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The Paradox of Retrogression in the New VRA: Comment on Persily

The Court ruled in *Georgia v. Ashcroft*[1] that states, when redistricting, could try to increase "substantive representation"—the degree of influence that minority voters have on policy outcomes—even at a possible cost to "descriptive representation"—the number of minority candidates elected to office. As reviewed in Nathaniel Persily's article *The Promise and Pitfalls of the New Voting Rights Act*,[2] Congress attempted to overrule *Georgia v. Ashcroft* in the 2006 Voting Rights Act Renewal Act (VRARA), claiming that the VRARA would return redistricting law to its pre-*Ashcroft* state and disallow tradeoffs between substantive and descriptive representation.[3] It is still not clear how the new standards should be implemented, though, and Persily suggests that retrogression in descriptive representation be measured as the total expected number of minority candidates of choice elected to office, according to a given redistricting plan.

This response points out a paradox in the interpretation of the new VRA redistricting standards: returning preclearance decisions to the pre-*Georgia v. Ashcroft* procedures would actually *allow* tradeoffs between substantive and descriptive representation, like the plan originally proposed by Georgia. On the other hand, Persily's proposed standard, which we have advocated in the past and is in many respects more flexible, would disallow such tradeoffs.

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1. 539 U.S. 461 (2003).

2. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

3. According to the new standards, covered jurisdictions may not enact or administer voting laws that "diminish[]" minority voters' "ability . . . to elect their preferred candidates of choice." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §5(b), 2006 U.S.C.C.A.N. (120 Stat.) 577, 580-81 (to be codified at 42 U.S.C. §§ 1971 to 1973aa-1a).

I. BACK TO THE FUTURE

Proponents of the new preclearance standard embodied in the VRARA claim that it returns retrogression analysis to its pre-*Georgia v. Ashcroft* state, as if the Supreme Court had never taken the case.[4] If this is the case, then the DOJ need only use its previous procedure for determining retrogression. This line of reasoning has two possible flaws, the first of which we have discussed elsewhere; namely, that with increased racial crossover voting in elections and growing partisan, as opposed to racial, divisions in political behavior, the electability of minority voters' candidates of choice becomes more a matter of degree than a sharp break.[5]

But let us put those matters aside, for the moment, and assume that the Justice Department can determine with a high degree of certainty which districts will allow minority voters effective control, and which will not. Then retrogression under the leading interpretation would be measured by whether the number of minority opportunity districts decreased from one districting plan to the next. Indeed, in one of the most thoughtful and informative articles written on the pre-*Georgia v. Ashcroft* preclearance procedures at the Justice Department, a former official claims that this is exactly the standard DOJ was attempting to use.[6]

Under this standard, all that would be required would be that a district above the threshold of electability prior to redistricting must remain above that threshold afterwards. To be consistent, this minimum threshold could not be based on a "magic number" below which a district's black population could not fall. Indeed, Senator Kennedy, speaking on the Senate floor, emphasized that:

> Contrary to the suggestions of Senator Cornyn and Senator Kyl on the floor, while the standard rejects the notion that "ability-to-elect" districts can be traded for "influence" districts, it also recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances. The

4. *See* H.R. REP. NO. 109-478, at 68-72 (2006).

5. *See* David L. Epstein & Sharyn O'Halloran, *Gerrymanders as Tradeoffs: The Co-Evolution of Social Scientific and Legal Approaches to Racial Redistricting*, *in* MOBILIZING DEMOCRACY: A COMPARATIVE PERSPECTIVE ON INSTITUTIONAL BARRIERS AND POLITICAL OBSTACLES (Margaret Levi et al. eds., forthcoming 2008) (on file with author).

6. David J. Becker, *Saving Section 5: Reflections on* Georgia v. Ashcroft*, and Its Impact on the Reauthorization of the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 223 (Ana Henderson ed., 2007), *available at* http://www.law.berkeley.edu/centers/ewi/research_VotingRights.html.

> test is fact-specific, and turns on the particular circumstances of each case.[7]

So majority-minority districts, per se, are not protected under this interpretation of the standard; if sufficient numbers of nonminority voters reliably cross over to vote for the minority community's candidates of choice, then preserving districts with less than fifty percent black voting age population–so-called coalition districts–could be sufficient for a state to meet its section 5 burden.[8]

Under this regime, therefore, states would still have some latitude to trade off substantive and descriptive representation. For every minority opportunity district in place at the time of the redistricting, states would have the option of reducing the minority population until the point where the district is just barely over the threshold of electability for minority voters' candidates of choice. These voters can then be reallocated to other districts without fear of retrogression. Let us consider three ways in which such reallocations might work.

First, the voters could be reallocated to create additional minority opportunity districts. In this case, there is no hint of retrogression. Second, the voters could be reallocated to create influence districts, which is exactly the strategy pursued by Georgia after the 2000 census, and whose legitimacy has been in question ever since. Or third, these voters might simply be allocated to heavily Republican districts, in which case they will most likely cease to be represented by a candidate of their choice. Under other circumstances this might be seen as a diminution of minority voting rights, but it would be unassailable under this proposed rule, which ensures only that the number of minority opportunity districts does not decline.

Thus the DOJ, under the back-to-the-future scenario, would in fact preclear plans that look almost identical to the plan it rejected in *Georgia v. Ashcroft*. In fact, we know already that the DOJ has been willing to preclear plans of this type, because it raised no objections to the Georgia State House plan that accompanied the State Senate plan, which was later the subject of *Georgia v. Ashcroft*. The House plan, like the Senate plan, reduced the minority population of a number of majority-minority districts and used these voters to

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7. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy); *see also id.* at S8005 (statement of Sen. Leahy).

8. Indeed, Becker advocates "discarding the term 'majority-minority' district altogether." Becker, *supra* note 6, at 235.

create influence districts.[9] The only difference is that the DOJ judged that all of these reformulated minority opportunity districts nonetheless provided a sufficient chance for candidates of choice to be elected to Georgia's House. Of course, the DOJ believed that the three Senate districts that were at issue in *Georgia v. Ashcroft*—Districts 2, 12 and 26—were no longer minority opportunity districts, and though the District Court agreed with the DOJ that the state had not provided persuasive evidence to the contrary, the Supreme Court did not rule directly on this issue.[10] However, as David Becker admits, with relatively minor modifications the Senate scheme would in fact have passed muster.[11] So again the strategy of trading off descriptive and substantive representation is not ruled out by the traditional DOJ redistricting criteria.

This approach to the issue, then, could best be termed an "*Ashcroft*-clarification," rather than an "*Ashcroft*-fix." States could reduce minority populations in some districts and use them for whatever purposes they like, including the construction of influence districts, as long as they do not diminish the number of minority opportunity districts. The minority population of these districts could go below fifty percent as long as sufficient numbers of white voters reliably cross over to vote for the minority community's preferred candidate, and raise the probability that a candidate of choice is elected to a suitably high level.

II. MAINTAINING OVERALL DESCRIPTIVE REPRESENTATION

If we allow ourselves to rely on a technique that involves estimating probabilities of minority-preferred candidates winning office, then we might as well go the final step and do away with racial categories altogether, simply estimating the overall probability that the candidates of choice of minority voters are elected to office. That is, one can estimate the probability, in each district, that a candidate of choice is elected, and then add these probabilities across all districts. This is the course advocated by Persily, and which is consistent with our previous work on the subject.[12]

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9. *See* Ronald Keith Gaddie & Charles S. Bullock, III, *From* Ashcroft *to* Larios*: Recent Redistricting Lessons from Georgia*, 34 FORDHAM URB. L.J. 997, 1016-17 (2007).

10. The District Court for the District of Columbia found that the plan eliminated three majority-minority districts in areas where voting was racially polarized and greatly reduced the percentage of the black voting age population (BVAP) in other majority-minority districts. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 77, 86 (D.D.C. 2002), *vacated and remanded*, 539 U.S. 461 (2003).

11. *See* Becker, *supra* note 6, at 237-38.

12. *See* Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996);

Adopting a "total probability" standard is no doubt the cleanest approach to the problem, mathematically precise and intuitively clear. It emphasizes the fact that retrogression is a standard applied to plans, not districts, and makes obvious the requirement that diminutions in the ability to elect in some districts must be offset by equal or greater gains elsewhere. It would, however, allow tradeoffs such as dismantling one district where a minority-supported candidate was sure to win for three districts with a one-third probability each. Gambling a bird in the hand, so to speak, makes some observers queasy.[13] On the other hand, with favorable electoral results, this strategy could increase overall minority office-holding.

Unlike the previous two proposed interpretations, the total probability method would, by definition, not allow states to decrease the overall expected number of minority representatives elected. In this sense it would be more of an *Ashcroft*-fix in that plans like the Georgia House and Senate proposals would not be allowed.[14] On the other hand, it would permit states to trade off minority control districts for those with only probabilistic chances of winning, including influence districts. So in these terms, the essence of *Ashcroft*—that minority control districts can be reduced from one redistricting to the next—would not be overruled. The possibility that adopting the total probability standard could, in the end, reduce the number of candidates of choice elected to office clearly worries Persily, leading him to state that "the art of describing minority voting power ought to temper the science of measuring

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David Epstein, Michael Herron, Sharyn O'Halloran & David Park, *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J. L., ECON. & ORG. 499 (2007). Elsewhere we detail procedures for calculating these probabilities; one simply takes the history of elections in the relevant jurisdiction and asks in which cases a candidate of choice was elected to office, and what the district demographics were. *See* Epstein & O'Halloran, *supra* note 5. These procedures all presuppose a method for determining whether a given officeholder is in fact a "candidate of choice" of the minority community. In previous work, we have suggested that a minority candidate be deemed a candidate of choice absent evidence of strong opposition from within the minority community. Further, nonminority candidates can be candidates of choice as well if they 1) are elected from a majority-minority district, and 2) receive support from minority voters in obtaining office. *See* David Epstein & Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 AM. J. POL. SCI. 367, 371 (1999).

13. *See, e.g.*, Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31 (2004) ("[M]aking sure that one's group *always* has at least some representation in the room where legislative deals are being made might be far more beneficial than occasionally having superrepresentation and occasionally being absent altogether.").

14. In a forthcoming article, we demonstrate that the Georgia State Senate plan would in fact have slightly reduced expected descriptive representation in order to increase substantive representation. Epstein & O'Halloran, *supra* note 5.

retrogression."[15] These measurement issues can be faced head on; for instance, by estimating the probability that fewer candidates of choice will be elected to office in competing districting plans.[16] In the end, though, the only way to prohibit states from trading off the goals of descriptive and substantive representation is to fossilize ex ante districting plans, disallowing all reductions in minority population. Short of this proposal, which serves no one's interests and would almost certainly be ruled unconstitutional, it seems that the most restrictive interpretations of the new retrogression standards would, paradoxically, give states the most latitude to trade off different types of representation when redrawing their political boundaries.

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15. Persily, *supra* note 2, at 251.

16. In the case where one 100% control district is recast to form three 33% districts, the probability that zero candidates of choice will be elected in the new scheme is $(2/3)^3 \cong 30\%$. If such a plan is deemed too risky, the proposed scheme could be disallowed.