22 *Explainer: Race vs. party*

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The Voting Rights Act (VRA) is a tool that is discussed throughout this book, and it safeguards the ability for minority groups to elect candidates of their choice. This would not be necessary if there were no systematic differences in preference between the minority and the wider society.[1] On the national scale, recent presidential elections provide a way to examine racially polarized voting in our country. The sidebar below explores this polarization in exit polls from the two most recent Presidential elections.

22.1 VOTING POLARIZATION TODAY

These sex-by-race figures on presidential support come from CNN exit polls. They show interesting patterns around the country. (In blank cells, the number of people polled from that group was judged to be too small to produce a reliable estimate.)

National	White women	White men	Black women	Black men	Latina women	Latino men	All other
Clinton '16	43	31	94	82	69	63	61
Trump '16	52	62	4	13	25	32	31
Biden '20	44	38	90	79	69	59	58
Trump '20	55	61	9	19	30	36	38

This shows that Trump improved his relative standing in nearly every group from 2016 to 2020, while losing the popular vote by a larger margin. This is possible because White voters were estimated at 67% of the 2020 electorate, down from 71% in 2016.

AL	White women	White men	Black women	Black men	Latina women	Latino men	All other
Biden '20	19	23	93	82	-	-	-
Trump '20	80	74	7	18	-	-	-

CA	White women	White men	Black women	Black men	Latina women	Latino men	All other
Biden '20	51	51	-	75	77	73	68
Trump '20	47	47	-	21	22	24	28

MI	White women	White men	Black women	Black men	Latina women	Latino men	All other
Biden '20	49	39	95	88	-	-	66
Trump '20	51	60	5	11	-	-	30

[1] To bring a VRA case, plaintiffs must show that voting patterns are racially polarized, with the minority cohesively supporting one set of candidates while the majority has a different, and prevailing, preference—these are the 2nd and 3rd Gingles criteria discussed elsewhere in the book.

What's going on here? Party polarization itself is very high, among both voters and legislators.[2] The preferences of people of color around the country are, in the main, very Democratic. Some authors have used the term "conjoinment" or "conjoined polarization" to refer to the tight correlation of race with party preference. With the conversion of the "Solid South" from Democratic to Republican now complete, the degree of race/party conjoinment may well be at a 50-year high. As political scientists Bruce Cain and Emily Zhang put it: "Since the migration of Southern White conservatives to the Republican Party, party identification has become more consolidated and consistent. As the parties have become more distinct from each other, they have also become more internally ideologically consistent. This assortative political sorting has been accompanied by the strengthening of racial partisan identification, leading to a conjoined polarization of party, ideology, and race. Conjoined polarization complicates and undermines the efforts of an earlier time to protect minority voting rights, most notably through the passage of the Voting Rights Act [3]."[3]

Let's look at how that has actually played out in some recent court cases.

In his dissenting opinion in a 2017 North Carolina racial gerrymandering case, Justice Samuel Alito noted that "partisan and racial gerrymandering can be made to look much the same on a map."[4] Since racial gerrymandering is unconstitutional but partisan gerrymandering is not, this might allow defendants to disguise impermissible predominance of race over other principles, or can at least muddy the waters and make it hard to discern intent. However, as Justice Kagan wrote in this same North Carolina decision, "[t]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics." In other words, no matter the focus in a redistricting case, a decision is suspect if the map-drawers considered race in determining how constituencies would vote.

In practice, the challenge of distinguishing between race-based versus party-based voting is a vivid one for advocates working on the ground to advance equal voting

[2]Many authors have tried to assess the impact of simple partisan polarization on the work of legislative bodies (for just two examples, see Andris et al. and Dimock et al. [1, 4]).

[3]Trends in racially polarized voting have historically been particularly strong in jurisdictions previously covered by the Voting Rights Act. As Ansolabehere et al. explain in *Race, Region, and Vote Choice in the 2008 Election* [2], White voters in previously covered jurisdictions voted distinctly more Republican that year than those in the noncovered jurisdictions. Only 28% of White respondents in jurisdictions previously covered by the Voting Rights Act said they voted for the Democratic nominee—fourteen percentage points lower than their counterparts in the noncovered jurisdictions, where 42% of Whites on average reported voting for Democratic nominees. This is thirty-three percentage points lower than Democratic nominees' average vote share among Latinos (61%) and fifty-six percentage points lower than the average among African Americans (84%) in the covered jurisdictions. Regardless of whether they live in covered or noncovered jurisdictions, racial minorities, in contrast, were not found to differ substantially in the share that reported voting for Democratic nominees.

[4]Alito continued, "This phenomenon makes it difficult to distinguish between political and race-based decision-making. If around 90% of African American voters cast their ballots for the Democratic candidate, as they have in recent elections, a plan that packs Democratic voters will look very much like a plan that packs African American voters. '[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African American precincts, but the reasons would be political rather than racial.'" *Cooper v. Harris*, 137 S.Ct. 1455, 1488 (U.S.N.C., 2017) (citing *Easley v. Cromartie*, 121 S.Ct. 1452, 1455, 532 U.S. 234, 235 (U.S.N.C., 2001)). The tension between partisan and racial claims is discussed further by Charles and Spencer in Chapter 9.

opportunities.[5] After plaintiffs make an argument that the Gingles preconditions are satisfied, including a showing of racially polarized voting, defendant jurisdictions often respond by arguing that voting trends are based on party allegiance, rather than race. For instance, San Juan County, Utah was sued multiple times because of discriminatory voting practices making it harder for its Navajo residents to vote, particularly by cutting down in-person voting to a single (poorly located) polling place and providing inadequate language support for voting materials. This minority group had its electoral preferences blocked by polarized voting. But defendants argued in a brief that voting trends were explained best by the alleged fact that "Navajo [residents] vote along party lines." The county asserted that "political party affiliation among Navajo voters in San Juan County is so strong that they will vote for a non-American-Indian Democratic candidate rather than a Navajo Republican candidate" and that "non-Navajo Democratic candidates prevailed over Navajo Republican candidates."[6] This case was ultimately settled with an agreement to maintain at least three polling places close to Navajo Nation and to provide increased translation and interpretation support for voters.

Similarly, in a Lawyers' Committee case challenging Alabama's method of electing judges to a number of the state's courts, the Middle District of Alabama found that, while "there is a significant correlation between race and voting behavior in Alabama," the real question was why that was the case. The court queried, "[i]s it on account of race, as condemned by § 2 of the VRA, or on account of some other cause or causes, such as partisan politics?"[7] In answering this question, and ultimately ruling against plaintiffs, the court pointed to a number of factors—other than a race-based unwillingness to vote for people of color—contributing to White bloc voting. For instance, the court noted that the relative weakness of the Alabama Democratic Party "makes it [] harder for any Democratic candidate — white or black — to get elected." The court also noted the fact that "appellate judges must run under a party banner" and the prevalence of straight ticket voting (voting for a single party up and down the ballot) as additional evidence that "judicial election results are driven [ ] by the party of the candidate, not the race of the candidate." Again, race/party conjoinment was used to undermine a VRA case.

The court's decision in the Alabama case reflected the finding in *LULAC v. Clements*, a case challenging a single-district system of electing state trial judges in Texas. In considering the Gingles preconditions, the Fifth Circuit found that:

> "The race of the candidate did not affect the pattern. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans. Likewise, black and white Democratic candidates received equal percentages of the white vote. Given these

[5] Compare *Easley v. Cromartie*, 532 U.S. 234, 239 (2001) with *Hunt v. Cromartie*, 526 U.S. 541, 550 (1999) (struggling to determine whether North Carolina District 12 was a racial gerrymander due to "a strong correlation between racial composition and party preference"); *Bush v. Vera*, 517 U.S. 952, 968 (1941) (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify"); Richard L. Hasen, Race or Party? [5].

[6] *Navajo Nation Hum. Rts. Commn. et al v. San Juan County et al*, 2:16-cv-00154-JNP D. Utah, Def. Opp. to Pls' Mot. for Prelim. Inj.

[7] *Alabama State Conference of National Association for Advancement of Colored People v. Alabama*, 2020 WL 583803 (M.D.Ala., 2020).

> facts, we cannot see how minority-preferred judicial candidates were defeated 'on account of race or color.' Rather, the minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*."[8]

One way out of this bind is to view race-party conjoinment as an *expression* of racially polarized voting, not a confounding factor.[9] That is, in a setting where the parties themselves are associated with racialized messages, the preference of people of color for Democratic candidates should still be understood as bloc voting that is salient to shared interests as a minority group.

REFERENCES

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[2] Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act, 123 Harv. Law Rev. 1385, 1403 (2010)

[3] Bruce E. Cain and Emily R. Zhang, Blurred Lines: Conjoined Polarization and Voting Rights, Ohio State Law J., https://kb.osu.edu/bitstream/handle/1811/79603/1/OSLJ_V77N4_0867.pdf

[4] Michael Dimock et. al., Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life, Pew Research Service (12 June, 2014) (available at https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/)

[5] Richard L. Hasen, Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere, 127 Harv. L. Rev. F. 58 (2014)

[8] *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 879 (C.A.5 (Tex.),1993).

[9] Another obvious way out of this bind is to look for polarization patterns in Democratic primary elections, so that party preference is held constant. But data from contested primary elections is not always available.