

## Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisited 1870–1905 and 2011–2013

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"[Reconstruction in North Carolina was an episode when] selfish politicians, backed by the federal government, for party purposes attempted to Africanize the State and deprive the people through misrule and oppression of most that life held dear."

~ J.G. de Roulhac Hamilton,  
Reconstruction in North  
Carolina (1914)

Here Mr. Hamilton is expounding the predominant-White-Southern elite view of Reconstruction, the interracial experiment in which, for a time, North Carolina tried democracy. By Hamilton's account, North Carolina was "redeemed" when the experiment in multi-racial democracy was finally overthrown around 1898–1900.

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**Abstract:** The use of race as a tool in the struggle for political dominance was a method used to disrupt the Black-White Republican coalition and multi-racial coalitions in the 1870s and for many, many years following. The attack on democracy during and after Reconstruction was never simply about race. Race was a tool used in the struggle for political dominance. As this Paper will show, race, including racial redistricting, was also a key tool used by the Republican majority in the 2011 North Carolina General Assembly.

For 2011 and for the future, this Paper focuses in part on the revision and bulking up of *selected* legislative and congressional districts in North Carolina's 2011 redistricting—"steroid districts"

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that were selected for increased segregation by concentrating and increasing their African American voting age population and diminishing their White voting age population. These “steroid districts” were ones that were already, about 90% of the time, electing candidates preferred by African American voters. Specifically, the legislature revised 40% or 40%+ Black voting age population (BVAP) districts by adjusting district lines to move in more African Americans in order to create 50% or 50%+ Black voting age population districts. Its redrawn lines also shipped Whites or other non-Blacks out of the districts. These newly transformed districts (1) were not needed to produce very strong opportunity for the election of Blacks *in those districts*; (2) were not *required* or justified by a proper reading of Section 2 of the Voting Rights Act with its reference to equal opportunity for minorities to elect candidates of their choice and its rejection of requiring Blacks in the legislature in proportion to the Black voting age population; (3) eliminated virtually every prior district where a multi-racial coalition had been electing the candidate of choice of Black voters and replaced these districts with more segregated districts; (4) diminished overall Black influence in the legislature by undermining Black-White coalitions in districts where Whites and others had supported Blacks but also in districts where Blacks supported Whites; (5) achieved all these effects by explicit use of racial quotas and numerical targets and by including or excluding voters and sometimes candidates from districts because of race; and (6) wasted Black votes by packing more Black voters into these districts, serving no legitimate remedial purpose.

The question raised by the creation of these “steroid districts” is not whether Section 2 of the Voting Rights Act requires the creation of coalition districts. Instead the question, not yet answered by the Supreme Court of the United States, is this: Does the systematic and unnecessary destruction of coalition districts by racial quotas violate the Fourteenth Amendment? Under the doctrine of constitutional avoidance—reading statutes to avoid serious constitutional questions when reasonably possible—and based on the text of the Voting Rights Act, and in light of the history of past attacks on biracial coalitions in North Carolina, the courts should not construe the Act to require or justify this sort of gratuitous segregation. But, if the Voting Rights Act is construed to produce these results, its application is unconstitutional as a violation of the Equal Protection Clause of

the Fourteenth Amendment—unconstitutional as applied to create or justify these “steroid districts.”

### *Table of Contents*

<b>Introduction</b> . . . . .	56
<b>Part I. Overview: North Carolina, the Election of 2010, and Its Consequences</b> . . . . .	56
<b>A. Racial Redistricting</b> . . . . .	59
<b>B. Revising Election Laws</b> . . . . .	62
<b>C. The Effects of These Changes on Black Political Power and Multi-racial Coalitions</b> . . . . .	64
<b>D. The Effect of the Republican Legislative Agenda on Issues of Concern to Most Black Americans and Their Allies</b> . . . . .	66
<b>Part II. Transition: Forward to the Past.</b> . . . . .	69
<b>Part III. Post-Civil War and the 19<sup>th</sup> Century: Reconstructions and the Reactions</b> . . . . .	73
<b>A. Background.</b> . . . . .	73
<b>B. Reconstruction.</b> . . . . .	75
<b>C. North Carolina Tries Democracy</b> . . . . .	77
<b>D. Redemption: A Triumph of the Anti-Coalition “Conservatives” Who Became “Democrats”</b> . . . . .	82
<b>E. A Populist Revolt and a Republican-Populist Coalition</b> . . . . .	84
<b>F. A Renewed Assault on Democracy: Redemption Redux</b> . . . . .	85
<b>G. The Congress and the Courts Face the Terrorist Attack on Democracy and Disfranchisement in the Late 19<sup>th</sup> and Early 20<sup>th</sup> Centuries.</b> . . . . .	90
<b>Part IV. Mid-20<sup>th</sup> Century Transformations</b> . . . . .	92
<b>A. The Racial Caste System Under Siege</b> . . . . .	92
<b>B. Political Transformations: A Southern Strategy</b> . . . . .	93
<b>Part V. Voting Rights and the Law</b> . . . . .	95
<b>A. Section 2 of the Voting Rights Act, the 1982 Amendments, and Majority-Minority Districts.</b> . . . . .	96
<b>B. A Brief Overview of More Recent Precedent.</b> . . . . .	102
<b>Part VI. North Carolina’s 2011 Redistricting Revisited</b> . . . . .	115
<b>Part VII. The North Carolina 2011 Racial Gerrymander Goes to Court</b> . . . . .	120
<b>Conclusion</b> . . . . .	137
<b>Appendix A. Chart of NC Party Affiliations</b> . . . . .	141
<b>Appendix B. Redistricting Maps</b> . . . . .	142
<b>A. North Carolina Maps</b> . . . . .	142
<b>B. Maps From Other Jurisdictions.</b> . . . . .	142

## **Introduction: Representative Democracy, Gerrymanders in General, and a Racial Gerrymander in North Carolina After 2010**

This Article provides an overview of recent changes in North Carolina electoral politics and law since the 2010 election. It focuses on the devices the General Assembly's post-2010 Republican majority used in its effort to secure political mastery now and in the foreseeable future. Putting these changes in historical and legal context, this Article highlights the fundamental issues of democracy, gerrymanders, race, and history raised by these changes. In terms of historical context, the struggle to overthrow multi-racial (male) democracy in North Carolina from 1870 to the turn of the century was never simply about race.<sup>1</sup> Instead, race was a tool used to disrupt White-Black political coalitions and to secure political mastery for the oligarchic, anti-coalition party.<sup>2</sup> The 2010–2011 story is relevant beyond North Carolina; instead, it exemplifies a larger and more profound phenomenon.

The story that follows begins with fairly current events, then looks at them in light of history and then analyzes them in a modern context, and finally looks at some of the legal issues involved in the 2011 North Carolina redistricting.

### **Part I. Overview: North Carolina, the Election of 2010, and Its Consequences**

In the 2010 off-year election, North Carolina, for the first time in more than a century,<sup>3</sup> elected a Republican majority in both houses of the state legislature, and in 2012, the state also elected a Republican governor.<sup>4</sup> In the lower house of the North Carolina General Assembly, the House of Representatives, Republicans won sixty-seven seats and Democrats won forty-six.<sup>5</sup>

1. See MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888–1908* (2001).

2. *Id.*

3. Lynn Bonner & Michael Biesecker, *GOP Takes the General Assembly*, NEWSOBSERVER.COM (Nov. 3, 2010), [http://www.newsobserver.com/2010/11/03/777711\\_gop-takes-the-general-assembly.html?rh=1](http://www.newsobserver.com/2010/11/03/777711_gop-takes-the-general-assembly.html?rh=1).

4. Stephanie Strom, *State Highlights*, N.Y. TIMES (2012), <http://elections.nytimes.com/2012/results/states/north-carolina>.

5. North Carolina State Board of Elections, *Election Results, 2010 General Election*, available at <http://www.ncsbe.gov/ncsbe/Elections/Election-Results-Display?ED1=11xx02xx2010&EL1=GENERAL&YR1=2010&CR1=A> [hereinafter

In the state Senate, Republicans won thirty-one seats and Democrats won nineteen.<sup>6</sup> In the 2010 North Carolina congressional elections, Democratic candidates won seven seats and Republican candidates won six seats.<sup>7</sup>

The 2010 Republican success was quite an achievement. It was achieved under a redistricting plan put into effect by Democrats after the 2000 election. As recently as 2009, the Democratic edge in the state House of Representatives had been sixty-eight to fifty-two and in the state Senate thirty to twenty.<sup>8</sup>

Fresh from its 2010 electoral triumph, the Republican legislature redistricted both the state legislature and North Carolina's congressional districts.<sup>9</sup> The results of this breathtaking gerrymander were dramatic. In 2012, Republicans won seventy-seven seats in the state House (a gain of ten since 2010) to forty-three seats for Democrats.<sup>10</sup> In the state Senate, Republicans won thirty-three seats (a gain of three since 2010), compared to seventeen for the Democrats.<sup>11</sup>

In 2012, North Carolina Republicans won, on a statewide basis, a slim majority of the popular vote for the General Assembly, but not for Congress.<sup>12</sup> The 2012 congressional election shows how effective the Republican gerrymander of North Carolina was in giving majorities of voters a minority of congressmen: North Carolina Democrats won a bit more than half the statewide congressional vote total (outpolling Republicans by 2,218,357 to 2,137,167),<sup>13</sup> but Republicans won nine of the thirteen congressional seats.<sup>14</sup> Meanwhile, Republicans in 2012 won a majority of the combined popular votes for the state legislature, about 53%.<sup>15</sup> Republican map-drawing skills translated this 53% overall popular vote total into 64% of the state House of

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NCSBE 2010].

6. *Id.*

7. *Id.*

8. See *infra* Figure 1 General Assembly Party Affiliations and Appendix B.

9. Ari Berman, *How the GOP Is Resegregating the South*, THE NATION (Jan. 31, 2012), <http://www.thenation.com/article/165976/how-gop-resegregating-south#>.

10. North Carolina State Board of Elections, *Election Results, 2012 General Election*, available at <http://www.ncsbe.gov/ncsbe/Elections/Election-Results-Display?ED1=11xx06xx2012&EL1=GENERAL&YR1=2012&CR1=A> [hereinafter NCSBE 2012].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

Representatives seats and 66% of the state Senate seats.<sup>16</sup> The following chart, which includes statistics on race, demonstrates the shift in political balance between 2009 and 2013<sup>17</sup>:

**Figure 1\***

Biennium	Senate Democrats	Senate Republicans	House Democrats	House Republicans	Unaffiliated
2009	30 [20 W, 10 B]	20	68 [46 W, 22 B]	52	
2011	19 [12 W, 7 B]	31	52 [33 W, 19 B]	67	1
2013	17 [7 W, 10 B]	33	43 [21 W, 22 B]	77	

*\*One Native American and one Hispanic were identified by legislative statistics in 2009. In 2011 and 2013, one Native American was identified. Party affiliation of these legislators was not noted.*

North Carolina Republicans used techniques Republicans had pioneered elsewhere.<sup>18</sup> The well-crafted gerrymander plus election “reforms” is an effective tool in the struggle for political mastery and an effective tool for taming future recalcitrant numerical majorities including, and perhaps especially, a majority coalition of minorities and “Whites.”<sup>19</sup> At any rate, the gerrymander can secure seats a party otherwise could not win.<sup>20</sup> Once the state legislature is gerrymandered, it can continue to

16. See *infra* Figure 1 and note 17.

17. See generally N.C. Gen. Assemb., Senate Documents, <http://www.ncleg.net/Senate/Senate.html> (last visited Nov. 4, 2014) (demographic data compiled of elected Senators from 2009, 2011, and 2013); N.C. Gen. Assemb., House Documents, <http://www.ncleg.net/House/House.html> (last visited Nov. 4, 2014) (demographic data compiled of elected House Representatives from 2009, 2011, and 2013); see *infra* N.C. Gen. Assemb. Party Affiliations, Appendix A, <http://www.ncleg.net/library/Documents/GAPartyAffiliations.pdf>.

18. See, e.g., STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE FALL OF TOM DELAY (2007) (detailing concentration of minority voters and plans to decimate “Anglo” Democratic congresspersons).

19. See *infra* note 20.

20. See *supra* notes 12–18 and accompanying text. See *infra* Appendix B for maps of gerrymandered states and comparison with congressional vote totals. For more detailed effects on certain districts, see SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 920–24 (2d ed. 2002) (demonstrating how the Alabama state Republican party used the re-districting process to “pack” Black voters into particular districts, thus preserving Congressional seats elsewhere in the state that the Republicans would not otherwise then have had the numbers to hold).

gerrymander itself and congressional districts in succeeding ten-year (or sooner in some states<sup>21</sup>) redistricting.<sup>22</sup> (See Appendix B for maps from North Carolina and other states illustrating this point.) A key tool in the North Carolina anti-coalition party's struggle for political mastery was *racial* redistricting. Another was changes in North Carolina election laws.

### A. Racial Redistricting

In 2011, the North Carolina legislature packed more Blacks into selected districts.<sup>23</sup> The result was that fewer districts had a substantial Black population of voting age, but more of the remaining districts were more heavily African American—50% or over 50%.<sup>24</sup> Before 2011, at least seventeen legislative and two congressional districts had been handily electing Black candidates or the preferred candidate of Black voters—without the increase to 50% or 50%+ Blacks of voting age.<sup>25</sup> As explained below, the main effect of bulking up these African American districts was the creation of super-safe majority-minority districts and to “bleach” the remaining districts. So a few more super-safe African American districts were created.<sup>26</sup>

The districts slated to be transformed and bulked up had been multi-racial coalition districts—districts where a coalition was electing the candidate preferred by Black voters—typically a Black candidate.<sup>27</sup> Coalition districts where a multiracial coalition had been electing Whites were decimated.<sup>28</sup>

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21. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (holding that the Texas legislature's decision to scrap a court-drawn redistricting plan and create a new one in the middle of the last decade did not, by itself, rise to the level of an Equal Protection violation). State constitutions may bar the tactic unless the Supreme Court decides that approach is forbidden by the federal Constitution. See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (holding that the Colorado Constitution prohibited the state General Assembly from redistricting more than once per decade).

22. ISSACHAROFF ET AL., *supra* note 20, at 920–24.

23. See Sharon McCloskey, *Redistricting 2011: A Solution in Search of a Problem*, N.C. POL'Y WATCH (Feb. 27, 2013, 10:41 AM), <http://www.ncpolicywatch.com/2013/02/27/redistricting-2011-a-solution-in-search-of-a-problem/>. See, e.g., *infra* text of note 33.

24. See *id.*

25. Lichtman Second Affidavit at 24, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) [hereinafter Lichtman Second Aff.].

26. *Id.*

27. *Id.* See McCloskey, *supra* note 23.

28. See, e.g., *supra* Figure 1 and note 17 and accompanying text. Garrou Affidavit at 6, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) [hereinafter Garrou Aff.].

The explicitly stated goal of the Republican legislative leadership was to have a percent of Black representatives in the legislature that matched the percent of Blacks in the voting age population.<sup>29</sup> So Republicans in the legislature had a dual quota. First, the nineteen districts had to be reconfigured to have enough Black voters (50% or 50%+) in the new districts. This required sorting voters by race—by adjusting district lines to move more Black voters in and to kick out more voters who were not Black.

The second quota sought proportional representation for African Americans in the state legislature—a percent of legislators to mirror the percent of Black voting age population of North Carolina.<sup>30</sup> In one case, in pursuit of the quota for Black legislators, a White female state Senator who had been the preferred candidate of Black voters in her district was moved out of her district—a move that *admittedly* would not have been made had she been a Black incumbent senator.<sup>31</sup> By its quota for Black Democrats, the legislature was able to limit the number of elected White Democrats, greatly limiting the number of those White Democrats who could form coalitions with Blacks.<sup>32</sup>

The legislature's redistricting reconfigured and bulked up nineteen state House and Senate coalition districts and several coalition congressional districts that were handily electing candidates preferred by Black voters.<sup>33</sup> (These coalition districts were districts where African Americans were less than 50% of the voting age population of the district but could, and around 90% of the time did, elect their candidate of choice thanks to a multiracial coalition.) The elimination of these districts as coalition districts

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29. See Carolina Proportionality Chart prepared for Defendants, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) [hereinafter Proportionality Chart].

30. See *id.*

31. Garrou Aff. at 6, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012); Rucho Deposition at 193:9–192, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) [hereinafter Rucho Dep.].

32. See Berman, *supra* note 9.

33. See Lichtman Second Aff. at 6–7, 20–25, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) (discussing the eleven coalition districts and the chance of success for the candidate of choice for the Black community). By the 2011 redistricting, two House Districts with 37.395% to 36.95% Black voting age population (BVAP) were also bulked up to 50%+ BVAP districts. Two districts that had 35.88% and 34.91% BVAP were also bulked up to 45%+ BVAP. *Id.* at 24. Six districts that had a significant 32.57% to 30.15% BVAP were eliminated from the list of districts having 30%+ BVAP. *Id.* This eliminated districts where coalitions were quite likely to elect White Democrats. In eleven state House Districts in elections in 2008 and 2010 with 40%+ BVAP African Americans had a 90% chance of electing the candidate of their choice, indeed a chance as good in districts 50% or more Black. *Id.* at 6–7.



and replacing them as Black majority districts was done in spite of the smashing successes of African Americans in districts with a voting age population that was significantly less than 50% Black—districts with 40% or more but less than 50% or above Black.<sup>34</sup>

The state and individual defendants in North Carolina sought to justify the newly bulked up “steroid districts” and racial proportionality by Sections 2 and 5 of the Voting Rights Act.<sup>35</sup> Where Section 2 *requires* the creation of a majority-minority Section 2 district *as a remedy for the inability of Blacks to have an equal opportunity to elect candidates of their choice*<sup>36</sup> (to be discussed below), the controlling plurality opinion of the Court holds (*as a matter of Voting Rights Act law—the constitutional question was not raised*) the district must have at least 50% or 50%+ BVAP.<sup>37</sup> Of course, whether a district with a majority of Black voters is *required* or justified by the Voting Rights Act in districts where Black candidates or those Blacks prefer are winning without it, is a pertinent question. Another is whether the Fourteenth Amendment permits these racial quotas and sorting of voters by race in cases where the quotas and sorting are not needed to assure African Americans an equal opportunity to elect representatives of *their* choice, a choice that may not constitutionally be limited to members of their race. (Whites may choose to support Black candidates and Blacks may choose White candidates.) A related question is whether such racial quotas are allowed at all. These issues are discussed in Parts V-VII below.

Republican leaders asserted that the changes were justified by Sections 2 and 5 of the Voting Rights Act.<sup>38</sup> One might see the changes as an advance for Black rights since the changes had produced a record number of Black legislators,<sup>39</sup> producing a few more than before.<sup>40</sup> Now, for the first time in history, the North

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34. *Id.*

35. Brentin Mock, *NAACP Appealing North Carolina Redistricting Rule*, FACING SOUTH (July 30, 2013), <http://www.southernstudies.org/2013/07/naacp-appealing-north-carolina-redistricting-rulin.html>.

36. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2012).

37. See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (deciding a challenge to North Carolina multimember districts under the Voting Rights Act); *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (holding redistricting plan invalid under state constitution, since the district violated the whole county requirement of the state constitution and was not justified by Sections 2 or 5 of the Voting Rights Act).

38. See, e.g., *Dickson v. Rucho*, No. 11-CVS-16896, 30–31 (N.C. Super. Ct. July 8, 2013); see *infra* note 557 and accompanying text.

39. See *supra* Figure 1 and sources cited.

40. *Id.*

Carolina legislature had African American representatives very nearly in proportion to the Black voting age population.<sup>41</sup>

Still, African American representatives in the legislature voted against the plan.<sup>42</sup> Perhaps they viewed the “gift” as a Trojan horse designed to pack Black voters, reduce their voting power, and frustrate their ability to form coalitions with Whites. Every Black representative opposed the redistricting.<sup>43</sup> So did the North Carolina chapter of the NAACP.<sup>44</sup>

### *B. Revising Election Laws*

In addition to its districting changes, the legislature made a number of changes in North Carolina voting laws.<sup>45</sup> There seems to be little doubt that most of these changes disproportionately disadvantaged African American voters.<sup>46</sup> Pursuing its quotas, the legislature split a record number of precincts or voting tabulation districts.<sup>47</sup> The legislature also changed the law so votes cast in the wrong precinct would not be counted even for races for which these voters were clearly qualified to vote.<sup>48</sup>

41. See Proportionality Chart, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

42. See Patrick Gannon, *Political Foes Unite to Oppose New Redistricting Map*, STAR NEWS ONLINE (July 25, 2011), <http://www.starnewsonline.com/article/20110725/ARTICLES/110729795/1177?p=1&tc=pg>.

43. *Id.*

44. See First Amended Complaint, *North Carolina State Conference of Branches of the NAACP v. North Carolina*, 2011 WL 10451923 (N.C. Super. Ct., 2011); Mock, *supra* note 35.

45. See, e.g., H.B. 589, 2013 N.C. Sess. Laws (N.C. 2013) (cuts the number of early voting days from seventeen to ten and also prohibits same-day registration); Voter Information Verification Act, 2013 N.C. Sess. Laws 381 (N.C. 2013) (making certain changes to North Carolina voting laws such as: reducing the number of early voting days, prohibiting same-day registration, and allowing non-precinct voter challenges).

46. For a detailed analysis, see Complaint at ¶¶ 29–50, *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C. Sept. 30, 2013) available at <http://legaltimes.typepad.com/files/doj-nc-complaint.pdf>. Cf. Answer, *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C. Dec. 2, 2013).

47. See, e.g., Plaintiff’s Memorandum in Support of Joint Motion for Partial Summary Judgment at 89 ¶¶ 106–07, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) (citing affidavits or deposition testimony by the legislature’s majority’s “line drawing expert” admitting splitting precincts to increase Black voting age population to 50% and to create total Black voting population districts); Gary D. Robertson, *New N.C. Law Cancels Ballots Cast in Wrong Precinct*, PILOTONLINE.COM (Aug. 18, 2013), <http://hamptonroads.com/2013/08/new-nc-law-cancels-ballots-cast-wrong-precinct>.

48. See *United States v. North Carolina*, No. 1:13-CV-861, ¶¶ 39–47 (M.D.N.C. Sept. 30, 2013); Robertson, *supra* note 47. Most of the recent changes related to elections have been challenged. In September 2013, several lawsuits were filed in the United States District Court for the Middle District of North Carolina

The North Carolina legislature also reduced early voting days from seventeen to ten, but also (following the Florida 2012 model) extended the number of hours in the remaining days.<sup>49</sup> In Florida, this gambit produced long lines and long delays.<sup>50</sup> African Americans disproportionately used early voting and especially voting during the first eliminated week.<sup>51</sup> The legislature also eliminated same-day registration and early voting the Sunday before the election, both disproportionately used by African American voters.<sup>52</sup> It also eliminated straight-ticket voting.<sup>53</sup>

For 2016 and later years, the legislature required photo identification, passing one of the strictest voter identification laws in the nation.<sup>54</sup> Seven point four percent of African Americans do not have a DMV-issued identification, compared to 3.8% of White voters.<sup>55</sup> In ten North Carolina counties, the DMV office is open only once a month.<sup>56</sup> Four of these counties are predominantly African American.<sup>57</sup>

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challenging North Carolina Session Law 2013-381, a statute that imposes new restrictions on North Carolina's voters. The district court's order denying a preliminary injunction was appealed to the Fourth Circuit. The circuit court enjoined several of the changes, a decision subsequently stayed by the United States Supreme Court. For details see, *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6 (2014); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C. 2013).

49. *Id.*

50. See Juliet Lapidus, *Florida Voting: Like 'a Third-World Country'*, N.Y. TIMES (Nov. 5, 2012, 1:41 PM), [http://takingnote.blogs.nytimes.com/2012/11/05/florida-voting-like-a-third-world-country/?\\_r=0](http://takingnote.blogs.nytimes.com/2012/11/05/florida-voting-like-a-third-world-country/?_r=0).

51. See Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RES. Q. 646 (2014).

52. See Voter Information Verification Act, 2013 N.C. Sess. Laws 381, 16 (N.C. 2013) (cutting the number of early voting days from seventeen to ten and also prohibiting same-day registration).

53. *Id.* at 38.

54. See *id.* See also Complaint at ¶¶ 39–42, *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C. Sept. 30, 2013).

55. Complaint at 16, ¶ 50, *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C. Sept. 30, 2013).

56. *Id.* at ¶ 48. See Paul Wooverton, *Justice Department Sues North Carolina over New Voting Laws*, FAYOBSERVER.COM (Oct. 1, 2013, 5:48 AM), [http://www.fayobserver.com/news/local/justice-department-sues-north-carolina-over-new-voting-laws/article\\_bf5a78be-6441-55a7-93b5-33e8b5516a48.html](http://www.fayobserver.com/news/local/justice-department-sues-north-carolina-over-new-voting-laws/article_bf5a78be-6441-55a7-93b5-33e8b5516a48.html) (discussing numerous restrictions on early voting and noting that DMVs in ten counties are only open once per month).

57. See Complaint, *United States v. North Carolina*, No. 13-CV-861 (M.D.N.C. Sept. 30, 2013).

The legislature changed the law to allow out-of-precinct voters to challenge voters.<sup>58</sup> Additional challenges, though not successful, can delay voting, imposing a particular hardship on poor voters and those whose work or family responsibility schedules preclude standing in line all day. The elimination of straight-ticket voting is also likely to produce longer lines.

*C. The Effects of These Changes on Black Political Power and Multi-racial Coalitions*

Creation of minority-majority districts has helped in the past to increase the number of Americans of African descent in the North Carolina state legislature and in state legislatures throughout the South and nation.<sup>59</sup> But is the current use of racial districting by packing additional Black voters into “Black” districts in districts where before Blacks were winning handily without such packing a means to any legitimate end? No.

One effect of pouring more Blacks into semi-segregated Black districts is to bleach the surrounding districts and to make them more Republican.<sup>60</sup> To the extent that Blacks are crowded into a smaller number of more racially-concentrated Black districts, the effect is to impair Black-White coalitions in other districts with substantially more Whites.<sup>61</sup> Districts that could have provided successful Democratic White-Black coalitions are reduced.<sup>62</sup> The effect overall is to reduce *Black* political power and influence in the legislature by unnecessarily concentrating more Black voters in quasi-segregated districts.<sup>63</sup>

Thomas Edsall, in an article on the decline of Black power in the South, notes that a growing number of Blacks in state legislatures has coincided with a decline in Black political power.<sup>64</sup> With typically all-White-Republican-Party takeovers in the South, Blacks in state legislatures have been relegated to minority status and lost committee chair positions, losing power to set agendas,

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58. H.B. 589, 2013 N.C. Sess. Laws 381, 20 (N.C. 2013).

59. Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES OPINIONATOR (July 10, 2013, 9:34 PM), [http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/?_r=0).

60. *Id.*

61. *Id.*

62. *Id.*

63. Lichtman First Affidavit, *Dickson v. Rucho*, 11-CVS-16896 (N.C. Super. Ct. 2012) [hereinafter Lichtman First Aff.]; Lichtman Second Aff. at 24, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012); see also Edsall, *supra* note 59.

64. Edsall, *supra* note 59.

push legislation to the floor, and call hearings.<sup>65</sup> In North Carolina before the 2010 election, Blacks were committee chairs and North Carolina had had a Black Speaker of the House.<sup>66</sup> On substantive issues of personal concern to Blacks and less wealthy Whites and their allies, changes have been substantial.<sup>67</sup>

With their currently entrenched White majorities, as Edsall explains, Republicans are moving aggressively to secure their state legislative majorities from future majorities of voters—majorities made up a coalition in which ethnic minorities may be the majority in the coalition.<sup>68</sup> The effort combines gerrymanders with efforts to suppress the minority and Democratic vote “under the guise of combating voter fraud.”<sup>69</sup> “Republicans in control of redistricting,” Edsall explains:

[H]ave two goals: the defeat of [W]hite Democrats, and the creation of safe districts for Republicans. They have achieved both of these goals by increasing the number of districts likely to elect an African-American. Black voters are gerrymandered out of districts represented by [W]hites of both parties, making the Democratic incumbent weaker and the Republican incumbent stronger.<sup>70</sup>

Or, when that seems impractical and the White legislator cannot be easily carved out of the district, White incumbents can have Black majorities added to their districts to increase the possibility of an African American challenging the White incumbent.<sup>71</sup>

“In private discussions,” Edsall reports, “Republicans in the South talk explicitly about their goal of turning the Democratic Party into a [B]lack party, and in many Southern states they have succeeded.”<sup>72</sup> So giving the Democratic Party a predominantly Black face is designed to polarize the Southern electorate into a Black (Democratic) minority and White (Republican) majority. Aggressive racial districting uses race as a polarizing tool, and advances Republican control of Southern legislatures.<sup>73</sup> So far it is working well throughout the South.<sup>74</sup>

65. *Id.*

66. *E.g.*, *Senator Dan Blue*, <http://danblue.org/about/senator-blue> (last visited Nov. 18, 2014). Blue, an African American, was Speaker of the House from 1991 to 1994.

67. Edsall, *supra* note 59.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*; Berman, *supra* note 9.

74. Edsall, *supra* note 59.

North Carolina seems to be following a similar plan to the one pioneered in Texas by Tom DeLay and Karl Rove.<sup>75</sup> That plan succeeded in eliminating “Anglo” congressmen.<sup>76</sup> Indeed, by the Texas Republican playbook, a district that was majority Hispanic and that elected an Anglo, was labeled “non-performing” and slated for reconstructive surgery.<sup>77</sup> In Texas, Karl Rove helped to engineer large infusions of cash for Republican legislative candidates.<sup>78</sup> In North Carolina, large infusions of cash were orchestrated by multi-millionaire Art Pope, now Governor Pat McCrory’s budget director.<sup>79</sup> Of course, when a party wins control of the legislature it can and sometimes does dramatically change the law.<sup>80</sup>

So discussion of the fact that the North Carolina legislature has changed the law in ways opposed by African Americans and their allies may seem out of place. However, where racial districting like that in 2011 could be justified as a major advance for political power for Americans of African descent, it may be worthwhile to look at the record.

*D. The Effect of the Republican Legislative Agenda on  
Issues of Concern to Most Black Americans and Their  
Allies*

Republican changes injure poor citizens of every race, and disproportionately injure many North Carolina Americans of African descent.<sup>81</sup> The following is a list of some changes made by the current Republican legislature and governor, including a number summarized by Rob Christensen in a June 15, 2013

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75. Compare Edsall, *supra* note 59 and Berman, *supra* note 9 (explaining how North Carolina’s 2010 Republicans created districts with even higher percentages of African Americans to garner political advantage for the GOP), with BICKERSTAFF, *supra* note 18, at 263–64 (discussing Texas redistricting in which Republican map drawers “us[ed] Republican political advantage to the maximum extent possible to draw partisan districts that would defeat Anglo Democrats”).

76. BICKERSTAFF, *supra* note 18, at 263–64.

77. *Id.* at 262–65.

78. Wayne Slater, *Karl Rove: How to Build a Multi-Million Dollar Money Machine*, DALL. MORNING NEWS (Feb. 12, 2012, 8:02 PM), <http://trailblazersblog.dallasnews.com/2012/02/karl-rove-how-to-build-a-multi.html/>.

79. Jim Morrill, *McCrory’s First Task: Building a New Team*, CHARLOTTE OBSERVER (Jan. 5, 2013), [http://www.newsobserver.com/2013/01/05/2583546\\_mccrorys-first-task-building-a.html?rh=1](http://www.newsobserver.com/2013/01/05/2583546_mccrorys-first-task-building-a.html?rh=1).

80. See, e.g., Rob Christensen, *NC GOP Rolls Back Era of Democratic Laws*, RALEIGH NEWS & OBSERVER (June 16, 2013), <http://www.newsobserver.com/2013/06/16/2968241/state-gop-rolls-back-era-of-democratic.html> (listing examples of Republican changes that negatively impacted minority and poor citizens).

81. *Id.*

*Raleigh News and Observer* article and recounted by Thomas Edsall:

1. Repeal of North Carolina's Earned Income Tax Credit, which provided tax benefits to the working poor.<sup>82</sup>
2. Cuts in Medicaid eligibility for poor women, reducing the pool of eligible recipients from pregnant women with income 185% of the poverty level to pregnant women with income at 133%.<sup>83</sup>
3. Rejection of Medicaid expansion resulting in contraction of medical services for the poor.<sup>84</sup>
4. Reduced eligibility for unemployment benefits from twenty-six weeks to twelve to twenty weeks, depending on circumstances.<sup>85</sup>
5. Cutting funds for education by freezing teacher salaries (a freeze that began in 2009), reducing the number of teacher aides, eliminating a salary supplement for teachers who obtain a master's degree, and eliminating a teaching fellowship program that develops young teachers in rural areas.<sup>86</sup> In a later session, the legislature did provide a significant raise largely limited to very new teachers.
6. Repeal of the 2009 Racial Justice Act. The Act allowed death row inmates to challenge their sentences by arguing that race played a factor in either their conviction or their sentencing.<sup>87</sup>
7. For 2016 and following elections, enactment of a voter ID law, which requires voters to show some form of government-issued photo identification before casting a ballot.<sup>88</sup> Studies tend to show that poor, elderly, and African American voters disproportionately lack government-issued IDs.<sup>89</sup> For example, a recent study

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82. *Id.*

83. *Id.*

84. John Frank, *McCrory Signs Bill Blocking Medicaid Expansion*, RALEIGH NEWS & OBSERVER (Mar. 6, 2013), [http://www.newsobserver.com/2013/03/06/2730744\\_mccrory-signs-bill-blocking-medicaid.html?rh=1](http://www.newsobserver.com/2013/03/06/2730744_mccrory-signs-bill-blocking-medicaid.html?rh=1).

85. Christensen, *supra* note 80.

86. *Id.*

87. *Id.*

88. See Voter Information Verification Act, 2013 N.C. Sess. Laws 381 (N.C. 2013); see also David Zucchini, *North Carolina Lawmakers Approve Sweeping Voter ID Bill*, L.A. TIMES (July 26, 2013, 5:06 PM), [http://cached.newslookup.com/cached.php?ref\\_id=49&siteid=2040&id=2645615&t=1374884323](http://cached.newslookup.com/cached.php?ref_id=49&siteid=2040&id=2645615&t=1374884323) (discussing North Carolina's 2013 Voter ID law requiring voters to show some form of government-issued ID).

89. Zucchini, *supra* note 88.

conducted by the North Carolina State Board of Elections found that 107,681 registered African American voters do not have a state-issued photo ID, as opposed to 172,613 registered White voters.<sup>90</sup> However, there are only about 1,498,000 African Americans of voting age in North Carolina, as opposed to about 5,156,000 Whites.<sup>91</sup> Thus, African Americans account for 34% of registered voters who cannot show a state photo ID at the polls *even though* they only make up 21% of the potential electorate. For voters who do not have a driver's license or other photo ID, the bill provides for a voter identification card that may be obtained at the DMV.<sup>92</sup> The statute provides that registered voters and registered voters who swear they lack an acceptable photo ID may receive one for free. Free renewal does not seem to be specified.<sup>93</sup>

8. Cutting early voting and same-day registration and eliminating early voting the Sunday before the election.<sup>94</sup> The legislature maintained the same number of hours for early voting but cut the days—following the model used by Florida in 2012.

A proposal to delay restoration of the right to vote for felons for five more years passed the Senate but in the end was not added to the bill.<sup>95</sup> One thing is clear: most of the voting measures along

90. See NCSBE 2012, *supra* note 10.

91. *County Summary of Voting Age Population by Race and Ethnicity: 2011 NCGA Redistricting Database*, NCGA, [http://www.ncleg.net/GIS/Download/Base\\_Data/2011/Reports/byCounty/rptBaseCountyVap.pdf](http://www.ncleg.net/GIS/Download/Base_Data/2011/Reports/byCounty/rptBaseCountyVap.pdf) (last visited Feb. 8, 2014).

92. Voter Information Verification Act, ch. 163, sec. 3.1, § 20-37.7(d), 2013 N.C. Sess. Laws 381 (N.C. 2013).

93. *Id.* For fees associated with a certified copy of a birth certificate or a special ID, see N.C. GEN. STAT. § 20-14 (2013).

94. Voter Information Verification Act, 2013 N.C. Sess. Laws 381 (N.C. 2013); see also Zucchini, *supra* note 88.

95. S. 721, Gen. Assemb., part 2, sec. 2.1, § 13.1 (N.C. 2013) (proposing a five-year waiting period before the right to vote is restored); see also Thomasi McDonald, *Proposal Would Make Ex-Felons Wait 5 Years to Vote*, RALEIGH NEWS & OBSERVER (Apr. 22, 2013), [http://www.newsobserver.com/2013/04/22/2843578\\_state-senator-proposes-five-year.html?rh=1](http://www.newsobserver.com/2013/04/22/2843578_state-senator-proposes-five-year.html?rh=1). The North Carolina Constitution currently disfranchises persons convicted of a felony “unless the said person shall first be restored to citizenship in the manner prescribed by law.” N.C. CONST. art. IV, § 2(3). Under current North Carolina law, this right to citizenship is restored upon completion of a prison sentence and probation. N.C. GEN. STAT. § 13-1 (2013). Delaying the right to vote for those convicted of a felony would disproportionately affect African Americans. For example, Blacks are almost four times more likely than Whites with similar behavior to be arrested for marijuana offenses. EZEKIEL EDWARDS ET AL., *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4 (2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>; see also Harry J. Enten, *Felon Voting Rights Have a Bigger Impact on Elections Than Voter ID*



with the creation of bulked up Black districts are tools that reduce the political power of Black, poor, and minority voters.<sup>96</sup>

By reducing the number of districts with a substantial Black population, by packing more Blacks into fewer districts, by decimating districts based on Black-White and multiethnic coalitions, and decimating Blacks' White Democratic legislative allies, the legislature's racial gerrymander left African American legislators in a long-term minority with little power to shape laws and little likelihood of resuming committee chairs or leadership positions.<sup>97</sup> Indeed, on issue after issue from the racial gerrymander, to voting rights, and the social safety net, the legislation of the new and then the newly entrenched majority has been a disaster from the point of view of policies preferred by Africans Americans and their allies.<sup>98</sup> This does not show the legislative changes were unwise. That is an issue readers will decide for themselves. It does show any claim that the racial gerrymander was to benefit Americans of African descent is dubious.

## **Part II. Transition: Forward to the Past**

The transition that follows may strike readers as puzzling. Having looked at recent election changes in North Carolina, the next sections of this Paper look at these changes in historical context. So far, the reader may conclude that Blacks in North Carolina have been targeted by these myriad 2011–2013 election “reforms.” But even if the reader sees that pattern, she or he may shrug and say, “So what? This is just politics. This is not like the bad old days at all. Here, Blacks are targeted not because of their color, but because they vote Democratic.” The ho-hum reaction assumes that targeting racial minorities to attain political ends is not problematic. That understates the perniciousness of what is going on. History helps to see why.

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*Laws*, THEGUARDIAN.COM (July 31, 2013, 9:30 AM), <http://www.theguardian.com/commentisfree/2013/jul/31/felon-voting-rights-impact-on-elections> (explaining how strict felon voting laws can swing an election by drastically reducing the minority vote).

96. See Mock, *supra* note 35 (discussing the impact of these voting changes on political power).

97. See Edsall, *supra* note 59 (noting a general pattern in the South); Berman, *supra* note 9 (“The use of race in redistricting is just one part of a broader racial strategy used by Southern Republicans to . . . make it more difficult for minorities to vote and to limit their electoral influence.”).

98. See, e.g., Christensen, *supra* note 80 (listing examples of Republican changes that negatively impacted minority and poor citizens).

The 2010–2012 story is about the use of racial districting and voting “reforms” to disrupt the multi-racial Democratic coalition. These methods produce more racially-polarized politics.<sup>99</sup> The 2011–2013 racial gerrymander and changes in election laws that disproportionately disadvantage African Americans and other vulnerable voters are tools in the struggle for political mastery.<sup>100</sup> The gerrymanders also have the usual effect of gerrymanders—magnifying the representation of the party controlling the gerrymander and often protecting it from future majorities for a very long time.<sup>101</sup>

The historic story that follows is also about the struggle for political mastery.<sup>102</sup> It is a story of the use of race to disrupt a White-Black coalition and of targeting Black voters by election “reforms” because they were the most vulnerable part of a biracial coalition.<sup>103</sup> But then the victims were Black and White Republicans and other reformers.<sup>104</sup> As history shows, using racial means to disrupt White-Black coalitions and to undermine effective democracy is not new.<sup>105</sup> Of course, some can and do argue that using race for *political* purposes seeking political mastery sanitizes it as a legal matter.<sup>106</sup> Use of racial tools systemically to discourage Black voting and using it systematically to undermine multi-racial political cooperation should not be sanitized because it yields political benefits. But if it should, then

99. See, e.g., Edsall, *supra* note 59; Berman, *supra* note 9 (discussing how North Carolina’s redistricting “has changed the political complexion of North Carolina” to create a White Republican majority and a Black Democratic minority).

100. See generally PERMAN, *supra* note 1 (describing disfranchisement in the South as a “Struggle for Mastery”). Here the words are used to cover a longer period.

101. See, e.g., Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL’Y 103, 112–13 (2000) (discussing the consequences of gerrymandering which include the creation of “more homogenous districts,” “insulation of incumbents from political accountability,” and “increased partisanship and extremism in legislative bodies”).

102. PAUL D. ESCOTT, *MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850–1900* at 148–51 (1985).

103. *Id.*

104. *Id.*

105. *Id.* at 148 (“Conservatives also began to appeal to the social self-interest of the ordinary White. They stressed that all White people had an interest in the continued debasement of the Negro. His subjection had been the fundamental fact in the discriminatory social order of the Old South, and power over blacks had constituted one of the rights that White people enjoyed.”).

106. See generally 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) (citing alternative “just politics” argument by Texas to justify voting changes that disadvantaged minorities). Hasen rejects such sanitation. *Id.*

the overthrow of Reconstruction and Black disfranchisement needs to be viewed in a new and more favorable light.

After Black men gained the vote under the North Carolina's 1868 Constitution, the anti-coalition "Conservative" party (later calling itself the "Democratic" party) used racial targeting for political purposes against the Republican Party's White-Black (majority Black) coalition.<sup>107</sup> Because the "Conservative" anti-coalition party changed its name to the Democratic Party in the 1870s, and because the current Democratic Party is a multiracial coalition party and the modern Republican Party in the South is the anti-coalition party, I will often use the words anti-coalition and coalition party to help the reader keep things straight. As the name suggests, the anti-coalition group sought to disrupt a biracial coalition.<sup>108</sup> In 1877, using racial appeals and politically-motivated terror aimed at White and Black Republicans, the self-styled anti-coalition "Conservatives," soon to be re-christened as Democrats, regained control of the legislature and "redeemed" the state.<sup>109</sup> In the years that followed, they continued to use race in the struggle for political mastery—often by "reforming" voting laws with devices that did not explicitly mention race, but disproportionately burdened Black voters.<sup>110</sup> Black voters were targeted because they were a vulnerable and identifiable part of the Republican coalition.<sup>111</sup>

In the 1890s, a fusion coalition between Populists and White and Black Republicans briefly gained power.<sup>112</sup> Once again, anti-coalition Democrats used race and terror to regain power, and then they used that power to further "reform" election laws and then to disfranchise Black men.<sup>113</sup> Disfranchisement was accomplished by various devices including literacy tests, the White primary, partisan control of election machinery, segregation, and

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107. See ESCOTT, *supra* note 102, at 150 ("The general strategy of the Democrats or Conservatives . . . was the same throughout the state. 'The lines of society are being rigidly drawn,' [as one Conservative put it] . . . 'all the Intelligence and Virtue . . . are with the Conservative party and they treat with contempt and scorn the miserable wretches who have deserted their race' by voting Republican.").

108. *Id.*

109. HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, *THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA* 465–73 (2d ed. 1963) (discussing how after nearly a decade of troublous Reconstruction, "[t]he state had been 'redeemed,' 'home rule' had been restored, and [Conservative] 'White supremacy' had been achieved").

110. *Id.* at 509–10.

111. *Id.*

112. *Id.* at 515–16.

113. *Id.* at 517–27.

the poll tax.<sup>114</sup> Disfranchisement was a political masterstroke because it eliminated the major part of the Republican coalition.<sup>115</sup> Of course, racial appeals and segregation also helped to disrupt labor and other coalitions as well.<sup>116</sup>

History never simply repeats itself. Current tactics are, thankfully, by no means fully identical to historic tactics. Political terror is not a weapon. The consistent thread tying the present to the past is the use of partisan, racially skewed, electoral manipulation (often effectuated by facially “neutral” rules that disproportionately disadvantage Blacks) as a tool to undermine multiracial coalitions. The effort to undermine White-Black political coalitions and to discourage or otherwise disadvantage Black voting in the search for political mastery, ties the past to the present.

After looking at the destruction of White-Black coalitions, the story moves on to the response of the Supreme Court. In general, from the 1870s through the 1920s and beyond, the Court often failed to protect democracy from terror and disfranchisement.<sup>117</sup> Indeed, it undermined congressional laws designed to protect democracy.<sup>118</sup> Judges often suggested that political terror aimed at

114. *Id.* at 526–27.

115. *See id.* at 528–29 (“The adoption of the suffrage amendment [which imposed a poll tax and literacy test] deprived the Republican party of about 50,000 voters, confirmed Democratic dominance of state politics, and strengthened the one-party system.”).

116. DEBORAH BECKEL, *RADICAL REFORM: INTERRACIAL POLITICS IN POST-EMANCIPATION NORTH CAROLINA* 61–63 (2011). For a leading study of Reconstruction, see ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* (Henry Steele Commager & Richard B. Morris eds., 1988).

117. *See generally* Michael Kent Curtis, *Reflection on Albion Tourgee’s View of the Supreme Court: A “Consistent Enemy of Personal Liberty and Equality of Right,”* 5 ELON L. REV. 19, 37–71 (2013) (Tourgee spoke about the 19<sup>th</sup> and early 20<sup>th</sup> Century Court); Michael Kent Curtis, *The Klan, The Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Act Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1398–1425 (2009) [hereinafter Curtis, *The Klan*] (recounting the dismal story); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000). He exaggerated; it was only usually an enemy of liberty and equal right. James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385–447 (2014). *James v. Bowman*, 190 U.S. 127 (1903) (applying the state action syllogism to private attacks on the right to vote, at least in state elections); *United States v. Reese*, 92 U.S. 214 (1876) (construing federal statutory protection of the right to vote since race was not reiterated in subsequent sections of the statute); *United States v. Cruikshank*, 92 U.S. 542 (1875) (finding that constitutional protections only apply to state, not private, actions, and that the right to assembly in the First Amendment did not restrict state governments, and more importantly, did not protect citizens against private terrorists).

118. *Reese*, 92 U.S. at 216.

Black and White Republicans and facially neutral laws aimed at Black voters were beyond the power of the Congress or the Court's reach.<sup>119</sup> After the 1870s, failure to protect democracy was often systemic and included Congress and the Executive as well.<sup>120</sup>

After bringing the story up through 1965, the focus shifts to some of the legal issues raised by North Carolina's 2011 racial gerrymander—issues under the Fourteenth Amendment and the Voting Rights Act.<sup>121</sup> But now I move to the earlier use of race in the struggle for political mastery.

### **Part III. Post-Civil War and the 19<sup>th</sup> Century: Reconstructions and the Reactions**

#### *A. Background*

Slavery and its legacy shaped American politics under the Nation's new Constitution, ratified in 1791.<sup>122</sup> The Constitution inflated the political power of the slave states by counting slaves as three-fifths of a person for representation in the House of Representatives and therefore also in the Electoral College.<sup>123</sup> "The federal ratio [of the Three-fifth's Clause] consistently augmented southern representations in the House by 30 percent or more."<sup>124</sup> To a truly remarkable degree, the new nation was governed by slaveholders and their allies.<sup>125</sup> The Supreme Court became increasingly attentive to the wishes of the slaveholding elite.<sup>126</sup>

119. *Id.*

120. *See, e.g.,* Curtis, *The Klan*, *supra* note 117 (recounting the dismal story).

121. U.S. CONST. amend. XIV; Voting Rights Act, 42 U.S.C. § 1973 (2012).

122. U.S. CONST. art. I, § 2, cl. 3 (superseded by U.S. CONST. amend. XIII).

123. *Id.*

124. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 20 (2001).

125. *See generally* LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860* at 10 (2000) ("Slaveholders generally were in control.").

126. *E.g.,* *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that African Americans were not citizens, had no federal constitutional rights, could not sue in federal court, and that the federal government had no power to ban slavery in the federal territories), *superseded by constitutional amendments*, U.S. CONST. amends. XIII and XIV; *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (holding that the fugitive slave clause and a federal fugitive slave law guaranteeing a slaveholder the right to recover an escaped slave preempted a Pennsylvania state law that protected African Americans from being taken out of the state and into slavery without a due process hearing to establish that the person seized was actually a fugitive slave and not a free Black person).

Critics referred to the augmented political power of slave states as the "Slave Power," a power they felt was undermining the republican nature of the American experiment.<sup>127</sup> The constitutions of a number of Southern states further inflated the political power of slave owners by having little-state-three-fifths clauses. For example, the North Carolina Constitution provided that representatives in the lower house of the General Assembly would be elected by counties "according to their federal population"; thus, slaves would count as three-fifths of a person for purposes of representation in the state House.<sup>128</sup> So slave owners and their allies had extra power at the state level, which translated to still more extra power at the national level.<sup>129</sup> They also enjoyed economic advantages from slavery.<sup>130</sup> With the end of the Atlantic slave trade in 1808, Southern slaveholders had a lucrative commerce—selling slaves to new areas where slavery was developing.<sup>131</sup>

As the nation expanded, whether new territories were to be free or slave (and thus become free or slave states) became a divisive political issue.<sup>132</sup> As opposition to slavery mounted, Southern states suppressed anti-slavery speech and demanded that the rest of the nation follow suit, but the demand was generally rejected by the North.<sup>133</sup> Southerners next demanded that all federal territory be open to slavery.<sup>134</sup> New slave territory promised new lucrative markets for "surplus" slaves as well as augmentation of the political "slave power" bloated by the Three-fifths Clause.<sup>135</sup> But compliance with the demand to plant slavery in all the federal territories sparked a political revolution in the North, culminating in the election of Abraham Lincoln on a platform that promised to tolerate slavery in the states where it existed, but to ban it from all federal territory.<sup>136</sup> Faced with what

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127. RICHARDS, *supra* note 125, at 1–4.

128. N.C. CONST. of 1776 art. I, § 1, cl. 2 (amended 1835).

129. RICHARDS, *supra* note 125, at 56–57.

130. *Id.* at 71–72.

131. *Id.*

132. DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861* at 53–55 (Don E. Fehrenbacher et al. eds., 1976).

133. MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 182–94* (2000).

134. POTTER, *supra* note 132, at 53–54.

135. RICHARDS, *supra* note 125, at 32–88.

136. FEHRENBACHER, *supra* note 124, at 535–63. Only seven of the forty-four Northern Democrats who had voted to repeal the Missouri Compromise that opened national territory to slavery were re-elected in 1858; the Democratic Party lost 70% of its free state seats. *Id.* at 188. See also *Republican Party Platform of*

they saw as the threat that the slaveholding South would become an ever-smaller minority in the national government, faced with what they saw as a threat to slavery itself, and faced with what they saw as a threat to its potential profits from selling slaves in new slave territories, much, but not all, of the slaveholding elite advocated secession.<sup>137</sup>

### *B. Reconstruction*

After the Confederate defeat, many in North Carolina's old elite sought to preserve as much as possible of the pre-war system and to resume their prior position in the state's hierarchy.<sup>138</sup> For a short time, North Carolina operated under Andrew Johnson's effort at prompt restoration of the states of the Confederacy (with increased representation in the federal House and Electoral College based on counting 100% of the newly-freed slaves).<sup>139</sup> The Johnson reconstruction plan required the seceded states to call a convention to establish a new state constitution which abolished slavery and banned repayment of the state debt used in part to aid the rebellion, but left much of the former federal system intact (including broad state control over newly-freed slaves including the power to deny them the right to vote).<sup>140</sup>

At the call of Governor William W. Holden, a Convention assembled in North Carolina to draft a new state constitution.<sup>141</sup> As President Andrew Johnson had insisted,<sup>142</sup> the Convention's proposed 1866 constitution abolished slavery and repudiated the

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1860, AM. PRESIDENCY PROJECT (May 17, 1860), *available at* <http://www.presidency.ucsbl.edu/ws/?pid=29620> ("[T]he new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself . . . . [O]ur Republican fathers, when they had abolished slavery in all our national territory, ordained that 'no persons should be deprived of life, liberty or property without due process of law,' [and] it becomes our duty . . . to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.").

137. See CHARLES B. DEW, *APOSTLES OF DISUNION: SOUTHERN SECESSION COMMISSIONERS AND THE CAUSES OF THE CIVIL WAR 18–36* (2001) (discussing general consensus among Commissioners from the seceded states to slave states still on the fence that secession was necessary to protect slavery and appealing to race and slavery used to justify secession).

138. ESCOTT, *supra* note 102, at 85–86.

139. LEFLER & NEWSOME, *supra* note 109, at 453–54. With the abolition of slavery, African Americans now counted towards the total basis of representation in the former slave states. U.S. CONST. art. I, § 2.

140. See LEFLER & NEWSOME, *supra* note 109, at 454–55.

141. *Id.* at 455.

142. *Id.* at 453–57.

debt incurred in aiding the "War for Southern Independence" (as one text quaintly describes it).<sup>143</sup> It retained property qualifications for election to the legislature, excluding many White males from service in the state House and more from service in the state Senate.<sup>144</sup> It substituted a White basis for representation in the state House, a rule which did not count disfranchised free and emancipated Blacks.<sup>145</sup> It did not allow any Black voting or office holding.<sup>146</sup>

Still, leading "Conservatives" found the proposed constitution unacceptable.<sup>147</sup> Among other things, leading "Conservatives" objected to repudiating the war debt.<sup>148</sup> Some "Conservatives" also hoped to restrict the White voting population to the "better" sort, even rolling back democratic advances of the 1850s.<sup>149</sup> Thomas Ruffin, a leading "Conservative" opponent of the proposed constitution, insisted that the war had changed nothing: the prior North Carolina government should simply be reinstated.<sup>150</sup> He also objected to the failure to count newly-freed, but disfranchised, slaves as persons for purposes of representation in the legislature—his plan would again swell the power of the old slaveholding elite.<sup>151</sup> Many "Conservatives" found the proposed constitution too radical, and voters rejected it at the polls.<sup>152</sup>

As Paul Escott explains in his classic book, *Many Excellent People*,<sup>153</sup> most of the White elite's "fear of change revealed that Reconstruction was more than a contest over racial equality—it was a battle against the principle of equality itself."<sup>154</sup> What would be the nature and extent of political equality among White and Black males, and what would be the nature and extent of economic equality? In the first two years after the war, "[b]efore meaningful equality for Blacks became an issue, most of the state's traditional leaders had begun to draw together in defense of the fundamental principle of hierarchy against [greater] democracy. To them the

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143. *Id.* at 426. In their comprehensive history of North Carolina, Lefler and Newsome use these words as the title of the chapter on the Civil War. *Id.*

144. ESCOTT, *supra* note 102, at 105–08.

145. *Id.* at 105.

146. *Id.*

147. *Id.* at 107–08.

148. *Id.* at 96–98.

149. *Id.* at 84.

150. *Id.* at 108.

151. *Id.*

152. *Id.* at 109–10.

153. *Id.*

154. *Id.* at 85.



immediate danger was a shift of power from prominent to supposedly undeserving Whites.”<sup>155</sup>

Under the Johnson plan, voters elected a legislature and elected “Conservative” Jonathan Worth as governor.<sup>156</sup> Worth defeated William W. Holden, Johnson’s temporary appointee as provisional governor.<sup>157</sup> The legislature passed a Black Code for former slaves.<sup>158</sup> It rejected the proposed Fourteenth Amendment to the U.S. Constitution.<sup>159</sup> It did this in part, because it banned state or federal office holding by “Confederates” who had taken and violated (as the Congress saw it) the oath to support the Constitution—disqualifying them until Congress lifted the ban,<sup>160</sup> which it did in 1872;<sup>161</sup> in part, because it would proportionally reduce the representation in the Federal House and Electoral College of Southern states (or any state) that disfranchised any males twenty-one years of age or older (including newly-freed slaves) except for rebellion or other crime;<sup>162</sup> in part, because it banned payment of the state’s war debt;<sup>163</sup> and, no doubt, in part, because of its broad equality and equal liberty provisions.<sup>164</sup>

Congress responded with the Military Reconstruction Act of March 2, 1867,<sup>165</sup> and with subsequent Reconstruction Acts.<sup>166</sup> The Acts divided Southern states into military districts and required, before readmission to the Union, a constitutional convention elected by manhood suffrage that would abolish slavery and enfranchise the free Blacks and newly-free slaves.<sup>167</sup>

### *C. North Carolina Tries Democracy*

Now under a mandate from Congress, North Carolina called a constitutional convention, with delegates elected under broad

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155. *Id.*

156. LEFLER & NEWSOME, *supra* note 109, at 456.

157. *Id.*

158. *Id.* at 457.

159. *Id.* at 458.

160. *Id.*

161. U.S. CONST. amend. XIV, § 3.

162. *Id.* at § 2.

163. *Id.* at § 4.

164. *Id.* at § 1 (protecting privileges or immunities, due process, and equal protection of the laws); ESCOTT, *supra* note 102, at 101, 104–05.

165. An Act to Provide for the More Efficient Government of the Rebel States, Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (1867).

166. Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867); Act of July 19, 1867, ch. 30, 15 Stat. 14 (1867).

167. LEFLER & NEWSOME, *supra* note 109, at 458–59.

manhood suffrage that included Black males.<sup>168</sup> In the constitutional convention, Republicans had a majority of 107 to thirteen; fifteen Black delegates were elected.<sup>169</sup>

The constitution, approved by the newly expanded electorate, expressed strong commitments to liberty and equality.<sup>170</sup> Article I, Section 1 declared that "all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."<sup>171</sup> Article I, Section 2 provided that "all political power is vested in, and derived from, the people . . . . [G]overnment . . . is instituted solely for the good of the whole."<sup>172</sup>

The constitution abolished property qualifications for voting.<sup>173</sup> It called for General Assembly electoral districts of equal population, with the qualification that each county should have at least one representative in the House of Representatives.<sup>174</sup> It guaranteed manhood suffrage, even including former Confederate leaders.<sup>175</sup> It provided for elected local governments and elected judges instead of appointment at the state level—a blow to the former elite squirearchy.<sup>176</sup> It also called for a uniform system of free public education (of which the University of North Carolina was a part), generally banned imprisonment for debt, and provided for a homestead exemption.<sup>177</sup>

In 1868, under the new constitution, Republicans won the legislature, and William Holden won back the governor's office.<sup>178</sup> The party's motto was "Free Speech, Free Labor, Free Ballot and Free Schools."<sup>179</sup> According to historian Deborah Beckel, the party had the highest percent of White members of any Southern Republican Party; it attracted working-class men, agricultural

168. *Id.* at 460.

169. *Id.*

170. N.C. CONST. of 1868, art. I, § 1 (1868).

171. *Id.*

172. *Id.* at § 2.

173. *Id.*

174. *Id.*; see also ESCOTT, *supra* note 102, at 144; LEFLER & NEWSOME, *supra* note 109, at 460–61.

175. N.C. CONST. of 1868, art. II, § 5 (1868); see also ESCOTT, *supra* note 102, at 142; LEFLER & NEWSOME, *supra* note 109, at 460–61.

176. ESCOTT, *supra* note 102, at 142–44; LEFLER & NEWSOME, *supra* note 109, at 460–61.

177. BECKEL, *supra* note 116, at 61–63; LEFLER & NEWSOME, *supra* note 109, at 460.

178. LEFLER & NEWSOME, *supra* note 109, at 456.

179. BECKEL, *supra* note 116, at 3.

laborers and small farmers, and men who felt the pre-war political system had denied them power.<sup>180</sup>

The new Republican legislature substantially increased expenditures for education, though schools were racially segregated.<sup>181</sup> It provided for local elections. Non-elite men were elected to local offices.<sup>182</sup>

Sweeping change[s] took place at the county level . . . as new types of men came into office instead of the wealthy notables who had dominated the county courts . . . . [A] political revolution had truly begun. Thousands of ordinary White North Carolinians were voting Republican, and the cooperation of these Whites with Black voters was having potent effects.<sup>183</sup>

In the mountains, Republicans were typically White.<sup>184</sup> In the east, largely Black.<sup>185</sup> But, “in [much of] the piedmont White and Black voters together were producing a viable, competitive, victorious Republican party.”<sup>186</sup> Across the state, and particularly in some Piedmont and eastern counties, including Wake County, Black and White Republicans joined forces to create and develop “grassroots political organizations, committees, conventions and canvassing.”<sup>187</sup>

More than the prior post-war Conservative government, the new men in local government, “showed determination to act for the good of the people, not the elite.”<sup>188</sup> So, for example, historian Paul Escott reports that in Randolph County, the new commissioners set out “to revive and improve the public schools.”<sup>189</sup> After careful and extensive investigation, the commissioners:

resolved that ‘the number of school houses to be supplied’ should be increased to eighty and that each schoolhouse should accommodate at least thirty pupils . . . . Their plans included [B]lack children as well as [W]hite children, and they apportioned school funds strictly ‘in proportion to the number of children in each township.’<sup>190</sup>

In response to Republican electoral success in 1868, an

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180. *Id.*

181. *Id.* at 67–68.

182. ESCOTT, *supra* note 102, at 144–45.

183. *Id.* at 144–45.

184. *Id.* at 145.

185. *Id.*

186. *Id.*

187. BECKEL, *supra* note 116, at 8.

188. ESCOTT, *supra* note 102, at 145.

189. *Id.*

190. *Id.* at 145–46.

angry and beleaguered elite determined to regain its [political] privileges by attacking racial equality as the weakest point in the Republican platform of social reform.<sup>191</sup> Instead of letting Republicans define the issue as democracy—universal manhood suffrage, local democracy, free public schools for all, and expanded economic opportunities—[anti-coalition] Conservatives set out to make [W]hite supremacy the central question.<sup>192</sup>

The depression of the 1870s was a factor that contributed to the waning influence of Southern Republicans, dealing an additional blow to the credibility of surviving Republican governments in the South.<sup>193</sup>

The anti-coalition “Conservatives” (who, by the 1870s, began to call themselves Democrats) used race as a tool to disrupt a Black-White (and majority Black) political coalition.<sup>194</sup> Republicans, perhaps 30% of whose voters were White,<sup>195</sup> were vilified as race traitors.<sup>196</sup> Later, when Populists defected from the anti-coalition Democratic Party and allied with Republicans, they were denounced as “White negroes.”<sup>197</sup>

To counter Republican appeals to less affluent Whites, “Conservatives” said all Whites shared an interest in the debasement of the Negro.<sup>198</sup> Racism was a “tool to split” a democratic revolution.<sup>199</sup> (Of course, democracy was radically incomplete, since women were denied the right to vote and serve on juries, and Blacks who left slavery with no economic assets to speak of were disadvantaged by these prior determinations.)

The effort to restore the former economic and political elite was not at all limited to denunciation, ostracism, and economic pressure, as painful as that no doubt was.<sup>200</sup> Between 1868 and 1872, as Paul Escott explains,

[T]he Klan’s reign of terror accounted for at least one to two hundred whippings in Rutherford County alone, and far more across piedmont counties such as Alamance, Caswell, Lincoln, Gaston, Cleveland, Mecklenburg, Guilford, Orange, Randolph, Chatham, Montgomery, and Moore. Innumerable

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191. *Id.* at 148.

192. *Id.*

193. FONER, *supra* note 116, at 585; *see id.* at 535–63 (explaining multiple factors contributing to the waning of Southern Republicans).

194. *Id.*

195. BECKEL, *supra* note 116, at 3.

196. ESCOTT, *supra* note 102, at 148.

197. PERMAN, *supra* note 1, at 157.

198. ESCOTT, *supra* note 102, at 148.

199. *Id.* at 149.

200. *Id.* at 152.

schoolhouses were burned and scores of Black and White Republicans were murdered . . . . In Alamance the Klan hung Wyatt Outlaw, the county's foremost Black Republican, from a tree only thirty yards from the door of the courthouse in Graham. In Caswell County during the local Democratic convention, a Klan deception lured [White state] Senator John W. Stephens into a backroom of the courthouse where one man choked him with a rope while another stabbed him fatally in the throat . . . . The old, formerly established elite organized the Klan and directed its violence to accomplish one central purpose: to reestablish the hierarchy and control to which they were accustomed. The immediate and primary goal of the Klan was to wrest political power away from Republicans.<sup>201</sup>

Rape was another Klan weapon.<sup>202</sup> Remarkably, Republicans, White and Black, continued to vote in substantial numbers.<sup>203</sup>

Racial prejudice was not limited to Democrats, and there were interracial strains in the Republican coalition.<sup>204</sup> Occasional corruption and opportunism were not limited to one political faction. The Republican legislature had made an unwise investment in railroad bonds and there was some (bipartisan actually) corruption in connection with railroad bonds in Southern states.<sup>205</sup> Faced with Klan violence, murder, race-baiting, and whipping of the Klan's political opponents, Governor Holden declared martial law in certain counties and suspended the writ of habeas corpus.<sup>206</sup> The effort was a failure in the end and produced a backlash.<sup>207</sup> The anti-coalition "Conservatives," now increasingly called Democrats, won the election of 1870, impeached Holden,<sup>208</sup> and after 1877 controlled state offices until, in 1891, a farmer's revolt produced a reformist "farmer's legislature."<sup>209</sup>

The story of the use of violence against a struggling broad democracy is a sad, depressing chapter in North Carolina history. But violence, vilification, and intimidation were not the only methods aimed at the Black-White political coalition. When in

201. *Id.* at 154. For a discussion of the Klan's political terrorism and the role of elite Conservative Party leaders, see BECKEL, *supra* note 116, at 69–73.

202. BECKEL, *supra* note 116, at 70–71.

203. ESCOTT, *supra* note 102, at 158.

204. See FONER, *supra* note 116, at 538–39.

205. LEFLER & NEWSOME, *supra* note 109, at 493–94. For a discussion of railroad bonds in various Southern states, see FONER, *supra* note 116, at 386–90 (discussing railroad corruption).

206. ESCOTT, *supra* note 102, at 162.

207. *Id.* at 185.

208. LEFLER & NEWSOME, *supra* note 109, at 469.

209. *Id.* at 513.

power, anti-coalition Democrats, known early on as “Conservatives,” used electoral devices to limit democracy as well as to disadvantage their opponents and to disrupt the Republican multi-racial political coalition. Though often not specifically race-based, many devices were crafted to disproportionately disadvantage Blacks and therefore the Republicans.

*D. Redemption: A Triumph of the Anti-Coalition  
“Conservatives” Who Became “Democrats”*

With anti-coalition Democrat Zebulon Vance’s inauguration as governor in 1877, North Carolina experienced “Redemption.”<sup>210</sup> The “Redeemer” legislature passed the Local Government Act of 1877.<sup>211</sup> It essentially abolished elected county government and returned to local officials appointed at the state level.<sup>212</sup> “In order to ensure that White [anti-coalition] Democrats would dominate the Black majority districts of eastern North Carolina, the law empowered the legislature to appoint justices of the peace who, in turn, would choose county commissioners.”<sup>213</sup> Abolition of local government denied Republicans local offices even in areas in the West where White Republicans were in the majority.<sup>214</sup> As long as anti-coalition Democrats were in power at the state level, local officials would be Democrats. The County Commissioners could also exempt anyone from the poll tax for any reason.<sup>215</sup> The 1877 “Redeemer” legislature also gerrymandered legislative districts so as to minimize Republican power.<sup>216</sup>

In 1875, the anti-coalition party obtained some significant changes proposed by a closely-divided new constitutional convention.<sup>217</sup> “Conservatives” (soon to be called Democrats) banned integrated education and interracial marriage; reduced the number of judges, eliminating a number of Republicans; provided for state-wide election of judges (also disadvantaging Republicans); and obtained a constitutional amendment allowing

210. WILLIAM A. LINK, *NORTH CAROLINA: CHANGE AND TRADITION IN A SOUTHERN STATE* 236 (2009).

211. *Id.*

212. An Act to Establish County Governments, 1876–1877 N.C. Sess. Laws 226, ch. 141.

213. LINK, *supra* note 210, at 236; An Act to Establish County Governments, 1876–1877 N.C. Sess. Laws 226, at ch. 141, §§ 4–5.

214. LINK, *supra* note 210, at 236.

215. An Act to Reveal Chapter Thirty-Nine of Battle’s Reversal, 1876–1877 N.C. Sess. Laws 266, ch. 155, § 21.

216. LINK, *supra* note 210, at 236.

217. *Id.* at 235.

the General Assembly to end democratically elected local government.<sup>218</sup>

Anti-coalition “Redeemers” repudiated a scandal-ridden debt for railroad bonds, unwisely incurred by the Republican 1868–1870 legislature.<sup>219</sup> “[T]hey drastically cut property taxes” so that by 1890 only one other state in the union had lower property tax rates.<sup>220</sup> According to historian William Link, “[a]mong [the Redeemers’] targets were the public schools, symbols of Republican Reconstruction. Redeemers undermined the system of public financing by drastic reductions that eliminated any centralized state supervision over schools and returned complete control to localities.”<sup>221</sup> So school boards came under control of county commissioners appointed by Democratic Justices of the Peace who were appointed by the Democratic legislature.<sup>222</sup>

In 1889, the legislature passed a bill to require voters to provide registrars with biographical facts such as dates and places of birth.<sup>223</sup> The information was not available to many men, including poor Whites and many Blacks, including even some Black leaders.<sup>224</sup> The Act also gave considerable discretion to registrars, appointed by the anti-coalition Democrats.<sup>225</sup> Many discouraged Blacks left the state.<sup>226</sup> Still, the anti-coalition Democrats continued to face threats from various independent movements, as well as from Republicans. Independents supported:

‘[A] free vote and a fair count,’ a slogan they applied to [B]lack as well as [W]hite ballots. The anti-Redeemers also pledged full support for public education, a necessity if the Southern poor, including the [B]lacks, were to rise. Moreover, nearly every Independent [as well as Republicans] appealed openly for Negro votes, thereby legitimizing the race’s participation in politics, *sanctioning biracial political alliances*, and accustoming many White leaders to politicking in the [B]lack

218. *Id.* The Republicans obtained some provisions including bans on secret societies and a ban on carrying concealed weapons. *Id.*

219. *Id.* at 241.

220. LINK, *supra* note 210, at 236.

221. *Id.*

222. *Id.* at 237.

223. An Act to Amend Chapter Sixteen of the Code in Relation to Elections, 1889 N.C. Sess. Laws 289, ch. 287, § 3.

224. BECKEL, *supra* note 116, at 150.

225. See 1889 N.C. Sess. Laws 289, ch. 287, § 6 (explaining that, as proof, the Registrar may accept “such testimony, under oath, as may be satisfactory to the registrar”) (emphasis added).

226. BECKEL, *supra* note 116, at 151; ESCOTT, *supra* note 102, at 185.

community.<sup>227</sup>

*E. A Populist Revolt and a Republican-Populist Coalition*

The 1891 "farmer's legislature," departing to a degree from conservative Democratic dogma, increased the tax rate for public schools; established a normal college for White girls and an agricultural and normal college for Blacks; increased state appropriations to the University of North Carolina; regulated railroads; and created a state railroad commission empowered to reduce rates and eliminated special tax exemptions enjoyed by railroads.<sup>228</sup> But the legislature was far from uniformly progressive: it passed laws to restrict Black emigration, failed to pass an income tax, and defeated a bill providing free textbooks for schoolchildren.<sup>229</sup>

Later in 1894, a Republican-Populist fusion further threatened the mastery of the conservative-anti-coalition Democratic Party and its elite.<sup>230</sup> The Republican-Populist coalition captured the legislature in 1894 winning forty Republican seats in the state House together with twenty-two Populist seats.<sup>231</sup> Democrats held only thirty-seven seats.<sup>232</sup> By 1896, the Republicans and Populists held both U.S. Senate seats, a majority of the congressional seats, and the governorship.<sup>233</sup> The Republican-Populist legislature repealed the Conservative Local Government Act of 1877, restoring democratically elected local government.<sup>234</sup> Local elections were again abolished after the Democratic victory in 1898.<sup>235</sup> Once in power, the Republican-Populist coalition revised election laws to protect the right to vote and to support fairer elections.<sup>236</sup> Under the new law, local election boards should represent all parties, ballots could have party symbols (to assist illiterates), and arbitrary powers of registrars to disqualify voters and votes were limited.<sup>237</sup> As a result, counties

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227. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* at 25-26 (1974) (emphasis added).

228. LEFLER & NEWSOME, *supra* note 109, at 546-47.

229. BECKEL, *supra* note 116, at 162-63.

230. *Id.* at 152-54.

231. *Id.* at 176.

232. *Id.*

233. *Id.* at 188.

234. LINK, *supra* note 210, at 266.

235. ESCOTT, *supra* note 102, at 259.

236. *Id.* at 251-52.

237. LINK, *supra* note 210, at 266.



with a large African American electorate increased their vote total from 18,543 in 1892 to 33,900 in 1896.<sup>238</sup>

*F. A Renewed Assault on Democracy: Redemption Redux*

In the election of 1898, the anti-coalition Democratic Party again resorted to extreme racist appeals, political violence, Red Shirt rifle bands, intimidation, and ballot box stuffing.<sup>239</sup> Democratic propaganda and speakers “admonished [men] to rise up and act like White men, whose self-respect compelled them to throw off ‘Negro rule.’”<sup>240</sup> In spite of claims of Negro domination and Black rule, between 1895 and 1899 only eleven Americans of African descent served in the North Carolina General Assembly.<sup>241</sup> The number of Black office holders at the county level was also limited.<sup>242</sup> After their earlier defeat, Democratic newspaper editors published articles suggesting that the state, as a result of fusion rule, was suffering from a Black crime wave and widespread sexual assaults by Black men on White women.<sup>243</sup> Democrats encouraged women to entreat their men to “protect” them.<sup>244</sup>

Clergy, with their own private religious colleges, were agitated by state funding for the public universities.<sup>245</sup> Democratic Chairman Furnifold Simmons secretly promised them strict limits on funding of public colleges.<sup>246</sup> Corporations in the state, in return for a secret pledge not to raise their taxes, “provided most of the plentiful funds to finance the [Democratic and intensely racist] propaganda, picnics, and rallies.”<sup>247</sup> The White Government Union, “sought to register and propagandize Democratic voters” and to intimidate opponents.<sup>248</sup>

“More threatening still were the paramilitary Red Shirts . . . [whose] sole purpose was to intimidate opposition voters, and especially Blacks.”<sup>249</sup> It worked. “[T]he fusionists were

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238. *Id.*

239. PERMAN, *supra* note 1, at 156–61.

240. *Id.* at 160.

241. LINK, *supra* note 210, at 269.

242. *Id.*

243. *Id.*

244. PERMAN, *supra* note 1, at 160.

245. *Id.*

246. *Id.*

247. *Id.* at 161.

248. *Id.*

249. *Id.*

bewildered and fearful and, toward the end, virtually immobilized.<sup>250</sup> Anti-coalition Democrats won a massive victory.<sup>251</sup>

Political violence and intimidation and Democratic success was capped by a vicious race riot and coup in Wilmington, North Carolina.<sup>252</sup> The leaders of the coup dislodged the democratically-elected government, burned the building that housed the Black newspaper, and exiled remaining White and Black Republican leaders from the city.<sup>253</sup>

The Republican and Populist electoral reforms of 1894 and following had aimed at a fair vote and a fair count, and at facilitating rather than obstructing voting.<sup>254</sup> The fusion election reform laws were promptly repealed by Democrats in the 1899 session of the legislature.<sup>255</sup> To prepare for a vote on a new capstone disfranchising amendment to the state constitution, the overwhelmingly Democratic North Carolina legislature modified the election law.<sup>256</sup>

Under the revised law, the legislature was to appoint a seven-member state election board which would appoint county election boards.<sup>257</sup> No provision was made for the representation of other political parties.<sup>258</sup> An entirely new registration was required for all voters.<sup>259</sup> The registrars were to record the race of the voter,<sup>260</sup> and voters were required to provide to the registrar their age, place of residence, owner of the residence or of the land on which he lived, his occupation, place of business, employer if any, whether he is listed for the poll tax, and any other questions the registrar considered material.<sup>261</sup> "Black men born into slavery were often ignorant of their exact ages; streets in Negro areas often had no names, houses had no numbers."<sup>262</sup> Democrats employed this law to deny the vote to White and Black

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250. *Id.*

251. *Id.*

252. H. LEON PRATHER, SR., *DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY* (David S. Cecelski & Timothy B. Tyson eds., 1998) (describing the race riot and coup that dislodged the elected government of Wilmington, N.C.).

253. *Id.*

254. 1895 N.C. Sess. Laws 211, ch. 159.

255. 1899 N.C. Sess. Laws 106, ch. 16, § 1.

256. An Act to Regulate Elections, 1899 N.C. Sess. Laws 658, ch. 507.

257. *Id.* at ch. 507, § 4.

258. *Id.*

259. An Act to Regulate Elections, 1899 N.C. Sess. Laws 661, ch. 507, § 11.

260. *Id.*

261. *Id.*

262. KOUSSER, *supra* note 227, at 48.

Republicans and Populists.<sup>263</sup> Blacks, of course, were presumptively Republicans. Registrars, now all anti-coalition Democrats, were “granted virtually unlimited discretionary power.”<sup>264</sup> Ballots were to be uniform, not distinguishable by color or party emblem—a provision aimed at illiterate voters, mostly Blacks, who could expect little help from election officials.<sup>265</sup> To further confuse voters, six different ballot boxes were provided, one for each category of contested office.<sup>266</sup> A vote placed in the wrong box was not counted.<sup>267</sup> The legislature expanded the right to challenge voters.<sup>268</sup> Any applicant for registration who admitted not having listed his poll tax as required by law was to be referred to the solicitor (district attorney) of the district who was to send an indictment to the grand jury.<sup>269</sup> The legislature also moved state elections from November to August to insulate them from federal supervision.<sup>270</sup> Voting locations in precincts could be moved with twenty days’ notice.<sup>271</sup>

With the electorate suitably culled, intimidated, selectively challenged, and confused, the way was open for a vote on a disfranchising amendment to the state constitution.<sup>272</sup> It provided:

Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language: and before he shall be entitled to vote, he shall have paid on or before the first day of March of the year in which he proposes to vote his poll tax . . . as prescribed by law for the previous year.<sup>273</sup>

A grandfather clause allowed voters who were qualified to vote in North Carolina or in any other state in 1867 and their descendants to escape the literacy qualifications provided they registered before 1908.<sup>274</sup>

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263. *Id.* at 50.

264. PERMAN, *supra* note 1, at 167; *see also* An Act to Regulate Elections, 1899 N.C. Sess. Laws 661–62, ch. 507, § 11.

265. An Act to Regulate Elections, 1899 N.C. Sess. Laws 668, ch. 507, § 27; PERMAN, *supra* note 1, at 168.

266. PERMAN, *supra* note 1, at 168.

267. KOUSSER, *supra* note 227, at 50.

268. An Act to Regulate Elections, 1899 N.C. Sess. Laws 668, ch. 507, § 11.

269. *Id.*

270. PERMAN, *supra* note 1, at 168.

271. An Act to Regulate Elections, 1899 N.C. Sess. Laws 660, ch. 507, § 10.

272. PERMAN, *supra* note 1, at 171.

273. N.C. CONST. art. VI, § 4, *amended by* 1899 N.C. Sess. Laws. 341–42.

274. *Id.*; *cf.* Guinn v. United States, 238 U.S. 347 (1915) (finding a similar Oklahoma grandfather clause racially discriminatory).

Amazingly, in spite of all the attacks on White and Black Republicans and on Populists and on fair elections, opponents of the Amendment still polled at least 128,285 (counted) votes against the amendment to 182,217 (counted) in favor.<sup>275</sup> Curiously, in the heavily Black second congressional district, Charles B. Aycock, the anti-coalition Democratic candidate for governor, carried the district by 18,333 votes and in three of the district's counties the number of votes for Aycock exceeded the number of Whites of voting age.<sup>276</sup> In New Hanover County, which contained the 51% Black city of Wilmington, only two votes were cast against the amendment and only five for the Republican candidate for governor.<sup>277</sup> Force and fraud helped to carry the day for the anti-coalition party.<sup>278</sup>

Disfranchisement and the prior election "reforms" were a response to a salient political fact: "robust, interracial political coalitions" had flourished and enjoyed some success in North Carolina.<sup>279</sup> "[T]he very success of interracial political coalitions . . . catalyzed the disfranchisement movement among the previously ruling [W]hite [conservative] elite."<sup>280</sup> Whites were deeply divided over disfranchisement and without the elimination of so many Black voters by intimidation, election "reforms" and the rest, disfranchisement might well have failed.<sup>281</sup>

In addition to the literacy test, the White Democratic primary was instituted, as one editor explained, "to keep the White men united."<sup>282</sup> It was another device to protect against White-Black coalitions and alliances.<sup>283</sup> Still another device to disrupt White-Black alliances and coalitions was segregation, for example, on railroads and steamboats.<sup>284</sup> The effect was to make Blacks a pariah class and to discourage White-Black association, and, of course, political coalitions and alliances.<sup>285</sup>

Hugh Talmage Lefler and Albert Ray Newsome, in their book, *A History of a Southern State: North Carolina*, describe the

275. PERMAN, *supra* note 1, at 171.

276. *Id.*

277. *Id.*

278. *Id.* at 170–71.

279. Pildes, *supra* note 117, at 314.

280. *Id.*

281. *See id.*

282. KOUSSER, *supra* note 227, at 75–76.

283. *Id.*

284. An Act to Promote the Comfort of Travelers on Railroad Trains, and for Other Purposes, 1899 N.C. Sess. Laws 539, ch. 384.

285. PERMAN, *supra* note 1, at 171–72.

former “Conservative” Party—renamed as the Democratic Party—and its principles up to around 1900.<sup>286</sup> This anti-coalition Democratic Party “did not commit the state to a progressive program of public education, internal improvements, and state development” that the state had followed up to 1861.<sup>287</sup> Instead, it leased and sold the state’s private capital—the state railroad and track.<sup>288</sup> “Party leaders and public officials held railroad stock, rode on free passes, served as railroad lobbyists and attorneys, and aided the railroads in securing special legislative favors of tax exemption and immunity from public regulation.”<sup>289</sup> While companies expanded and provided for the transportation needs of the state, they charged higher rates than were charged in other sections, inflated their capitalization and granted passes and rebates to influential friends and large customers.<sup>290</sup> “The conservatively controlled Democratic party became the ally and guardian of the railroad and industrial interests . . . . It championed the *laissez-faire* philosophy . . . and the freedom of business from government interference.”<sup>291</sup> The party opposed a rising demand for a regulatory railroad commission, for readjustment of discriminatory taxation, for social legislation to correct the evil effect of long hours and low wages upon mill workers, and for the expansion of the system of public education.<sup>292</sup> “It opposed all such measures of economic and social reform allegedly because they would necessitate higher taxes, would discourage business and perhaps drive it from the state, and would cause discussion which might split the Democratic party and permit the return of Republican-Negro control.”<sup>293</sup>

Of course, the anti-coalition party evolved over time, as a new generation of leaders replaced its former leaders.<sup>294</sup> The new generation, including Governor Aycock, emphasized expanded public education (separate, but not equal) and pursued some other progressive causes such as public health.<sup>295</sup> What did not change

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286. See LEFLER & NEWSOME, *supra* note 109.

287. *Id.* at 509.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. LINK, *supra* note 210, at 268.

295. *Id.* at 299–307 (discussing public education, public health, and other causes).

for most was the commitment to the racial caste system and to disfranchisement to destroy the interracial coalition.<sup>296</sup>

*G. The Congress and the Courts Face the Terrorist Attack  
on Democracy and Disfranchisement in the Late 19<sup>th</sup> and  
Early 20<sup>th</sup> Centuries*

Haltingly, Congress responded to Klan and similar politically-inspired terror by passing laws that targeted the Klan's and other groups' politically-inspired violence.<sup>297</sup> The Klan targeted Republicans, both White and Black, and people who had either led or supported the Republican Party.<sup>298</sup> In response, these Congressional laws reached "private" political terrorists acting with the intent to either deprive Americans of their rights, privileges and immunities as citizens of the United States, or of equal privileges and immunities.<sup>299</sup> The description was aimed at Klan-like activities and it fit—or seemed to at least. Other laws attempted to protect the right to vote.<sup>300</sup> Section 2 of the Fourteenth Amendment provides for the proportional reduction of representation in the federal House and Electoral College of any state that denies or abridges the right to vote of any male citizens over twenty-one years of age in state or federal elections for the legislature, executive, or judiciary for any reasons other than rebellion or other crime.<sup>301</sup> It should have greatly reduced Southern representation in the House of Representatives and in the Electoral College after disfranchisement. But, it did not.

The short story is that in the late 19<sup>th</sup> and much of the 20<sup>th</sup> Centuries, the judiciary at first failed to protect Bill of Rights liberties except against the federal government,<sup>302</sup> typically denied federal power to reach pervasive private terror that undermined democratic rights including speech and association,<sup>303</sup> and too often

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296. *Id.* at 286.

297. *Id.* at 233.

298. *Id.* at 230.

299. Act of May 31, 1870, ch. 114, 16 Stat. 140; *see also* Act of February 28, 1871, 16 Stat. 433; Act of April 20, 1871, 17 Stat. 13.

300. U.S. CONST. amend. XV; Act of May 31, 1870, ch. 114, 16 Stat. 140; *see also* Act of February 28, 1871, 16 Stat. 433; Act of April 20, 1871, 17 Stat. 13.

301. U.S. CONST. amend. XIV, § 2.

302. *United States v. Cruikshank*, 92 U.S. 542 (1875) (rejecting the idea that Bill of Rights liberties were general rights of American citizens, and instead finding such rights as merely a limit on federal power).

303. *Id.* (applying a state action syllogism—the Fourteenth Amendment limits only state power. Klansmen (and similar groups of political terrorists) do not wield state power; therefore, Klan power used against democratic rights is unreachable by Congress.); *see also* *James v. Bowman*, 190 U.S. 127 (1903).

hobbled federal laws designed to protect the right to vote.<sup>304</sup> Both the courts and Congress (with Southern representation unconstitutionally swelled by counting now disfranchised Blacks for purposes of representation) failed to enforce the penalty for disfranchisement in Section 2 of the Fourteenth Amendment.<sup>305</sup> The Court failed to recognize any judicial power to deal with pervasive state disfranchisement based on race,<sup>306</sup> and it treated facially neutral laws designed to disfranchise Black and poor voters as permissible.<sup>307</sup> Because they believed that facially neutral and generally applicable laws designed to get rid of Black voters were constitutional, a view ratified by the Court, the disfranchising Southern elite was quite candid about what it was up to.<sup>308</sup> Today, the Court holds that an intent to discriminate against African American voters, even by facially-neutral and generally applicable laws, is deeply problematic—at least if an

304. *United States v. Reese*, 92 U.S. 214 (1876) (construing narrowly a federal statutory protection of the right to vote since race was not reiterated in subsequent sections of the statute). For a refreshing exception, see *Ex parte Yarbrough*, 110 U.S. 651 (1884) (finding that there is a federal power to protect against private violence in federal elections).

305. See, e.g., SAMUEL ISSACHAROFF ET AL., *supra* note 20, at 65 (discussing Section 2 of the Fourteenth Amendment); *cf. id.* at 71–72 (discussing failures in Congress though not specifically dealing with Section 2). For scholarly discussions of Section 2, see, for example, Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RES. L. REV. 965, 965–76 (1965) (describing Section 2); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 121–36 (1960) (detailing a “workable plan” for judicial enforcement of Section 2); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 94–107 (1961) (discussing the intent of the framers of Section 2 and their expectation as to its operation).

306. *Giles v. Teasley*, 193 U.S. 146, 161 (1904) (stating that no damage remedy was available—a wrong without a remedy); *Giles v. Harris*, 189 U.S. 475, 486 (1903) (holding that courts lack equitable power to enjoin intentional disfranchisement of Black voters in Alabama). For a splendid discussion of Giles’ cases and their central place in understanding the nation and the Court’s response to the oligarchic-anti-democratic coup that occurred when the South was “redeemed,” see Pildes, *supra* note 117, at 297 (arguing that Giles’ cases should occupy a central place in the constitutional law canon and noting their absence from the major constitutional law books at the time).

307. See, e.g., *Williams v. Mississippi*, 170 U.S. 213, 222 (1898) (announcing that nothing tangible can be deduced from the statement of the Mississippi Supreme Court that “[r]estrained by the federal constitution from discriminating against the negro race, the [disfranchising Mississippi constitutional] convention discriminat[ed] against its characteristics”); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896).

308. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 112 (quoting Carter Glass in the Virginia Constitutional Convention extolling “elimination of every negro voter who can be gotten rid of, legally . . .”); see also *id.* at 111–16 (discussing disfranchisement).

intent to discriminate based on race is clear.<sup>309</sup> This fact has a chilling effect on announcing an intent to use facially-neutral devices to disfranchise Blacks.

Effective responses to Southern disfranchisement came later, in the 1940s and with the Voting Rights Act of 1965.<sup>310</sup> Of course, as success in the Democratic primary became tantamount to election, there were divisions in the North Carolina Democratic Party between more populist and more liberal Democrats and Conservative Democrats.<sup>311</sup>

#### Part IV. Mid-20<sup>th</sup> Century Transformations

##### A. *The Racial Caste System Under Siege*

A major breach in Southern disfranchisement came when the Court, in 1944, held that a White-only Democratic primary violated the Fourteenth Amendment.<sup>312</sup> In December 1946, by executive order, President Harry Truman established a Civil Rights Commission.<sup>313</sup> In July 1948, also by executive order, President Truman integrated the military.<sup>314</sup> When, in 1948, the Democratic Convention endorsed a strong civil rights plank in its platform, a number of Southern delegates walked out in protest.<sup>315</sup> Subsequently, in the 1948 Presidential election, four deep-South states defected from the Democratic Party and voted for the States' Rights segregationist candidate, Strom Thurmond.<sup>316</sup> In 1954, the Court decided school segregation violated equal protection, though there was little practical integration of Southern schools for some years.<sup>317</sup> In 1964, the nation struck

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309. *Hunter v. Underwood*, 471 U.S. 222, 223–34 (1985) (holding Alabama's disfranchisement for crimes selected on the view that Blacks were more likely to commit them was unconstitutional where the predominant motive was race).

310. See Voting Rights Act of 1965, 42 U.S.C. 1973.

311. See WARREN ASHBY, FRANK PORTER GRAHAM, *A SOUTHERN LIBERAL* 309–10 (1980).

312. *Smith v. Allwright*, 321 U.S. 649 (1944), *overruling* *Grovey v. Townsend*, 295 U.S. 45 (1935).

313. Exec. Order No. 9808, 3 C.F.R. § 184 (1946).

314. Exec. Order No. 9981, 3 C.F.R. § 722 (1943–1948).

315. Alonzo L. Hamby, *1948 Democratic Convention: The South Secedes Again*, SMITHSONIAN MAG.COM (Aug. 2008), <http://www.smithsonianmag.com/history-archaeology/1948-democratic-convention.html>.

316. *Compare Election of 1944*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1944#axzz2jLQoRCG0> (last visited Oct. 31, 2013), *with Election of 1948*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1948#axzz2jLQoRCG0> (last visited Oct. 31, 2013).

317. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). On the slow pace of school



another blow at the racial caste system.<sup>318</sup> Under the leadership of President Lyndon Johnson and responding to civil rights leaders including Martin Luther King, Jr. and many individuals demonstrating for equal rights, Congress passed the 1964 Civil Rights Act, banning discrimination in places of public accommodation and in employment.<sup>319</sup> Southern Democrats, with a few exceptions, and all the few Southern Republicans, opposed the Act. Still, the Act had bipartisan support as did the 1965 Voting Rights Act.<sup>320</sup>

### B. Political Transformations: A Southern Strategy

But a seismic political shift was underway. Senator Barry Goldwater, the Republican presidential nominee, opposed the 1964 Act on states' rights grounds,<sup>321</sup> following advice from his legal advisors William Rehnquist and Robert Bork.<sup>322</sup> Still, the 1965 Voting Rights Act and related developments eliminated most roadblocks to Black registration and the number of African American voters in the Southern states soared.<sup>323</sup>

Goldwater's limited success in the South after his opposition to the Civil Rights Act of 1964, and the broad popularity of George Wallace's new, more muted and coded racial appeal,<sup>324</sup> promised a new political alignment.<sup>325</sup> When he signed the 1964 Act, President Lyndon Johnson reportedly told his young aide Bill Moyers that he had delivered the South to the Republican Party

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integration in the South following *Brown*, see Michael Kent Curtis et al., *School Desegregation After Brown v. Board of Education*, in 2 CONSTITUTIONAL LAW IN CONTEXT 1739–44 (3d. ed. 2010).

318. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

319. *Id.*

320. Brad McMillan, *Effective Bipartisan Leadership*, PEORIA MAGAZINES.COM (Nov. 2011), <http://www.peoriamagazines.com/ibi/2011/nov/effective-bipartisan-leadership>.

321. David Farber, *Barry Goldwater on the Civil Rights Act: The Antecedent to Rand Paul*, HISTORY NEWS NETWORK, <http://www.hnn.us/article/126630> (last visited Oct. 31, 2013).

322. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65* at 356–57 (1998); JAMES M. PERRY, *BARRY GOLDWATER: A NEW LOOK AT A PRESIDENTIAL CANDIDATE* 125 (1964).

323. KEYSSAR, *supra* note 308, at 264.

324. See JOHN E. ROEMER ET AL., *RACISM, XENOPHOBIA AND DISTRIBUTION: MULTI-ISSUE POLITICS IN ADVANCED DEMOCRACIES* 59 (2007) (stating that “[the] success of George Wallace’s racial appeals in the 1968 campaign highlighted that [White] back-lash had moved North” as Northerners began realize that they could relate to Wallace’s rhetoric).

325. *Id.* at 59–60.

for his generation and for Moyers' generation.<sup>326</sup> In the 1964 Johnson landslide, a few more Southern states defected to the Republican Party, but by 1968, the defection became a rout. George Wallace and Richard Nixon divided all the Southern states except Texas.<sup>327</sup> Richard Nixon became president, William Rehnquist joined the Justice Department, vetting Supreme Court nominees (and soon was appointed to the Court), and Robert Bork became Nixon's Solicitor General, then a federal judge, and finally (a decade later) an unsuccessful Reagan nominee to the Court.<sup>328</sup>

Both Richard Nixon and Ronald Reagan pursued a Southern strategy.<sup>329</sup> Then-Republican strategist Kevin Phillips suggested that Nixon's election and the possible full capture of the South could produce a new national Republican majority.<sup>330</sup> Emphasizing coded racial issues could help convert alienated Southern Democrats to Republicans and cement a long-term Republican political alignment.<sup>331</sup> According to Warren Weaver, writing in the *New York Times*:

Full racial polarization is an essential ingredient of Phillip's [sic] political pragmatism. He wants to see a [B]lack Democratic Party, particularly in the South, because this will drive into the Republican Party precisely the kind of anti-Negro [W]hites who will help constitute the emerging majority. This even leads him to support some civil rights efforts.<sup>332</sup>

Starting with Goldwater, the actions of Republican leaders reflected a new emphasis on values somewhat different from those of Lincoln's party.<sup>333</sup> Ronald Reagan, for example, opened his 1980

326. BRANCH, *supra* note 322, at 404–05; WILLIAM E. LEUCHTENBURG, *THE WHITE HOUSE LOOKS SOUTH: FRANKLIN D. ROOSEVELT, HARRY S. TRUMAN, LYNDON B. JOHNSON* 325 (2005).

327. *Election of 1968*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1968#axzz2jXDFFc6i> (last visited Nov. 2, 2013).

328. On the Rehnquist nomination, see JOHN DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF NIXON* (2001). See also 37, *Richard M. Nixon*, WHITEHOUSE.GOV, <http://www.Whitehouse.gov/about/presidents/richardnixon> (last visited Nov. 2, 2013); Bill Mears, *Robert Bork, Known for Contentious Supreme Court Nomination, Dies at 85*, CNN POLITICS (Dec. 20, 2012), <http://www.cnn.com/2012/12/19/politics/robert-bork-dead/>; *William Rehnquist: Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/william-rehnquist-9454479> (last visited Nov. 2, 2013).

329. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 43–44 (2012); KEVIN PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 223–24, 259–60 (1969).

330. PHILLIPS, *supra* note 329, at 187, 260.

331. ALEXANDER, *supra* note 329, at 44–45.

332. Warren Weaver, *The Emerging Republican Majority*, N.Y. TIMES, Sept. 21, 1969, at BR3.

333. PHILLIPS, *supra* note 329, at 74–76.

presidential campaign in the Mississippi county—where young Black civil rights workers had been killed—with an endorsement of states' rights.<sup>334</sup> In Georgia, he complimented Jefferson Davis for his balanced budget amendment.<sup>335</sup>

Of course, multiple factors influenced the transformation of Southern politics, and the Civil Rights Act, Voting Rights Act, and the Southern Strategy akin to that suggested by Phillips and Alexander, were only some of them.<sup>336</sup> From 1972 to 2008 the South was solidly Republican in presidential politics; by the 1990s increasingly, and then heavily, Republican in congressional, governor, and state legislative elections.<sup>337</sup> The North Carolina gerrymander may promise political mastery for a long time, whatever most voters do. In the 2008 election, Barack Obama was elected president, and re-elected in 2012 with the help of a biracial coalition. His election galvanized anti-coalition forces once again.<sup>338</sup>

## Part V. Voting Rights and the Law

In the following examination of aspects of Voting Rights bear in mind, first, that the Court has read the Voting Rights Act and its 1982 Amendments to require an extraordinary majority-minority-district quota-based remedy in cases in which White-polarized voting—White unwillingness to vote for Black candidates—frustrated the equal opportunity of African Americans or other minorities to elect candidates of their choice.<sup>339</sup>

334. Joseph Crespino, *Ronald Reagan's South: The Tangled Roots of Modern Southern Conservatism*, in LIVING IN THE EIGHTIES 37 (Gil Troy & Vincent J. Cannato, eds. 2009) (explaining how, in August of 1980, Reagan made his first presidential campaign stop at the Neshoba County Fair, where, "[j]ust 16 years earlier, the discovery of three murdered civil rights workers in Neshoba County had horrified the nation").

335. BERNARD VON BOTHMER, FRAMING THE SIXTIES: THE USE AND ABUSE OF A DECADE FROM RONALD REAGAN TO GEORGE W. BUSH 68 (2010) (quoting Roger Wilkins as having stated that when Reagan was in Stone Mountain Georgia, he said "that 'Jefferson Davis was one of my heroes'").

336. See ALEXANDER, *supra* note 329, at 38, 43–44; PHILLIPS, *supra* note 329, at 205–06, 237–38.

337. See PHILLIPS, *supra* note 329, at 237–42.

338. See Steven Hahn, *Political Racism in the Age of Obama*, N.Y. TIMES (Nov. 10, 2012), [http://www.nytimes.com/2012/11/11/opinion/sunday/political-racism-in-the-age-of-obama.html?\\_r=0](http://www.nytimes.com/2012/11/11/opinion/sunday/political-racism-in-the-age-of-obama.html?_r=0); Ruy Teixeira & John Halpin, *The Obama Coalition in the 2012 Election and Beyond*, CTR. FOR AM. PROGRESS (Dec. 4, 2012), <http://www.americanprogress.org/issues/progressive-movement/report/2012/12/04/46664/the-obama-coalition-in-the-2012-election-and-beyond/> (last visited Sept. 29, 2014).

339. See *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Note that polarization is a slippery concept if the number of White voters supporting a White Democrat and the number supporting a Black Democrat is roughly equivalent. One thing to focus on is whether the triggers or preconditions for the extraordinary majority-minority district remedy are present. If the preconditions are not present but racial quotas are used, a constitutional question is squarely presented: is racial districting by quotas without a compelling remedial justification simply a violation of the Fourteenth Amendment's guarantee of equal protection? The answer should be "yes" because the remedial justification for extreme racial classifications and quotas is absent. A second question lurks in the background—when, if ever, are racial electoral quotas justified?

A. *Section 2 of the Voting Rights Act, the 1982  
Amendments, and Majority-Minority Districts*

The Voting Rights Act was a huge advance, greatly increasing the ability of Americans of African descent to participate in the political process.<sup>340</sup> Still, at first, with a few notable exceptions, Southern state legislative districts with a White majority did not elect a Black legislator.<sup>341</sup> In the 1970s through 1985, approximately 1% of all state legislative districts that were less than 50% Black elected Black legislators.<sup>342</sup> One response was to amend the Voting Rights Act to provide that a violation occurs if the political processes were not equally open to the nomination and election of minority candidates.

Section 2 of the Act currently provides:

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the

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340. KEYSSAR, *supra* note 308, at 111–16, 264–65.

341. Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359, 1368 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

342. Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 113 (1991).

totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.<sup>343</sup>

The Supreme Court interpreted the 1982 amendment to the Voting Rights Act to require the creation of majority-minority districts where certain preconditions were met.<sup>344</sup> In the 1986 case of *Thornburg v. Gingles*, a case which struck down most challenged multi-member districts, the Court explained that the essence of a Section 2 claim was that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and [W]hite voters to elect their preferred representatives.”<sup>345</sup> By the rule from *Gingles*, in a challenged district, “a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”<sup>346</sup> In such cases, a new majority-minority district was a remedy required by Section 2 of the Voting Rights Act.<sup>347</sup>

The Court elaborated: “[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit *and to determine whether [W]hites vote sufficiently as a bloc usually to defeat the minority’s preferred candidates.*”<sup>348</sup> The Court continued:

[I]n general, a [W]hite bloc vote that normally will defeat the combined strength of minority support plus [W]hite “crossover” votes rises to the level of legally significant [W]hite bloc voting. The amount of [W]hite bloc voting that can

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343. 52 U.S.C. § 10301 (2013) (formerly cited as 42 U.S.C. § 1973 (a)–(b) (2012)).

344. See *Voinovich*, 507 U.S. at 156 (“The federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.”).

345. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

346. *Id.* at 49.

347. *Id.*

348. *Id.* at 56 (emphasis added).

generally “minimize or cancel” [B]lack voters’ ability to elect representatives of their choice, however, will vary from district to district . . . .<sup>349</sup>

Here the Court listed a number of factors including “the percentage of the registered voters in the district who are members of the minority group.”<sup>350</sup>

Logically, the larger the percentage of cohesive minority voters in a district with less than a majority of Black (or other minority) voters, the smaller percentage of crossover or coalition voters will be required to help minority voters elect the candidate of their choice in a White majority district.<sup>351</sup> Crossover voters are those in the majority supporting the minority candidate despite the fact that most members of the majority race do not—for example, White voters who vote for the Black candidate when the majority of Whites in the district do not.

Based on this understanding, a district in which Blacks were not a majority, but in which their preferred (often Black) candidate could and would typically win the primary and general election, would not be a district justifying judicial creation of a majority-minority district.<sup>352</sup> If so, it would follow that the legislature could not justify transforming the district into a majority-minority one to avoid liability under Section 2 of the Voting Rights Act because there would be no liability to avoid.

In a groundbreaking article, Professor Richard H. Pildes noted that in the 1990s, social scientists and the courts agreed (based largely on information from the 1980s) that voting was substantially and pervasively polarized on racial lines.<sup>353</sup> He pointed that courts and social scientists agreed:

(2) [T]hat [B]lack-majority electorates were therefore required to enable [B]lack voters to overcome racial bloc voting; (3) that [B]lack political participation, even among eligible voters, was lower than among [W]hite voters and . . . (4) as a result, that where voting was in fact racially polarized [B]lack election districts must have majority [B]lack populations, roughly around 55%, to be “safe” havens for overcoming racial bloc voting.<sup>354</sup>

349. *Id.* (emphasis added) (citations omitted).

350. *Id.*

351. *Id.*

352. *Id.*; see *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (“Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.”).

353. Richard H. Pildes, *Is Voting Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

354. *Id.* at 1527.

Professor Pildes noted that “[t]hese principles were reflected nationwide . . . in the redistricting of the 1990s.”<sup>355</sup> That redistricting created a number of majority-minority districts.<sup>356</sup>

But as the nation developed after the 1980s, these observations were no longer as generally accurate.<sup>357</sup> Black political participation soared and White Democratic crossover voting increased so that majority-minority districts were, as a matter of empirical fact, less often required for African American voters to have an equal chance to elect their preferred candidates.<sup>358</sup>

When the Court promulgated the *Gingles*<sup>359</sup> test in 1986, crossover White voting for Black candidates had usually been small. *Gingles* itself had found sufficient crossover voting in a Durham district so that a majority-minority district was not required in that instance.<sup>360</sup> By 2000, the political landscape had changed dramatically in many places.<sup>361</sup> In North Carolina, for example, Black participation in voting often exceeded that of Whites in the elections leading up to 2012.<sup>362</sup> Crossover voting increased.<sup>363</sup>

To be sure, studies were not entirely consistent.<sup>364</sup> Still, generally, by the later 1990s, an estimated Black registered voter population between 33% and 39% (and certainly between 40% and 49%) could often elect a Black candidate, and White voters would crossover to support Black Democratic candidates at rates of approximately 20%–36%.<sup>365</sup> Because Black voters were strongly Democratic, in Democratic districts candidates preferred by Blacks had a very high chance of winning both the primary and general election with significantly less than 50% Black voting age population.<sup>366</sup>

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355. *Id.* at 1528.

356. *Id.*

357. *Id.* at 1530–36.

358. *Id.* at 1536–38.

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

360. *Id.* at 80.

361. See THOM FILE, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS, U.S. CENSUS BUREAU) (2013), available at <http://www.census.gov/prod/2013pubs/p20-568.pdf>.

362. *Id.* at 9.

363. *Id.*

364. Cf. generally Fredrick C. Harris et al., *Macrodynamics of Black Political Participation in the Post-Civil Rights Era*, 67 J. POL. 1144, 1148 (2005).

365. Pildes, *supra* note 353, at 1531–32.

366. *Id.* at 1534.

Since Blacks can often elect candidates of their choice with less than 50% Black voting age population, it is understandable that Blacks (whose political power would be diluted and whose votes would be wasted by being packed into 50 or 50%+ Black voting age population districts) might resist the creation of such “steroid” districts. At any rate, as we have seen, every Black legislator in the North Carolina General Assembly and the state NAACP opposed the North Carolina legislature’s 2011 racial gerrymander.<sup>367</sup> It is equally understandable that, in the search for political mastery, Republicans champion such districts with their corresponding wasting of Black votes and defeats of White Democrats.<sup>368</sup> They have all the advantages of a gerrymander, they increase racial polarization, and they serve to disrupt multiracial coalitions.<sup>369</sup>

Gerrymanders undermine our republican form of government and make a mockery of the purpose behind one-person, one-vote.<sup>370</sup> A system that allows a 51% majority or a 48% or smaller minority to control a supermajority of the state legislature or of the congressional delegation for the foreseeable future makes a mockery of the principle of one-person, one-vote.<sup>371</sup> That mockery, of course, is exactly what we have in many states.<sup>372</sup> A neutral and pro-representative-democracy and anti-gerrymander golden rule is right in principle, and in the long term may be useful to all. The devices that benefit one side today may be turned against it in the future—provided the judiciary is politically neutral between parties. Racial gerrymanders are a more pernicious form of

367. See *Pildes*, *supra* note 353, and accompanying text.

368. See *id.*

369. See *id.*; FILE, *supra* note 361.

370. Cf. *Gray v. Sanders*, 372 U.S. 368, 381 (U.S. 1963) (arguing that the conception of political equality in our founding documents is most accurately distilled to the principle “one person, one vote”). In the one-person, one-vote cases, the Court held districting schemes violated equal protection where they provided that voters in some parts of the state—despite comprising only 25% of the state’s population—could elect a majority of the state legislature. *Id.* People in certain geographical areas were severely disadvantaged. For example, a county with a population of only 13,462 was given two seats in the Alabama House while another county with a population of 314,301 was given only three. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding the apportionment of the Alabama legislature violated the one-person, one-vote principle and therefore violated equal protection). Gerrymandering is an analogous scheme, though the disadvantage is based on political preference. For example, voters affiliated with one party who are in the majority in that state are able to elect less than 33% of the state’s congressmen and congresswomen. See *supra* notes 13–14 and accompanying text.

371. See *infra* Appendix B.

372. See *infra* Appendix B.



gerrymanders because they increase racial polarization and disrupt biracial political cooperation.<sup>373</sup>

As a slim plurality of the Supreme Court sees it, there are two types of gerrymanders.<sup>374</sup> The standard political gerrymander is an evil for which, at least so far, most justices see no judicial remedy.<sup>375</sup> Racial gerrymanders, however, may be susceptible to judicial correction.<sup>376</sup> For Justices in the current majority, the problem is to distinguish racial gerrymanders from their acceptable political counterparts.<sup>377</sup>

For a racial gerrymander, the Court suggests that the predominant motive must be racial,<sup>378</sup> and proving that can be difficult.<sup>379</sup> But, does the distinction make sense? Is it fine to use race predominantly to disadvantage Black voters because they vote Democratic just as it was once used because they voted Republican? Here the legislature purportedly relies on Section 2 or 5 of the Voting Rights Act to create steroid majority-minority districts even though candidates preferred by Blacks were winning most of the time with little difficulty. And here the legislature set quotas or “targets” to have Blacks in the legislature in proportion to the state’s Black voting age population, and it moved voters into and out of these districts to make them 50%+ Black voting age population, and drew districts with curious tentacles to pick up additional Black voters. Strict scrutiny should apply to this gross racial quota regime.<sup>380</sup> And this is so even if the purpose is to

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373. See Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RES. 878 (2007). But see Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009).

374. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

375. *Id.*

376. See *id.* at 348 (Souter, J., dissenting).

377. Compare *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that deliberately segregating voters into separate districts on the basis of race is a violation of citizens’ rights to participate in a “color-blind” electoral process), with *Easley v. Cromartie*, 532 U.S. 234 (2001) (finding that North Carolina’s 12<sup>th</sup> congressional district was drawn based upon voting behavior rather than according to race). See also *Miller v. Johnson*, 515 U.S. 900 (1995) (ruling gerrymanders based on race are not a violation of equal protection so long as they are supported by a compelling state interest).

378. *Miller*, 515 U.S. at 913.

379. Compare *Vieth*, 541 U.S. at 267 (ruling that gerrymandering is not a justiciable issue before courts because the process of creating districts implicates numerous political considerations courts cannot enforce), with *Shaw*, 509 U.S. at 653 (holding that a claim can be made under the Equal Protection Clause that a redistricting scheme is so irrational on its face that it can only be understood to segregate voters on the basis of race).

380. See, e.g., *Bush v. Vera*, 517 U.S. 952, 962–78 (1996) (majority opinion) (requiring multiple factors to support a finding of predominantly racial

disadvantage a White-Black political coalition and to advantage the anti-coalition party.

*B. A Brief Overview of More Recent Precedent*

The Court's Voting Rights Act decisions are often rationalized by less than a majority, and the result, to put it mildly, is that the "law" is often far from clear.<sup>381</sup> *Bush v. Vera*,<sup>382</sup> is an example. In a controlling concurring plurality decision, the three Justices in the plurality announced that should the state legislature voluntarily decide to create majority-minority districts, it must have "a strong basis in evidence" that the racial districting is "reasonably necessary" to comply with Section 2 and must "substantially address the Section 2 violation."<sup>383</sup> If so, *Bush* would indicate that while the legislature has a limited degree of flexibility, it "satisfies strict scrutiny."<sup>384</sup> Still, two of the three plurality Justices in *Bush* disagree on whether state legislation intentionally creating a 50% majority-minority district must pass strict scrutiny, seeming to leave the question for the future.<sup>385</sup> Justice O'Connor, the author of the concurring plurality opinion, also wrote her own separate concurring opinion to answer that strict scrutiny question. (Her answer was "No.")<sup>386</sup> Justice Kennedy also addressed the strict

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gerrymandering). Justices Scalia and Thomas found strict scrutiny was required by the intentional creation of majority-minority districts. *Id.* at 952. Justice Kennedy suggested—without deciding—"we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent [W]hite, and our analysis should be no different if the State so favors minority races." *Id.* at 996 (Kennedy, J., concurring). Justice O'Connor concurred specially in her opinion and would have held that majority-minority districts do not require strict scrutiny "so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy." *Id.* at 998 (O'Connor, J., concurring). *But see* Easley v. Cromartie, 532 U.S. 234, 258 (2001) (discussing, in reference to majority-minority districts, that when racial identification is strongly correlated with political affiliation, the party attacking the boundaries must show that the legislature could have achieved its legitimate political objectives in alternate ways that are comparatively consistent with traditional districting principles, and that those alternatives would have brought about significantly greater racial balance).

381. See *Bush*, 517 U.S. at 952 (1996).

382. *Id.* at 977.

383. *Id.* (finding a "strong basis in evidence" that a majority-minority district "is reasonably necessary to comply with Section 2" and the racial districting "substantially addresses the Section 2 violation satisfies strict scrutiny") (emphasis added) (citations omitted).

384. *Id.* at 977–78.

385. *Id.* at 962.

386. *Id.* at 993 (O'Connor, J., concurring) ("States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny.")

scrutiny issue in his concurrence. (His answer was “yes.”)<sup>387</sup> To make matters even murkier, two of the three Justices in the plurality are no longer on the Court and one, Justice O’Connor, was more supportive of affirmative action than her replacement (Justice Alito) or than the current court is.<sup>388</sup> Justices Thomas and Scalia found that strict scrutiny is clearly required in this situation.<sup>389</sup>

With that warning about the murky state of the law, I will discuss a few cases, some focusing on Section 2 of the Voting Rights Act, and some on the Fourteenth Amendment.

In the 1993 case *Voinovich v. Quilter*,<sup>390</sup> the Ohio Republican-dominated state apportionment board created several majority-minority districts. Democratic board members sued, claiming that creating majority-minority districts *where racially polarized voting did not exist* violated Section 2 of the Voting Rights Act.<sup>391</sup> They won on this claim in the lower court,<sup>392</sup> but the Supreme Court unanimously reversed, holding that nothing in Section 2 of the Voting Rights Act prevented states from creating majority-minority districts, even in the absence of racially-polarized voting, and a plausible Section 2 violation.<sup>393</sup> The plaintiffs had not alleged that the state’s conscious use of race violated the Fourteenth Amendment, nor did the court below address that issue.<sup>394</sup>

In 1995, in *Miller v. Johnson*,<sup>395</sup> just such an allegation was made about one of Georgia’s congressional districts. The Supreme Court held that courts must “exercise extraordinary caution in adjudicating claims that a State has drawn [its] district lines on the basis of race.”<sup>396</sup> Unless the use of race was conceded or clear, plaintiffs making such a claim are required to show, from a district’s shape or other factors, that race was “the predominant

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387. *Id.* at 996 (Kennedy, J., concurring) (“In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent [W]hite, and our analysis should be no different if the State so favors minority races.”).

388. *See id.* at 982. Two of the dissenters, Justice Souter and Justice Stevens, are also no longer on the Court.

389. *Id.* at 999 (Thomas and Scalia, JJ., concurring) (noting that applying strict scrutiny was “never a close question”).

390. 507 U.S. 146 (1993).

391. *Id.* at 146.

392. *Id.*

393. *Id.* at 156.

394. *Id.* at 157.

395. 515 U.S. 900, 916 (1995).

396. *Id.*

factor motivating the legislature's decision."<sup>397</sup> To show that, the plaintiff must show that traditional districting principles—including but not limited to compactness, contiguity, respect for political subdivisions, or communities of interest—were subordinated to racial considerations.<sup>398</sup>

In *Miller*, the Georgia legislature's districting decisions were based on the Justice Department's reading of Section 5 of the Voting Rights Act, a reading which the Court did not share.<sup>399</sup> The Court also held that the district court's finding that race *was* the predominant motivating factor was not clearly erroneous.<sup>400</sup> The Court ultimately struck down the legislature's racial districting because it was not necessary to avoid liability under the Justice Department's reading of Section 5 of the Voting Rights Act<sup>401</sup> since the Court believed that reading was erroneous.<sup>402</sup> Thus, the Court upheld the lower court's finding that Georgia's districting was clearly based on race<sup>403</sup> and therefore violated the Fourteenth Amendment.<sup>404</sup>

In the 2009 case *Bartlett v. Strickland*,<sup>405</sup> the Court reviewed North Carolina's creation of a 39% Black voting age population district from pieces of Pender and other counties. The state claimed it would be creating a coalition district that would allow Blacks in the district an opportunity to elect candidates of their choice<sup>406</sup> and that Section 2 of the Voting Rights Act mandated the district.<sup>407</sup> If Section 2 mandated the district, as supreme federal law, Section 2 would trump the state constitution's "Whole County Provision," which forbade dividing whole counties in state legislative districting.<sup>408</sup> The Whole County Provision is a

397. *Id.*

398. *Id.* at 901, 916, 918.

399. *Id.* at 921. The Court specifically stated that "[t]he congressional plan challenged here was not required by the Act under a *correct* reading of the statute." *Id.* (emphasis added).

400. *Id.* at 917.

401. See 42 U.S.C. § 1973c (2012) ("[Any] standard, practice, or procedure with respect to voting that [diminishes] the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote.").

402. *Miller*, 515 U.S. at 921.

403. *Id.* at 900.

404. *Id.* at 927.

405. 556 U.S. 1 (2009).

406. *Id.* at 3, 19.

407. *Id.* at 6.

408. N.C. CONST. art. II, §§ 3, 5 (discussing Senate Districts and representative districts respectively). *Pender Cnty. v. Bartlett*, 361 N.C. 491, 493 (2007). The Whole County rules provide that "[n]o county shall be divided in the formation of a

wholesome, though modest, anti-gerrymandering provision that limits the creativity of partisan map drawers<sup>409</sup>—except, of course, when it is trumped by federal law.

In *Bartlett*, the Court confronted whether “the first *Gingles* requirement [for a Section 2 remedy] can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district.”<sup>410</sup> The first precondition was that the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district . . . .”<sup>411</sup> Curiously, the parties had stipulated that the third precondition had been met—that the majority must vote as a bloc sufficiently “to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>412</sup>

New social science data showed that Blacks in the South could often elect a candidate of their choice with less than a majority of Blacks of voting age in the district—with less than a majority-minority district.<sup>413</sup> In light of this, was a majority-minority district the only type of district legally required under Section 2? Or could a coalition district or a crossover district—for example, one where White or other crossover votes would help to elect the minority candidate—*also be required*? In other words, could Section 2 of the Voting Rights Act *require* the creation of a coalition district that would simultaneously allow Blacks a heightened opportunity to elect a candidate of their choice and foster multiracial cooperation?

Although social science studies suggested that African American voters in such a district would, with White or other ethnic crossover votes, be able to elect a candidate of their choice, the Court in a splintered opinion found that *only* a majority-minority district could be justified as required under Section 2 of the Voting Rights Act.<sup>414</sup> Since Section 2 did not require the

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senate [or representative] district.” *Id.*

409. See James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 896 (2006) (speaking to the emergence of new anti-gerrymandering provisions in state constitutions in the last half-century).

410. *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009).

411. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

412. *Id.* at 8 (quoting *Gingles*, 478 U.S. at 50–51); *Pender Cnty.*, 361 N.C. at 496 (quoting *Gingles*, 478 U.S. at 50–51).

413. See *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208 (2003).

414. *Bartlett*, 556 U.S. at 23–24.

district, as the state supreme court had ruled, the whole county provision of the state constitution barred its creation.<sup>415</sup>

Chief Justice Roberts and Justice Alito joined Justice Kennedy's plurality opinion.<sup>416</sup> Justices Thomas and Scalia concurred on the ground that Section 2 "does not authorize any vote dilution claim, regardless of the size of the minority population in a given district."<sup>417</sup> Four Justices dissented, finding "there is nothing in [Section 2] to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority [districts]."<sup>418</sup> Many Voting Rights Act decisions have a Delphic quality, a quality enhanced when the decision is derived from a plurality opinion from a deeply and complexly divided Court.<sup>419</sup> *Bartlett* is a case in point.

Because the *Bartlett* plurality opinion is technical and complex, I will summarize its holdings and implications before discussing it in detail. Logically applied, the plurality opinion held five things: first, Section 2 of the Voting Rights Act does not require the creation of coalition districts.<sup>420</sup> Second, Section 2 does not provide special protection to the right to form political coalitions.<sup>421</sup> Third, where a majority-minority district can be created, such a district is mandated by Section 2 of the act if *and only if* the three *Gingles* preconditions are met *and* "if [Section] 2 applies based on a totality of the circumstances."<sup>422</sup> Those circumstances include Blacks' inability in those districts to have an equal opportunity to elect candidates of their choice.<sup>423</sup> From these three holdings a fourth logically follows: Section 2 does not mandate the destruction of existing coalition districts where Blacks have typically and overwhelmingly been able to elect

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415. See *Stephenson v. Bartlett*, 357 N.C. 301, 309–10 (2003) (holding the district did not follow the previously set *Stephenson I* factors, including the Whole County Provision) (referring to *Stephenson v. Bartlett*, 355 N.C. 354, 373–74 (2002), which sets out the *Stephenson I* factors and held that the Voting Rights Act did not in the facts of that case abrogate the Whole County Provision in the North Carolina Constitution).

416. *Bartlett*, 556 U.S. at 1.

417. *Id.* at 26.

418. *Id.* at 31.

419. See John Schwartz, *Between the Lines of the Voting Rights Act Opinion*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html> (discussing the 2013 Supreme Court ruling on the Voting Rights Act).

420. *Bartlett*, 556 U.S. at 13, 19.

421. *Id.* at 15.

422. *Id.* at 24.

423. *Id.* at 20.

candidates of their choice.<sup>424</sup> This is because the *Gingles* preconditions are not met in those districts, and the totality of the circumstances does not show that Blacks lack an equal opportunity to elect candidates of their choice in those districts.<sup>425</sup> Fifth, the *Bartlett* plurality does not tell us whether an intentional imposition of dual racial quotas—50%+ Black voting age population districts and Black legislators in proportion to the state's Black voting age population—are permissible under the Fourteenth Amendment; nor does the plurality declare that these quotas are constitutionally permissible where Section 2 does not require creating a majority-minority district.<sup>426</sup> In short, *Bartlett* neither mandates coalition districts nor grants special protection to the right to form political coalitions. Still, the Court's plurality seems to strip the state of any Section 2 protections for destroying functioning coalition districts by an imposition of racial quotas. It also leaves open challenges under the Equal Protection Clause.<sup>427</sup> In these circumstances, under existing precedent, the North Carolina dual quotas should be held unconstitutional as applied.

Justice Kennedy, writing for the *Bartlett* plurality, noted that imposing a Section 2 remedy on a district requires that minorities “have less opportunity than other members of the electorate to . . . elect representatives of their choice.”<sup>428</sup> However, he continued, “because they form only 39 percent of the voting-age population in District 18, African Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength.”<sup>429</sup> While these Black voters could join other minorities or Whites, they could not elect candidates based on their own votes without assistance.<sup>430</sup>

To recognize the Section 2 claim, Justice Kennedy wrote, would grant minority voters “a right to preserve their strength for purposes of forging an advantageous political alliance.”<sup>431</sup> He rejected that approach, stating “[n]othing in §2 grants special protection to a minority group's right to form political coalitions.”<sup>432</sup>

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424. *Id.* at 31.

425. *Id.*

426. *Id.* at 20.

427. *Id.* at 21, 24.

428. *Id.* at 2 (opinion of Kennedy, J.).

429. *Id.* at 14.

430. *Id.*

431. *Id.* at 14–15 (quoting *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004)).

432. *Id.* at 15.

Like others, a minority group was “not immune from the obligation to pull, haul, and trade to find common political ground.”<sup>433</sup> Nothing in Section 2 required that the minority group be allowed to “maximize” its political power.<sup>434</sup> Of course, if Black voters are concentrated in a few Black districts, their political power is minimized and their ability to trade to find common ground is severely limited.<sup>435</sup>

The plurality noted that Section 2 “is not concerned with maximizing minority voting strength.”<sup>436</sup> This observation raises the converse empirical question: is creating more majority-minority districts merely a way to *minimize* minority voting strength, at least when not required to give minorities an equal opportunity to elect candidates of their choice? At any rate, the plurality announced that “as a statutory matter, §2 does not mandate creating or preserving crossover districts.”<sup>437</sup>

Justice Kennedy continued:

Where an election district could be drawn in which minority voters form a majority but such district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—*assuming the other Gingles factors are also satisfied*—denial of the opportunity to elect a candidate of choice is present and a mandatory district is required [by Section 2].<sup>438</sup>

What, however, is the rule as a *constitutional* matter? That issue was not squarely presented in *Bartlett*.<sup>439</sup>

At any rate, the italicized Section 2 qualification seems clear enough as presented by Justice Kennedy.<sup>440</sup> Indeed, he suggested that Pender County’s proposed Section 2 coalition district could not meet one of the *Gingles* preconditions: “It is difficult to see how the majority-bloc-voting requirement [frustrating the minority’s ability to elect candidates of its choice] could be met in a district

433. *Id.*

434. *Id.*

435. See, e.g., Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, NAT’L AFF. Spring 2010, at 52, 64, available at <http://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act> (noting that “race-conscious districting may act as a brake on black political advancement,” such majority-minority districting schemes have not changed much in the face of historic disfranchisement).

436. *Id.* at 23.

437. *Id.* (emphasis added).

438. *Id.*

439. *Id.* at 18–19. See *id.* at 6 (noting that the question presented was whether the statute could be used to require majority-minority districting, not deciding the law as a constitutional matter).

440. *Id.* at 18–19.



where, by definition, [W]hite voters join in sufficient numbers with minority voters to elect the minority's preferred candidate."<sup>441</sup> Driving the point home, Justice Kennedy suggested there was some doubt as to whether the proposed district could meet the bloc voting requirement where 20% of the White voters were expected to vote for the minority candidate.<sup>442</sup>

In addition to the *Bartlett* plurality, Supreme Court precedent supports the proposition that a majority-minority district is not required by Section 2 where it replaces districts where the minority has an equal opportunity to elect candidates of its choice, and certainly not where the prior district is regularly doing so by comfortable margins, even though the district that is less than Black minority-majority.<sup>443</sup>

When considering whether to create majority-minority districts, one might look at the state as a whole.<sup>444</sup> If that approach were used to justify majority-minority districts replacing districts that were consistently electing the minority's candidate of choice with less than a 50% minority voting age population, it would be in serious tension with the *Gingles* "preconditions" for transformation of a district.<sup>445</sup>

In *Bartlett*, both the plurality<sup>446</sup> and the dissent<sup>447</sup> recognize that in some districts the minority voting age population may be too small or the crossover vote too great to meet the *Gingles* preconditions.<sup>448</sup> Because the parties stipulated that the third *Gingles* factor was met in *Bartlett*, the Court did not reach the question of how much crossover vote would be considered too much to meet the *Gingles* precondition.<sup>449</sup> In *Bartlett*, the dissent

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441. *Id.* at 16.

442. *Id.*

443. *See* Thornburg v. Gingles, 478 U.S. 30, 77 (1986) (holding that "the District court erred, as a matter of law, in ignoring the significance of the *sustained* success [B]lack voters have experienced" in the district and that this "persistent proportional representation . . . is inconsistent with appellees' allegation that [B]lack voters' ability . . . to elect representatives of their choice is not equal to that enjoyed by the [W]hite majority") (emphasis added); *see also* Bush v. Vera, 517 U.S. 952, 979, 984 (1996) (noting states also cannot use Section 2 to augment "continued electoral success").

444. *Bartlett v. Strickland*, 556 U.S. 1, 30 (2009) (Souter, J., dissenting) ("[A] § 2 complaint must look to an entire districting plan (normally, statewide), alleging that the challenged plan creates an insufficient number of minority-opportunity districts in the territory as a whole.") (citations omitted).

445. *See Gingles*, 478 U.S. at 50.

446. *Bartlett*, 556 U.S. at 5 (Kennedy, J., plurality).

447. *Id.* at 26 (Souter, J., dissenting).

448. *See id.*

449. *See id.* at 39 n.3 (Kennedy, J., plurality).

suggested that the plurality failed to grasp and apply the totality of the circumstances test.<sup>450</sup>

Justice Kennedy justified the majority-minority requirement for a Section 2 district based on the need for workable standards.<sup>451</sup> That rule, he said, draws clear standards for the courts and legislatures.<sup>452</sup> Determining whether potential crossover districts meet the equal opportunity to elect test would force courts to struggle with political variables and tie them to race-based assumptions.<sup>453</sup> For similar reasons, Justice Kennedy rejected the proposal of looking at minority voters' strength within a particular party—for example, requiring only that minority voters constitute a majority of those voting in the primary of the party that usually wins in the general election.<sup>454</sup> Of course, as an empirical matter, if the minority controls the Democratic primary and a substantial number of Democratic Whites vote for the nominee, that seems to be a very strong indication that the minority will be able to elect candidates of its choice.<sup>455</sup> But Justice Kennedy warned that the courts should be cautious about racial classifications and race-based predictions.<sup>456</sup>

The concern about race-based predictions is curious. To the untrained eye, the assumption that a minority-majority district is *necessary* so Blacks, for example, can elect candidates of their choice seems to be a political and race-based prediction.<sup>457</sup>

Finally, Justice Kennedy noted, legislatures could *in proper circumstances* elect to create crossover districts.<sup>458</sup> For a district with a substantial minority population, he wrote, “a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal.”<sup>459</sup> This option could lead to less racial isolation. As the Court noted in connection with Section 4 of the Voting Rights Act, which prohibits retrogression in certain covered

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450. *Id.* at 30–31 (Souter, J., dissenting).

451. *Id.* at 17 (Kennedy, J., plurality).

452. *Id.*

453. *Id.*

454. *Id.* at 22.

455. *See* Lichtman Second Aff. at 24, 25, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

456. *Bartlett*, 556 U.S. at 18.

457. *See* *Johnson v. De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring).

458. *Bartlett*, 556 U.S. at 23.

459. *Id.* at 23.

areas,<sup>460</sup> “various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts.”<sup>461</sup>

A portion of Justice Kennedy’s complex plurality opinion is worth quoting at length:

Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only *required* if *all three* Gingles factors are met *and* if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters . . . . In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate. *States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third Gingles factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.* There is no evidence of discriminatory intent in this case, however. Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.<sup>462</sup>

Justice Kennedy’s plurality opinion was based only on Section 2.<sup>463</sup> It did not decide a Fourteenth Amendment challenge and contained some generalized warnings about racial classifications.<sup>464</sup>

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer dissented.<sup>465</sup> For the dissenters:

460. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding 5-4 that the prohibition was not enforceable because of its limited geographical extent and because changed conditions).

461. *Bartlett*, 556 U.S. at 23 (internal quotation marks omitted) (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003)).

462. *Id.* at 23–24 (emphasis added) (citations omitted); see Pildes, *supra* note 353 at 1567 (“Districts could still be designed in such places that encouraged coalitions across racial lines, but these districts would result from legislative choice, not . . . obligation”).

463. *Bartlett*, 556 U.S. at 24.

464. *Id.*

465. *Id.* at 26.

If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under § 2, States will be required under the plurality's rule to pack [B]lack voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation.<sup>466</sup>

This critique seems to give inadequate weight to Justice Kennedy's insistence that the third *Gingles* precondition must always be satisfied.<sup>467</sup>

According to the dissent, the Court's precedent required looking first at the *Gingles* preconditions for a potential district, and second at the totality of the circumstances in the state as a whole.<sup>468</sup> The starting point would be to compare the number of districts where minority voters can elect their chosen candidate with the group's population percentage.<sup>469</sup> Though there is no entitlement to proportional representation or electoral success, the state is, by this view, under an obligation to look at proportionality.<sup>470</sup> In a state with a 20% Black voting age population, for example, Black voters should be "entitled to a practical chance to compete in a roughly proportionate number of districts."<sup>471</sup> By the Souter view, recognizing coalition districts as satisfying the State's Section 2 obligation would reduce litigation.<sup>472</sup> Since districts where minorities could elect candidates of their choice with less than 50% minority voting age population could satisfy the State's obligation, fewer Section 2 suits would be justified.<sup>473</sup> This would allow for "a beneficent reduction in the number of majority-minority districts with their 'quintessentially race-conscious calculus' . . . [and] moderating reliance on race."<sup>474</sup> Integrative, cross-racial alliances were, he suggested, consistent with the ideal of the Voting Rights Act and

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466. *Id.* at 27 (Souter, J., dissenting).

467. See *id.* at 16 (Kennedy, J., plurality) for Justice Kennedy's discussion of the tension crossover districts create with the third *Gingles* requirement. However, because the third *Gingles* requirement was conceded, the Court has no need to examine this issue.

468. *Id.* at 29–30.

469. *Id.* at 29.

470. *Id.* at 29, n.2.

471. *Id.*

472. *Id.* at 43.

473. *Id.* at 36.

474. *Id.* at 34. (citation omitted) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

the Constitution.<sup>475</sup> Both the Kennedy plurality and the dissent expressed some discomfort with minority-majority districting.<sup>476</sup>

Earlier, in 1994 in *Johnson v. De Grandy*,<sup>477</sup> the Court considered a Section 2 claim that the minority vote had been diluted because the legislature had failed to create as many minority districts as possible under the *Gingles* three-part test. Significantly, the Court found the *Gingles* preconditions were necessary but not sufficient to support the creation of more majority-minority districts.<sup>478</sup> Under the totality of the circumstances, and where minorities represented at or close to their proportion of the voting age population, the Court did not find vote dilution.<sup>479</sup> The Court noted that reading Section 2 as requiring the maximum number of minority districts possible under *Gingles* “tends to obscure the very object of the statute and to run counter to its textually stated purpose.”<sup>480</sup>

The State argued for a rule that proportionality would create a safe harbor against Section 2 vote dilution claims.<sup>481</sup> The Court rejected that approach because of “a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.”<sup>482</sup> After all, the Court noted, “there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.”<sup>483</sup>

Justice Kennedy concurred, but he noted that the decision was based only on Section 2 of the Voting Rights Act, not on constitutional grounds.<sup>484</sup> For Section 2 claims, he warned against both conflating the number of minorities elected to office with the number of majority-minority districts, and the related assumption

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475. *Id.* at 34 (quoting Pildes, *supra* note 353, at 1539).

476. *Id.* at 21 (Kennedy, J., plurality). Justice Kennedy acknowledges the possibility of an Equal Protection Clause concern regarding whether Section 2 requires the majority-minority rule.

477. 512 U.S. 997 (1994).

478. *Id.* at 1012.

479. *Id.* at 1024.

480. *Id.* at 1016–17.

481. *Id.* at 1017–18.

482. *Id.* at 1019–20.

483. *Id.* at 1020.

484. *Id.* at 1031 (Kennedy, J., concurring).

that only majority-minority districts elect minorities while White-majority districts do not.<sup>485</sup>

Justice Kennedy found proportionality relevant but not dispositive *in a Section 2 claim*.<sup>486</sup> But he found proportionality constitutionally suspect.<sup>487</sup> He stated:

States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid §2 litigation. Likewise, a court finding a §2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority.<sup>488</sup>

The Department of Justice might require the same thing for preclearance under Section 5.<sup>489</sup> Justice Kennedy found such actions deeply problematic. “Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against . . . . As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.”<sup>490</sup> He noted, however, that “no constitutional claims were brought here . . . .”<sup>491</sup> The challenge to North Carolina’s 2011 racially-gerrymandered redistricting explicitly raises the very constitutional claims about which Justice Kennedy expressed deep concern.<sup>492</sup>

The North Carolina case raises crucial issues. Can the state legislature use dual quotas to create Black-majority districts, even though they would not be mandated by the Voting Rights Act, supposedly to be safe from a Section 2 claim? In a plurality opinion, the Court said the legislature must have a “strong basis in evidence” to support a claim that a majority-minority district is “reasonably necessary to comply with Section 2.”<sup>493</sup> A second issue that remains is whether the legislature can pursue political dominance by using race as a proxy for political aims. Since

485. *Id.* at 1027.

486. *Id.* at 1028.

487. *Id.* at 1029.

488. *Id.*

489. *Id.*

490. *Id.* (citation omitted).

491. *Id.* at 1031.

492. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (Kennedy, J., plurality) (stating that the plurality resolves doubts regarding the necessity of the majority-minority rule by avoiding the constitutional concerns raised under the Equal Protection Clause).

493. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) (citation omitted) (internal quotation marks omitted).

Blacks are overwhelmingly Democratic voters, if the end is political domination, can the legislature use quotas (50% and 50%+ Black districts and proportion in the legislature) and the concentration of Black voters to undermine the Democratic multi-racial coalition and eliminate as many White Democrats as possible for the purpose of securing Republican political dominance? In short, if the end is political mastery, can the means be boldly and explicitly racial, whether or not dressed up as based on the Voting Rights Act?

## Part VI. North Carolina's 2011 Redistricting Revisited

As we have seen, in North Carolina, the redistricting process was complicated and shaped to a considerable extent by use of Section 2 of the Voting Rights Act.<sup>494</sup> The Republican majority in the legislature, claiming a mandate under Section 2 of the Voting Rights Act, created twenty-three majority-minority State House districts,<sup>495</sup> of which thirteen were new majority-minority districts.<sup>496</sup> After the reapportionment, twenty-one districts elected an African American in 2012.<sup>497</sup> Meanwhile, the Republicans' plan for the state Senate involved the creation of nine majority-minority state Senate districts—whereas before there had been zero—even though seven Senators that were the choices of Black voters in their prior benchmark districts had been

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494. See *Dickson v. Rucho*, No. 11-CVS-16896, at 12 (N.C. Super. Ct. July 8, 2013).

495. *Id.* at 24, 28–36. *Dickson* involved several individual and organizational plaintiffs who sued North Carolina state officials after the 2011 redistricting, arguing that the racially gerrymandered districts violated the North Carolina and United States Constitutions. In one of the many issues raised in this complex case, the State argued that “packing” Black voters into minority-majority districts was necessary in order to avoid liability under Section 2 of the Voting Rights Act. While the three-judge panel ultimately upheld the redistricting, they found this particular argument unpersuasive. See *id.* at 39.

496. Lichtman Second Aff. at 24, tbl.5, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

497. *Id.* at 25. Also compiled from *Current District Plans: Lewis-Dollar-Dockham*, N.C. GEN. ASSEMB., [http://www.ncleg.net/representation/Content/Plans/PlanPage\\_DB\\_2011.asp?Plan=Lewis-Dollar-Dockham\\_4&Body=House](http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Lewis-Dollar-Dockham_4&Body=House) (last visited Sept. 28, 2014), and *2013 House Demographics*, N.C. GEN. ASSEMB., <http://www.ncleg.net/DocumentSites/HouseDocuments/2013-2014%20Session/2013%20Demographics.pdf> (last visited Sept. 28, 2014) [hereinafter *2013 House Demographics*]. Three African American representatives were also elected from White-majority districts. House District 47, in which a majority of the voting age population identify themselves as Native American, elected a Native American representative, Charles Graham.

elected.<sup>498</sup> Ten newly-minted districts elected African American Senators in 2012.<sup>499</sup>

Section 2 seeks to ensure for Blacks a fair or equal *opportunity*<sup>500</sup> to elect candidates of their choice. So districts with a substantial Black voting age population that elect Whites who were the choice of Black voters and districts with less than a majority Black voting age population electing Black candidates with White “crossover” votes or coalition votes, should be a cause for celebration. That, however, was obviously not the view of the architects of the Republican gerrymander.<sup>501</sup> Nor was the gerrymander motivated by giving Blacks an *equal opportunity* to elect candidates of their choice.<sup>502</sup>

Instead, as we have seen, the Republican plan had two targeted racial quotas: (1) the number of Black legislators in the General Assembly should equal the percentage of voting age Blacks in the state,<sup>503</sup> and (2) where a 50% Black voting age population district could be created, it should be created regardless of the previous success of African American candidates in that district—success achieved without the infusion of more Black voters.<sup>504</sup>

The case of Senator Garrou graphically illustrates how the legislature used race. In one 2010 slightly-less-than-majority Black district, a White state Senator, Linda Garrou, had been the preferred candidate of most Black voters in 2010 and in prior elections. This was so when she ran against both Black and White challengers.<sup>505</sup> Still, the North Carolina Republican legislature redrew her district to make it majority-minority.<sup>506</sup> By a small

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498. *Dickson*, No. 11-CVS-16896, at 24.

499. Compiled from *Current District Plans: Rucho Senate 2*, N.C. GEN. ASSEMB., [http://www.ncleg.net/representation/Content/Plans/PlanPage\\_DB\\_2011.asp?Plan=Rucho\\_Senate\\_2&Body=Senate](http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2011.asp?Plan=Rucho_Senate_2&Body=Senate) (last visited Sept. 28, 2014) and *2013 Senate Demographics*, N.C. GEN. ASSEMB., <http://www.ncleg.net/DocumentSites/SenateDocuments/2013-2014%20Session/2013%20Senate%20Demographics.pdf> (last visited Sept. 28, 2014) [hereinafter *2013 Senate Demographics*].

500. Voting Rights Act § 2, 42 U.S.C. § 1973 (2012).

501. See First Amended Complaint at ¶ 78, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013).

502. *Id.*

503. *Dickson v. Rucho*, No. 11-CVS-16896, at 14 (N.C. Super. Ct. July 8, 2013).

504. First Amended Complaint at ¶ 80, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013).

505. Garrou Aff. at 5, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012); see also Lichtman First Aff. at 4, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012); Lichtman Second Aff. at 22, tbl.3, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

506. Lichtman Second Aff. at 25, tbl.6, *Dickson v. Rucho*, No. 11-CVS-16896



boundary detour, it also geographically eliminated the White incumbent, Senator Garrou, from the district.<sup>507</sup> When discussing the proposed Republican electoral map, Senator Garrou asked Senator Robert Rucho, chair of the Republican-controlled redistricting committee, whether she would have been removed from the district if she had been Black; Senator Rucho refused to answer.<sup>508</sup> But when asked the same question in his deposition in a suit challenging the new districts, Senator Rucho testified that Garrou would not have been eliminated if she had been a Black incumbent.<sup>509</sup>

Regardless of the prior preferences of African Americans in her district, Senator Garrou was the wrong color to satisfy the targeted quota for Black persons in the legislature.<sup>510</sup>

Similarly, under the 50% quota, a number of White or other crossover voters who had been supporting Black candidates had to be excised from the benchmark districts to make it possible to fulfill the dual quotas—the 50% or 50%+ Black voting age population quota and the quota to ensure that African Americans in the legislature were elected in proportion to the African American voting population in the state.<sup>511</sup>

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(N.C. Super. Ct. 2012).

507. Garrou Aff. at 7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

508. *Id.*

509. Rucho Dep. 193:9–192, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013); see also Wesley Young, *Garrou, Forsyth Democrat, Won't Run for Re-Election to State Senate*, WINSTON-SALEM J. (Feb. 7, 2012) (reporting that Senator Linda Garrou, a White Democrat who had served in the state Senate for over a decade, would not seek re-election after her home was redrawn into an overwhelmingly White district represented by a long-tenured Republican Senator). During the refashioning of Garrou's former district, Senator Rucho, the Republican chairman of the redistricting committee recommended that the "current White candidate [Garrou] not be included in the proposed District 32" since, in his opinion, there was no way she could be the candidate of choice of a majority African American and Hispanic population. Garrou Aff. at 5, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012). The view is curious, since Garrou had consistently won the African American vote in her district for over a decade—decisively defeating both Black and White challengers. *Id.* In 2012, the new majority-minority District 32 elected an African American candidate, Earline Parmon. Senator Parmon had previously served terms in the state House representing a majority-White district. He was one of a number of Black legislators to achieve electoral success in racially-diverse districts without the dubious assistance of the 2011 racial gerrymander. See *supra* notes 41–45 and accompanying text.

510. See Rucho Dep. 193:9–192, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013).

511. Lichtman Second Aff. at 10, 11, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

In 2010, more than forty state House and Senate districts had a substantial, but not majority, Black voting age population.<sup>512</sup> Still, in 2010 under the prior districting, many of these less-than-majority-Black districts had been electing Blacks for years with extremely comfortable majorities.<sup>513</sup> In these districts, racial Section 2 redistricting was not required to give Black voters an equal chance to elect candidates of their choice.<sup>514</sup> Indeed, expert analysis showed that in the prior (or benchmark) districts with 40% or more Black voting age populations, Blacks had a 90% chance of electing a candidate who was the choice of Black voters.<sup>515</sup> Nor were chances of success increased in districts that were composed of a voting population that was 50% or 50%+ Black.<sup>516</sup> To cite just one example, Senator Floyd McKissick, an African American Democrat, was elected to represent a Durham County district with a Black voting age population of 45% by forty-point margins in 2004, 2006, 2008, and 2010.<sup>517</sup> But in its 2011 redistricting, the legislature increased the Black voting age population of heavily Black districts—including Senator McKissick's—to between 50 and 52%.<sup>518</sup>

The purported Section 2 racial gerrymander was designed to create majority Black districts with a Black voting age electoral majority; the racial gerrymander has had a dramatic effect on racial polarization between the parties.<sup>519</sup> In 2009, the state House of Representatives had twenty-two Black Democrats and forty-six White Democrats.<sup>520</sup> There was one Black Republican.<sup>521</sup> In 2011, after the Republican sweep in 2010, there were eighteen Black Democrats and thirty-four White Democrats in the House.<sup>522</sup>

512. Sharon McCloskey, *Redistricting 2011: A Solution in Search of a Problem*, N.C. POL'Y WATCH (Feb. 27, 2013, 10:41 AM), <http://www.ncpolicywatch.com/2013/02/27/redistricting-2011-a-solution-in-search-of-a-problem/>.

513. See Berman, *supra* note 9.

514. Lichtman Second Aff. at 18, 19, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

515. *Id.* at 6–7, 9; see also Berman, *supra* note 9.

516. Lichtman Second Aff. at 7–9, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

517. McCloskey, *supra* note 512.

518. *Id.*

519. See *infra* notes 520–522.

520. *2009 House of Representatives Demographics*, N.C. GEN. ASSEMB. (Sept. 9, 2010), <http://www.ncleg.net/DocumentsSites/HouseDocuments/2009-2010%20Session/2009%20Demographics.pdf> [hereinafter *2009 House Demographics*].

521. *Id.*

522. *2011 House of Representatives Demographics*, N.C. GEN. ASSEMB. (Dec. 12, 2012), <http://www.ncleg.net/DocumentSites/HouseDocuments/2011-2012%20Session/2011%20Demographics.pdf> [hereinafter *2011 House Demographics*].

There were no Black Republicans.<sup>523</sup> In 2013, after the 2011 racial gerrymander, there were twenty-two Black Democrats and twenty-one White Democrats.<sup>524</sup> There were still no Black Republicans in the House.<sup>525</sup>

In the state Senate in 2009, before the Republican sweep, there were twenty White Democrats and nine Black Democrats;<sup>526</sup> in 2011 (after the Republican sweep but before the gerrymander) there were seven Black and two White senators who were preferred by Black voters and twelve White Democrats.<sup>527</sup> There were no Black Republicans in the Senate. All these Black senators had been elected in districts with less than 50% Black voting age population.<sup>528</sup> In 2013, after the racial gerrymander, there were seven White Democrats in the Senate and ten Black Democrats.<sup>529</sup> In sum, after the gerrymander, White Democrats in the House dropped from thirty-four in 2011 to twenty-two in 2013.<sup>530</sup> In the Senate, White Democrats dropped from twelve in 2011 to seven in 2013.<sup>531</sup> Configuring a “Black Democratic Party” and a “White Republican Party” was making substantial progress.<sup>532</sup> Meanwhile, five Senate districts in which the Black voting age population ranged from 30% to 35% disappeared.<sup>533</sup> In the House, six districts in which Blacks had been between 30% and 33% of the voting age population disappeared.<sup>534</sup>

The effect of raising the percentages of the Black voters to 50% and above in districts with less than 50% Black voting age population that already elected Black representatives by an

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523. *Id.*

524. 2013 *House Demographics*, *supra* note 497.

525. *Id.*

526. 2009 *Senate Demographics*, N.C. GEN. ASSEMB. (Feb. 11, 2010), available at <http://www.ncleg.net> [hereinafter 2009 *Senate Demographics*].

527. 2011 *Senate Demographics*, N.C. GEN. ASSEMB. (Oct. 18, 2012), available at <http://www.ncleg.net> [hereinafter 2011 *Senate Demographics*]; see Lichtman Second Aff. at 22, tbl.3, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012). There were a total of eight Black senators.

528. Lichtman Second Aff. at 22, tbl.3, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

529. See 2013 *Senate Demographics*, *supra* note 499.

530. Compare 2011 *House Demographics*, *supra* note 522, with 2013 *House Demographics*, *supra* note 497. This may treat Hispanics as “White.”

531. Compare 2011 *Senate Demographics*, *supra* note 527, with 2013 *Senate Demographics*, *supra* note 499.

532. See *supra* notes 530–531.

533. See Lichtman Second Aff. at 25, tbl.6, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

534. See *id.* at 24, tbl.5.

534. *Id.*

extremely comfortable margin was not to increase the chances of Blacks electing candidates of their choice *in those districts*, much less to increase their chances having an equal opportunity in those districts.<sup>535</sup> The effect was to diminish overall Black political power in the legislature by wasting Black votes and by disrupting White-Black political coalitions, whether the coalitions had preferred a White representative, Black representative, or a representative of a different ethnic origin.<sup>536</sup>

Increased segregation of Black voters in these 40% or 40%+ into 50% or 50%+ Black voting age population districts (1) was not required by Section 2 of the Voting Rights Act, with its reference to equal opportunity and its rejection of requiring proportionality;<sup>537</sup> (2) was not needed to produce the election of Blacks *in those districts*;<sup>538</sup> and (3) diminished overall Black power in the legislature.<sup>539</sup> All these effects were achieved by (4) explicit use of racial quotas and numerical targets by drawing district lines to include or exclude voters and sometimes candidates from districts because of race.<sup>540</sup> Collectively all these elements describe “steroid districts.”<sup>541</sup>

## Part VII. The North Carolina 2011 Racial Gerrymander Goes to Court

After the 2011 North Carolina gerrymander, a number of voters affected by the racial gerrymander filed suit, alleging, among other claims, a violation of the Fourteenth Amendment by racial districting that unnecessarily packed Black voters into 50% or 50%+ state legislative and federal congressional districts.<sup>542</sup>

535. *Id.* at 18–19.

536. *Id.*

537. *See supra* note 480.

538. *See supra* notes 513–514.

539. Lichtman Second Aff. at 18, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

540. *See* First Amended Complaint, at ¶ 6, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013); Garrou Aff. at 6–7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

541. *See Mock, supra* note 35.

542. Rounded to the nearest whole number, the legislature made one House district 57% BVAP, one 55%, two 54%, two 53%, three 52%, twelve 51%, one 50%, two 45%, and one 32%. By concentrating the Black votes, the legislature was able not only to increase the number of Black majority districts from ten to twenty-three, but also to eliminate six of the eleven districts ranging from 37% to 30% BVAP. It was able to raise two more 37% BVAP to 50% districts. Lichtman Second Aff. at 24, tbl.5, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012). In the state Senate, there had been no majority Black districts, but seven Blacks were still elected to the Senate. The legislature created nine majority Black voting age

Those in control of redistricting in the legislature claimed that in these purported Section 2 districts, racial districting was required by the Voting Rights Act; putting 50% or 50%+ Black voting age population in the districts was *the* way to comply with both Section 2 of the Voting Rights Act and the judicial precedent interpreting Section 2.<sup>543</sup> And if not exactly required, it was justified as a “safe harbor”—a way to avoid Section 2 and Section 5 challenges, neither of which had been made in the state for nearly thirty years.<sup>544</sup>

In *Pender County v. Bartlett*, the North Carolina Supreme Court held that where a Section 2 district was ordered by the court, it can only be a majority-minority district.<sup>545</sup> As we saw in *Bartlett v. Strickland*, a controlling plurality of the Supreme Court said the same thing.<sup>546</sup> Moving beyond precedent,<sup>547</sup> the legislature sought to ensure that the percentage of Blacks in the legislature would reflect the percent of Blacks in the voting age population. The legislature fulfilled its quota admirably, though it did not call it that.<sup>548</sup> The percent of African Americans in the legislature was as close as possible to the African American percent of the state’s Black voting age population.<sup>549</sup>

The legislature’s dual quota (the 50% or 50%+ quota and the proportionality quota) is, to put it mildly, in serious tension with recent Supreme Court precedent.<sup>550</sup> The Court has found explicit racial balancing or quotas to be a violation of the Fourteenth

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population districts, and one 42.53% district. The redistricting eliminated five districts where the Black voting age population ranged from 30% to 35%. *Id.* at 25, tbl.6.

543. *Dickson v. Rucho*, No. 11-CVS-16896, at 30–31 (N.C. Super. Ct. July 8, 2013).

544. See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (deciding a challenge to North Carolina’s multimember districts under the Voting Rights Act); *Stephenson v. Bartlett*, 562 S.E.2d 377, 398 (N.C. 2002) (holding the redistricting plan adopted by the General Assembly invalid under the State Constitution instead of §§ 2 or 5 of the Voting Rights Act).

545. *Pender Cnty. v. Bartlett*, 649 S.E.2d 364, 376 (N.C. 2007).

546. See *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (holding that majority-minority districts are required where all three *Gingles* factors are present, and Section 2 applied based on the totality of the circumstances).

547. The Court has suggested that proportionality may be a defense against a Section 2 action, but has never required such a quota. See *id.*

548. *Dickson v. Rucho*, No. 11-CVS-16896, at 26–27 (N.C. Super. Ct. July 8, 2013).

549. Proportionality Chart, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012). See Brief of Plaintiff, *Dickson v. Rucho*, 11-CVS-16896 (N.C. Super. Ct. July 8, 2013).

550. See *infra* notes 551–556 and accompanying text for the Court’s precedent on racial quotas.

Amendment in a number of settings.<sup>551</sup> As the Court noted in *Fisher v. University of Texas at Austin*, “outright racial balancing . . . is patently unconstitutional.”<sup>552</sup> In *Parents Involved v. Seattle School District No. 1*,<sup>553</sup> the Court warned that “[a]ccepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society”<sup>554</sup> and “would support indefinite use of racial classifications . . . .”<sup>555</sup> In the voting rights context, the Court has explained that neither Section 2 nor Section 5 of the Voting Rights Act *requires* proportionality between the percentage of African Americans in the state and the percentage of districts in which Blacks are a majority of the voting age population.<sup>556</sup>

If legislatures enact or courts sanction such use of proportionality as compliance with Section 2, their actions are also in serious tension with *the text* of Section 2.<sup>557</sup> It provides that “nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”<sup>558</sup> It protects an equal opportunity, not a certainty, to elect.<sup>559</sup> Black and White Democratic losses in 2010 were roughly proportional.

As we see in the following calculations, the 2012 voting bloc that frustrated the ability of African Americans to elect the candidates of their choice was absent in at least 90% of races in the benchmark districts that the legislature transformed. In 2010, in the state House elections for districts that were between 40% and 49% Black voting age population, the minority candidate was successful in ten of eleven of the races.<sup>560</sup> That same year, in the eight state Senate races in districts with between 40% and 49% BVAP, the minority candidate of choice won seven races.<sup>561</sup> In one race, the candidate of choice was a White woman who defeated her

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551. In the context of education, see *infra* notes 552–555. In the context of voting rights, see *infra* note 556.

552. 133 S. Ct. 2411, 2119 (2013) (citations omitted).

553. 551 U.S. 701, 705 (2007).

554. *Id.* at 730.

555. *Id.* at 731 (quoting *Metro Broad. v. FCC*, 497 U.S. 547 (1990)).

556. See *Miller v. Johnson*, 515 U.S. 900 (1995); *Johnson v. De Grandy*, 512 U.S. 997 (1994).

557. See Voting Rights Act § 2, 42 U.S.C. § 1973 (2012).

558. *Id.*

559. 42 U.S.C. § 1973 (b). In addition, the statute’s goal of equal opportunity to elect could cast doubt on super-safe districts.

560. See *supra* Figure 1 and note 17.

561. Lichtman Second Aff. at 22, tbl.3, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

Black challengers with most of the Black vote on her side.<sup>562</sup> Two of the purported Section 2 benchmark congressional districts, with 43.8% and 48.6% Black voting age population, had been electing the Black candidates of choice with less than 50% Black voting age population, and typically by very large majorities.<sup>563</sup>

In a breathtaking anti-coalition racial gerrymander, the legislature destroyed virtually all of the state House, state Senate, and congressional districts in which a multi-racial coalition had been electing candidates preferred by minority voters.<sup>564</sup> The assault on inter-racial coalitions did not end there, of course.<sup>565</sup> By removing Black voters from districts that had been electing White Democrats, the legislature reduced Black political influence in those districts and in the legislature as a whole, and engineered the defeat of Whites elected with Black support—striking an additional blow at inter-racial cooperation.<sup>566</sup> It also struck a blow for the goal of racial polarization, transforming parties into more nearly Black and White political parties with legislators serving increasingly segregated districts.<sup>567</sup> The result, in the prophetic words of Justice Kennedy, “tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against.”<sup>568</sup> Of course, these actions had political advantages for one political party.<sup>569</sup> So did the tactics used to disrupt the White-Black Republican coalition in the 19<sup>th</sup> and early 20<sup>th</sup> Centuries.<sup>570</sup> Segregation was a tool that helped to disrupt White-Black political association and cooperation.<sup>571</sup> It will be ironic if the courts allow legislatures to achieve similar effects under the Voting Rights Act in the absence of any compelling need.

For convenience, I will refer to these less than 50% districts that regularly elected the Black candidate of choice as “benchmark districts.” The plaintiffs’ challenges included twenty-one of these 40%+ benchmark legislative and congressional districts in their

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562. *Id.*

563. *Id.* at 8–9, 23, tbl.4.

564. *Id.* at 20–25, tbls.1–6.

565. For discussion on the different ways in which Republican leaders attacked interracial coalitions, see *infra* notes 590–95 and accompanying text.

566. Lichtman Second Aff. at 26, tbl.7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

567. See *supra* note 397.

568. *Johnson v. De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring).

569. First Amended Complaint, at ¶¶ 78–80, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. July 8, 2013).

570. For discussion on White-Black coalitions, see *supra* note 102.

571. *Id.*

suit against the 2011 North Carolina reapportionment and racial gerrymander.<sup>572</sup> Each of these districts had been inflated to 50% or more Black voting age population based on the 2010 census—in spite of the fact that White-Black coalitions rendered the bulking up unnecessary for Black voters to have an equal opportunity to elect the candidates of their choice.<sup>573</sup> *The 2010 success rate for Blacks' candidates of choice was no better in districts with 50% or greater Black voting age population.*<sup>574</sup> According to Professor Lichtman, the main result of the extra racial packing was to diminish the ability of African American voters to influence the political process across the state of North Carolina.<sup>575</sup>

### *The Trial Court's Opinion*

The plaintiffs' complaint, filed in state court, came before three superior court judges appointed by the Chief Justice.<sup>576</sup> The judges faced a large record.<sup>577</sup>

The trial court noted the undisputed facts: (1) the legislature intended to create twenty-six of the thirty challenged districts as voting rights districts; (2) these were designed by the legislature to include [at least] a 50% total Black voting age population; (3) this required including a targeted number of Black voters in such districts and excluding a targeted number of White voters;<sup>578</sup> (4) in addition, the legislature sought to “achieve a ‘roughly proportionate’ [actually nearly exactly proportionate] number of senate, house, and congressional districts as compared to the

572. See Lichtman Second Aff. at 20, 22, 23, tbls.1, 3 & 4, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012). Of these twenty-one 40%+ benchmark districts, eleven were state House districts, eight were state Senate districts, and two were congressional districts.

573. *Id.* at 24, tbl.5. In fact, the candidates preferred by Black voters had a 90% chance of winning the elections. Based on the 2010 census, the percentage of Black voting age population in the newly-enacted House districts are as followed: seven were above 53%; eleven were between 51.83% and 51.11%; four were between 50.69% and 50.45%; two were roughly 45%; and one was at 32%. As expert witness Allan J. Lichtman demonstrated, because of crossover voting and the multi-racial coalitions, a benchmark district in the 2010 election with at least a 40% or 40%+ Black voting age population provided Black voters with a 90% or greater chance of electing the candidate of their choice in state legislative races. That number becomes 100% in the federal congressional races. See Lichtman First Aff. at 7, 8, tbls.1 & 3, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

574. Lichtman Second Aff. at 9, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

575. *Id.* at 9.

576. Dickson v. Rucho, No.11-CVS-16896, at 5 (N.C. Super. Ct. July 8, 2013).

577. See *id.* at 19–20 (itemizing the legislative record).

578. *Id.* at 14–15.



Black population in North Carolina.<sup>579</sup> The legislature admittedly had made a racial classification with numerical quotas and targets—not too few Blacks and not too many Whites in the district and a quota of Black legislators.<sup>580</sup> The trial court found that:

[E]ven though . . . the legislative intent may have been remedial and the districts may have been drawn to conform with federal and state laws to provide Black voters in those districts with an opportunity to elect their preferred candidate of choice, the shape, location, and racial composition of each VRA district<sup>581</sup> was predominately determined by racial objective . . . .<sup>582</sup>

Thus, it was a racial classification, and strict scrutiny applied.<sup>583</sup>

The rule in this situation should be that the state has to have a compelling state interest pursued by narrowly tailored means in order to justify its explicit use of racial classifications.<sup>584</sup> Moreover, when the state has admittedly used race as its predominant criteria, the burden to show a compelling state interest and narrow tailoring should be on the state.<sup>585</sup>

The State contended that its compelling state interest was to comply with Section 2, to protect the State from possible liability under Section 2, and to assure preclearance under Section 5.<sup>586</sup> Curiously, the Section 5 requirement was no longer constitutionally enforceable at the time of the trial court's decision.<sup>587</sup>

Although preclearance had been abrogated under the *Shelby County*<sup>588</sup> decision by the time of the trial court's decision and, at any rate, there was no evidence that significant retrogression would have occurred as a result of preserving coalition districts,<sup>589</sup> the trial court said the legislature had to have a "strong basis in evidence to conclude that the new districts, as drawn, were

579. *Id.*

580. *See id.*

581. *Id.* at 15.

582. *Id.*

583. *See* Bush v. Vera, 517 U.S. 952, 958–59 (1996); Miller v. Johnson, 515 U.S. 900, 904–06 (1995); Shaw v. Reno, 509 U.S. 630, 643 (1993).

584. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013).

585. Dickson v. Rucho, No.11-CVS-16896, at 16 (N.C. Super. Ct. July 8, 2013).

586. Compare Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (decided June 25, 2013), with Dickson, No.11-CVS-16896 at 21.

587. 133 S. Ct. at 2631 (2013). So it seems the legislature, when it purportedly relied on the Section 5 rationale, was acting on a mistake of law.

588. See Lichtman Second Aff. at 6, 7, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012) (indicating minority voters within challenged district already were consistently electing their preferred candidate).

reasonably necessary to avoid Section 2 liability and to obtain preclearance under Section 5 of the VRA.<sup>589</sup> The trial court recognized that the *Gingles*<sup>590</sup> factors “are a mandatory precondition to any § 2 claim against the state . . . .”<sup>591</sup> These factors are: “(1) a minority group exists within the area affected by the Enacted Plans and that the group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the group is politically cohesive; and (3) that racial bloc voting usually will work to defeat the minority’s preferred candidate.”<sup>592</sup> The trial court found as a matter of law “that the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of the circumstances, VRA districts were required to remedy against vote dilution.”<sup>593</sup>

Since proportionality would be a defense against a Section 2 claim,<sup>594</sup> the trial court held it was entirely appropriate for the legislature to establish “rough” (actually close to perfect) proportionality.<sup>595</sup> Furthermore, the trial court noted that polarized voting<sup>596</sup> was present in virtually all the plaintiffs’ challenged districts.<sup>597</sup> Under the law, however, the *Gingles* preconditions and opportunity to elect, rather than some generalized concept of racially-polarized voting, should control the outcome.

The trial court correctly noted the plaintiffs’ contention: as to the challenged districts where minorities were winning with less than 50% Black voting age population, the Voting Rights Act did not require that the purported Voting Rights Act districts be made up of 50% or more Black voting age population.<sup>598</sup> The trial court responded that the Voting Rights Act did mandate minority-majority districts in districts *where the Voting Rights Act required*

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589. *Dickson*, No.11-CVS-16896, at 18 (citations omitted).

590. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

591. *Dickson*, No.11-CVS-16896, at 18 (citations omitted).

592. *Id.* at 18 (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996); *Johnson v. De Grandy* 512 U.S. 997, 1006–09 (1994); *Grove v. Emison*, 507 U.S. 25, 40, 41 (1993)); *see also Gingles*, 478 U.S. at 50–51.

593. *Dickson*, No.11-CVS-16896, at 20–21 (emphasis added).

594. *Id.* at 26–27.

595. *Id.* at 27–28.

596. *See id.* at 37–38.

597. *Id.* at A-82.

598. *Id.* at 29.

a Section 2 district.<sup>599</sup> According to the trial court, where there is a Section 2 violation, a minority-majority district is the only appropriate remedy.<sup>600</sup> That seems to be the current law *under* Section 2.<sup>601</sup> But it is not on point. The constitutional challenge to the systematic *destruction* of coalition districts in the present case, in contrast, is a case of first impression.

The trial court's opinion begs the question. It assumes that racially-polarized voting existed in the benchmark districts and therefore the *Gingles* preconditions were met.<sup>602</sup> That, however, is not the law.<sup>603</sup> The third *Gingles* precondition is met if (and only if) voting is sufficiently polarized in the districts in question to usually defeat the minority's preferred candidate.<sup>604</sup> The trial court did not find that the minority's preferred candidate was usually being defeated in the benchmark districts.<sup>605</sup> In those challenged districts that were less than 50% minority-majority BVAP, the minority's preferred candidate was winning 90% of the time, and typically winning by quite a lot.<sup>606</sup> Even in districts with 30% BVAP, minorities in certain districts had a 50-50 chance of winning—winning in good years, losing in bad.<sup>607</sup> A few Black Democratic North Carolina legislative incumbents lost in 2010, but so did a much larger number of White Democratic incumbents.<sup>608</sup> Equal opportunity is, or should be, a two-way street.

So the issue as to the areas and districts where Blacks' preferred candidates consistently won with 40 or 40%+ of the vote should not have been "what kind of minority-majority district does Section 2 require?" Instead, it should have been, "in this situation does Section 2 require a minority-majority district?" with the

599. *See id.* at 32–33.

600. *Id.*

601. Bartlett, 556 U.S. at 17–18 (Kennedy, J., concurring) (plurality opinion).

602. *See Dickson*, No. 11-CVS-16898, at 10.

603. Bartlett v. Strickland, 556 U.S. 1, 8–9 (2009) (Kennedy, J., concurring) (plurality opinion).

604. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

605. *See Dickson*, No. 11-CVS-16896, at A-92–A-151 (discussing district-by-district analysis of racial polarization and opportunities for minorities to elect their preferred candidate in 2011 Voting Rights Act districts).

606. Lichtman Second Aff. at 6, 7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

607. *Id.* at 10–12 (discussing Black voters' electoral success in districts with Black voting age population between 12% and 40%).

608. *See Dickson*, No. 11-CVS-16896, at A-78 (noting that in 2010, two African American incumbents were defeated in majority White districts); *see also* Bonner & Biesecker, *supra* note 3 (detailing overall Democratic electoral defeat in the General Assembly for that election cycle).

attendant undermining of coalition districts. The answer should have been “no,” because the minority’s preferred candidate was winning consistently and handily with crossover or coalition votes.<sup>609</sup> Wherever that is the case, then as a matter of law, there should be no Section 2 defense against the plaintiff’s claim that Equal Protection has been violated by a use of racial classifications, numerical targets, and quotas.<sup>610</sup> For such areas, quotas, numerical racial targets, excision (because of her race) of a White incumbent who was the candidate of choice of minorities in her district, racial decisions to add and subtract voters based on race, and similar strategies should be impermissible.

The legally correct Section 2 analysis and better holding would be that, in districts where polarized voting does not block the ability of minorities to elect the candidates of their choice, the Voting Rights Act does not require these districts to become majority-minority districts.<sup>611</sup> This is consistent with a number of Supreme Court decisions<sup>612</sup> and with the controlling plurality opinion of *Bartlett*.<sup>613</sup> It is also consistent with the *Bartlett* dissent’s recognition that in some districts crossover voting or coalitions will preclude Section 2 liability.<sup>614</sup> And it is consistent with the rule of construing statutes, where reasonable to do so, to avoid grave constitutional questions.<sup>615</sup> So the systematic destruction of crossover or coalition districts cannot be shielded from the force of the Equal Protection Clause by a purported compelling interest under Section 2 to give Black voters in those districts an equal opportunity to select candidates of their choice—

609. See Lichtman Second Aff. at 6, 7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

610. See *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986) (“Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group [to raise a claim under § 2].”) (emphasis original).

611. See *id.*

612. See *id.*; see also *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (indicating courts should consider if an “apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population”).

613. See *Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (Kennedy, J., concurring) (“In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred.”) (citations omitted).

614. See *id.* at 43–44 (Souter, J., dissenting).

615. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question, although properly presented, if there is also present some other ground upon which the case may be disposed of.”).

an opportunity they had without the dual quotas, without racial sorting voters, and without eliminating candidates from districts based on race.<sup>616</sup> In such districts a safe harbor argument is preposterous—a super-safe district does not require a safe harbor where the harbor is already safe. At any rate, equal opportunity to elect is not refuted by the fact that Black, like White, incumbent Democrats can sometimes lose.

But if Section 2 is construed to require or justify *systematic* destruction of these coalitions or crossover districts that were electing candidates preferred by Black voters, it should be declared unconstitutional as applied. The explicit racial quotas would be left with no legitimate justification.

That rule of law is also the better rule because it would reduce the number of districts racially segregated or justified by *law* between majority-minority districts and the rest, based on race-based quotas, numerical racial goals, etc.<sup>617</sup> It will allow Blacks and Whites and people of other backgrounds to continue to form political coalitions in those districts.<sup>618</sup> And it will prevent or discourage their systematic disruption by racial classifications and racial quotas.<sup>619</sup> In the situation where racial coalitions have been allowing Blacks or minorities to elect their candidate of choice, there is no compelling interest favoring the disruption of coalitions.<sup>620</sup> That is so because the Section 2 preconditions do not apply or even arguably apply.<sup>621</sup> The issue here is not whether Section 2 requires the creation of coalition districts; the Court holds it does not. Instead, the issue is whether the systematic

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616. See *Bartlett*, 556 U.S. at 11–12 (Kennedy, J., concurring) (plurality opinion).

617. Approving the legislature's approach will realize the dire prediction of Justice Souter, a prediction that seems to be averted by the *Gingles* precondition. Cf. *id.* at 27 (Souter, J., dissenting) ("If districts with minority populations under 50% can never count as minority-opportunity districts... [s]tates will be required... to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation.").

618. See Lichtman Second Aff., *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

619. See *id.*

620. See *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("While the States and their subdivisions may take remedial action *when they possess evidence* of past or present discrimination, they must identify that discrimination... with some specificity before they may use race-conscious relief.") (citations omitted) (emphasis added). Because African Americans were consistently succeeding in electing their preferred candidate, the State had no basis for taking "remedial" action.

621. See *Dickson v. Rucho*, No. 11-CVS-16896, at A-92-A-151 (N.C. Super. Ct. July 8, 2013) (record does not substantiate claim of substantial evidence). *But see id.* at 20–21 (concluding as a matter of law the *Gingles* preconditions did apply).

destruction of previously existing coalition districts, effectuated by dual quotas, mistaken readings of Section 2, and preposterous claims of safe harbors, violates the Fourteenth Amendment. That is an issue the Court has not yet decided.<sup>622</sup>

In its reply brief to the plaintiffs' appeal, the defense makes two arguments in favor of bypassing the strict scrutiny analysis necessitated by the Fourteenth Amendment.<sup>623</sup> First, it claimed that strict scrutiny was not appropriate because the trial court erroneously found that race predominated in the creation of the "steroid districts"; instead, it said, the districts were created using racial means (purportedly Section 2 means) for political ends.<sup>624</sup> The defendants cited the 2001 case of *Easley v. Cromartie*,<sup>625</sup> where the five-justice majority wrote that "where majority-minority districts are at issue . . . the party attacking the legislative boundaries must show at least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and that would have "brought about significantly greater racial balance."<sup>626</sup> The majority framed the issue as whether the legislature drew District 12's boundaries "because of race *rather than* because of political behavior . . . ."<sup>627</sup>

As a matter of fact, Republicans did have some political objectives in their use of gerrymandering, but all of the objectives were inseparable from race: districts were to be 50% or more Black voting age population;<sup>628</sup> the target was to have Blacks in the legislature in proportion to their share of the voting age population;<sup>629</sup> the "steroid districts" were shaped so they destroyed pre-existing multi-racial and multi-ethnic coalitions;<sup>630</sup> and they

622. *Compare Bartlett*, 556 U.S. at 15 ("Nothing in § 2 grants special protection to a minority group's right to *form* political coalitions.") (emphasis added), and *id.* at 19 ("No federal court of appeals has held that § 2 requires *creation* of coalition districts.") (emphasis added), with *id.* at 23–24 (see *supra* note 274 and accompanying text), and *Dickson*, No.11-CVS-16896 at 34 ("Plaintiffs express grave concerns regarding the public policy implications of a bright-line 50% rule that they fear . . . *discourages* cross-over coalitions among the races.") (emphasis added).

623. See Brief of Defendant-Appellee at 60–64, *Dickson v. Rucho*, No. 201PA12-2 (N.C. Dec. 6, 2013); *id.* at 138 n.2.

624. See *id.* at 60–64.

625. 532 U.S. 234, 258 (2001).

626. *Id.*

627. *Id.* at 257 (emphasis original).

628. *Dickson v. Rucho*, No.11-CVS-16896, at 14 (N.C. Super. Ct. July 8, 2013).

629. *Id.*

630. See *id.* at 35 ("[I]n its effort to avoid liability under § 2 of the VRA, the General Assembly eschewed crossover districts.").

were constructed to help to rid as many White Democrats as possible<sup>631</sup>—advancing racial polarization between a Black party and a White party (a historic goal in Southern Republican districting.)<sup>632</sup> The record of racial design is clear. If a party seeks racial polarization by racial means for political purposes, that should not sanitize the use of race. The case of Linda Garrou disproves “innocent” political objectives.<sup>633</sup> There, the undisputed facts show she was removed from her senatorial district because she was a White incumbent Democrat rather than a Black incumbent Democrat.<sup>634</sup>

If these racial methods can be sanitized by a political objective, perhaps the poll tax, the literacy test and other historical barriers to Black franchise should be rethought. These mechanisms similarly degraded Black voting for political reasons, namely because African Americans voted Republican and allied with Populists.<sup>635</sup>

The defendants’ second contention relied largely on *Shaw v. Reno*: because the legislature itself imposed the Black majority districts, it need only articulate a “strong basis in evidence” of the need to act to avoid Section 2 liability.<sup>636</sup> Though conceding the state supreme court had previously required the state to bear the burden of establishing the *Gingles* preconditions in a Section 2 challenge,<sup>637</sup> the defense maintained, “the [s]tate’s burden is one of production rather than of proof.”<sup>638</sup> Accordingly, it should not be “held to as high of a standard as one bringing a § 2 challenge would be.”<sup>639</sup> By this approach, because the legislature, not a court, decided on the racial districting constructed with dual racial

631. See Garrou Aff. at 6, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012); see also Lichtman Second Aff. at 6, 7, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

632. See Edsall, *supra* note 59.

633. See Garrou Aff. at 6, Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

634. *Id.* at 6.

635. See, e.g., BECKEL, *supra* note 116, at 3; ESCOTT, *supra* note 102, at 148; Pildes, *supra* note 117, at 302 (detailing historical conservative opposition to Black-White political coalitions in the Republican Party and Populist movement).

636. See Brief of Defendant-Appellee at 138 n.62, Dickson v. Rucho, No. 201PA12-2 (N.C. Dec. 6, 2013) (quoting *Shaw v. Hunt*, 517 U.S. 899, 899, 910 (1996); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986)).

637. See *id.* Pender Cnty. v. Bartlett, 649 S.E.2d 364, 367–68 (N.C. 2007).

638. Brief of Defendant-Appellee at 138 n.62, Dickson v. Rucho, No. 201PA12-2 (N.C. Dec. 6, 2013) (citing *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D.N.C. 1996) *rev’d on other grounds*, *Shaw*, 517 U.S. 899 (1996)).

639. Brief of Defendant-Appellee at 138 n.62, Dickson v. Rucho, No. 201PA12-2 (N.C. Dec. 6, 2013).

quotas, a more permissive test is adopted for analysis of the *Gingles* preconditions.<sup>640</sup>

Most Justices have expressed discomfort with decisions to impose racial classifications under the Voting Rights Act.<sup>641</sup> Court decisions are increasingly hostile to “benign” affirmative action, racial quotas, and numerical targets.<sup>642</sup> It will be a sad irony if the only acceptable use of racial quotas is to facilitate racially packing Blacks and expelling Whites from selected districts with the effect of isolating Blacks and degrading their political influence.

Still, the strongest argument for allowing the legislature to create majority-Black districts, even where the evidence for the *Gingles* pre-conditions should not satisfy a court, is to protect legislatures that choose minority-majority districts—both to protect them from being sued if they fail to act and from being sued if they act on their own.<sup>643</sup> Adopting a watered-down version of strict scrutiny (or none at all) protects legislatures against verdicts in suits challenging majority-minority districts they freely choose to create—though at the expense of perpetuating racial districting whether or not it is required by the Act.<sup>644</sup> Courts could transcend this problem by giving substantial deference to the view, supported by “strong evidence,” that racial districting with

640. See Brief of Defendant-Appellee at 138 n.62, *Dickson v. Rucho*, No. 201PA12-2 (N.C. Dec. 6, 2013); see also *Bush v. Vera*, 517 U.S. 952 (1996).

641. See, e.g., *Bush*, 517 U.S. at 1002–03 (1996) (Thomas, J., concurring) (“I am content to reaffirm . . . that all racial classifications by government must be strictly scrutinized . . . even in the sensitive area of state legislative redistricting.”); *id.* at 1031 (Stevens, J., dissenting) (“I note that in most contexts racial classifications are invidious because they are irrational.”); *Shaw*, 517 U.S. at 907 (Rehnquist, C.J.) (“Racial classifications are antithetical to the Fourteenth Amendment . . .”); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (O’Connor, J.) (“Racial classifications of any sort pose the risk of lasting harm to our society . . . . Racial classifications with respect to voting carry particular dangers.”); *id.* at 663 (White, J., dissenting) (“[D]ividing racial classifications between the ‘benign’ and the malicious [is] an enterprise which . . . the Court has treated with skepticism.”).

642. See, e.g., *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637–38 (2014) (finding Michigan constitutional amendment prohibiting affirmative action in educating, employment, and contracting acceptable under the Equal Protection Clause); *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (Kennedy, J., concurring) (plurality opinion) (“[T]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause, and racial classifications are permitted only as a last resort.”) (citations omitted).

643. See *Dickson v. Rucho*, No.11-CVS-16896, at 18 (N.C. Super. Ct. July 8, 2013) (“[T]he trial court is required to defer to the General Assembly’s reasonable fears of, and their reasonable efforts to avoid, § 2 liability.”) (citations omitted).

644. Cf. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (holding that under strict scrutiny any “racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification”) (citations omitted).



its quotas and proportions is not required to avoid liability under Section 2 where African Americans had enjoyed a very high degree of success in the prior districts.<sup>645</sup> Of course, changes required to comply with one-person, one-vote will require population shifts, making it possible that some previously successful African American (and White) candidates may sometimes lose.<sup>646</sup> But the Voting Rights Act guarantees equal opportunity, not success. Reasonable modifications of prior districts should not give rise to a successful suit.

So what should happen on redistricting these benchmark districts now transformed into “steroid districts?” At a minimum, since Section 2 should not apply unless one-person, one-vote requires breaking up counties. North Carolina’s Constitution, with its anti-gerrymander Whole County Provision, should control state legislative redistricting. New weird tentacles reaching out of these districts and dividing precincts and city blocks to pick up a few extra Blacks and remove Whites should be fatally suspect. Taking incumbents out of their old benchmark districts solely based on race should be prohibited. That is so even when dual racial quotas and the related quota-driven decision to prevent Blacks from voting again for their White incumbent state Senator are used for political purposes. The dual quotas with their bulked up “steroid” minority-majority districts are designed to advance a racial political gerrymander that violates the Whole County Provision of the North Carolina Constitution. Efforts to destroy a Black-White coalition is an old and ugly story in North Carolina and not one courts should support repeating.

Someday, courts should act to restore meaningful representative democracy and a republican form of government by not approving gerrymanders that allow minorities that win a majority one election to transform themselves into an entrenched majority. That rule should apply in all states and to all temporary political majorities—Democratic, Republican, or otherwise. It

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645. See, e.g., *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899–900 (D. Md. 2011) *aff’d*, 133 S. Ct. 29 (2012) (indicating that African American electoral success in coalition districts undermines an affirmative finding of the third *Gingles* precondition); *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 857 (E.D. Wis. 2012) (indicating an evidentiary finding that a proposed district would operate as a coalition district would not corroborate a Section 2 violation); see also *Fletcher*, 831 F. Supp. 2d at 898 (noting that a state’s failure to create the maximum number of majority-minority districts does not expose that state to Section 2 liability).

646. See, e.g., *Dickson v. Rucho*, No. 11-CVS-16896, at A-78 (N.C. Super. Ct. July 8, 2013) (reporting that two Black incumbents lost in North Carolina coalition districts in 2010).

should apply under the North Carolina Constitution and under the United States Constitution.<sup>647</sup>

To the extent that Section 2 forbids unnecessary racial packing, it still has an important defensive role to play—preempting still worse disruptions of multi-racial coalitions. The perverse use of Section 2 to justify racial packing in super-safe districts should be prohibited, either by construing Section 2 to avoid a serious constitutional question or by holding such applications are unconstitutional as applied.

Transforming the benchmark districts into majority-minority districts to serve some supposed compelling Section 2 interest is a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>648</sup> That is true even when there is a compelling interest to construct more Section 2 districts elsewhere in the state by use of racial quotas.<sup>649</sup> Creation of majority-minority districts in benchmark districts should be allowed in those districts, if ever, only when, contrary to current facts, they would be necessary *in those districts* to give Blacks an *equal* electoral opportunity to elect candidates of their choice.

But no such interest exists in benchmark districts. That is so because the admitted racial classification triggers strict scrutiny.<sup>650</sup> Not only must the ends (of equal opportunity) be compelling, but the means must be narrowly tailored.<sup>651</sup> For the benchmark districts there was an entirely obvious alternative to racial quotas, numerical targets, exclusion of White incumbents from districts because of their race, and the rest. The State could simply have maintained the crossover districts with whatever population adjustments were needed, thus serving the objective of giving minorities an equal opportunity to elect candidates of their choice without the imposition of extreme racial quotas and numerical targets, or the racial quota mandated exclusion from their prior districts of White Democratic incumbents.

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647. See U.S. CONST. amend. XIV § 1; N.C. CONST. art. II §§ 3, 5 (2013).

648. See U.S. CONST. amend. XIV § 1.

649. See *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (discussing how a violation of Section 2 in one area cannot be remedied by creating a safe majority-minority district elsewhere in the state).

650. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418–19 (2013) (holding that any racial classification must meet strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that all government classifications based on race trigger strict scrutiny).

651. See *Fisher*, 133 S. Ct. at 2419 (discussing how racial classifications will be upheld only if they are narrowly tailored to further a compelling governmental interest).

As this Article has argued, the history of race and politics in North Carolina has been a long history of efforts to disrupt racial coalitions, and to brand one party “the Black party” and to depress or eliminate voting by African Americans.<sup>652</sup> Nothing in the Fourteenth Amendment or in Section 2, properly interpreted, legitimizes the use of racial quotas, numerical targets, and racial presumptions that Blacks must not be given the chance to prefer a White candidate or vice versa—in order to disrupt effective multi-racial coalitions.<sup>653</sup>

The Supreme Court continues to maintain that racial quotas and racial classifications are deeply suspect and only may be upheld when they are narrowly tailored to further a compelling state interest.<sup>654</sup> That is so also in redistricting cases.<sup>655</sup> However, there is no compelling state interest in protecting the state from Section 2 challenges to districts from which minority-preferred candidates are being elected with coalition support, and therefore districts in which the *Gingles* preconditions do not obtain.<sup>656</sup> Nor is the subsequent packing of Black votes into super-safe “steroid districts” a remedy that is narrowly tailored to this circumstance.<sup>657</sup> Indeed the challenged benchmark districts that the state transformed were quite safe.<sup>658</sup> Instead, the compelling state interest here should have been the protection of multiracial coalitions in which people of all races and backgrounds work together, instead of systematically dismantling them. In this

652. See, e.g., *supra* Part III (“Post-Civil War and the 19<sup>th</sup> Century: Reconstructions and the Reactions”); BECKEL, *supra* note 116, at 3; ESCOTT, *supra* note 102, at 148; Pildes, *supra* note 117, at 302.

653. See U.S. CONST. amend. XIV; 42 U.S.C. § 1973 (2012).

654. See, e.g., *Fisher*, 133 S. Ct. at 2419; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Johnson v. California*, 543 U.S. 499, 505 (2005).

655. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

656. Compare *Dickson v. Rucho*, No. 11-CVS-16896, slip op. at 17 (N.C. Super. Ct. July 8, 2013) (stating that to demonstrate a “compelling governmental interest” the factual record must provide a “strong basis” for the General Assembly’s conclusion that the plans were *reasonably* necessary to avoid liability) (emphasis added), with *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986) (“Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group [to raise a claim under § 2].”), and *Lichtman Second Aff.* at 6, 7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012) (demonstrating the minority’s preferred candidate was typically successful in challenged districts with less than 50% BVAP).

657. See *Bartlett v. Strickland*, 556 U.S. 1, 23–24, 27 (2009) (Kennedy, J., concurring); cf. *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993). *Contra Dickson v. Rucho*, No. 11-CVS-16896, at 34–36 (N.C. Super. Ct. July 8, 2013).

658. See *Lichtman Second Aff.* at 6, 7, *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super. Ct. 2012).

situation, the law should discourage the increased racial polarization caused by racial quotas, numerical targets, and racial exclusion of candidates from certain districts.

Unnecessary and extreme racial districting does more than segregate Black voters into “steroid districts” with 50% or 50%+ Black voting age population.<sup>659</sup> And it does more than waste, for no worthy purpose, Black votes by an extreme racial classification.<sup>660</sup> It helps to segregate White voters too.<sup>661</sup> It contributes to bleaching other districts.<sup>662</sup> It exacerbates racial isolation and exacerbates racial divisions.<sup>663</sup> Charlie Cook notes in his political report:

Between 2000 and 2010, the non-Hispanic White share of the population fell from 69 percent to 64 percent, closely tracking the 5-point drop in the White share of the electorate measured by exit polls between 2004 and 2012. But after the post-census redistricting and the 2012 elections, the non-Hispanic White share of the average Republican House district jumped from 73 percent to 75 percent, and the average Democratic House district declined from 52 percent White to 51 percent White. In other words, while the country continues to grow more racially diverse, the average Republican district continues to get even whiter.<sup>664</sup>

In more racially segregated districts politicians are less likely to pursue policies favored by most members of the excluded groups, thus widening the racial divide.<sup>665</sup> Both Black and White districts become less representative of our multi-racial nation.<sup>666</sup> Racial gerrymanders are not the only cause of this distressing electoral segregation, but they are a contributing factor. Gerrymanders and racially designed gerrymanders have contributed to dysfunctional government.<sup>667</sup> It will be a perverse

659. See *Voinovich*, 507 U.S. at 153.

660. *Id.*

661. See *Bartlett*, 556 U.S. at 27 (Souter, J., dissenting) (“[T]he object of the VRA will now be promoting racial blocs . . .”).

662. *Id.*

663. *Id.*

664. Charlie Cook, *The GOP Keeps Getting Whiter*, NAT’L J. (Mar. 14, 2013), <http://www.nationaljournal.com/columns/cook-report/the-gop-keeps-getting-whiter-20130314>.

665. See Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RES. 878, 898–99 (2007). But see Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009).

666. Carson, *supra* note 665, at 880.

667. See *id.*; see generally THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2013); Thomas L. Friedman, *Our*

and sad day indeed if the Whole County Provision of the North Carolina Constitution, a modest, partial safeguard against gerrymanders of the state legislature, is voided to facilitate a racial gerrymander.

## Conclusion

The use of racial devices to prevent a possible majority of voters from becoming a majority in legislatures—all in the quest for political mastery—is with us still. Since Democrats today are a multi-racial multi-ethnic party, since Blacks overwhelmingly vote Democratic, and since the Black-White coalition has had some success in North Carolina, devices aimed at Blacks and some minorities (and others such as the poor or the young or the old) are once again attractive to their political opponents.<sup>668</sup> Manipulation of electoral rules and targeted efforts to discourage people in the other political party from voting by disproportionately depressing voting by selected groups, including Black voters, is not new.<sup>669</sup> The anti-coalition Conservative-Democrats of the late 19th and the early 20th centuries also crafted election laws that disproportionately disadvantaged Blacks—as part of their effort to end “Negro-Republican” rule.<sup>670</sup> The election “reforms” (no party labels on ballots, no different colors, encouraging challenging voters, and tests such as the demands for date and place of birth) *look* facially neutral—and even reformist—when divorced from their context. Most of us can see racial discrimination in the distant past. Conservative-Democrats explicitly played the race card early and often.<sup>671</sup> Today, tactics to undermine Black political power and that of potential allies such as the poor and young or elderly sometimes come wrapped in the rhetoric of civil rights.<sup>672</sup>

Some methods of pursuing political mastery are different from the past. Stuffing more Blacks into more majority-minority districts to reduce overall Black power in the legislature and to

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*Democracy Is at Stake*, N.Y. TIMES, Oct. 1, 2013, at A23.

668. See 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, 65 (2014).

669. See PERMAN, *supra* note 1.

670. Pildes, *supra* note 117, at 302.

671. *Id.*

672. See, e.g., David Zucchino, *North Carolina Lawmakers Approve Sweeping Voter ID Bill*, L.A. TIMES (July 26, 2013), available at <http://www.gopusa.com/news/2013/07/29/north-carolina-lawmakers-approve-sweeping-voter-id-bill/> (noting the Republican assertion that voter ID law was meant to ameliorate a “fair and accountable election system”).

eliminate as many of their White allies from the legislature as possible—all under the cover of benefiting Blacks and complying with the Voting Rights Act—may be a new twist. Other tactics are the same, such as targeting the Black and Democratic vote for diminution by election laws.

Admission that “reformers” are attempting to disfranchise *Black voters as Blacks* or *young voters as young* or *poor voters as poor* by facially-neutral means which disproportionately impact Blacks, the poor, or younger voters, respectively, is rare. Instead, supporters claim the laws are supported by good reasons—or at least not wholly irrational ones. A second defense is that Blacks are targeted along with others, not because they are Black, but because they are Democrats and discrimination in voting laws based on party is permissible, just as it seems to be for districting.<sup>673</sup> In contrast, North Carolina’s post-Civil War anti-coalition “Conservatives” (later called Democrats) overtly used direct racial appeals; the call for White supremacy was a political weapon in their campaigns.<sup>674</sup> That type of appeal is less socially acceptable today.

The issue in Reconstruction and after, however, was never simply race. The issue was a democracy made up of Blacks and Whites, with Blacks targeted because they were easily identified for disadvantage, and Whites targeted for being “Black Republicans.” Biracial coalitions remained a very serious political threat until the early 1900s.<sup>675</sup> The key goal of the “Conservatives” of that earlier era was to disrupt this White-Black Republican coalition.<sup>676</sup> Success left the anti-coalition “Conservatives” (morphed into anti-coalition Democrats) in a position of political mastery for many years. As Professor Richard H. Pildes has noted, the “[f]ramers of disfranchisement were typically the most conservative, large landowning, wealthy faction of the Democratic Party . . . .”<sup>677</sup> Those in the faction “were seeking to fend off challenges from Republicans, Populists, and other third parties, as well as from the more populist wings of the Democratic Party.”<sup>678</sup> Destruction of bi-racial coalitions was a disaster for Blacks; among a myriad of other awful changes, it led to denials of basic legal

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673. See Hasen, *supra* note 668, at 65.

674. See, e.g., Curtis, *The Klan*, *supra* note 117, at 1398–1425.

675. E.g., KOUSSER, *supra* note 227, at 25–26.

676. See, e.g., BECKEL, *supra* note 116, at 69–73; ESCOTT, *supra* note 102, at 154.

677. Pildes, *supra* note 117, at 302.

678. *Id.*

rights and protections and, of course, to large discrepancies in the state's expenditures for Black and White schools.<sup>679</sup>

The Republican coalition and subsequent Republican–Populist alliance faced severe internal problems. There were race differences, class differences, and tensions between big-business Republicans, less affluent farmers, and poor former slaves and Populists.<sup>680</sup> Some Republicans were prejudiced, and some conservative Republicans advocated becoming an all-White party too.<sup>681</sup>

The proposal here confronts using racial quotas and proportions today as a tool for political domination. It deals with the case at hand and does so narrowly. It simply limits some abuses under Section 2 and allows some previously existing multi-racial coalitions to flourish and not be destroyed by racial quotas. It involves the constitutionality of Section 2 as purportedly applied by the legislature.

Rejecting these “steroid districts” does not give minorities special advantages allowing them to achieve maximum political power. It simply affords them the minimal constitutional guarantee of the equal protection of the laws, protections available, on the same basis, to persons and candidates of all races, colors, and ethnic origins. There was a time when the Supreme Court struck down a law passed by the Congress to ban segregation in places of public accommodation. In doing so the Court proclaimed:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws and . . . his rights as a citizen, or a man, are to be protected by the

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679. See DAVISON M. DOUGLAS, *READING, WRITING & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 13–14 (1995) (“By the end of the first decade of the twentieth century, the gap between [B]lack and [W]hite schools in North Carolina was the greatest it had ever been. In 1910, [B]lack schools received about 17 percent of total school monies, even though African Americans accounted for about one-third of the school population.”). Douglas argues that the amount of money spent on African American students would continue to decline, such that by 1915, “the state spent an average \$7.40 for each [W]hite child and \$2.30 for each [B]lack child.” *Id.* at 14.

680. PERMAN, *supra* note 1, at 241.

681. See JOHN HALEY, CHARLES N. HUNTER AND RACE RELATIONS IN NORTH CAROLINA 142 (60 James Sprunt Studies in History & Political Sci.) (1987) (stating that by mid-1902 North Carolina Republicans “were well on their way toward making their party an all-White organization”).

ordinary modes by which other men's rights are protected.<sup>682</sup>

Granting American citizens of different backgrounds, including Americans of African descent, equal treatment in public accommodations was not granting special protections to Blacks.<sup>683</sup> Granting Americans of African descent protection against being racially gerrymandered into electoral "steroid districts"—all done in the interest of undermining the multi-racial coalition of which they are a part—is not making them special favorites of the law either.

As we have seen, the Court rejected a statutory right under Section 2 of the Voting Rights Act for minorities to establish coalition districts—because the *Gingles* preconditions were not met. It would be ironic if the Court were to hold that the legislature has a right to destroy effective coalition districts because of Section 2—even though the legislature's racial gerrymander does not meet the *Gingles* preconditions. If that were so, while minorities would have no special statutory right to assistance in forming multi-racial and multi-ethnic coalitions, the legislatures would have unique and special powers from Section 2 to justify destroying them.

The redistricting in this case faces courts and voters with an existential challenge to a fair, just, and republican form of government. The right to vote, to free speech, to associate, to form coalitions including multi-racial coalitions, and to a system where a majority—even a multi-racial and multi-ethnic majority—can reasonably expect to be able to elect a majority of legislators are sacred democratic values.<sup>684</sup> Using racial quotas to disrupt bi-racial and multi-ethnic coalitions for partisan purposes does not make the quotas constitutional. Claims that these "steroid districts" (50% or 50%+ BVAP racially-constructed districts to replace crossover or coalition districts where minority candidates were winning handily with coalition votes) are pro-equality and pro-democracy or are somehow a necessary device to advance the interest of African Americans, or are necessary to create a "safe harbor" for super-safe districts, are thin and cynical veneers.

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682. Civil Rights Cases, 109 U.S. 3, 31 (1883).

683. For an explanation of why the 1875 Civil Rights Act should not have been read as exclusively protecting Blacks, see Curtis, *Reflections on Albion Tourgee's 1896 View of the Supreme Court: A "Consistent Enemy of Personal Liberty and Equal Right"?*, *supra* note 117, at 59–60 (noting that the text and title of the Act should be read to protect groups in addition to Blacks, especially given 19<sup>th</sup> Century usage).

684. See U.S. CONST. amends. I, XIV, XV, XIX, XXIII, XIV.



## Appendix A: Chart of NC Party Affiliations from 1931–2013

N. C. General Assembly Party Affiliations					
Biennium	Senate Democrats	Senate Republicans	House Democrats	House Republicans	Unaffiliated
1931	48	2	118	8	
1933	48	2	112	8	
1935	48	2	107	13	
1937	48	2	112	8	
1939	48	2	114	8	
1941	48	2	114	6	
1943	48	2	108	12	
1945	47	3	108	14	
1947	48	2	107	13	
1949	48	2	109	11	
1951	48	2	110	10	
1953	48	2	106	14	
1955	49	1	110	10	
1957	47	3	107	13	
1959	49	1	118	4	
1961	48	2	105	15	
1963	48	2	99	21	
1965	49	1	108	14	
1967	43	7	94	26	
1969	39	12	91	29	
1971	43	7	96	24	
1973	35	15	85	35	
1975	49	1	111	9	
1977	46	4	114	6	
1979	45	5	105	15	
1981	40	10	96	24	
1983	44	6	102	18	
1985	38	12	82	38	
1987	40	10	84	36	
1989	37	13	74	46	
1991	36	14	81	39*	
1993	39	11	78	42	
1995	28	24	52	68	
1997	30	20	59	61	
1999	35	15	58	54	
2001	35	15	62	58	
2003	28^	22^	60**	60**	
2005	29	21	63	57	
2007	31	19	58	52	
2009	30	20	58	52	
2011	19	31	52	67	1
2013	17	33	43	77	

\* C. Russell elected as unaffiliated candidate in 1990 but changed registration to (R) before taking office in 1991.  
 \*\*61 (D) 59 (R) beginning 1/24/03 until 9/16/03 when M. Decker switched parties  
 ^ T. Moore switched from (D) to (R) on 11/24/03 to become 27(D) & 23(R)  
 updated 11/27/12

Appendix B: Redistricting Maps

