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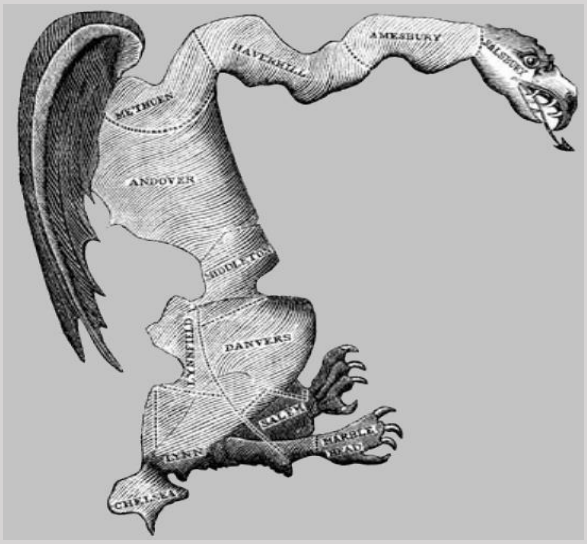
a cura di Lorenzo Spadacini

ENHANCING EFFECTIVENESS OF DEMOCRATIC REPRESENTATION

CONSTITUENCIES AND EQUALITY OF THE VOTE WITHIN DIFFERENT ELECTORAL SYSTEMS AND FORMS OF GOVERNMENT



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Enhancing effectiveness of democratic representation
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within different electoral systems and forms of government

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In copertina:
The Gerry-mander
Political cartoon by Elkanah Tisdale
Boston Gazette, 1812
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A CURA DI LORENZO SPADACINI

ENHANCING EFFECTIVENESS OF DEMOCRATIC REPRESENTATION
DISTRICTS AND EQUALITY OF THE VOTE WITHIN DIFFERENT ELECTORAL SYSTEMS AND FORMS OF GOVERNMENT *

SUMMARY

* All contributions are subject to a peer review process according to the journal's regulations.

Arianna Carminati*

The Descending Parable of Affirmative Racial Gerrymandering in the United States**

SUMMARY: 1. Some Insights for Comparison. – 2. Racial "fair representation" and election districts. – 3. From "negative" to "affirmative" racial gerrymandering in the earliest Supreme Court's jurisprudence. – 4. The debated legitimacy of affirmative racial gerrymandering under the Equal Protection Clause. – 5. Final remarks.

ABSTRACT*: This paper explores the evolving landscape of affirmative racial gerrymandering in the United States, tracing its trajectory from early Supreme Court jurisprudence to contemporary debates surrounding its legitimacy under the Equal Protection Clause. Drawing upon insights from comparative analysis, the paper first provides a nuanced understanding of the concept within the broader context of electoral districting. It then delves into the historical transition from "negative" to "affirmative" racial gerrymandering, examining pivotal Supreme Court decisions and their implications for fair representation. Central to the discussion is an examination of the contested legitimacy of affirmative racial gerrymandering, with particular attention to its compatibility with constitutional principles of equality and non-discrimination. In conclusion, the paper offers reflections on the complexities inherent in navigating the intersection of race, representation, and electoral law in contemporary American democracy.*

1. *Some Insights for Comparison*

The process of drawing electoral district boundaries in the United States, in relation to the political representation of ethnic minorities, is a very interesting area of legal comparison.

This is primarily due to a legal system that, for well-known historical reasons, still places significant emphasis on the issue of racial discrimination and on the dynamics between the dominant non-Latino white American demographic and the diverse ethnic groups comprising the kaleidoscopic American society[1].

Secondly, this analysis prompts a domestic reflection on how the relationship between representatives and constituents is shaped by the division and grouping of

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** This contribution is subject to a peer review process according to the Journal's Regulations.

[1] The U.S. Census Bureau has collected data on race since the first census in 1790 and on Hispanic or Latino origin since the 1970 Census. Since the 1970s, the Census Bureau has conducted content tests to research and improve the design and function of different questions, including questions on race and ethnicity. Today, the Census Bureau collects race and ethnic data following U.S. Office of Management and Budget (OMB) guidelines, and these data are based upon self-identification. See on this topic J. PERLMANN, M. C. WATERS, *The New Race Question. How the Census Counts Multiracial Individuals*, Russell Sage Foundation, 2002; A.D. PEREZ, C. HIRSCHMAN, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, in Population and Development Review, 1/2009, 1 ff.

the electoral body to determine candidate selection[2], and in relation to how the principle of equality can be applied with reference to the right to vote.

Delving into the intricacies of racial gerrymandering exposes the systemic inequalities embedded within political representation. To truly uphold the democratic principle of fair and equitable representation, it becomes imperative to not only address the overt manipulation of electoral boundaries but also to actively engage in the promotion of substantive representation. This involves going beyond mere numerical parity embedded in the principle of one man-one vote to ensure that the voices and concerns of historically marginalized communities are not only heard but also effectively advocated for within the decision-making processes.

In contexts like Italy, where formal political participation is often restricted for residents of foreign origin, the concept of substantive representation gains even more significance. Additionally, as will be attempted to highlight, linking the discussion to the principle of substantive equality in Article 3 of the Italian Constitution could provide a relevant and insightful perspective.

2. *Racial "fair representation" and election districts*

At the core of the discussion about the legitimacy of redistricting policies concerning ethnic-racial factors, lies the concept of "fair representation", which aims to assess whether a district map affords equal opportunities for various voter groups to elect their preferred candidates. As pointed out, identifying and avoiding racial gerrymandering implies making «the fatal step from mere equal *voting* to fair *representation*»[3].

In fact, this step also represents a shift from numerical equality in voting rights to advocating for proportional representation based on the *expressed* vote. Quoting Martin Shapiro: «A one-person- one-vote standard rests on a purely formal individualist theory of voting» or even «it rests on no theory of representation at all»[4]. Thus, while the principle of one-person-one-vote is rooted in nineteenth-century

[2] A. REHFELD, *The concept of Constituency. Political Representation, Democratic Legitimacy and Institutional Design*, Cambridge University Press, New York, 2005. See also N. URBINATI, M.E. WARREN, *The Concept of Representation in Contemporary Democratic Theory*, in *Annual Review of Political Science*, 1/2008, 387 ff., noting that «the idea that constituencies should be defined by territorial districts has been all but unquestioned until very recently, although it has long been recognized that initial decisions about who is included in (or excluded from) "the people" constituted the domain of democracy».

[3] M. SHAPIRO, *Gerrymandering, Unfairness, and the Supreme Court*, in *Ucla Law Review*, 1/1985, 232.

[4] M. SHAPIRO, *Gerrymandering, Unfairness, and the Supreme Court*, cit., 236. Similarly see Justice Powell's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), 478: «The concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters do not».

liberal political theory, where individuals were seen as the basic units of politics, twentieth century liberal theories tend to use *groups* as the basic units of politics[5].

Along this line, the right to vote has evolved to encompass a call for increased involvement of minority groups in political decision-making processes. The individual right to vote has become instrumental in pursuing broader collective representation for the group to which one belongs[6].

In a more specific vein, "racial fairness"[7] is measured by the degree to which legislators reflect the racial and ethnic make-up of the electorate[8]. This objective can be effectively pursued through designing electoral districts based on the ethnic composition of residents and the tendency of minority groups to support candidates from their own community.

In fact, as highlighted by scholars, these efforts to increase the number of minorities' officeholders are associated with *descriptive representation*, meaning having representatives who reflect the demographic characteristics of their constituents[9]. Since Pitkin's work in 1967[10], there has been a rich literature exploring the political consequences of descriptive representation concerning racial and ethnic minorities[11]. According to some scholars, descriptive representation would have

[5] «Once the conditions of equal weight and equal access to the ballot are satisfied, there is little in the way of individual rights that governs the electoral process. Attention must at this point shift to group rights to differentiate a fair from an unfair system» (T. A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno,* in *Michigan Law Review*, 3/1993, 600-601).

[6] The need to consider the collective dimension of the right to vote in order to appreciate the adequacy of representation in cases of vote dilution is underlined by C. CASONATO, *Minoranze etniche e rappresentanza politica. I modelli statunitense e canadese*, Università degli Studi di Trento, Trento, 1998, 244. See Justice Souter's dissenting opinion in *Shaw v. Reno*, 509 U.S. 630 (1993), 683 noting that: «"Dilution" thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter».

[7] The expression "racial fairness" is used by B. GROFMAN, *Criteria for Districting: A Social Science Perspective*, in *Ucla Law Review*, 1/1985, 153.

[8] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, in *South Carolina Law Review*, 4/2006, 750.

[9] D.T. CANON, *Race and Redistricting*, in *Annual Review of Political Science*, 2022, vol. 25, 510.

[10] According to Hanna Pitkin (F.H. PITKIN, *The Concept of Representation*, University of California Press, Berkeley, 1967) the elements of democratic representation may be grouped in two categories: "structural" and "substantive". The structural element deals with who and what should be represented, that is, it considers the make-up of the legislature, while the substantive element emphasizes what a representative does. Pitkin repeatedly warns that both the dimensions are necessary, and blames much confusion on theorists who hold any one element of representation as sufficient for the whole (see N. LEONEN, *Citizenship and Democracy. A Case for Proportional Representation*, Dundurn Press, Toronto, 1997, 47).

[11] D.C. BOWEN, C.J. CLARK., *Revisiting Descriptive Representation in Congress: Assessing the Effect of Race on the Constituent–Legislator Relationship*, in *Political Research Quarterly*, 3/2014, 695 ff.; C.J. CLARK, *Gaining Voice: The Causes and Consequences of Black Representation in the American States*,

inherent value, unrelated to substantive representation, stemming from the fundamental notion of being represented by someone who shares one's racial identity[12].

When considering instead the connections between descriptive and substantive representation, it is widely recognized that there isn't necessarily a direct link between the election of minority candidates and the advancement of these groups' interests. In this context, several qualitative and quantitative analyses have been conducted to explore whether and to what extent the creation of "majority-minority districts" – electoral constituencies where Black, Hispanic, or other racial or ethnic groups constitute the majority of the population[13] – genuinely enhances minority representation. Indeed, many of these studies have concluded that the ethnic and racial background effectively influences the choices of parliamentarians representing minorities, beyond their party-political affiliation[14].

Oxford University Press, Oxford 2019; J.D. GRIFFIN, B.P. NEWMAN, *Minority Report: Evaluating Political Equality in America*, University of Chicago Press, Chicago 2008. The Italian doctrine delved deeper into the topic for achieving gender-balanced representation, in an attempt to clarify if gender quotas just increase descriptive representation, or if they also produce comprehensive changes in the characteristics of those who serve in political office. See G. BRUNELLI, *Donne e politica. Quote rosa? Perché le donne in politica sono ancora così poche?*, il Mulino, Bologna, 2006; L. CARLASSARE, *La rappresentanza femminile: principi formali ed effettività*, in F. Bimbi, A. Del Re (ed.), *Genere e democrazia*, Giappichelli, Torino, 1997, 83 ff.; A. APOSTOLI, *La parità di genere nel campo "minato" della rappresentanza politica*, in *Rivista AIC*, 4/2016, 32 ff.; A. MANGIA, *Rappresentanza di «genere» e «generalità» della rappresentanza*, in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (ed.)*, La parità dei sessi nella rappresentanza politica*, Giappichelli, Torino, 2002, 84; S. LEONE, *L'equilibrio di genere negli organi politici. Misure promozionali e principi costituzionali*, FrancoAngeli, Milano, 2013; M. CAIELLI, *Per una democrazia duale: perché il genere dei nostri rappresentanti continua ad avere importanza*, in B. PEZZINI, A. LORENZETTI (ed.), *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto di genere nella Costituzione e nel costituzionalismo*, Giappichelli, Torino, 2019, 93 ff. In the American doctrine, regarding gender quotas and how they can affect existing political dynamics, as well as what they might mean for women as a group, consider M.L. KROOK, F. MACKAY (eds.), *Gender, Politics and Institutions*, Palgrave Macmillan, 2011; T.D. BARNES, M.R. HOLMAN, *Gender Quotas, Women's Representation, and Legislative Diversity*, in *Political Science Faculty Publications*, 4/2020, 1271 ff.; Y.P. KEREVEL, *Empowering Women? Gender Quotas and Women's Political Careers*, in *Journal of Politics*, 4/2019, 1167 ff.; C. S. ROSENTHAL, *The Role of Gender in Descriptive Representation*, in *Political Research Quarterly*, 3/1995, 599 ff.

[12] J. MANSBRIDGE, *Should Blacks represent Blacks and women represent women? A contingent "yes"*, in *Journal of Politics*, 3/1999, 628 ff.; C.M. SWAIN, *Black Faces, Black Interests: The Representation of African Americans in Congress*, Harvard University Press, Harvard, 1993; K. TATE, *The Political Representation of Blacks in Congress: Does Race Matter?*, in *Legislative Studies Quarterly*, 4/2001, 623 ff., underscoring the value of descriptive representation in the black community; K. TATE, *Black Faces in the Mirror: African Americans and Their Representatives in the US Congress*, Princeton University Press, 2003; C.M. SWAIN, *Black Faces, Black Interests: The Representation of African Americans in Congress*, Harvard University Press, Harvard, 1993.

[13] G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, in *California Law Review*, 2004, 92(6), 1589 ff.

[14] Some scholars find intrinsic and extrinsic mechanisms linking descriptive and substantive representation. On one hand «minority candidates share a sense of common minority experiences, and

Further research has highlighted the benefits of descriptive representation by looking at the constituent–legislator relationship and how citizens experience representation[15]. In other words, descriptive representation also creates a «social meaning of "ability to rule"» for historically excluded groups and promotes the legitimacy of the political system by addressing the effects of past discrimination[16].

Taking an opposing stance, some argue that the race of representatives holds little significance, contending that racial issues are no longer central to American politics, or at least they should not be[17]. In addition, segregating political districts based on race would further exacerbate racial divisions by eliminating the need for voters or candidates to form cross-racial connections or alliances[18]. Another aspect that is criticized concerns the current validity of resorting to the category of ethno-racial identity as a basis for representation, given the complexity and fluidity of identity and the limitations of such categorizations in capturing the diverse experiences and perspectives within communities[19]. Ultimately, the notion of fair representation is quite controversial, especially because the issue of race intersects with other factors,

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feel a responsibility to represent minority voters, although this is moderated by political party»; on the other hand «electoral incentives engendered by an ethnically diverse electorate, can work through increasing prospective representatives' intrinsic motivation» so that «minority candidates standing in more ethnically diverse seats were more motivated than the ones standing in predominantly white seats» (M. SOBOLEWSKA, R. MCKEE and R. CAMPBELL, *Explaining motivation to represent: how does descriptive representation lead to substantive representation of racial and ethnic minorities?*, in *West European Politics*, 6/2018, 1237 ff.). The literature shows that descriptive representation improves minority substantive representation (see D.T. CANON, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts*, University of Chicago Press, Chicago, 1999; K.L. GAMBLE, *Black Political Representation: An Examination of Legislative Activity within U.S. House Committees*, in *Legislative Studies Quarterly*, 3/2007, 421 ff.; C. GROSE, *Congress in Black and White: Race and Representation in Washington and at Home*, Cambridge University Press, Cambridge, 2001; W. WILSON, *Descriptive Representation and Latino Interest Bill Sponsorship in Congress*, in *Social Science Quarterly*, 4/2010, 1043 ff.).

[15] D.C. BOWEN, C.J. CLARK, *Revisiting Descriptive Representation in Congress: Assessing the Effect of Race on the Constituent–Legislator Relationship*, in *Political Research Quarterly*, 3/2014, 695 ff.; K. TATE, *The Political Representation of Blacks in Congress: Does Race Matter?*, cit. See also *Affirmative Action and Electoral Reform*, in *The Yale Law Journal*, 8/1981, 1814 ff., noting that the election of minority representatives encourages greater political consciousness and participation in the minority community.

[16] D.T. CANON, Race and Redistricting, cit., 628. The presence of minorities' representatives also has a beneficial impact on the rest of the population according to E.Y. RILEY, C. PETERSON, *Examining the Impact of Black Political Representation on White Racial Attitudes in Majority Black Congressional Districts*, in *Journal of Black Studies*, 7/2019, 611, who challenge the notion that having a black political representative will be associated with a decrease in negative racial attitudes among whites.

[17] A. THERNSTROM, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, Harvard University Press, Harvard, 1987; A. THERNSTROM, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*, Aei Press, 2009.

[18] Regarding the bad side-effects of racial gerrymandering, see C.M. BURKE, *The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court*, Greenwood Press, Santa Barbara, 1999, 32; S.D. CASHIN, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, in *Wash. University Journal of Law & Policy*, 1/2006, 71 ff.

[19] D.C. LEMI, *What is a Descriptive Representative?*, in *Political Science & Politics*, 5/2022, 290.

and often the emphasis on one aspect of representation in district construction – that related to belonging to ethnic minorities – overlaps with another – particularly, that of political affiliation – producing a result that can even have perverse effects to the detriment of the substantive representation of the interests of the groups intended to be favored[20].

Indeed, all these aspects have emerged in the rich jurisprudence of the district courts and especially in the jurisprudence of the United States Supreme Court, which has examined the legitimacy of majority-minority districts. Despite attempts at systematization, the paradigm of racial fairness remains uncertain[21] and highly subject to case-by-case evaluations[22]. Such uncertainty in defining the concept of adequate representation of minorities is, in turn, at the base of not infrequent changes in the Supreme Court's orientation[23].

3. *From "negative" to "affirmative" racial gerrymandering in the earliest Supreme Court's jurisprudence*

The term racial gerrymandering simply refers to the policy of redrawing district lines to advantage one racial group of voters over another. The manipulation of district lines for racial purposes encompasses two distinct redistricting methods: one form of gerrymandering, known as "negative" racial gerrymandering, occurs when district lines are manipulated to minimize or dilute the voting strength of racial or ethnic

[20] K.W. SHOTTS, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, in *American Journal of Political Science*, 1/2001, 120 ff. The most serious criticism of racial gerrymandering «concerns possible tradeoffs between descriptive representation of and substantive representation for the black community» for L.M. OVERBY, K.M. COSGROVE, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, in *Journal of Politics*, 2/1996, 541. See W.D. HICKS, C.E KLARNER, S.C. MCKEE and D.A. SMITH, *Revisiting Majority-Minority Districts and Black Representation*, in *Political Research Quarterly*, 2/2018, 420, noting that «the creation of majority-minority districts has generated an issue that crosscuts the Democratic coalition by pitting black and withe Democrats against each other».

[21] See G. KING, J. BRUCE and A. GELMAN, *Racial Fairness in Legislative Redistricting*, in P.E. PETERSON (ed.), *Classifying by Race*, Princeton University Press, Princeton, 1996, 85, remarking that there presently exists no agreed upon absolute standard of racial fairness in redistricting.

[22] While «in its malapportionment decisions, the Supreme Court has been helped by accepted measures of equal population», in gerrymandering-district cases the Court «has been hindered severely in its quest for a gerrymandering standard by lack of agreement on what constitutes "fair and effective representation"» (J. O'LOUGHLIN, *The Identification and Evaluation of Racial Gerrymandering*, in *Annals of the Association of American Geographers*, 2/1982, 165 ff.). C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 235, emphasizes that while the principle of numerical correspondence among districts provided a generally objective basis for measuring the political equality of redistricting activities, the decision standards adopted for subsequent judgments regarding the "aesthetic" aspects of districts would prove less operational.

[23] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 245.

minorities[24]. The second form of gerrymandering, referred to as "affirmative" racial gerrymandering, deliberately creates "majority-minority" districts to enable minority populations to elect a candidate who represents their interests in office[25].

Early jurisprudential cases of racial gerrymandering focused on the first type of district manipulation, which was prompted by demands from black minorities to rectify contemporary disenfranchisement policies through electoral districts delineation. Dating back as early as 1960, even before the enactment of the Voting Rights Act, in the seminal case of *Gomillion v. Lightfoot*[26] the Supreme Court addressed for the first time the use of electoral districting along racial lines[27]. Here, the plaintiffs alleged that the legislature had altered the square shape of the city of Tuskegee to form «an uncouth twenty-eight-sided figure»[28] effectively excluding all blacks from the city limits in order to deprive them of their existing municipal voting rights. On that occasion, the Court held the legislation unconstitutional because it was «solely concerned with

[24] There are standard terms used in literature to describe techniques that can be employed to draw district maps that penalize minorities representation, hindering their ability to translate voting support into seats, in contrast to what might be expected from a plan drawn based on neutral principles. For example, the term "cracking" occurs when areas dominated by minorities are divided into different constituencies to dilute their electoral strength. Conversely, the term "packing" involves concentrating minorities within a few constituencies to secure overwhelming victories for the group's candidate, thereby wasting potential votes that could secure victories in other districts. The term "stacking" identifies the technique used to submerge the minority population within constituencies where whites are in the majority. A glossary that delineates all districting criteria is given by B. GROFMAN, J. CERVAS, *The Terminology of Districting*, March 30, 2020. "Qualitative dilution" through gerrymandering practices also differs from "quantitative dilution", which happens when votes receive unequal weight due to huge deviations in the population among the constituencies (P.S. KARLAN, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, in *Harvard Civil Rights-Civil Liberties Law Review*, 1/1989, 176; G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1589 ff.). See also G.M. HAYDEN, *Refocusing on race*, in *George Washington Law Review*, 6/2005, 1258, noting that «the two most straightforward categories involve (1) numerically diluting the strength of the group's vote and (2) preventing members of the group from combining their votes in a way that results in the election of a preferred candidate».

[25] P. OKONTA, *Race-based political exclusion and social subjugation: Racial gerrymandering as a badge of slavery*, cit., 270. See also D.D. POLSBY, R.D. POPPER, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, in *Yale Law & Policy Review*, 2/1991, 301 and M. SASSON, *Shaw v. Reno: Is Remedial Racial Gerrymandering Another Victim of the Pursuit of the Color-Blind Constitution?*, in *New England Law Review*, 2/1995, 363, who divides gerrymandering into three categories: «traditional racial gerrymandering, collusive bipartisan gerrymandering, and remedial racial gerrymandering».

[26] *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). The case concerned a law from the State of Alabama that altered electoral boundaries for the city of Tuskegee, effectively excluding all black residents from within the city limits. According to K.I. BUTLER, *Affirmative racial gerrymandering: rhetoric and reality*, in *Cumberland Law Rev.*, 1996, vol. 26(2), 334: «*Gomillion* was clearly a "negative" use of race case».

[27] As it has been noted: «Most court decisions on gerrymandering have involved allegations of vote dilution through multimember district» (J. O'LOUGHLIN, *The Identification and Evaluation of Racial Gerrymandering*, cit.).

[28] *Gomillion v. Lightfoot*, 364 U.S. 339, 340.

segregating white and colored voters» with the aim of diminishing minority political power[29].

Notably, Justice Frankfurter's majority opinion based the ruling solely on the Fifteenth Amendment, which ensures the right to vote[30]. As highlighted by Professor Casonato, the majority of the Court distinguished between *formal* equality in access to voting (which was upheld) and *effective* equality in influence, namely in the effectiveness of voting (which was violated). However, instead of invoking the Equal Protection Clause[31], the Court later maintained that both dimensions of equality were part of the content of the right to vote taken alone. Only based on this assumption could the issue be resolved with exclusive reference to the Fifteenth Amendment[32].

In other words, the Supreme Court preferred to give a restrictive interpretation of the Equal Protection Clause of the Fourteenth Amendment and consequently broaden the interpretation of the Fifteenth Amendment, in order to encompass within the right to vote also the collective right of a specific group of voters to be adequately represented. However, in a concurring opinion, Justice Whittaker argued that there was a violation of the Fourteenth Amendment. According to him, the right to vote itself had not been violated[33], but rather the equal effectiveness of its exercise that falls under the umbrella of the Equal Protection Clause[34].

In fact, subsequent Supreme Court jurisprudence has upheld the majority interpretation, so that, while the Equal Protection Clause has been applied to malapportionment claims[35], racial redistricting decisions have continued to rely

[29] *Gomillion v. Lightfoot*, 364 U.S. 339, 341.

[30] Amendment XV (1870), Sec. 1: «The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude».

[31] The Equality Protection Clause is rooted in the Fourteenth Amendment, stating that no State shall «deny to any person within its jurisdiction the equal protection of the laws».

[32] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 187.

[33] «Inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B if he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B, rather than A» (*Gomillion v. Lightfoot*, 364 U.S. 339, 349, Whittaker concurring).

[34] Refferring to *Brown v. Board of Education* and *Cooper v. Aaron,* he concluded that excluding such a large portion of Tuskegee's population would result in the type of segregation prohibited by the equal protection clause (see I.L. OTTO, *Constitutional Law-Municipal Redistricting: Deprivation of Right to Vote or Violation of Equal Protection*, in *Case Western Reserve Law Review*, 4/1961, 808).

[35] The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Gray v. Sanders*, 372 U.S. 368, 381 (1963), holding that the conception of political equality means one person, one vote; *Reynolds v. Sims*, 377 U.S. 533 (1964), holding that the Equal Protection Clause presumptively mandates the equal distribution of the right to vote, when governmental offices are staffed by election. Referring to these cases, some scholars observed that: «The right to vote—a right quite possibly not intended to be covered in the Fourteenth Amendment, and protected in the Fifteenth only from racial discrimination—eventually found a home in the so-called fundamental rights

predominantly on the Fifteenth Amendment and, after 1965, on Section 2 of the Voting Rights Act[36].

Furthermore, the Fourteenth Amendment has ended up representing a *limitation*, rather than support, for the promotion of policies aimed at ensuring minorities the right to adequate representation[37], particularly through "affirmative" racial gerrymandering. Indeed, the Supreme Court has held that, in some instances, the Equal Protection Clause prevents voting rights plans designed to give, or attempt to give, an advantage to minority groups. These are incentivizing policies that many State legislators began to implement after the Voting Rights Act was passed in 1965, especially those subject to the pre-clearance mechanism of section 5 of the Act.

The use of affirmative actions in the electoral process is by itself a troubling question and a controversial topic. This arises from the notion that discrimination against minority racial groups is historically entrenched or pervasive to the extent that it necessitates measures beyond a simple non-discrimination policy[38]. The policy of maximizing the number of majority-minority voting districts has been viewed as the solution of choice[39], very close to achieving proportional representation on an ethnic basis.

State legislatures created a large number of these majority-minority districts from the end of the 1970s[40] and, prior to *Shaw* v. *Reno,* it was possible to argue that the Court had not determined the constitutional limits upon the State's use of race to "aid" minorities in districting decisions[41]. Whereas outside the specific realm of the

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strand of the Equal Protection Clause» (W.D. ARAIZA, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law*, NYU Press, New York, 2015, 52).

[36] Both quantitative vote dilution and qualitative vote dilution (for this distinction see G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1594) may be functionally (and perhaps even theoretically) prevent members of a group from aggregating their votes in a way that elects a number of representatives of their choice in rough proportion to their share of the electorate. In practice, however, «the two types of dilution have been treated quite differently under the law» (G.M. HAYDEN, *Refocusing on race*, cit., 1258). Vote dilution of racial or ethnic minorities can also come from at-large voting schemes and multimember districts, as they tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. See *White v. Regester*, 412 U.S. 755 (1973), holding that a multimember district violates the equal protection clause when, considering the totality of the circumstances, it denies the opportunity to participate in the election process in a reliable and meaningful manner. See also *Rogers v. Lodge*, 458 U.S. 613 (1982), where the Court invalidated a multimember district on the basis of the Fourteenth Amendment, finding that elected officials were unresponsive and insensitive to the needs of the economically depressed black community.

[37] The observation come from C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 187, nt. 187.

[38] A. DERFNER, *Pro: affirmative action in districting*, in *Policy Studies Journal*, 1981, 852.

[39] G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1602.

[40] *Ivi*, 1591.

[41] Whereas prior cases had addressed the remedial use of race-conscious districting to alleviate proven exclusion, «the 1990s redistricting cases concerned the affirmative use of race in the quintessentially political process of dividing electoral spoils» (T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 590).

right to vote a race conscious policy had to be narrowly tailored to serve a compelling government interest to overcome the scrutiny of the Court – regardless of whether the racial classification aimed to benefit or harm a racial group[42] – until the 1990s, the Supreme Court applied a less stringent standard of review for affirmative actions pertaining to the political representation of minorities[43].

In the most important voting rights case of the pre-Reagan Court era, *United Jewish Organizations v. Carey*[44], the Court had even approved a race-conscious district plan of the State of New York with benign effects for ethnic minorities, although it resulted in an apparent reverse discrimination effect. Indeed, the creation of new majority-minority voting districts diluted the vote of a religious minority (Hasidic Jews), whose community of some 30,000 people consequently lost the ability to elect a candidate of their choice. Comparing the two situations, the Court nonetheless assessed that the white religious minority did not suffer racial slur or stigma, as it would still be adequately represented by the preservation of white-majority districts in the rest of the country[45]. The most controversial aspect of the decision was the assumption that "white" voters shared outlooks and interests simply on the basis of their race, thus excluding other factors such as religious differences. This reasoning, as highlighted, ended up indulging in a form of race "essentialism" and, by downplaying other lines of division, seemed to allude to the political theory of "virtual representation"[46].

[42] See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J. A. Croson Co*., 488 U.S. 469 (1989). For a critical analysis rooted in the original intent doctrine, see E. SCHNAPPER, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, in *Virginia Law Rev.*, 1985, vol. 71(5), 754. According to her, the authors of the Fourteenth Amendment could not have intended that it generally prohibited affirmative actions in favor of Blacks or other disadvantaged groups. See also D.A. STRAUSS, *Affirmative Action and the Public Interest*, in *The Supreme Court Review*, 1995, 1 ff., who critically observes: «the notion that affirmative action is like discrimination against minorities is unconvincing in the abstract and, not surprisingly, the Supreme Court has not followed through on it in the design of the doctrine». In contrast see M.B. RAPPAPORT*, Originalism and the Colorblind Constitution*, in *Notre Dame Law Rev*., 2013, vol. 89(1), 71 ff.

[43] See C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 350, noting that the other race-based remedial classifications had been already subjected to strict scrutiny.

[44] *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

[45] *United Jewish Organizations v. Carey*, 430 U.S. 144, 165, Justice White opinion.

[46] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 596. See Chief Justice Burger dissenting opinion, challenging the assumption that the legislative interests of all "whites" are even substantially identical because «"whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations» (*United Jewish Organizations v. Carey*, 430 U.S. 144, 185). See E. CECCHERINI*, Eguaglianza del voto e rappresentatività delle minoranze:*

recenti orientamenti giurisprudenziali negli Stati Uniti, in *Quad. cost*., 2/1997, 321 ff.

4. *The debated legitimacy of affirmative racial gerrymandering under the Equal Protection Clause*

The jurisprudential turning point on affirmative racial gerrymandering arose later[47], in response to the redistricting process that followed the 1990 census. This process emphasized the creation of majority-minority districts to optimize minority voting and to comply with either Section 5 or Section 2 of the Voting Rights Act. Some of these districts possessed bizarre and fantastic shapes[48].

Under the *Shaw v. Reno* case[49] and its progeny[50], in the latter half of decade many of the majority-minority districts in the South were subsequently struck down by federal judges[51]. All these cases were promoted by white plaintiffs who did not allege any representational harm – namely, a denial or dilution of their right to vote – but rather claimed they were unfairly deprived of their equal protection rights.

According to this premise, the new jurisprudential course based its approach to the tools on a formalistic analysis of the Fourteenth Amendment. On one hand, although the original purpose of the Amendment was to protect the black community from discrimination, the broad wording of the Equal Protection Clause has led the Supreme Court to hold that all racial discrimination (including discrimination against whites, Hispanics, Asians, and Native Americans) was constitutionally suspect.

On the other hand, the Clause has been narrowly interpreted as intended to ban solely discrimination against *individuals*. In this regard, Justice O'Connor in *Shaw v. Reno* stated for the Court that the central purpose of the Equal Protection Clause «is to prevent the States from purposefully discriminating between individuals on the basis

[47] In *Shaw v. Reno* the Court applied for the first time the principles announced in *City of Richmond v. J.A. Croson co.* – namely the Fourteenth Amendment analysis of remedial legislation highly suspected to make an illegitimate uses of race – in the area of voting rights, which is «a complex and politically charged area» (M. SASSON, *Shaw v. Reno: Is Remedial Racial Gerrymandering Another Victim of the Pursuit of the Color-Blind Constitution?*, in *New England Law Review*, 1995, 357).

[48] D.H. LOWENSTEIN, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, in *Stanford Law Review*, 1998, vol. 50, 780.

[49] *Shaw v. Reno*, 509 U.S. 630 (1993).

[50] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, cit., 779. The remaining cases, collectively referred to as "*Shaw* progeny" were (I) challenges to North Carolina's congressional districts: *Shaw v. Hunt,* 517 U.S. 899 (1996), *Hunt v.Cromartie,* 526 U.S. 541 (1999), and *Easley v. Cromartie,* 532 U.S. 234 (2001); (2) a challenge to Georgia's congressional districts: *Miller v. Johnson,* 515 U.S. 900 (1995) holding that districts may violate the Equal Protection Clause of the Constitution if race was the predominant factor in their creation; and (3) a challenge to Texas's congressional districts: *Bush v. Vera,* 517 U.S. 952 (1996) holding that strict scrutiny does apply where race was the predominant factor in drawing district lines and traditional, race-neutral districting principles were subordinated to race.

[51] See the note *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, in *Harvard Law Rev.*, 2003, vol. 116(7), listing majority-minority districts struck down by the Supreme Court and District Courts.

of race»[52]. And she adds: «Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition»[53].

Indeed, although voting-rights claims inherently involve groups, «in Shaw the Court attempted to bring voting-rights law into the new equal protection model by reconceptualizing the right at stake as pertaining to individuals, not groups»[54].

This judicial stance aligns with the American ideal of individual liberalism within the sphere of political representation. Individual liberalism values individuality and promotes equality and meritocracy. Its aim is to establish a political system where race becomes irrelevant[55].

The weakness of such an outcome lies in a distorted perception of social data by the law: a legal system and a jurisprudential approach based on the color-blind theory do not adequately address a society which in many aspects is still race-conscious[56]. With a more realistic approach, Supreme Court Justice Harry Blackmun stated in 1978: «In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently»[57].

From this perspective, ensuring the meaningful participation of racial minorities in decision-making bodies may require arrangements that come with costs in other aspects of representation. In other words: «the claim of a right of effective participation in an electoral system not only entails the recognition of an affirmative group right, but – given the zero-sum quality of representation – the claim also assumes the right to subordinate electorally some other group or groups»[58].

Therefore, a policy of affirmative action – as arrangements that permit all to participate as peers in social life[59] – is constitutionally compliant even when applied in

[52] *Shaw v. Reno*, 509 U.S. 630 (1993), 642.

[53] *Shaw v. Reno*, 509 U.S. 630 (1993), 642. See T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 602, stressing that insofar as it focuses on another understanding of the constitutional norm based on the individual, the Court held that the Fourteenth Amendment establishes a right not to be segregated on the basis of one's race in electoral districting plans.

[54] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 601.

[55] See *Shaw v. Reno*, 509 U.S. 630 (1993), 657, ruling that: «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».

[56] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 350 ff. See M.P. MATTER, *The Shaw Claim: The Rise and Fall of Colorblind Jurisprudence*, in *Seattle Journal for Social Justice*, 2019, vol. 18(1), 67, considering that «jurisprudence based on the aspiration of a society where race no longer matters is, in fact, a racial act».

[57] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), 407.

[58] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 601

[59] E. SCHNAPPER, *Affirmative Action and The Legislative History of The Fourteenth Amendment*, in *Virginia Law Review*, 1985, 753 ff.

the paramount context of political representation[60]. Indeed, representation can be described as a third political dimension of justice, alongside the economic dimension of redistribution and the cultural dimension of recognition[61].

Furthermore, representation is even a *precondition* for the other dimensions of justice, as it «furnishes the stage on which struggles over distribution and recognition are played out»[62]. That's why, in a heterogeneous society – where ethnic belonging is still a source of considerable inequalities – the right to vote and the universal suffrage, taken alone, can become a mere legal fiction[63]. In this sense, the slogan "no taxation without representation", a symbol of the American democracy, with its legacy – namely the idea that citizens should have a say in the decisions that affect their lives – could be effectively updated into the formula «no redistribution or recognition without representation»[64] to reveal the sneaky new forms of virtual representation.

On the contrary, far from pursuing effective representation, the final outcome of the Supreme Court's affirmative racial gerrymandering decisions is that legislators can no longer be compelled by legal or political forces to create majority-minority districts if those districts can only be created through significant deviations from traditional districting standards. Paradoxically, these cases have had no impact on the legitimacy of bizarre districts created for nonracial (i.e. political) reasons[65].

Furthermore, in subsequent years, the Court progressively narrowed the protection afforded to minorities against voting dilution. Relief was granted to non-white plaintiffs only when the challenged districts strictly adhered to the "Gingles three-part test"[66]. Conversely, the Court rejected cases involving "influence districts", in which

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[60] D.O. BARRETT, *The Remedial Use of Race-Based Redistricting After Shaw v. Reno*, in *Indiana Law Journal*, 1/1994, 255 ff.

[61] See N. FRASER, *Re-framing Justice in a Globalizing World*, in N. FRASER, P. BOURDIEU (ed.), *(Mis)recognition, Social Inequality and Social Justice*, Routldedge, London 2007, 17 ff.

[62] N. FRASER, *Reframing Justice in a Globalizing World*, cit., 21.

[63] See N. URBINATI, M.E. WARREN, *The Concept of Representation in Contemporary Democratic Theory*, cit., 397, considering that the equality ensured by universal suffrage within nations is, simply, equality with respect to one of the very many dimensions that constitute "the people".

[64] N. FRASER, *Reframing Justice in a Globalizing World*, cit., 31. Fraser points out that «Those who suffer from misrepresentation are vulnerable to injustices of status and class. Lacking political voice, they are unable to articulate and defend their interests with respect to distribution and recognition, which in turn exacerbates their misrepresentation». The result is a vicious circle in which the three orders of injustice reinforce one another.

[65] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, cit., 776.

[66] See *Thornburg v. Gingles*, 478 U.S. 30 (1986), requiring plaintiffs to prove (1) that the minority group is sufficiently large and geographically compact; (2) that the minority group is politically cohesive; and (3) that white voters vote as a bloc and thereby typically defeat minority- preferred candidates. The role of the Gingles' framework in voting rights litigation is questioned by T.J. MILES, A.B. COX, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, in *The University of Chicago Law Review*, 2008, 1493 ff. Recently, the Court reiterated the conditions of the Ginlges' test in *Allen v. Milligan*, 599 U. S. 1 (2023). For an in-depth discussion of the case, see R. BIZZARRI, *Towards 2024 Elections: Racial Gerrymandering in the Latest U.S. Supreme Court's Rulings*, in this issue. See also S.

racial minority groups constitute less than 50 percent of the voting population[67]. However, when combined with crossover voters, these minority groups could significantly influence electoral outcomes and shape the political behavior of elected representatives. Consequently, the dismantling of such districts, which falls outside the purview of the Voting Rights Act, could potentially diminish the political influence of minorities, curtail opportunities to elect representatives of their choice, and, ultimately, run counter to a substantive interpretation of the Equal Protection Clause.

The Court's claim to adopt a neutral approach clashes with the fact that «all districting involves making normative judgments about political outcomes»[68]. Actually, if the solution of majority-minority districting has reached an impasse, the barriers to full minority participation in the American political system continue to exist on many levels. Further solutions probably need to question «both the statutory and constitutional rules that – however well-intentioned – may stand in the way of those goals, and to not let the "Second Reconstruction" slip away before it is completed»[69].

5. *Final remarks*

The preceding analysis compels us to reflect on a theme that, despite its importance, in our legal system is rather underestimated. Conversely, the North American experience testifies that the nature of electoral districts lies at the very core of any democratic system. As Professor Stephanopoulos has observed, district boundaries implicate not only the allocation of legislative power, but also the character of participation and representation, to the extent that «what districts are like is as meaningful as who they elect»[70].

Of course, this is a more relevant issue in electoral democracies using majoritarian voting rules, which are, not incidentally, more prone to the gerrymandering practices than mixed-member and proportional ones[71]. As highlighted above, the majority-

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FILIPPI, *Allen v. Milligan: la Corte Suprema USA conferma (inaspettatamente) la propria giurisprudenza sulla Sezione 2 del VRA*, in *Diritti comparati*, 27 giugno 2023; D. ZECCA, *Lunga vita al Voting Rights Act? Criteri di redistricting, predominanza del fattore razziale ed enforcement powers del Congresso*, in *DPCE online*, 4/2023, 3787 ff.

[67] See *Bartlett v. Strickland*, *556 U.S. 1 (2009)*. On this point see J. MITCHELL, *Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege*, in *Washington Un. Journal of Law and Policy*, 2013, 244.

[68] G.M. HAYDEN, *Refocusing on race*, cit., 1264.

[69] *Ivi*, 1273.

[70] N. STEPHANOPOULOS, *Spatial Diversity*, in *Harvard Law Review*, 2012, 125, 1903 ff., emphasizing that district boundaries implicate not only the allocation of legislative power, but also the character of participation and representation. He comes to the conclusion that «When we redraw district lines, we do more than pick political winners and losers. We forge the very core of our democracy».

[71] See M. COMA FERRAN, I. LAGO, *Gerrymandering in comparative perspective*, in *Party Politics*, 2/2018, 99 ff., stressing that the literature lacks a method for measuring gerrymandering in different types of electoral systems.

minority concern itself implies a certain proportionalist interpretation of election results, as well as a preference for proportional electoral systems. Moreover, democratic theorists focused on the representation of disadvantaged groups mostly favor a proportional electoral system, because its more inclusive logic would increase the chances that disadvantaged groups would have meaningful representation[72]. Indeed, the actual inclusive capacity of proportional systems compared to single-member districts and candidate-centered voting systems is a debatable matter[73], which might be worth reconsidering, particularly in light of the Italian experience. However, this topic cannot be addressed here[74].

Secondly, the analysis conducted above enriches the reflection on the principle of substantive equality in the field of political representation, which, in our context, has predominantly developed with reference to gender representation. Indeed, the mechanism of affirmative action to address inequalities originated in the United States, and has significantly influenced the European and Italian debate[75]. But paradoxically, right in their homeland, racial affirmative action seems definitively banned from the US legal system, where the practice originated. In this regard, it has been observed that the Supreme Court from the 1990s onwards left its «well traveled path»[76] in redistricting decisions on majority-minority districts.

The Court did so in the absence of an explicit reference in the Constitution to the principle of substantive equality[77]. Conversely, in our legal system, the principle of substantive equality is embraced in par. 2 art. 3 Cost. to promote the «effective participation of all workers in the political organization […] of the Country», and it is combined with the duty of *political* solidarity, found in art. 2 Cost. Thus, the different approach of our Constitution, compared to the American one, could even more easily support, for the future, a policy of affirmative actions that impact electoral rules with the aim of ensuring the effective political participation of naturalized citizens. From this point of view, naturalized citizens should be considered as disadvantaged groups expressive of their own, peculiar, interests.

Another issue to take in consideration when attempting a comparison on the American race-conscious districting policies, is that this practice is mostly capable of

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[72] S.A. BANDUCCI, J.A. KARP, *Perceptions of Fairness and Support for Proportional Representation*, in *Political Behavior*, 3/1999, 217 ff.; D.J. AMY, *Proportional Representation and the Future of the American Party System*, in *American Review of Politics*, 1996, 371 ff.; K.L. BARBER, A *Right to Representation: Proportional Election Systems for the Twenty-first Century*, Ohio State University Press, Columbus, 2001.

[73] See C.R. BEITZ, *Political Equality: An Essay in Democratic Theory*, Princeton University Press, Princeton, 1989, arguing that «proportional representation is not an imperative of the principle of political equality in any general sense».

[74] On this contested issue see D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, Editoriale scientifica, Napoli, 2020, 161.

[75] A. D'ALOIA, *Discriminazioni, eguaglianza e azioni positive: il "diritto diseguale"*, in T. CASADEI (ed.), *Lessico delle discriminazioni tra società, diritto e istituzioni*, Diabasis ed., Parma, 2008, 191 ff.

[76] *Bush v. Vera*, 517 U.S. 952 (1996), 1005, Justice Stevens dissenting opinion.

[77] S. LEONE, *Costituzione americana e razza ancora allo specchio. La parabola delle* affirmative actions *nella giurisprudenza della Corte Suprema*, in *Rivista AIC*, 1/2024, 28.

enhancing the representation of geographically concentrated groups. Therefore, because in other immigration context, many ethnic and racial minorities are geographically dispersed, there is a systemic limit to the capacity of group conscious maps to approach proportionality[78].

Actually, the issue of the voting preferences of immigrants is gaining attention in Europe. Recent works explore whether current and future growth in the size of the second-generation migrant populations of Western Europe could play a significant role in shaping the left-to-right political balance. They suggest EU politicians should consider the long-term effects of immigration rather than just immediate reactions[79]. Furthermore, they note that populist right parties in Western Europe experienced a slight decline in popularity due to decreasing concern over the migrant crisis and immigration, although Italy stands out as an exception[80].

In our Country the issue of representation of new ethnic minorities is still relatively unnoticed at the moment, except for historical minorities rooted in certain territories[81]. Indeed, before addressing the issue of fair representation for emerging ethnic minorities, in light of the principle of *substantive* equality, our legal system still needs to solve the problem of recognizing the right to vote for foreigners who are permanent residents. Currently, this challenge is constrained by the narrow confines of our restrictive and unjust citizenship laws[82]. Looking ahead, it is unlikely that the matter of political representation for Italian citizens of foreign origins will be characterized in the same quantitative and qualitative terms as observed in the United

[78] M.S. WILLIAMS, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, Princeton University Press, Princeton, 1998, 206.

[79] S. MORICONI, G. PERI, R. TURATI, *Are immigrants more Left leaning than Natives?*, in *National Bureau of Economic Research*, *Working Paper 30523*, September 2022; K. PILATI, L. MORALES, *Ethnic and immigrant politics vs. mainstream politics: the role of ethnic organizations in shaping the political participation of immigrant-origin individuals in Europe*, in *Ethnic and Racial Studies*, 15/2006, 2796 ff; E. DE ROOIJ, *Patterns of immigrant political participation: explaining differences in types of political participation between immigrants and the majority population in Western Europe*, in *European Sociological Review*, 4/2012, 455; R. MAXWELL, *Evaluating migrant integration: political attitudes across generations in Europe*, in *International Migration Review*, 1/2010, 25 ff.; J. ZWEIMÜLLER, A. WAGNER and M. HALLA, *Immigration and Voting for the Far Right*, in *Journal of European Economic Association*, 6/2017, 1341 ff.

[80] J. DENNISON, A. GEDDES and M. GOODWIN, *Why immigration has the potential to upend the Italian election*, in *LSE blog post*, 2018; N. PASINI, M. REGALIA, *The immigration issue in the Italian general election*, in V. CESAREO (ed.), *The Twenty-eighth Italian Report on Migrations 2022*, Fondazione ISMU ETS, 2023, 77 ff., who note that in the 2022 Italian electoral campaign the immigration issue has been assigned less weight than in past electoral seasons, but they nonetheless come to the conclusion that it is still a fundamental theme for political parties grappling with the new challenges that immigration brings.

[81] See M. PODETTA, *La Costituzione linguistica. Pluralismo e integrazione oggi*, Editoriale Scientifica, Napoli, 2023.

[82] The Italian's naturalization process is one of the strictest in Europe. See J. SAURER, *The acquisition of citizenship in the OECD countries*, *Ifo DICE Report*, 2/2017, 44 ff.; M.P. VINK, G. DE GROOT, *Citizenship attribution in Western Europe: International framework and domestic trends*, in *Journal of Ethnic and Migration Studies,* 5/2010, 713 ff.

States. Nevertheless, the journey toward achieving “racial fair representation” in our legislative bodies is only at the very beginning as it still arises in terms of preliminary respect for the “one vote-one person” rule which is rooted in the principle of *formal* equality among individuals.