/ncnews4.htm> [<https://perma.cc/EL7T-FNVK>] (describing how the Democrats controlled the legislature and how the 13th District was a "Democratic stronghold"); John Mercurio, *Between the Lines*, ROLL CALL (Dec. 3, 2001),

congressional delegation of six Democrats, two of whom were African American, and seven Republicans.⁷³ Throughout the decade, Democrats continued to hold between six and eight of the congressional seats,⁷⁴ and there was no racial gerrymandering litigation in relation to North Carolina's congressional districts.⁷⁵

But quiet on the racial gerrymandering front lasted for merely one redistricting cycle. In the 2010 election, Republicans captured the state legislature for the first time since 1870, thus securing control of the redistricting process.⁷⁶ They inherited a political scene where Democrats, including two African-American Democrats, held seven of thirteen seats.⁷⁷

As expected, the Republican-dominated legislature drew a plan that advantaged Republicans at the 2012 elections.⁷⁸ Republicans captured nine seats at the 2012 elections.⁷⁹ The Democrats, including two African-American Democrats elected from Districts 1 and 12, won just four seats. And at the 2014 elections, Republicans tacked on another victory, increasing their advantage in the congressional delegation to 10-3.⁸⁰

<http://archive.fairvote.org/redistricting/reports/remanual/ncnews4.htm> [https://perma.cc/EL7T-FNVK] (describing how the legislature designed a plan that protected all incumbents).

73. JEFF TRANDAHL, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 5, 2002, at 35 (2003), <http://history.house.gov/Institution/Election-Statistics/2002election/> [https://perma.cc/4XDP-H2N7]. Rep. Watt continued to be elected from District 12. *Id.* Rep. Frank W. Ballance, Jr., an African American, replaced Rep. Clayton in District 1. *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 33. Rep. Ballance, however, was soon replaced by Rep. G.K. Butterfield, Jr. *Id.*

74. The seven-six Republican-Democrat split persisted after the 2004 election. JEFF TRANDAHL, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2004 (2005), <http://history.house.gov/Institution/Election-Statistics/2004election/> [https://perma.cc/KQB2-4WH6]. In 2006, Democrats gained one seat. LORRAINE C. MILLER, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 7, 2006, at 34 (2007), <http://history.house.gov/Institution/Election-Statistics/2006election/> [https://perma.cc/ZK48-2VS5]. In 2008, Democrats gained another seat. LORRAINE C. MILLER, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 4, 2008, at 49 (2009), <http://history.house.gov/Institution/Election-Statistics/2008election/> [https://perma.cc/P8ZG-3YUM].

75. *Cooper v. Harris*, No. 15-1262, slip op. at 5 (S. Ct. May 22, 2017).

76. Michael Kent Curtis, *Using the Voting Rights Act to Discriminate: North Carolina's Use of Racial Gerrymanders, Two Racial Quotas, Safe Harbors, Shields, and Inoculations to Undermine Multiracial Coalitions and Black Political Power*, 51 WAKE FOREST L. REV. 421, 433 (2016) (noting that “[t]he Republican Party won a smashing victory in the 2010 off-year election” and that “the legislators elected in 2010 would be responsible for the drawing of the new districts for North Carolina’s congressional delegation”). In North Carolina, the governor does not play a role in the passage of redistricting legislation.

77. KAREN L. HAAS, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2010, at 37 (2011), <http://history.house.gov/Institution/Election-Statistics/2010election/> [https://perma.cc/5NZY-RVYW].

78. Curtis, *supra* note 76, at 424 (describing the post-2010 Census plan as a “Republican gerrymander”).

79. KAREN L. HAAS, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, at 46 (2013), <http://history.house.gov/Institution/Election-Statistics/2012election/> [https://perma.cc/K62C-WR9J].

80. KAREN L. HAAS, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 4, 2014, at 36 (2015), <http://history.house.gov/Institution/Election-Statistics/2014election/>

Democrats, though, successfully challenged the Republican plan by getting a federal district court to rule in 2016 that North Carolina's Districts 1 and 12 amounted to racial gerrymanders.⁸¹ The district court's racial gerrymandering decision was primarily informed by the following:

- An extraordinary amount of direct evidence that a “racial quota, or floor, of 50-percent-plus-one-person was established for [District] 1.”⁸²
- To achieve the goal of a majority-minority district, District 1 “not only subordinated traditional race-neutral principles but disregarded certain principles such as respect for political subdivisions and compactness.”⁸³
- Statements indicating District 12 was intentionally drawn as a majority-minority district.⁸⁴
- The lack of compactness of District 12.⁸⁵
- Failure to meet the test for strict scrutiny: (a) because the defendants did not provide a compelling interest for District 12; and (b) because District 1 did not need to be a majority-minority district for North Carolina to comply with the Voting Rights Act.⁸⁶

After finding the plan to be an unconstitutional racial gerrymander, the district court ordered the State to draw a remedial plan.⁸⁷ About two weeks after the district court order, the Republican legislature adopted a new plan.⁸⁸ A key legislator who drafted the remedial plan “acknowledge[d] freely that [the plan] would be a political gerrymander” and the plaintiffs who brought the original racial gerrymandering claim argued the remedial map was an unconstitutional partisan gerrymander.⁸⁹ But the district court rejected the plaintiffs' partisan gerrymandering objection and allowed the plan to be implemented at the 2016 election.⁹⁰

The results from the 2016 election using the remedial plan were the same as the results from the 2014 election using the racially gerrymandered plan. The

[<https://perma.cc/Z3C6-6NH3>]. In 2014, African American Rep. Alma Adams was elected from District 12. *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 33.

81. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016). The federal district court ruled on the challenge only after a state court rejected an identical challenge. *Id.* at 609.

82. *Id.* at 611.

83. *Id.* at 614.

84. *Id.* at 616–17.

85. *Id.* at 618.

86. *Id.* at 622–26.

87. *Id.* at 627.

88. *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 3129213, at *1 (M.D.N.C. June 2, 2016).

89. *Id.* at *2.

90. *Id.* at *2–*3. However, the district court left open the possibility of a future challenge to the plan as an unconstitutional *partisan* gerrymander. *Id.*

congressional delegation favored Republicans by a 10-3 margin.⁹¹ And once again the plan elected two African-American Democrats from Districts 1 and 12.⁹²

The year after the 2016 election, the Supreme Court upheld the district court's finding of a racial gerrymander.⁹³ The Court's reasoning largely tracked that of the district court. In relation to District 1, the Court noted that race predominated in its creation because a racial target was set to make the district majority black and that the district could not survive strict scrutiny because it was not required by Section 2 of the Voting Rights Act.⁹⁴ In relation to District 12, the Court rejected North Carolina's argument that politics rather than race predominated in its creation.⁹⁵ The State made no attempt to justify District 12 under strict scrutiny.⁹⁶

C. Conclusion: Why Focus on North Carolina?

North Carolina's congressional map has endured two separate cycles of racial gerrymandering litigation over the past twenty-five years with five full-blown opinions from the United States Supreme Court. Over that time, more than a dozen Congressional elections have been held using various plans—some deemed to be racial gerrymanders and some not. But what has that two-and-a-half decades worth of litigation and elections under various plans resulted in? That's the question to which we will turn in Part II.

But before we assess the impact of racial gerrymandering doctrine, a quick word on the reasons it is appropriate to focus on North Carolina's congressional map as the launching point for discussion of the impact of racial gerrymandering doctrine. First, North Carolina's congressional districts have seen more racial gerrymandering litigation at the Supreme Court level than any other districts in the country, therefore making the North Carolina congressional districts the most high-profile racial gerrymandering litigation to date. Second, North Carolina's congressional districts were where racial gerrymandering doctrine started and were challenged in *two separate* redistricting cycles, thus allowing for discussion about the doctrine's impact over as long a time period as possible. Third, the racial gerrymandering challenges to North Carolina's congressional districts have a bipartisan tinge to them because the challenge in the 1990s was to a Democratic gerrymander while the challenge in the 2010s was to a Republican gerrymander. Thus, North Carolina's congressional districts allow for discussion of racial gerrymandering doctrine in both types of political environments that racial gerrymandering challenges have been successfully used. For these reasons, North Carolina's congressional districts seem like an appropriate focal point for discussion,

91. KAREN L. HAAS, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 8, 2016, at 58 (2017), <http://history.house.gov/Institution/Election-Statistics/2016election/> [<https://perma.cc/XD3U-L39H>].

92. *Id.*

93. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

94. *Cooper v. Harris*, No. 15-1252, slip op. at 10–18 (S. Ct. May 22, 2017).

95. *Id.* at 18–34.

96. *Id.* at 34.

although I will also occasionally intersperse examples from other litigation during the discussion in Part II.⁹⁷

II. ASSESSING THE IMPACT OF RACIAL GERRYMANDERING DOCTRINE

Racial gerrymandering doctrine has existed for twenty-five years. During that time, numerous successful claims have been litigated in North Carolina and elsewhere.⁹⁸ And those successful claims have been against both congressional and state redistricting plans.⁹⁹

But what has been the overall impact of the doctrine? In creating the doctrine, the Court, essentially, dangled the prospect of greater racial harmony (the details of which will be discussed in a moment). Has racial gerrymandering doctrine achieved the Court's aims in this regard? Moreover, legal doctrines can also have other implicit or unintended consequences. What other consequences has racial gerrymandering doctrine had? This Part explores these questions.

A. The Court's Explicit Doctrinal Goals

A fitting place to begin an assessment of racial gerrymandering doctrine's impact is with the Court's stated goals when it created the doctrine.¹⁰⁰ Racial gerrymandering doctrine is somewhat unique in election law jurisprudence because the initial decision creating the doctrine, *Shaw v. Reno*, contained an explicit announcement of the doctrine's goals. In contrast, when creating other election law causes of action, such as one person, one vote and racial vote dilution, the Court has been more opaque in delineating doctrinal aims.

The key statement of racial gerrymandering doctrine's goals from *Shaw* is:

[W]e believe that reapportionment is one area in which appearances matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographic and political boundaries, and who may have little in common with one another but the color of their skin, 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 as impermissible racial stereotypes . . . By perpetuating such notions a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

97. I also recognize North Carolina's congressional districts only represent a few data points in assessing the doctrine as a whole, which is why I rely quite a bit on empirical research in Part II.

98. *Supra* note 6.

99. *Supra* note 6.

100. I use the term "goals" but recognize the Court never used that term. I think the word "goals" is useful shorthand for what might be described as "the harms the Court was addressing."

The message that such districting sends to elected representatives is equally pernicious. When 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. This is altogether antithetical to our system of representative democracy.¹⁰¹

While the above paragraphs represented the most elaborate exposition of the doctrine's goals, some of these same sentiments also appeared elsewhere in *Shaw*. For instance, in a couple of other places the Court emphasized the divisiveness that racial gerrymandering might create, noting that “[c]lassifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”¹⁰² And the Court also reiterated the impact of racial gerrymandering on elected officials, writing that “[racial gerrymandering] reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”¹⁰³

Thus, in the decision creating racial gerrymandering doctrine—*Shaw v. Reno*—we have several explicit statements of doctrinal goals. The basic goals involve a couple of aspects of representative democracy. The first involves the behavior of voters. The second involves the behavior of elected officials. An important question is whether racial gerrymandering doctrine has helped further either of these goals.

1. Voter Behavior

One theory behind racial gerrymandering doctrine was that an electoral district created by racial gerrymandering will feature greater racially polarized voting than a district not created by racial gerrymandering. In the Court's view, the governmental stereotyping that led to a racially gerrymandered district's creation will “exacerbate” racially polarized voting.¹⁰⁴ And by outlawing racial gerrymanders, the Court creates an electoral environment less conducive to polarized voting.¹⁰⁵

101. *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993).

102. *Id.* at 643. The *Shaw* opinion also notes:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Id. at 657.

103. *Id.* at 650.

104. *Id.* at 647–48.

105. As Justice O'Connor wrote in a concurring opinion in a racial gerrymandering decision from 1996: “At the same time that we combat the symptoms of racial polarization in politics [with the Voting Rights Act], we must strive to eliminate[, with racial gerrymandering doctrine,] unnecessary race-based state action that appears to endorse the disease.” *Bush v. Vera*, 517 U.S. 952, 993 (1996).

Whether racial gerrymandering doctrine causes lower levels of polarized voting (or is even associated with lower levels of polarized voting) is something that could be empirically tested but to my knowledge has not been.¹⁰⁶ Over the years there have been a number of districts that: (1) were created by the government; (2) held an election; (3) were later struck down as racial gerrymanders by federal courts; and (4) were replaced with districts that were not racially gerrymandered. For instance, North Carolina's District 12 was created by North Carolina in 1991. The district was used for three elections. The district was struck down as a racial gerrymander, redrawn, and then a new district was drawn in which an election was held.¹⁰⁷ Thus, researchers might design a study to determine whether racially polarized voting was different in the racially gerrymandered district as opposed to the "unracially" gerrymandered district. For instance, one might assess the behavior of voters who were part of the racially gerrymandered district and who were also part of the "unracially" gerrymandered district to determine if those voters changed their behavior in some meaningful way. There may well be other, better research designs—my point is that seemingly one could design some sort of assessment of the impact of racial gerrymandering doctrine on polarized voting.¹⁰⁸

Perhaps someday researchers will directly study whether racial gerrymandering doctrine leads to reduced polarization among voters, but, for several reasons, it seems unlikely racially polarized voting changes much from one election to the next depending on whether a district is drawn with or without race as the predominant factor. First, the *Shaw* Court's own theorizing on the subject is hesitant—racially gerrymandered districts "*may* exacerbate" patterns of racially polarized voting (my emphasis).¹⁰⁹ Put simply, even in creating the doctrine, the Court hedged its bets. Second, in post-*Shaw* discussions of the purpose of racial gerrymandering doctrine, the Court moved away from the idea that the doctrine will reduce polarized voting.¹¹⁰ So, not only did the Court initially hedge its bets, it subsequently seems to have folded its cards. Third, empirical research suggests the type of district in which a voter resides does not have an impact on racial attitudes (i.e., belief in racial

106. *Supra* note 12.

107. *Supra* Part I.A.

108. A couple of general caveats about additional empirical research related to the impact of racial gerrymandering doctrine. First, in some instances it may not be feasible to conduct any useful empirical inquiry. Put differently, it may not be possible to gather any useful empirical data about some aspects of how racial gerrymandering doctrine operates. Second, I recognize that even useful empirical data may not conclusively resolve certain points. For instance, it may be impossible to design a study to conclusively determine that racial gerrymandering doctrine *causes* something because electoral environments can shift from year to year. Putting both points simply, empirical research may be difficult to generate, and even if it can be generated, it may not conclusively resolve debate over the impact of racial gerrymandering doctrine.

109. *Supra* note 101 and accompanying text.

110. *See* *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (discussing the rationale for the doctrine and not discussing racially polarized voting); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (same).

stereotypes).¹¹¹ And if the type of district does not impact racial attitudes, it seems likely the type of district also will not change the level of racially polarized voting. Fourth, there is little reason to think that a doctrine preventing race from being the “predominant” motive of those engaged in redistricting will impact the behavior of voters at an election.¹¹² Put differently, why would the motive of the district’s designers impact the motives of the district’s voters?

Of course, what I’ve posited so far relates mostly to measuring changes in voter polarization over the short haul (e.g., comparing one election to the very next election), but racial gerrymandering doctrine’s performance in this realm could be more long term. In other words, the creation and use of racial gerrymandering doctrine does not change voters’ hearts and minds overnight but rather will change hearts and minds over several decades. On this score, it would be interesting to conduct a study that measures polarization over time. For instance, perhaps North Carolina is a less racially polarized place today than it was twenty-five years ago, and perhaps racial gerrymandering doctrine in some meaningful way has contributed to that trend.

Again, though, it seems unlikely racial gerrymandering doctrine has been much of a success in this regard. In North Carolina’s congressional delegation, there were two African-American candidates elected under the racially gerrymandered plans and two African-American candidates are still being elected a quarter-century later.¹¹³ So there’s no greater integration in the State’s congressional delegation over time, indicating that African-American candidates still struggle to generate substantial crossover voting from whites in districts not specifically designed to allow African-American voters to elect their candidates of choice. Yet perhaps these African-American candidates (and all the other white candidates) are being elected

111. Ansolabehere & Persily, *supra* note 12, at 1043 (“We conclude that residents of [majority-minority districts] are indistinguishable from residents of other districts in their answers to questions attempting to measure belief in racial stereotypes.”).

112. Thanks to Chris Elmendorf for this point. Of course, racial composition of a district may influence the candidates who run and how those candidates campaign (e.g., a campaign that involves more polarized messaging). However, racial gerrymandering doctrine does not block creation of districts with certain racial compositions. Instead, racial gerrymandering doctrine only blocks some districts drawn with a particular motive. Put more concretely, a hypothetical 55% minority district might be struck down if race was the predominant factor and it did not survive strict scrutiny. But another 55% minority district might be upheld because race was used but did not predominate or because race predominated but the district survived strict scrutiny. Yet the racial environment for polarized voting would seemingly be no different in either district. Of course, if racial gerrymandering doctrine only applied to districts that gathered black and white voters with fewer non-racial commonalities then it might make sense to say that racial gerrymandering doctrine could reduce polarized voting because, presumably, voters with greater non-racial commonalities will be less polarized. But the problem of racial gerrymandering identified by the Court in the racial gerrymandering cases is not that the districts combine minority and non-minority voters who have fewer commonalities. Rather, the problem identified by the Court seems to be that *minority voters who have few commonalities* have been linked together. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 908 (1995) (describing how Georgia’s Eleventh District linked “metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture”).

113. *Supra* Part I.A.

in a somewhat less racially polarized environment. However, it's hard to see that much racial progress has been made in North Carolina politics over the last twenty-five years. On this score, recall that a federal appellate court noted that North Carolina enacted voting-related legislation in 2013 that targeted black voters "with almost surgical precision."¹¹⁴

Looking at a more macro level than North Carolina, racial polarization does not appear to have changed much over time and may have become worse since the arrival of racial gerrymandering doctrine. As the University of Chicago's Nick Stephanopoulos notes:

In both [the South and the non-South], black-white polarization was severe in 1972, dipped in 1976 and 1980, declined more consistently from 1985 to 1996, and then rose steadily from 1996 to 2012. But too much should not be made of these shifts. The overall picture is one of stability In fact, black and white voters were about as divided in the period's final election as in its first.¹¹⁵

To be fair, though, these reflect national trends and perhaps areas where racial gerrymandering doctrine has actually been used are different. And, of course, even if racially polarized voting has become worse since the creation of racial gerrymandering doctrine, it's always possible that racial gerrymandering doctrine kept polarized voting from becoming *even worse*.

In short, there does not appear to be any evidence the doctrine has reduced racially polarized voting. That said, it's possible additional study could change that conclusion.

2. Elected Official Behavior

The second basic thread running through the Court's theoretical underpinning for racial gerrymandering doctrine relates to elected representatives rather than voters. The idea is that candidates elected from racially gerrymandered districts will be more likely to represent members of one racial group rather than the district as a whole. Put into a more concrete hypothetical, in a district racially gerrymandered to be, say, majority black, the elected representative will cater to black constituents rather than the entire constituency.¹¹⁶

To the best of my knowledge, no one has directly studied whether racial gerrymandering doctrine changes elected official behavior even though it seems

114. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

115. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1357 (2016); see also Stephen Ansolabehere et al., *Race, Region and Voter Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1405 (2010).

116. Presumably this can work in the opposite direction as well. A district racially gerrymandered to be majority white will have an elected representative who will represent white constituents rather than the entire constituency. I use a majority-black district as the example in the main text because *Shaw* involved a majority-black district and because racial gerrymandering challenges so far have typically involved districts that provide African-American voters the ability to elect candidates of choice.

plausible to do so. Districts redrawn after successful racial gerrymandering challenges sometimes retain the exact same representative. For instance, in the 1990s, the same representative was elected in North Carolina District 12 both before and after a successful racial gerrymandering claim.¹¹⁷ Presumably, a researcher could design a study to assess whether campaign behavior changed, legislative voting behavior changed, or constituent services changed after a successful racial gerrymandering claim,¹¹⁸ and, if so, whether the successful racial gerrymandering claim impacted that changed behavior.¹¹⁹ There are undoubtedly other possible research designs—my point is that seemingly one could design a study to measure whether racial gerrymandering doctrine achieves this goal.

But it seems doubtful that a successful racial gerrymandering claim causes any meaningful change in elected official behavior. For starters, the Court's own musings in *Shaw* about representative behavior fails to capture how racial gerrymandering doctrine works. In its discussion in *Shaw*, the Court talks about districts drawn “solely to effectuate the perceived common interests of one racial group.”¹²⁰ But the doctrine itself addresses only a district where race was a *predominant* factor in its creation.¹²¹ So the doctrine still allows race to be a factor. For example, even after the successful racial gerrymandering challenge to North Carolina's District 12 in the 1990s, race remained a factor in crafting the remedial plan.¹²² If race remains a factor in the drawing of a district, it seems likely incentives will still exist for elected officials to represent members of a particular racial group

117. *Supra* notes 40, 57 and accompanying text.

118. One commentator has argued that inadequate constituent service could provide a justification for racial gerrymandering doctrine. Joshua Bone, *Stop Ignoring Parks and Potboles: Election Law and Constituent Service*, 123 YALE L.J. 1407, 1445–47 (2014). But the author seems to use as a premise that one non-compact ability-to-elect district can be traded off for a more compact ability-to-elect district. *Id.* at 1446. However, it may be that one non-compact ability-to-elect district leads to a compact district that *no longer* gives minority voters the ability to elect a candidate of choice. More fundamentally, it's quite possible racial bias exists in the provision of constituent services. Daniel M. Butler & David E. Brockman, *Do Politicians Really Discriminate Against Constituents? A Field Experiment on State Legislatures*, 55 AM. J. POL. SCI. 463, 464 (2011) (“White legislators of both parties discriminate against the black alias at nearly identical, statistically significant rates, while minority legislators do the opposite, responding more frequently to the black alias.”). Thus, if legislators provide better constituent services to persons of their own race, it's possible that homogenous districts that are racially gerrymandered to be more homogenous provide better constituent services than heterogeneous districts—to both black and white constituents alike.

119. Again, such research may not be easy to conduct and may not provide absolutely definitive results. *Supra* note 108. As one researcher wrote:

[S]tudies of redistricting are complicated by numerous threats to validity. In virtually all redistricting studies, changes in district boundaries are accompanied by a host of other changes in the legislative environment, including shifts to chamber membership, committee rosters, partisan control of the legislature, and the chamber's policy agenda. It is thus difficult to isolate the effect of changes in the electoral environment on legislative voting behavior.

James Lo, *Legislative Responsiveness to Gerrymandering: Evidence from the 2003 Texas Redistricting*, 8 Q.J. POL. SCI. 75, 76 (2013).

120. *Supra* note 101 and accompanying text (emphasis added).

121. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

122. *Easley v. Cromartie*, 532 U.S. 234, 253–54 (2001) (recognizing that North Carolina considered race in the redrawing of District 12).

rather than the constituency as a whole. Moreover, to echo a point made earlier during the discussion of polarized voting, it's hard to see a solid link between the motives of the redistricters and the behavior of candidates and representatives.¹²³

Another factor that likely mitigates any impact of racial gerrymandering doctrine on elected official behavior is that even after a successful racial gerrymandering challenge, some (perhaps most) of the same elected officials will be returned to office. For instance, in the 1990s Congressman Mel Watt was elected in the racially gerrymandered District 12 and then again in the “unracially gerrymandered” District 12. Did Congressman’s Watt’s behavior change in some way because of the new district lines? Or did, say, Congressman Howard Coble, a white Republican elected from a district adjacent to the Twelfth District, change his behavior? Again, the suspicion is that elected representatives do not change their behavior because of a successful racial gerrymandering challenge and this would align with political science research suggesting members of Congress do not change positions based on changes to their district boundaries.¹²⁴

And yet another factor that likely minimizes the impact of racial gerrymandering doctrine on elected official behavior is that a successful racial gerrymandering challenge typically makes a district more racially heterogeneous. For instance, after the successful racial gerrymandering challenge to the post-2010 congressional redistricting plan in North Carolina, District 12 went from being 50.7% black voting-age population (BVAP) to 36.2% BVAP.¹²⁵ Some research suggests that greater diversity in a district does not lead to more “moderate” behavior on the part of an elected representative.¹²⁶ In other words, a more racially

123. *Supra* note 112 and accompanying text.

124. Lo, *supra* note 119 (finding that passage of a new redistricting plan in Texas did not moderate the voting records of targeted incumbents); *see also* Keith T. Poole, *Changing Minds? Not in Congress!*, 131 PUB. CHOICE 435, 447 (2007) (“The weight of the evidence . . . suggests that members of Congress are very stable ideologically.”). *But see* Anthony M. Bertelli & Jamie L. Carson, *Small Changes, Big Results: Legislative Voting Behavior in the Presence of New Voters*, 30 ELECTORAL STUD. 201, 205 (2011) (study of the 2000 redistricting cycle suggesting “[p]ermanent changes in constituencies implemented via redistricting made average congressional vote patterns more conservative. On the other hand, individual legislators who survived the first election in their new districts changed their voting patterns only slightly while in our preferred specification, they moved, on average, in a liberal direction.”); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RES. 878, 899–900 (2007) (suggesting that “a portion of the polarization we are observing in Congress is being artificially generated by the mapmakers responsible for drawing district boundaries” and refusing to rule out the possibility that redistricting contributes to polarization).

125. *Cooper v. Harris*, No. 15-1262, slip op. at 21 (S. Ct. May 22, 2017) (2010 plan data); N.C. GEN. ASSEMBLY, VOTING AGE POPULATION BY RACE AND ETHNICITY - DISTRICT 12 (2016), http://www.ncleg.net/GIS/Download/District_Plans/DB_2016/Congress/2016_Contingent_Congressional_Plan_-_Corrected/Reports/VTD_SingleDistrict/Vap_PDF/rptVTDVap-12.pdf [<https://perma.cc/K7G9-LKFR>] (2016 plan data).

126. Elisabeth R. Gerber & Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 J. POL. ECON. 1364, 1378 (2004) (“[L]egislators take policy positions that are close to their district’s median when many constituents share these preferences. In heterogeneous districts, median preference is a much less powerful predictor of legislative behavior. Legislators from heterogeneous districts often take policy positions that diverge substantially from the

competitive district might cause an elected official to cater more to the racial “base” of the district than to play to the center.¹²⁷

In sum, there is little evidence racial gerrymandering doctrine changes elected official behavior. Of course, more study could reveal that racial gerrymandering doctrine changes elected official behavior and changes it for what the Court views as something better—representing the “constituency as a whole” rather than just “the common interests of one racial group.”¹²⁸ At this point, though, such evidence does not exist.¹²⁹

3. *Of Stigmas and Stereotypes*

In my view, the Court identified only two clear, real-world goals for racial gerrymandering doctrine—reducing polarized voting and making elected officials more responsive to their entire constituencies. But I acknowledge that another thread running through the Court’s justification for racial gerrymandering doctrine involves what might be called a stigmatic harm.¹³⁰ The idea seems to be that when the government engages in racial gerrymandering, an individual gets stereotyped and this stereotyping is harmful in some way different from racially polarized voting or racially-biased representation from an elected official.¹³¹ Indeed, this individual harm has come to be emphasized even more over the twenty-five-year existence of the doctrine. As Justice Kennedy wrote in a 2017 racial gerrymandering decision, “The harms that flow from racial sorting include *being personally subjected to a racial classification* as well as being represented by a legislator who believes his primary obligation is to represent only members of a particular racial group.”¹³² And this

median voter in their district.”); *see also* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 457 (2017) (noting that “narrowly elected legislators take similar positions to those elected by 10 percentage points or more”).

127. A district that is more racially competitive may be one that is more integrated. Interestingly, some research suggests that greater black-white residential integration results in greater polarization. Stephanopoulos, *supra* note 115, at 1359 (“[A]s blacks become more residentially integrated, they grow somewhat more electorally polarized from whites.”). Of course, just because a single-member district becomes more integrated does not mean underlying residential segregation has been reduced. The “integrated” single-member district may just represent a combination of highly residentially segregated areas.

128. *See supra* note 101 and accompanying text.

129. Of course, as with polarized voting, it’s possible racial gerrymandering doctrine has little or no short-term impact on elected officials but instead has a long-term impact. For instance, Rep. Alma Adams was elected from racially gerrymandered North Carolina District 12 in 2014 and *un*racially gerrymandered District 12 in 2016. Perhaps Rep. Adams will not change due to the new district but perhaps a successor representative will. My instinct would be that unless Rep. Adams changed in some way it’s unlikely her successor would change in some way *because of* racial gerrymandering doctrine, rather than, say, the overarching political dynamic. But, to my knowledge, no one has studied this. I also suspect this would be very difficult to empirically assess.

130. *See* Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1620 (2000); *see also supra* note 101 and accompanying text (language from *Shaw*).

131. *See supra* note 101; *see also* Bush v. Vera, 517 U.S. 952, 984 (1996) (discussing the “foster[ing of] harmful and divisive stereotypes”).

132. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (emphasis added). Despite the Court’s individual rights rhetoric, I suspect that the Court is really trying to address some

view of being personally subjected to a racial classification was also part of Justice Breyer's opinion for the Court in a 2015 racial gerrymandering decision.¹³³

But, to put the point kindly, the precise nature of the personal harm is, as one commentator noted, "somewhat elusive."¹³⁴ Quite honestly, I am unsure exactly what the Court seeks to accomplish in addressing the personal harm.¹³⁵ And I am not alone.¹³⁶ The Court discusses stereotyping without identifying what the stereotype actually is.¹³⁷ And the Court talks of stereotyping in a case, *Shaw*, where a majority-black district was drawn and white plaintiffs were allowed to challenge it. One would think that the stereotype would be the idea that all black voters think alike but, if that was the case, wouldn't you require a black voter to be a plaintiff? Is any voter—white, black, or otherwise—wearing a scarlet letter of stigma due to the district they have been placed in? And the way racial gerrymandering doctrine has developed, the State can still use race which, presumably, involves stereotyping on some level. So it is okay to stereotype, just not too much? Frankly, I think the Court uses the rhetoric of stereotyping (and individual rights) in part to hide the fact that the doctrine likely does not accomplish the Court's initially stated goals.

But assuming racial gerrymandering doctrine is intended to promote less stereotyping of individuals, one could try to measure doctrinal success in at least a few different ways. One could try to measure whether people who lived in racially gerrymandered districts engage in more stereotyping than those who do not. One could try to measure whether officials elected in racially gerrymandered districts engaged in more racial stereotyping than officials elected in the remedial, unracially

sort of societal harm. See Sue T. Kilgore, *Between the Devil and Deep Blue Sea: Courts, Legislatures, and Majority-Minority Districts*, 46 CATH. U. L. REV. 1299, 1320 (1997) (describing the harm of racial gerrymandering as "harm to society as a whole caused by reinforcing racial stereotypes"). But the exact nature of the societal harm and how the Court's doctrine tangibly reduces that harm are unclear.

133. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015) (citations omitted) ("[T]he harms that underlie a racial gerrymandering claim . . . are personal. They include being 'personally . . . subjected to [a] racial classification,' as well as being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group" (citations omitted)).

134. Saunders, *supra* note 130, at 1620; see also Charles & Fuentes-Rohwer, *supra* note 49, at 242 (noting that "the Court has yet to clarify how an individual is harmed when district boundaries are predominantly influenced by racial considerations" and that "the Court does not say what exactly this [individual] right is"); Hasen, *supra* note 26, at 382 ("[T]he cause of action for racial gerrymandering protects against no real harm. . . . [T]here is no good evidence that racially conscious districts, including majority-minority districts, actually send messages to voters about the separation of voters by race. The harm of such racial gerrymandering is less than 'ephemeral'; it is non-existent" (footnotes omitted)).

135. Tania Tetlow, *How Batson Spawned Shaw – Requiring the Government to Treat Citizens as Individuals when It Cannot*, 49 LOY. L. REV. 133, 158 (2003) ("[T]he harm resulting from these stereotyping decisions is nebulous at best. . . . [V]oters suffer no consequences as individuals from redistricting decisions.").

136. See Hasen, *supra* note 26, at 365 (describing racial gerrymandering as "a shaky, ephemeral claim based solely on appearances").

137. Saunders, *supra* note 130, at 1620 ("As *Shaw*'s critics have often pointed out, it is impossible to say with a straight face that plaintiffs in *Shaw* and its progeny—all of whom resided in districts that were quite racially *integrated*—were being stigmatized in that particular way.").

gerrymandered districts.¹³⁸ One could try to measure whether a legislature that drew a racially gerrymandered set of districts had different racial attitudes than a later set of legislators who were compelled to draw a plan that was not racially gerrymandered. One could try to measure whether the individuals who lived in the racially gerrymandered districts felt less stereotyped after being moved to an unracially gerrymandered district. And there undoubtedly are even more ways to measure racial gerrymandering doctrine's impact on stereotyping.

But even assuming we take the stereotyping rationale seriously, it is unlikely the doctrine has led to any sort of systematic impact on stereotyping. One of the few articles that directly assesses racial gerrymandering doctrine's impact concludes that the doctrine does little on this score. As Professors Steve Ansolabehere and Nate Persily conclude, "contrary to the assumptions that undergird the *Shaw* cause of action, the data do not suggest variation among racial groups [in belief of stereotypes] depending on the type of district in which they live."¹³⁹ So it seems that the type of district in which a person resides does not impact racial attitudes.

But perhaps legislators elected from an unracially gerrymandered plan would engage in less stereotyping. Yet there often does not seem to be much of a change in who gets elected between a racially gerrymandered plan and a later remedial plan. For example, after North Carolina's 2011 plan was declared a racial gerrymander and a new unracially gerrymandered plan was used, North Carolina had twelve of thirteen incumbents re-elected. And even when an incumbent was not re-elected, a Republican just replaced a Republican.¹⁴⁰ It's possible the incumbents adopted less stereotypical ideas as a result of the doctrine, but it seems unlikely that new district lines would spark such a conversion.¹⁴¹

Perhaps the legislators doing the redistricting would stereotype less following a finding of racial gerrymandering, but, again, that seems unlikely. Republicans drew the plan for North Carolina's congressional districts in 2011. They then drew the plan in 2016. Did the second legislature have any less stereotypical beliefs that were caused by racial gerrymandering doctrine's existence? And, lest one think I am picking on Republicans—the same thing happened in the 1990s. Democrats drew a racially gerrymandered plan and then drew the remedial plan. Did these Democrats have any less stereotypical views the second time around because the Court held their first plan to be a racial gerrymander?

Finally, maybe the people who lived in the districts in 2011 and challenged them as a successful racial gerrymander felt less stereotyped by the new districts. Although it might be difficult, perhaps someone could survey residents of a district

138. In some ways, this could be similar to the goal of having elected officials represent their constituency as a whole. It's possible a representative who engaged in less stereotyping will be more likely to represent the constituency as a whole rather than just a racial or ethnic subsection of the district.

139. Ansolabehere & Persily, *supra* note 12, at 1043.

140. Rep. George Holding replaced Rep. Renee Ellmers in District 2. Rep. Ted Budd replaced Rep. George Holding in District 13. HAAS, *supra* note 92, at 58. In other words, Rep. Holding was re-elected—just from a different district—and Rep. Ellmers essentially was replaced by Rep. Budd.

141. See *supra* note 124 and accompanying text.

challenged as a racial gerrymander and then conduct a second survey after a successful challenge and a remedial district was drawn. We could then determine whether individuals felt less stereotyped because of racial gerrymandering doctrine changing the district lines. My suspicion is that racial gerrymandering doctrine has little overall impact because citizens tend to not be very knowledgeable about election laws,¹⁴² but one cannot say for certain.

It bears repeating, though, that this is an awfully difficult area to assess the doctrine's impact because of the vagueness in the Court's delineation of the harm. When the Court talks about stigmas and stereotypes, it does not give much indication as to who exactly is being stereotyped or stigmatized, what the exact stereotype or stigma is, and exactly how racial gerrymandering doctrine improves the situation in some tangible way.¹⁴³ Of course, that may be the point for the Justices. If they do not articulate a clear, measurable agenda then no one can hold them accountable for failure to achieve the agenda.

B. Representational Impacts on Minority Voters

The Court's creation of racial gerrymandering doctrine focused on two clear, explicit goals. The Court wanted the doctrine to foster less racially polarized voting and also wanted the doctrine to create an environment where elected officials would represent their entire constituency rather than a racial or ethnic subgroup. There was also a vague dash of anti-stereotyping thrown in.

But explicit goals might not be the whole story of the doctrine's impact. Perhaps there were other *sub silentio* consequences members of the *Shaw* majority wished to accomplish. Or, quite likely, the doctrine could result in other completely *unintended* consequences.

While the creation of racial gerrymandering doctrine was not explicitly about the amount or quality of representation provided to a minority group,¹⁴⁴ racial gerrymandering doctrine nonetheless may have impacted minority voters' representation. Put differently, even if the Court was not intending to either reduce or enhance minority voters' representation, racial gerrymandering doctrine might have led to the reduction or enhancement of minority voters' representation.

142. *Knowledge About Voter Laws Still Lacking*, CTR. FOR INFO. & RES. ON CIVIC LEARNING & ENGAGEMENT (Oct. 30, 2012), <http://civicyouth.org/knowledge-about-voter-laws-still-lacking/> [<https://perma.cc/9V7L-HDRA>].

143. As Rick Pildes & Richard Niemi wrote soon after the doctrine's creation:

One can only understand *Shaw*, we believe, in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about. . . . Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993).

144. I concede that the goal of elected officials playing to their whole constituency rather than a racial subgroup could have an impact on representation for a minority group. In this portion of the Article, I am offering a different angle on the representational impact on minority voters.

Two well-recognized types of representation exist in relation to minority voters—descriptive representation and substantive representation.¹⁴⁵ Descriptive representation is the easiest to measure. The question asked in relation to descriptive representation is whether the elected representative shares the same racial or ethnic group as the voters who control the outcome in the district. To put this into a concrete example, descriptive representation occurs when a district controlled by black voters elects a black candidate. In contrast, the question asked in relation to substantive representation is whether the representative shares the same substantive agenda or policy preferences of the racial or ethnic group.¹⁴⁶ The next two subparts discuss racial gerrymandering doctrine’s impact on these two types of representation.

1. Descriptive Representation

An initial concern about the creation of racial gerrymandering doctrine was that the doctrine would lead to less descriptive representation for minority voters. For instance, Stanford’s Pam Karlan worried the doctrine would cause the first decrease in black representation since Reconstruction.¹⁴⁷ This made sense because virtually all the districts challenged as racial gerrymanders, such as North Carolina’s District 12, had been drawn to increase minority descriptive representation.¹⁴⁸

But it’s not clear racially gerrymandering doctrine has decreased descriptive representation.¹⁴⁹ For instance, take the litigation involving North Carolina’s congressional districts over the years. The redistricting plan initially challenged in

145. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); see also Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 557 n.9 (2011) (“In Hanna Pitkin’s classic formulation, ‘descriptive’ representation is concerned with representing the identity of a voter, while ‘substantive’ representation is concerned with representing the interests of a voter.”).

146. Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 794 (1996) (“[I]f minority voters generally elect minority candidates [in majority-minority districts] to represent them, then *descriptive representation*—increasing the number of minority officeholders—goes hand in hand with *substantive representation*—enacting legislation that furthers the interests of the minority community.”); see also David Epstein & Sharyn O’Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 AM. J. POL. SCI., 367, 385 (1999) (defining descriptive representation as “electing minorities to office” and substantive representation as “passing minority-favored legislation”).

147. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 292 (1997); see also A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1603 (1994) (“[T]he [Shaw] Court has made it possible that North Carolina’s (and other states’ as well) congressional representation might once again become lily white by providing the basis for invalidating all minority-majority districts.”).

148. See, e.g., *Bush v. Vera*, 517 U.S. 952, 961 (1996) (noting that three districts successfully challenged as racial gerrymanders “were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress” (citation omitted)); see also *supra* notes 3–25 and accompanying text.

149. As Nick Stephanopoulos wrote after reviewing the literature, the “concern [about a decrease in descriptive representation] does not seem to be validated by the existing data, but this data is so patchy it’s impossible to tell.” Stephanopoulos, *supra* note 115, at 1364.

the early 1990s contained two majority-black districts (Districts 1 and 12), both of which elected an African-American candidate.¹⁵⁰ After District 12 was successfully challenged as a racial gerrymander and the North Carolina map was redrawn, the same two incumbent African-American candidates were returned to office from the same two districts.¹⁵¹ The same two districts continued to elect African-American candidates after the post-2000 redistricting plan.¹⁵² After the 2010 round of redistricting, the two districts electing African-American candidates were successfully challenged as racial gerrymanders and redrawn.¹⁵³ And, after the districts were redrawn, those same two African-American candidates were re-elected.¹⁵⁴ *So when it comes to North Carolina's congressional districts, two African-American candidates were elected prior to the creation of racial gerrymandering doctrine and two successful racial gerrymandering challenges over the course of twenty-five years have done nothing to change the amount of descriptive representation in Congress for African-American citizens of North Carolina.*

And the dynamics of descriptive representation in other States may not be all that different—at least when it comes to congressional districts. For instance, prior to the successful racial gerrymandering challenge in Georgia during the 1990s, there were three African-Americans elected to Congress.¹⁵⁵ After the challenges? Three African-Americans were elected to Congress.¹⁵⁶ Same thing in Virginia. Virginia was found to have racially gerrymandered Congressional District 3, which had elected Rep. Bobby Scott, an African American.¹⁵⁷ After District 3 was redrawn, it continued to elect Rep. Scott.¹⁵⁸

But it seems likely that at least in some instances racial gerrymandering doctrine has led to a bit less descriptive representation for minority voters at least at some points in time. This can undoubtedly be measured directly in some instances. For example, after a successful racial gerrymandering challenge in Louisiana during the 1990s, the number of African-American members of Congress

150. District 1 elected Rep. Eva Clayton and District 12 elected Rep. Mel Watt. *See supra* notes 3–33.

151. *See supra* note 57.

152. District 1 was represented briefly by Rep. Frank Ballance and then Rep. G.K. Butterfield; District 12 was represented by Rep. Alma Adams. *Supra* note 73.

153. *See supra* notes 81–89 and accompanying text.

154. *Supra* note 91.

155. District 2 elected Rep. Sanford Bishop, District 5 elected Rep. John Lewis, and District 11 elected Rep. Cynthia McKinney. DALLAS L. DENDY, JR., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 1992, at 18–19 (1993), <http://history.house.gov/Institution/Election-Statistics/1992election/> [https://perma.cc/8GJN-JLCH].

156. The same three candidates were elected from redrawn districts in 1996, although Rep. McKinney was elected from District 4 rather than District 11. ROBIN H. CARLE, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 5, 1996, at 18 (1997), <http://history.house.gov/Institution/Election-Statistics/1996election/> [https://perma.cc/UMW7-D2RF].

157. *Moon v. Meadows*, 952 F. Supp. 1141, 1150 (E.D. Va. 1997).

158. *Biography*, CONGRESSMAN BOBBY SCOTT, <https://bobbyscott.house.gov/about/biography> [https://perma.cc/UUS8-9GKE] (last visited Sept. 8, 2018).

from that state went from two to one.¹⁵⁹ And, during the 1990s, a number of successful challenges to state legislative districting plans occurred, likely resulting in the loss of some descriptive representation on the state legislative level.¹⁶⁰ Moreover, one would guess that the specter of a racial gerrymandering challenge causes redistricting actors to be slightly more hesitant to create additional majority-minority districts that would provide descriptive representation for fear of inviting a racial gerrymandering challenge. Finally, because racial gerrymandering concerns creep into concerns about geographic compactness for purposes of Section 2 vote dilution lawsuits,¹⁶¹ racial gerrymandering doctrine may have led to fewer Section 2 challenges being successfully brought.

However, a fairly recent study suggests racial gerrymandering doctrine did not reduce descriptive representation for minority voters in state legislatures. Professor Nick Stephanopoulos has presented data using state legislatures which demonstrates “minority representation has increased considerably in the modern era with much of the progress taking place in the 1990s.”¹⁶² From his perspective, then, the data “provide no support for the claim that the Court’s racial gerrymandering decisions may have reduced minority representation.”¹⁶³

But it’s possible this research does not fully capture the impact of racial gerrymandering doctrine on descriptive representation for several reasons. First, the focus of the research was on the impact of Section 2 of the Voting Rights Act rather than racial gerrymandering doctrine, with the research making only very passing mention of racial gerrymandering doctrine. Second, the research studied state legislatures, leaving aside Congress and local governments.¹⁶⁴ Third, it appears the study defines a reduction of minority representation as a decrease in the number of minority legislators.¹⁶⁵ However, it’s possible that increases in the number of minority legislators would have been even greater in a world without racial gerrymandering doctrine. Indeed, the research shows that the largest increase in descriptive representation occurred during the 1990 redistricting cycle and that increases have been lower in subsequent cycles.¹⁶⁶ Such a pattern is consistent with the idea that racial gerrymandering doctrine limited increases in descriptive

159. District 2 elected Rep. William Jefferson and District 4 elected Rep. Cleo Fields. DENDY, JR., *supra* note 155. After the redrawing of Rep. Fields’ district, he opted to retire from Congress. *Biography: Cleo Fields*, CONG. BLACK CAUCUS INST.: POL. EDUC. & LEADERSHIP, <https://cbcstitute.org/team/cleo-fields> [<https://perma.cc/F874-96L6>] (last visited Sept. 8, 2018).

160. *See, e.g.*, Johnson v. Miller, 929 F. Supp. 1529 (S.D. Ga. 1996) (successful racial gerrymandering challenge to Georgia’s State House and Senate districts).

161. Bush v. Vera, 517 U.S. 952, 977–79 (1996) (discussing Section 2 compactness in relation to racial gerrymandering); *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 427–35 (2006) (rejecting Texas’ argument that it complied with Section 2 because the district was “noncompact” with numerous citations to racial gerrymandering decisions in the discussion).

162. Stephanopoulos, *supra* note 115, at 1367.

163. *Id.*

164. *Id.* at 1329.

165. *Id.* at 1367–68.

166. *Id.* at 1369–70.

representation because racial gerrymandering doctrine only came to full fruition during the latter stages of the 1990 cycle.

At the end of the day, this area seems ripe for more systematic empirical analysis. At the very least, it would seem plausible to assess descriptive representation both before and after all the successful racial gerrymandering challenges to at least determine the short-term impact of the success of such challenges on descriptive representation. Obviously, such a very basic study seems likely to undercount the impact of racial gerrymandering doctrine because we may never know how many additional ability-to-elect districts might have been constructed in a world where racial gerrymandering challenges did not exist.¹⁶⁷ Moreover, such a study may not account for later changes that mitigate any short-term loss. Finally, any study may not be able to account for the impact of incumbency on re-election. Put differently, African-American legislators may only have been re-elected after a successful racial gerrymandering claim because they were incumbents. However, such a study would give some indication of racial gerrymandering doctrine's impact on descriptive representation.¹⁶⁸ While more study would be welcome, at this point the available evidence is that racial gerrymandering doctrine, at most, has led to slightly less descriptive representation than would occur in the absence of the doctrine.

2. *Substantive Representation*

While it may not be possible to conclusively and comprehensively measure racial gerrymandering doctrine's impact on descriptive representation because it's difficult to know how many *more* ability to elect districts might have been drawn absent creation of the doctrine, descriptive representation remains relatively easy to quantify. One need only count the number of minority representatives elected from districts controlled by minority voters.¹⁶⁹ Substantive representation—the election of representatives who represent the policy preferences of minority voters and then turn those policy preferences into actual policy—is much more difficult to quantify. How can we know whether minority voters are doing better or worse in terms of legislative outcomes as a result of racial gerrymandering doctrine?

Political affiliation presents a potential proxy for substantive representation. For instance, African-American voters overwhelmingly support Democratic candidates. Thus, the election of additional Democrats can mean substantive

167. Of course, there may be other less obvious impacts of racial gerrymandering challenges, such as settlement agreements or decisions to redraw districts prior to a final judgment.

168. I recognize it will be difficult, if not impossible, to fully account for districts not drawn because of the specter of a racial gerrymandering challenge.

169. Admittedly, there may be a few instances where it's unclear whether minority voters control the outcome of a district. However, in most instances control (or lack thereof) is obvious.

representation has improved for minority voters while the election of fewer Democrats can be interpreted as a sign of diminished substantive representation.¹⁷⁰

Using North Carolina's congressional districts as an example, it seems like racial gerrymandering claims have had little impact on substantive representation for black voters—at least as measured by overall partisan outcomes. During the 1990s round of racial gerrymandering litigation, the last election held using the plan declared to be a racial gerrymander was the 1996 contest which resulted in Democrats winning in 6 of the 12 congressional districts.¹⁷¹ The 1998 election used a plan developed by the State to remedy the racial gerrymander and the result of that election was Democrats winning in five of the twelve districts.¹⁷² In the second wave of racial gerrymandering litigation, Democrats held three of thirteen seats after the last election (2014) using the plan that was held to be a racial gerrymander.¹⁷³ After the next election, using a redrawn map, Democrats continued to hold three of the thirteen seats.¹⁷⁴ Put simply, after two successful racial gerrymandering challenges in North Carolina, Republicans gained one seat overall (out of twenty-five possible seats—twelve elections in the 1990s and thirteen elections in the 2010s).¹⁷⁵ This experience suggests racial gerrymandering doctrine does little to change substantive representation and could even decrease it.

Again, though, problems exist with assessing whether racial gerrymandering doctrine causes differences in substantive representation. Using the election of Democrats as a proxy has flaws because it's difficult to know whether a switch in a seat from one party to another is the result of a different redistricting plan or of other factors apart from the plan (e.g., a more or less favorable political environment for Democrats generally). In addition, the type of Democrat or Republican elected might change—even if the political party remains the same. For instance, a non-racially gerrymandered plan might elect more conservative Democrats or more liberal Republicans.¹⁷⁶ Finally, the 2010 round of racial gerrymandering litigation featured an attempt by Democrats to “unpack” black voters so that those voters could help elect white Democrats. This goal of Democrats was not immediately achieved but perhaps over the long-haul Democrats will be aided by such litigation.

Another way of thinking about the impact of racial gerrymandering claims on substantive representation might be to consider linkage between descriptive and substantive representation. One interesting study assessed whether more descriptive

170. Stephanopoulos, *supra* note 115, at 1382 (noting that one of the two main methods for measuring substantive representation for minority voters is “share of legislative seats held by Democrats”).

171. *See supra* note 51 and accompanying text.

172. *See supra* note 58 and accompanying text.

173. *See supra* note 80 and accompanying text.

174. *See supra* note 91 and accompanying text.

175. This leaves aside the fact that it's a change of one seat out of 435 total seats in the House of Representatives.

176. Stephanopoulos, *supra* note 115, at 1382 (noting that one of the two most common metrics for assessing substantive representation is “the liberalism of the median legislator, determined on the basis of roll call votes”).

representation for minority voters leads to less substantive representation.¹⁷⁷ The study analyzed the impact of the 1992 South Carolina Senate redistricting plan—a plan expressly designed to increase black descriptive representation—on senator voting.¹⁷⁸ The authors concluded that “black substantive representation fell after the 1992 redistricting” and “resulted in a more polarized Senate, less friendly overall to minority policy concerns.”¹⁷⁹ If this is the case, and if racial gerrymandering doctrine had led to a small decrease in descriptive representation for minority voters¹⁸⁰ then it’s possible racial gerrymandering doctrine has led to a small increase in substantive representation for minority voters.¹⁸¹

But it’s possible there may be a difference between Congress, state legislatures, and local government.¹⁸² Perhaps racial gerrymandering doctrine does little to substantive and descriptive representation at the federal level—and the experience of North Carolina’s congressional districts over twenty-five years may bear that out. But perhaps racial gerrymandering doctrine reduces descriptive representation and increases substantive representation in state legislatures (which was the focus of the above-mentioned research). And perhaps it’s possible that racial gerrymandering doctrine both reduces descriptive representation and reduces substantive representation.¹⁸³ Again, it appears that no one has tried to determine in any systematic way which of these hypotheses are accurate. In the end, though, the currently available evidence tends to indicate racial gerrymandering doctrine has done little to systematically move minority substantive representation in any particular direction.

177. See David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J.L. ECON. & ORG. 499 (2007).

178. *Id.* at 506.

179. *Id.* at 517.

180. See *supra* Part II.B.i.

181. One scholar commented, “[t]his empirical literature concludes almost unanimously that a tradeoff exists between descriptive and substantive representation.” Stephanopoulos, *supra* note 115, at 1383.

182. To date, there seem to have been relatively few racial gerrymandering claims filed against local governments. Of course, racial gerrymandering doctrine could still have an impact on local governments even if no claims are filed because local redistricting actors operate in the shadow of redistricting law.

183. Stephanopoulos, *supra* note 115, at 1385 n.308 (“The tradeoff [between descriptive and substantive representation] might also be more severe in recent years, since the Supreme Court has rendered unavailable certain policies (like bizarrely shaped majority-minority districts) that make it easier to achieve descriptive and substantive representation simultaneously. These are fruitful topics for further study.”). It seems pretty unlikely racial gerrymandering doctrine would *increase* descriptive representation. I am not aware of any successful litigation that alleged a white district as a racial gerrymander that then resulted in the creation of a district that minority voters controlled. That said, it’s possible that a racial gerrymandering challenge to a majority-minority district in which minority voters have been “packed” could lead to a redistricting plan that unpacks those voters to create an additional district that minority voters control. But such cases would seem to be rare.

C. Other Potential Impacts

Thus far we have considered the impact racial gerrymandering was designed to have by the Court's own reasoning—reduced polarization of voters and more inclusive representation by elected officials with a bit of anti-individual stereotyping thrown in. We have also considered two other potential representational impacts of racial gerrymandering doctrine—the descriptive and substantive representation of minority voters. But other potential impacts of racial gerrymandering doctrine include a constraint on partisan gerrymandering, an increase or decrease in voter participation, a devolution of power from the federal government to state government, doctrinal momentum toward a “colorblind” Constitution, more compact districts, increased legitimacy, and fiscal costs.¹⁸⁴

Constraint on Partisan Gerrymandering. To date, the Supreme Court has yet to strike down a redistricting plan as an unconstitutional partisan gerrymander. While the Supreme Court opened the federal courts to such claims in 1986,¹⁸⁵ lower federal courts have rarely struck down a redistricting plan on partisan grounds.¹⁸⁶

Because direct claims of partisan gerrymandering are overwhelmingly doomed to failure, racial gerrymandering claims could serve as an indirect check on partisan gerrymandering. While a racial gerrymandering claim won't directly result in a plan being struck down as an unconstitutional partisan gerrymander, racial gerrymandering claims function as a way to attack partisan gerrymanders from the flank. In other words, partisans who lose a redistricting battle in the legislature may well choose to use racial gerrymandering doctrine as a tool to undo the partisan gerrymander—at least in some small part.¹⁸⁷

Indeed, North Carolina's experience demonstrates how racial gerrymandering potentially operates as a check on partisan gerrymandering. In the 1990s, Democrats controlled North Carolina and, unsurprisingly, drew congressional districts gerrymandered in favor of Democrats.¹⁸⁸ In the 2010s, Republicans controlled North Carolina and, unsurprisingly, drew congressional districts gerrymandered in favor of Republicans.¹⁸⁹ In each decade, racial gerrymandering doctrine provided the losing side with the ability to mount an indirect challenge to partisan

184. This list reflects my own thinking about what impact a federal judicial doctrine related to redistricting might have and also reflects issues discussed in various academic articles related to racial gerrymandering doctrine. Future researchers might add to this list.

185. See *Davis v. Bandemer*, 478 U.S. 109 (1986).

186. See *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (describing history of litigation). The only instance is a 2016 decision involving Wisconsin's state legislative districts. See *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wisc. 2016). That decision was vacated. *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

187. See *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in part and dissenting in part).

188. See *supra* notes 17–18 and accompanying text.

189. See *supra* note 78 and accompanying text.

gerrymandering during an era when direct challenges to partisan gerrymandering were basically futile.¹⁹⁰

But North Carolina's congressional districting experience suggests racial gerrymandering provides, at best, only the most limited check on partisan gerrymandering. For starters, in the last decision involving the 1990s version of District 12, the Court explicitly allowed North Carolina to justify the district as motivated more by politics than by race. In other words, the Supreme Court explicitly accepted partisanship as a defense to racial gerrymandering.¹⁹¹ And, indeed, one study concluded that the 1997 remedial plan was more partisan than the 1992 racially gerrymandered plan.¹⁹² Turning to the 2010 round of racial gerrymandering litigation, the Court explicitly rejected an "it's partisanship, not race" defense of District 12—a decision that could be viewed as limiting the ability of partisanship to be deployed.¹⁹³ Even so, the remedial plan for the racial gerrymandering violation seemed to be partisan gerrymandering business as usual. The remedial plan resulted in ten districts generally safe for Republicans—not much different, if any different, than before, and empirical research indicates little changed from a partisan perspective.¹⁹⁴

This experience suggests racial gerrymandering claims are unlikely to have a systematic impact on partisan gerrymandering, but, to be fair, under the right circumstances, racial gerrymandering doctrine could curb partisan gerrymandering. There may be situations where a court finds a racial gerrymander and then the court orders its own remedial plan.¹⁹⁵ There may be situations where a court finds a racial gerrymander, allows the state to redraw the plan, and the underlying political dynamic has changed from one-party control to divided government (e.g., from

190. While technically partisan gerrymandering decisions were justiciable during this time-frame, as a practical matter partisan gerrymandering claims were virtually never successful. *Supra* note 186.

191. *Supra* notes 68–69 and accompanying text.

192. Charles & Fuentes-Rohwer, *supra* note 49, at 294–300 (“[T]he evidence is extremely convincing that the 1997 Plan, in contrast with the 1992 Plan, was a political gerrymander.”).

193. *Cooper v. Harris*, No. 15-1262, slip op. at 25–28 (S. Ct. 2017); see also Caroline A. Wong, *Sued if You Do, Sued if You Don't: Section 2 of the Voting Rights Act as a Defense to Race-Conscious Districting*, 82 U. CHI. L. REV. 1659, 1701 (2015) (“Equal protection precedents show that courts are indeed willing to dismiss claims alleging racial gerrymandering if a state defendant can show that political rather than racial considerations predominated in a challenged district's design, even when racial considerations entered the design's calculus.”).

194. One measure of partisan gerrymandering is the efficiency gap, and one analysis shows that the efficiency gap for the plan struck down as a racial gerrymander in 2016 is only slightly higher than the efficiency gap for the remedial plan. LAURA ROYDEN & MICHAEL LI, *EXTREME MAPS 6–7* (2017) (noting that “both of North Carolina's maps (the initial legislature-enacted plan and the redrawn plan in 2016) [hover] around 20 percent in favor of Republicans” with an accompanying chart demonstrating efficiency gap of both plans).

195. Evidence suggests court-drawn plans are less likely to be partisan gerrymanders than plans drawn by political actors. Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2131–34 (2018) (noting that court plans do not seem to skew the efficiency gap in state plans but may skew the efficiency gap slightly in favor of Democrats in congressional plans).

total Democratic control of state government to a Democratic legislature and a Republican governor).¹⁹⁶ More subtly, it's also possible that a redistricting actor could be less inclined to engage in partisan gerrymandering just knowing that another avenue for challenging a plan (i.e., racial gerrymandering doctrine) is available to his or her political opponents. For instance, knowing that another type of legal challenge is available might cause a redistricting actor to choose partisan gerrymander Plan A over more aggressive partisan gerrymander Plan B. For all these reasons, it would be helpful to have more systematic study beyond North Carolina's experience to better assess whether racial gerrymandering doctrine leads to less partisan plans.

And there is another way racial gerrymandering doctrine could have partisan implications. In a world where the Court allows the free pursuit of partisan gerrymandering, the doctrine might operate as a greater restraint on Republican gerrymandering than Democratic gerrymandering.¹⁹⁷ As Professors Adam Cox and Richard Holden recognized:

If *Shaw* and its progeny make it hard to assemble districts with large supermajorities of African American voters, then those cases could suppress the second-best strategy that Republicans might try to pursue when the law requires majority-minority districts . . .

If a legal rule added a ceiling to the VRA's floor [on minority representation]—that is, a prohibition against assembling districts with large supermajorities of minority voters—the ceiling could suppress the second-best strategy for Republicans of packing minority voters. Some might see this as a saving grace of the *Shaw* doctrine. Of course, if we are concerned principally about partisan bias, such a rule might seem particularly problematic. After all, Democrats are free under the legal regime to pursue their optimal partisan strategy. Republican redistricters, however, are already denied their first-best strategy by a legally mandated floor. Adding a ceiling to restrict access to their second-best strategy would further exacerbate partisan bias.¹⁹⁸

In the end, it is possible that racial gerrymandering doctrine leads systematically to less partisan redistricting plans. However, North Carolina's experience suggests the doctrine has little impact on this score.¹⁹⁹

196. Evidence suggests plans drawn by divided governments are less likely to be partisan gerrymanders than plans drawn by governments where a single political party controls the process. Stephanopoulos, *supra* note 195, at 2119. Of course, divided government could produce a different brand of partisan gerrymander—the incumbent protection gerrymander. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002).

197. To the best of my knowledge, during the 2010 redistricting cycle, no claims of racial gerrymandering were brought against redistricting plans that would be considered to be Democratic gerrymanders.

198. Cox & Holden, *supra* note 145, at 590.

199. Hasen, *supra* note 26, at 384 (“All in all, [racial gerrymandering doctrine] may help stem some egregious gerrymanders, but there will still be plenty of ways for states to draw district lines for partisan advantage without running afoul of the rules barring racial gerrymanders.”).

Individual voter participation. Racial gerrymandering doctrine might impact participation by voters. For instance, an African-American voter who resided in a majority-minority district but is then assigned to a majority-white district after a successful racial gerrymandering challenge might be less likely to turn out to vote at the next election. Similarly, a white voter assigned to a majority-minority district and then, after a successful racial gerrymandering challenge, finds his or herself in a majority-white district might be *more* likely to turn out at the next election.²⁰⁰ These differences could be attributable to at least a couple of things. First, a voter may think his or her vote matters more (or less) when placed inside a district with a majority (or a minority) of persons of his or her race or ethnic group.²⁰¹ Second, candidates might be more likely to mobilize voters based on the racial and ethnic demographics of districts.²⁰²

One study that did not focus on racial gerrymandering in particular suggests a change in district lines impacts the likelihood of individual voters to participate. Indiana University's Bernard Fraga found that:

- “For African-Americans, the immediate impact of being assigned to a district with a black incumbent and/or a black majority is a measurable boost in voter turnout.”²⁰³
- “White and Asian American registrants also participate more when co-ethnic candidates are on the ballot.”²⁰⁴
- “[T]he combined effect of co-ethnic candidacy and assignment to a majority Latino district does not increase Latino turnout on average.”²⁰⁵

The paradigmatic remedy for a violation of racial gerrymandering doctrine is for minority voters to be moved out of majority-minority districts and white voters to be moved into a district that is no longer majority-minority but that still allows minority voters the ability to elect a candidate of choice. For example, after the successful racial gerrymandering challenge to District 12 during the 1990s, the district went from about 53% black voting-age population (BVAP) to about 43% BVAP while still allowing black voters to elect their candidate of choice.²⁰⁶

200. Bernard L. Fraga, *Redistricting and the Causal Impact of Race on Voter Turnout*, 78 J. POL. 19, 19 (2015) (describing the literature in this area and noting that “[m]inority candidates and elected officials seem to stimulate co-ethnic turnout in some studies . . . but have little effect in other work, except to depress turnout for the (non-Hispanic) white majority,” and observing that “[m]ixed findings also appear when studying district demographic composition as distinct from minority officeholding”).

201. *Id.* at 20 (discussing “empowerment theory”).

202. *Id.* at 21 (describing how turnout increases for minority groups could be “a response to the ‘empowering’ mobilization activities of election-seeking politicians”).

203. *Id.* at 31.

204. *Id.*

205. *Id.* at 30.

206. Charles & Fuentes-Rohwer, *supra* note 49, at 258, 264 (providing statistics that District 12 in the 1992 plan was 53.34% BVAP and in the 1997 Plan was 43.36% BVAP).

Combining the paradigmatic remedy with Professor Fraga's research suggests that the doctrine might negatively impact African-American participation and have almost no impact on Latino and white participation.²⁰⁷ African Americans removed from a district declared to be a racial gerrymander seem unlikely to be assigned to a district that is majority-minority or that has a co-ethnic candidate or incumbent.²⁰⁸ If so, then it seems likely that African-American participation will decrease.²⁰⁹ Latinos do not appear to turnout more when placed in a majority-Latino district with a Latino candidate so it seems likely moving Latinos out of an ability-to-elect district will not change turnout for that group. With whites, they seem likely to be moved from a majority-white district with a white incumbent into a district that will either (1) be majority-white and elect a candidate of choice of white voters or (2) be majority-white but still allow minority voters to elect a candidate of choice. In the first circumstance, one would think that white voter turnout is unlikely to change as it's a lateral move. In the second circumstance, it might depend on whether a white candidate appears on the ballot with a white candidate appearing on the ballot keeping white turnout stable but with a white candidate not appearing on the ballot potentially reducing turnout.²¹⁰

However, there is a major caveat to this analysis. Professor Fraga's research focuses on individuals who have never lived in a district where their group constitutes a majority or where there is a candidate of the same race or ethnicity. In other words, his focus was on an individual being moved *into* a district where their group is a majority or where there is a candidate of the same race or ethnicity.²¹¹ In contrast, my analysis above in many instances discusses moving individuals *out of* a district where their group constitutes a majority or where there is a candidate of the same race or ethnicity. And it's quite possible that a different context—being moved out of instead of into a district—will have a different impact on voter participation.

Regardless, though, it seems unlikely that racial gerrymandering doctrine has a large impact on voter participation. Why? Because Professor Fraga's own research acknowledges that shifts in voter participation due to changes in district lines are "small in magnitude."²¹² That said, it would be interesting to more directly study

207. I have not included Asian-American voters in the above discussion only because I am not aware of any racial gerrymandering challenges being brought against districts that elect Asian-American candidates of choice.

208. For instance, the districts surrounding North Carolina District 12 in both plans where District 12 was declared to be a racial gerrymander were majority-white and represented by white incumbents.

209. Additional support for this idea can be found in another one of Professor Fraga's studies where he found that African-American turnout is greater in the general election when African Americans make up a larger portion of the electorate. Bernard L. Fraga, *Candidates or Districts? Reevaluating the Role of Race in Voter Turnout*, 60 AM. J. POL. SCI. 97, 98, 105–07.

210. In most instances where white voters have been moved into an ability-to-elect district for minority voters, at the very least a white Republican seems likely to appear on the ballot.

211. See generally Fraga, *supra* note 200.

212. *Id.* at 31.

racial gerrymandering doctrine's impact rather than the impact of districts more generally.

Devolution of Power to the States. Racial gerrymandering doctrine might have resulted in a devolution of redistricting power from the federal government to state governments.²¹³ An animating principle of the doctrine is that federal intervention in state redistricting should be done with great care and much deference to the States.²¹⁴ And federalism—in the form of more power to State government and less power to the federal government—seemed to be an overarching ideology of the Court majority that created the doctrine.²¹⁵

It seems counterintuitive that creation of a new federal cause of action to be wielded against state redistricting plans would result in a devolution of power from the federal government to the states, but it might have. The key here is the context in which racial gerrymandering claims tended to arise during the 1990s. A number of racial gerrymandering claims occurred in the aftermath of the Justice Department using its power under Section 5 of the Voting Rights Act to compel the states to create additional majority-minority districts.²¹⁶ Indeed, this dynamic between the Justice Department and the states is exactly what happened in relation to North Carolina's congressional districts in the early 1990s.²¹⁷

Because racial gerrymandering doctrine deemed that Section 5 of the Voting Rights Act as interpreted by the Justice Department during the 1990s could not support the creation of certain majority-minority districts,²¹⁸ this may have had an impact on the Justice Department's later implementation of Section 5. In essence, the Justice Department probably became less likely to intervene because of the potential for racial gerrymandering claims. And, indeed, the Justice Department explicitly acknowledged the need to comply with racial gerrymandering doctrine when it issued redistricting guidance for the 2000 redistricting cycle.²¹⁹ Moreover,

213. Power could devolve to local governments as well.

214. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting that courts should “exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race”).

215. As one commentator noted in 2002, “[s]ince the appointment of Clarence Thomas in 1991 . . . the Court has maintained a relatively stable five-justice majority—consisting of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas—committed to enforcing limits on national power and to protecting the integrity of the states.” Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 429–30 (2002). Those five justices comprised the Court’s majority in *Shaw v. Reno*.

216. See, e.g., *Miller*, 515 U.S. at 906–09 (describing the Justice Department’s efforts to get Georgia to create additional majority-minority districts). For a description of how this generally worked, see Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1585–86 (2010).

217. Hasen, *supra* note 26, at 365 (“In practice, the [racial gerrymandering] cause of action helped limit attempts by the U.S. Department of Justice in the 1990s to force jurisdictions then covered by section 5 of the Voting Rights Act to create more majority-minority voting districts.”); *supra* notes 19–25 and accompanying text.

218. See, e.g., *Miller*, 515 U.S. at 921–27.

219. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001) (“[P]reventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases.”).

the Justice Department was much less active in using Section 5 against state and local governments during the 2000 round of redistricting in comparison to the 1990s.²²⁰

However, with Section 5 being relegated to dormancy on the voting rights landscape in 2013,²²¹ racial gerrymandering doctrine no longer operates to increase the power of states vis-à-vis the federal government by serving as a check on the Justice Department forcing States to comply with potentially incorrect interpretations of the Voting Rights Act.²²² Instead, racial gerrymandering claims operate as a tool for using federal judicial authority to restrict state redistricting choices. Thus, absent Section 5's resurrection,²²³ racial gerrymandering now may function as a federal judicial usurpation of State authority. Moreover, even before Section 5 was rendered dormant, racial gerrymandering doctrine curbed state choices in areas not covered by Section 5.

Another consideration would be the federalism implications related to racial gerrymandering doctrine's impact on Section 2 of the Voting Rights Act. To win a claim under Section 2 that seeks an additional majority-minority single-member district, a plaintiff has to prove that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district."²²⁴ In many respects, the doctrine of racial gerrymandering has been incorporated into the requirement of geographic compactness.²²⁵ This doctrinal contribution could be

220. Hasen, *supra* note 26, at 365 ("Within a decade [of the creation of racial gerrymandering doctrine], however, racial gerrymandering claims seemed to wither away, as the Court used other methods to stop the Department of Justice from reading the [Voting Rights] Act too broadly."); Pitts, *supra* note 216, at 1587–88 (describing the reduction in the number of objections interposed by the Justice Department). To be fair, some of the reduction in activity was likely caused by another Supreme Court decision constraining the scope of the Justice Department's Section 5 review. *See* *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320 (2000); *see also* Pitts, *supra* note 216, at 1587–88.

221. *Shelby v. Holder*, 570 U.S. 529 (2013).

222. *See* Melissa L. Saunders, *The Dirty Little Secrets of Shaw*, 25 HARV. J.L. & PUB. POL'Y 141, 146–47 (2000) (discussing racial gerrymandering doctrine and suggesting that the "upshot of all this can only be described as a hostile takeover of the districting process . . . by the federal judiciary").

I recognize many of the *Shaw* cases from the 2010 redistricting cycle emerged from state actors arguing that compliance with Section 5 required redistricting along racial lines. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (challenge to state legislative districts in Virginia). However, unlike the 1990s round of racial gerrymandering claims involving Section 5, these choices were not made by States after receiving a denial of preclearance from the Justice Department. Instead, these choices were made by the state actors themselves and there is little evidence that the Justice Department would have blocked alternative plans that did not involve racial gerrymandering designed to increase the percentage of minority voters in districts where minority voters already had the ability to elect candidates of choice.

223. Technically, Section 5 remains alive and only the coverage formula that allows it to be implemented is unconstitutional. *See generally* *Shelby*, 570 U.S. 52. It's possible jurisdictions could be "bailed into" Section 5 using Section 3(c), but that has not happened with any frequency. EDWARD B. FOLEY ET AL., *ELECTION LAW AND LITIGATION* 98–99 (2014).

224. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

225. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 916–17 (1996) (racial gerrymandering decision describing how a district drawn with race as the predominant factor was not narrowly tailored as a remedy for a potential Section 2 violation because the district was not geographically compact); *see also* Hasen, *supra* note 26, at 373 (noting that *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399

viewed as enhancing state power in relation to federal power because it makes it harder for plaintiffs to prevail against the state on a federal law claim. On the other hand, racial gerrymandering principles that require compactness can also constrain state choices for complying with Section 2 and can allow plaintiffs to prevail on some claims that otherwise might have failed because non-compact ability-to-elect districts do not count toward a state's compliance with Section 2.²²⁶

It would likely be very difficult, if not impossible, to quantify the federalism costs and benefits (from the perspective of an increase in state power) of racial gerrymandering doctrine. Put simply, it seems doubtful we will ever know how much racial gerrymandering doctrine constrained the Justice Department during the time when Section 5 coexisted with the doctrine. And it's ambiguous whether incorporation of racial gerrymandering principles into Section 2 is state empowering or state constraining. But it seems like in a world without Section 5, racial gerrymandering doctrine now likely acts mostly as a federal check on state redistricting authority. In the end, it's hard to know whether the doctrine has had any significant impact on the federal-state power balance. At first, it may have given greater power to the states. Now it seems probable that it is taking power away from them.

Doctrinal Momentum Toward "Colorblindness". Racial gerrymandering doctrine could also potentially have an impact on moving toward a "colorblind" constitution.²²⁷ Racial gerrymandering doctrine could serve as a waystation to a regime where the government could virtually never take race into account when redistricting. As one commentator wrote as the 1990s came to a close:

Perhaps [*Shaw*] is in fact effecting a significant change in [the Court's] equal protection jurisprudence, declaring that the Equal Protection Clause forbids the state to use race in governing, absent truly extraordinary justification, even when it is not subjecting any identifiable class of persons to special disadvantage. There are certainly strong indications that at least three members of the *Shaw* majority—Justices Scalia, Kennedy, and Thomas—would like to see the Court's equal protection jurisprudence move in this direction, and it may well be that they are using *Shaw* and its progeny as a vehicle for doing just that.²²⁸

(2006), "appeared to merge aspects of racial gerrymandering claims into the section 2 analysis by requiring district residents to have more in common than simply race to avoid liability").

226. See, e.g., *League of United Latin Am. Citizens*, 548 U.S. at 427–35 (refusing to give any weight to a non-compact majority-minority district for purposes of assessing Texas' compliance with Section 2).

227. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011) ("The Justices who vote against affirmative action and other race-conscious civil rights policies are said to reason from a colorblind anticlassification principle, premised on the belief that the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing.").

228. See Saunders, *supra* note 130; see also Charles & Fuentes-Rohwer, *supra* note 49, at 229 (noting in the early 2000s that "[f]or some members of the Court, any evidence of race consciousness invalidates the infected district absent compelling reasons").

But if the doctrine was intended to be a way station toward a colorblind constitution, it has yet to develop over the last twenty-five years. Indeed, if anything the doctrine seems to have eased up on the colorblindness idea since the 1993 *Shaw* decision. After *Shaw*, the doctrine developed in two ways unsympathetic to the colorblind perspective. First, the doctrine clearly allows race to be a factor, just not the predominant factor.²²⁹ Second, even if race predominates, a district can presumably be saved by using the Voting Rights Act—a race-based remedy—as a compelling interest.²³⁰ In short, the doctrine does not appear to have moved the needle very far in the direction of colorblindness.²³¹

More Compact Districts. Racial gerrymandering doctrine might create more geographically compact districts. As the North Carolina congressional cases demonstrated, the districts challenged as racial gerrymanders were, to put it mildly, not exactly shapely.²³² And North Carolina was not alone. Louisiana’s Fourth Congressional district, successfully challenged as a racial gerrymander, was known as the “Mark of Zorro” because it stretched 600 miles in a giant Z.²³³ Texas’ 30th Congressional district, also successfully challenged, consisted of “narrow and bizarrely shaped tentacles.”²³⁴ Indeed, part of the rationale for racial gerrymandering claims in the first place was the notion that “appearances matter.”²³⁵

To the best of my knowledge, no one has empirically examined whether successful racial gerrymandering claims lead systematically to more geographically compact districts.²³⁶ Instinctively, one would think that a successful racial gerrymandering claim *does* lead to more compact districts. For instance, just compare a map of the North Carolina congressional districts passed by Republicans in 2012 that was declared a racial gerrymander with the districts passed in 2016 to remedy the racial gerrymandering violation.²³⁷ The remedial plan certainly appears to be

229. *Cooper v. Harris*, No. 15-1262 (S. Ct. May 22, 2017).

230. *Id.*

231. This discussion should not be taken to imply that a move toward colorblindness is a positive development. Rather, a colorblind Constitution is just one of the potential impacts of racial gerrymandering doctrine.

232. *Supra* notes 3–24 and accompanying text.

233. David S. Broder, *Zorro in the House*, WASH. POST, Mar. 27, 1994, https://www.washingtonpost.com/archive/opinions/1994/03/27/zorro-in-the-house/6a1e8f78-e8ab-4ec8-badb-60c0f05301a9/?utm_term=.78a5f993983e [<https://perma.cc/P74F-UHPC>].

234. *Bush v. Vera*, 517 U.S. 952, 965 (1996).

235. *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993).

236. Many different ways exist to assess the compactness of districts. For a primer on several of these measures, see Roland G. Fryer, Jr. & Richard T. Holden, *Measuring the Compactness of Political Districting Plans*, 54 J.L. & ECON. 493 (2007). A discussion of the various measures lies beyond the scope of this article.

237. For a map of the districts declared to be a racial gerrymander, see the Appendix to the Opinion of the Court in *Cooper v. Harris*, No. 15-1262 (S. Ct. May 22, 2017). For a map of the remedial plan, see NCSBE *US Congressional Maps*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT, <http://www.ncsbe.gov/webapps/redistrict/uscongrmaps.html> [<https://perma.cc/YWE5-A9KN>] (last visited Sept. 8, 2018).

more compact.²³⁸ The changes to District 12 in the 1990s also made the district appear a bit less bizarre.²³⁹

While it seems highly likely racial gerrymandering doctrine leads to more compact single-member districts, it's an open question whether compactness amounts to a worthy goal.²⁴⁰ Perhaps compactness helps voters better understand who they are voting for and perhaps helps make it easier for candidates to campaign.²⁴¹ Perhaps compactness also leads to greater overall public confidence in the redistricting process. On the other hand, compactness may serve to divide groups who have genuine shared interests. In the end, though, more compact districts seems like a place where racial gerrymandering is likely to have made an impact.

Legitimacy. A possible justification for racial gerrymandering doctrine is that it attacks a potential threat to democratic legitimacy.²⁴² As one oft-cited post-*Shaw* article noted, racial gerrymandering doctrine might remedy a legislature's "failure to respect value pluralism in territorial redistricting" which "compromises the integrity and legitimacy of the resulting institutions."²⁴³ Thus, the doctrine might increase the legitimacy of government.

It seems awfully hard, though, to measure political legitimacy. One potential way to measure political legitimacy might be through public confidence. Presumably one could take an opinion poll before a challenge and then, after a successful challenge, take another opinion poll to measure public confidence in government.

But I suspect that public confidence in the legitimacy of government correlates strongly with personal political preferences. Legitimacy is in the eye of the political beholder.²⁴⁴ Indeed, measures of public confidence in electoral results

238. Mark Binker, *New Challenge Says NC Congressional Maps Overly Partisan*, WRAL.COM (Sept. 22, 2016), <http://www.wral.com/new-challenge-says-nc-congressional-maps-overly-partisan/16038294/> [<https://perma.cc/5NZ3-83LQ>] (describing the remedial map as "more compact").

239. Of course, though, a racial gerrymandering claim can be brought against any district—not just a district that lacks compactness, *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("parties alleging [a racial gerrymander] . . . [are not] required to make a threshold showing of bizarreness"), so it might not be that every successful racial gerrymandering claim leads to more compact districts.

240. Pildes & Niemi, *supra* note 143, at 484 ("Leading academic experts in redistricting have long argued that this impulse [to recoil instinctively from willfully misshapen districts] reflects untutored intuition, an instinctive response that careful analysis reveals to be unwarranted.").

241. *Bush v. Vera*, 517 U.S. 952, 974 (1996) (describing how in a bizarrely-shaped district "voters did not know the candidates running for office because they did not know which district they lived in" (internal quotes omitted)). *Prosser v. Election Board*, 793 F. Supp. 859, 863 (W.D. Wis. 1992), states:

To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests. . . . There is some, although of course not a complete, correlation between geographical propinquity and community of interests, and therefore compactness and contiguity are desirable features of a redistricting plan. Compactness and contiguity also reduce travel time and costs, and therefore make it easier for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent.

242. Pildes & Niemi, *supra* note 143, at 502.

243. *Id.* at 503.

244. *Id.* ("[I]nstitutions legitimate from some groups' perspective might not be from others'").

seem to track whether one's candidate wins or loses.²⁴⁵ If my candidate wins, the election was sound. If my candidate loses, the election was rigged.

Placing this in the context of North Carolina's congressional districts, I suspect legitimacy would track along the following lines. In the 1990s, the Court's intervention against a majority-black district probably increased confidence among whites and decreased confidence among African Americans (which correspondingly probably increased confidence among Republicans and decreased it among Democrats).²⁴⁶ In the 2010s, the situation likely reverses. The Court's intervention against a Republican plan increases confidence among African Americans and Democrats and decreases confidence among whites and Republicans. Of course, it's also possible racial gerrymandering doctrine is such a small item on the political agenda that such decisions fail to resonate with anyone beyond a small cadre of political insiders. On the other hand, perhaps racial gerrymandering doctrine increases overall public confidence by making districts more compact and reducing the number of "bizarre" districts.

At bottom, legitimacy is a hard metric to pin down. However, it seems likely racial gerrymandering doctrine decisions create more legitimacy for the winners of the claims and less legitimacy for the losers.²⁴⁷ If so, it's hard to know whether racial gerrymandering doctrine accomplishes much when it comes to legitimacy.

Fiscal Considerations. Racial gerrymandering doctrine costs money. At the very least it costs:

- Litigation expenses for plaintiffs.
- Litigation expenses for governments defending plans.
- Additional expense for legal and demographic expertise when adopting a plan to assure compliance with the doctrine.
- Additional expense when the doctrine throws a plan out and a remedial plan needs to be drawn.

It appears no one has studied the total additional government expenses related to the doctrine. This should be done (and has been explored in other contexts, such as voter identification laws).²⁴⁸ But it seems safe to say that racial gerrymandering doctrine has increased monetary costs to the government.

245. Michael W. Sancer & Charles Stewart III, *Voter Fraud Is More Believable when Your Candidate Loses*, LSE US CTR. (Feb. 22, 2016), <http://blogs.lse.ac.uk/usappblog/2016/02/11/voter-fraud-is-more-believable-when-your-candidate-loses/> [<https://perma.cc/BE27-WL2S>].

246. Pildes & Niemi, *supra* note 143, at 503 ("If the 'highly irregular' District 12 was actually necessary to ensure a second representative of the black community in North Carolina, that community might well view the districting plan that included District 12 as more legitimate than its alternatives.>").

247. Of course, if happy winners outnumber unhappy losers in some systematic way, then it's possible the doctrine leads to greater legitimacy (and vice versa to achieve lesser legitimacy).

248. See generally VISHAL AGRAHARKAR ET AL., THE COST OF VOTER ID LAWS: WHAT THE COURTS SAY (2011), <http://www.nonprofitvote.org/documents/2011/03/brennan-center-cost-of-voter-id-laws.pdf> [<https://perma.cc/KBT6-P6DQ>]. Costs of compliance were also a consideration in the debate over the constitutionality of Section 5 of the Voting Rights Act. Janel Davis, *Costs Associated with Voting Rights Act Can Vary by Case*, POLITIFACT GA. (Apr. 3, 2013),

D. Summing Things Up

This Part has highlighted several potential impacts of racial gerrymandering doctrine. The court explicitly intended some impacts discussed in this Part when it created the doctrine. The court did not explicitly mention other impacts but there might be *sub silentio* intended or even unintended consequences. And it is possible other researchers will uncover even more metrics on which racial gerrymandering doctrine can be assessed.

In the end, here's the scorecard. First, the best evidence would seem to be that the doctrine has not accomplished any of the goals stated by the Court. Second, the best evidence would seem to be that the doctrine may have led to either no losses or very slight losses to minority voters in terms of descriptive representation and little difference to minority voters in terms of substantive representation. Third, it seems like the doctrine has not had much of an impact on partisan gerrymandering. Fourth, it seems unlikely the doctrine has had much of an impact on individual voter participation. Fifth, it does not seem like the doctrine has moved the needle much toward creation of a colorblind constitution. Sixth, it's possible the doctrine has increased legitimacy and state government power but it's also possible the opposite has occurred, as neither of these metrics can be easily measured. Seventh, it seems likely the doctrine has led to more compact districts and greater monetary costs for state governments.

Assuming the accuracy of this scorecard, one might legitimately ask whether the game of racial gerrymandering doctrine is worth it. If the best that can be said for the doctrine is that it achieves prettier maps while costing the government more money, then, in my view, the doctrine should be dumped. Of course, if the doctrine is actually having other, positive impacts then that might change the calculus. But, after twenty-five years of operation, the best evidence is that the doctrine does little to improve American democracy and the burden should be shifted to the doctrine's proponents to demonstrate the doctrine has a tangible, positive impact on American democracy.²⁴⁹

CONCLUSION

A final consideration in all this is whether racial gerrymandering doctrine is distinctive within redistricting law in terms of whether it is actually achieving the goals it was designed to achieve. Racial gerrymandering doctrine is unique because

<http://www.politifact.com/georgia/statements/2013/apr/03/john-lewis/costs-associated-voting-rights-act-can-vary-case/> [<https://perma.cc/2WNJ-2RRQ>].

249. In fairness, I suppose there could be a cost to scrapping racial gerrymandering doctrine. The argument would be that scrapping the doctrine would necessitate overruling several Supreme Court precedents. In doing so, the Court might lose some of its institutional credibility. And the loss of institutional credibility might not be worth the gain of eliminating the doctrine. I'm not particularly sympathetic to this line of reasoning. First, I think it's very difficult to measure institutional credibility and what the impact of eliminating a single doctrine might have on that institutional credibility. Second, if the doctrine is not actually accomplishing anything of substance, other institutions (for example, state and local governments) should not have to bear the costs of a useless doctrine created by the Justices.

when it was created, the Court was relatively explicit about its goals. This is unlike, say, one person, one vote doctrine where the Court was not particularly explicit in what it was trying to accomplish.²⁵⁰ But it seems like racial gerrymandering doctrine has not fulfilled its promise and many doctrines may not fulfill their promises—whether those promises are explicit from the Court or implicit in what advocates of the doctrine hope to achieve. To take an example from the one person, one vote context, it does not appear that doctrine did much to “prevent those in control of the redistricting process from drawing lines to their advantage” which was one of its potential promises.²⁵¹ And even if racial gerrymandering doctrine is accomplishing something, it may not be accomplishing very much and may demonstrate the limitations of judicial doctrine’s impact on legislative redistricting.²⁵²

Finally, in writing this, while I have used the best available empirical evidence, it seems like racial gerrymandering doctrine is ripe for further study, particularly because I think it’s unlikely the Supreme Court will actually abandon the doctrine anytime soon. And this may represent an additional reason the doctrine is not unique because, once created, judicial doctrines may not be systematically studied so as to be questioned at their core. For instance, it took about forty years for anyone to take a look at the impact of one person, one vote on change in control of state legislatures.²⁵³ And, as another researcher noted in the context of Section 2 racial vote dilution “[a]lmost three decades after [the seminal Section 2 case of] *Gingles* was decided, not enough is known about the phenomena the case recognized or the relationships between them.”²⁵⁴ In the end, perhaps researchers and courts need to

250. Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1307 (2002) (“The one-person, one-vote cases are rich reservoirs of political philosophy. One must look beyond their texts, however, to capture fully the justifications for equal population in districting.”).

251. *Id.* at 1351. I recognize that one person, one vote may serve as a constraint on some extreme partisan gerrymanders. For instance, it prevents a political party from putting all of the opposing political party’s voters in a single district. But such an extreme example is likely an outlier. And one person, one vote perhaps created fertile grounds for more partisan gerrymandering because it requires redistricting every ten years.

252. As one prominent set of scholars noted at the end of a study of one person, one vote: The lessons learned from studying the political effects of one person, one vote are both humbling and illuminating. On the one hand, lawyers and judges ought not exaggerate the rule’s independent effect on the political system. Political actors usually find a way to achieve pre-existing goals even under new legal regimes. On the other, new legal rules can seriously exacerbate or help channel concurrent environmental changes. The difficult task for those of us who analyze and advocate for such changes in the law of politics is to learn from these judicial experiments so as to prevent perverse consequences the next time around. Representing as they do the most substantial intrusion of the courts into politics, the one-person, one-vote decisions deserve to be analyzed, even four decades later, so we can discover increasingly relevant lessons about the consequences of judicial regulation for legislative representation and electoral competition.

Id. at 1352.

253. *Id.* at 1332 (“As far as we know, no one has examined the effect of one person, one vote on change in control of state legislatures.”).

254. Stephanopoulos, *supra* note 115, at 1327.

comprehensively examine all redistricting doctrine to determine whether it meets the needs of American democracy.