USING THE VOTING RIGHTS ACT TO DISCRIMINATE: NORTH CAROLINA'S USE OF RACIAL GERRYMANDERS, TWO RACIAL QUOTAS, SAFE HARBORS, SHIELDS, AND INOCULATIONS TO UNDERMINE MULTIRACIAL COALITIONS AND BLACK POLITICAL POWER

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INTRODUCTION

This Article (my second on the subject)[1] focuses on new developments in the ongoing saga of North Carolina's 2011 state legislative and congressional reapportionment and gerrymander. The earlier article included a review of devices, including changes in election laws, used in North Carolina in the late nineteenth and early twentieth centuries—at first, without explicit use of racial classifications—to undermine black voting and to disrupt the biracial Republican coalition.[2] The North Carolina legislature's 2011 redistricting and revision of statutes dealing with voting were also "reforms" with a rich potential to depress black voting and to disrupt the multiracial coalition of which blacks are a crucial part.

In redistricting, the legislature's 2011 Republican majority used racial gerrymanders with two numerical racial quotas.[3] The first racial quota required 50% plus total-black-voting-age-population ("TBVAP") districts where possible.[4] The second racial quota required black representatives in the legislature in proportion to the black voting-age population in the state.[5] Three examples show the quotas at work.

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1. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisited 1870–1905 and 2011–2013*, 33 LAW & INEQ. 53 (2015).

2. *Id.* at 56.

3. *See* Plaintiff-Appellants' Brief at app. 2, Dickson v. Rucho, 766 S.E.2d 238 (N.C. 2014) (No. 201PA12-2).

4. Dickson v. Rucho (*Dickson II*), 766 S.E.2d 238, 263 (N.C. 2014).

5. *Id.* at 255; Plaintiff-Appellants' Brief, *supra* note 3.

In Winston-Salem, white State Senator Linda Garrou, a Democrat, represented a district with a substantial, though not majority, black-voting-age population.[6] Black voters had preferred Senator Garrou over black opponents.[7] By a very slight change of the district lines, Senator Garrou was scooped out of her district.[8] Senator Robert Rucho—in charge of redistricting for the majority in the State Senate—admitted that Senator Garrou would not have been moved out of her district if she had been a black incumbent.[9] Black voters in Senator Garrou's district had preferred a senator of the wrong color—wrong from the perspective of a racial quota for black state senators in proportion to the black-voting-age population. So the senators who controlled redistricting made a slight adjustment to try to keep black voters from interfering with the racial proportionality quota by voting for the voters' preferred white state senator.

The first quota required, where possible, districts with 50% plus TBVAP.[10] In challenged districts, this racial quota required moving white or other nonblack voters out of a district slated to be a majority-black district, while retaining or adding black voters. For example, black Senator Dan Blue in Wake County represented a district that had a slight majority of whites and other voters who were not black.[11] Blue's district was overpopulated, exceeding the one-person, one-vote requirement.[12] Still, Senator Blue had defeated his Republican opponent by a two-to-one majority in 2010.[13] He was the preferred candidate of black voters but also had substantial white and other nonblack support.[14] To reach a racial quota of at least 50% plus TBVAP in Blue's district, white or other nonblack voters were overwhelmingly moved out of the district.[15] Despite Blue's landslide victory in 2010, the legislature moved 26,960 white citizens out of the district, but only moved 642 black citizens out of the district.[16] In this case, from the perspective of the 50% plus TBVAP racial quota for black districts, white voters had to

6. Affidavit of Linda Garrou, Dickson v. Rucho, No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013).
7. *Id.*
8. *Id.*
9. Deposition of Senator Robert Rucho at 193–94, Dickson v. Rucho, No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013).
10. *Dickson II*, 766 S.E.2d 238, 263 (N.C. 2014).
11. Plaintiff-Appellants' Reply Brief on Remand at 26–27, Dickson v. Rucho, No. 201PA12-3 (N.C. Dec. 18, 2015).
12. *Id.* at 26.
13. *See 2010 General Election Results*, N.C. ST. BOARD ELECTIONS, http://app.ncsbe.gov/webapps/elecresults/resultsby_contest_summary.asp?ED=11xx02xx2010AGENERAL2010REPUUS%2520SENATE&B1=Submit (last visited Jan. 29, 2016).
14. *See* Plaintiff-Appellants' Reply Brief on Remand, *supra* note 11, at 27.
15. *Id.*
16. *Id.*

be moved out, including a number who preferred Senator Blue.[17] Too many had been voting for a senator of the wrong color.

Congressional District 12 was only slightly overpopulated—by about 0.39%.[18] The black candidate who was preferred by black voters had been winning by whopping majorities since the creation of the District in 2001.[19] In Congressional District 12, the total TBVAP had been 43.77% in 2010.[20] Under the Rucho plan, it was increased to 50.7%.[21] Again, moving voters in and out based on race was required for quota purposes.[22] From the perspective of the quota, too many whites and other nonblack voters had chosen the black candidate.

From one perspective, these and similar changes are mysterious. How were they justified? How did the great 1965 Voting Rights Act ("VRA"), which was designed to restore political power to Americans of African descent, get transformed into the tool it had become in North Carolina in 2011? How did North Carolina's Supreme Court twice uphold the quotas? Will the United States Supreme Court—which is quite hostile to racial quotas or affirmative action in other situations, at least without compelling need—ultimately find these two quotas justified?

One way to think about the quotas is to judge them by their fruits and effects. In the South, Thomas Edsall reported Republican politicians privately discussing their plan to create a black Democratic Party and a mostly white Republican Party.[23] The dual quotas achieved systematic disruption of multiracial coalitions, wasted black votes, and decimated North Carolina's white Democratic legislators—taking a step toward the racial goal Edsall reported.

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17. *See id.* at 26–27.

18. *See Redistricting North Carolina's U.S. House Seats: District 12, 2001 v. 2011 Boundaries*, UNC CAROLINA POPULATION CTR., http://demography.cpc.unc.edu/wp-content/uploads/2015/11/NC_District_12.pdf (last visited Apr. 25, 2016).

19. *See 2008 General Election Results for District 12*, N.C. ST. BOARD ELECTIONS, http://results.enr.clarityelections.com/NC/7937/21334/en/vts.html?cid=165 (last updated Mar. 17, 2010, 10:59 AM) (showing that Representative Mel Watt won 71.56% of the votes in 2008); *2010 General Election Results for District 12*, N.C. ST. BOARD ELECTIONS, http://results.enr.clarityelections.com/NC/22580/41687/en/vts.html?cid=2012000 (last updated Dec. 20, 2010, 9:25 AM) (showing that Representative Mel Watt won 63.88% of the votes in 2010).

20. *Voting Age Population by Race and Ethnicity—District 12*, N.C. GEN. ASSEMBLY (May 9, 2011, 11:56 AM), http://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/VTD_SingleDistrict/Vap_PDF/rptVTDVap-12.pdf.

21. Plaintiff-Appellants' Reply Brief on Remand, *supra* note 11, at 36.

22. *See id.* at 10.

23. 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.

In North Carolina's 2011 redistricting, race was a major tool in the struggle for political domination.[24] The Republican gerrymander moved voters in and out of legislative and congressional districts to meet numerical racial quotas.[25] Racial means predominated.[26] The saga that follows is filled with ironies, not the least of which is appealing to racially polarized voting in places where it did not prevent election of candidates of choice of black voters to justify enhanced racial polarization of voting districts. The purported justification of these dual racial quotas—black districts with 50% plus TBVAP and blacks in the state legislature in proportion to the percent of black-voting-age population in the state—was to protect against successful and baseless suits pursuant to the VRA.

This Article focuses on the initial North Carolina Supreme Court decision upholding the legislature's quota-driven districting,[27] the United States Supreme Court decision vacating and remanding the case, and the North Carolina Supreme Court's second decision again upholding the racial quotas.[28] I also discuss *Harris v. McCrory*,[29] a February 2016, three-judge court decision from the Middle District of North Carolina that found the districting of Congressional Districts 1 and 12 violated the Fourteenth Amendment.[30]

While this Article is about racial gerrymandering in North Carolina, it also exemplifies a far broader problem: racial-political gerrymander techniques—which together with voting rules that disproportionally disadvantage young, minority, and poor voters—have been employed in many states, both in the North and South.[31] The results bear some resemblance to an earlier ugly and antidemocratic period in the history of North Carolina and the nation.

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24. *See Dickson II*, 766 S.E.2d 238, 263 & n.10 (N.C. 2014).

25. *See* Anne Blythe, *NC Supreme Court Reconsiders 2011 Redistricting*, NEWS & OBSERVER (Aug. 31, 2015, 6:15 PM), http://www.newsobserver.com/news/politics-government/state-politics/article32989182.html.

26. *See id.*

27. *Dickson II*, 766 S.E.2d at 242.

28. Dickson v. Rucho (*Dickson III*), 135 S. Ct. 1843 (2015) (mem.), *vacating* 766 S.E.2d 238 (N.C. 2014); Dickson v. Rucho (*Dickson IV*), No. 201PA12-3 (N.C. Dec. 18, 2015), *aff'g* No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013).

29. No. 1:13-cv-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016).

30. *Id.* at *2.

31. *See* Ari Berman, *Why the Voting Rights Act Is Once Again Under Threat*, N.Y. TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/06/opinion/why-the-voting-rights-act-is-once-again-under-threat.html; Chris Christoff & Greg Giroux, *Republicans Foil What Majority Wants by Gerrymandering*, BLOOMBERG BUS. (Mar. 18, 2013, 12:00 AM), http://www.bloomberg.com/news/articles/2013-03-18/republicans-foil-what-most-u-s-wants-with-gerrymandering.

There are supposedly two types of gerrymanders—political and racial.[32] A plurality of four justices found political gerrymander claims nonjusticiable[33] (a problem beyond the capacity of the justices to solve) and the rest have not yet agreed on a test for judging political gerrymanders. But, racial gerrymanders, if established, are subject to judicial review and correction as a violation of the Fourteenth Amendment's Equal Protection Clause.[34] Plaintiffs in such a constitutional challenge must prove that race predominated in the legislature's decision, though just what that meant has been murky.[35] There is an obvious tension between creatively reading the statutory command of the VRA to require more needless and wasteful (for black voters) majority-black districts and more blacks packed into black districts, on one hand, and the commands of the Equal Protection Clause of the Fourteenth Amendment on the other.

In North Carolina's history, when a multiracial political party has faced a one-race party (or a mostly one-race party), disrupting the multiracial coalition has been a key goal of the anticoalition party.[36] Of course, there are many tools in the anticoalition tool kit, such as gerrymanders; election laws that disproportionally disadvantage members of one race, today including laws reducing the number of early voting days; eliminating voting on the Sunday before election day; voter identification laws; and eliminating same-day registration.[37] Here, I focus on a particularly effective and an explicitly racial tool: creating majority-minority districts by adding additional black voters to districts where the candidate preferred by black voters was *already* winning *by whopping majorities*. This wastes black votes, making them less effective, and weakens the multiracial coalition.

The legislature appealed to the VRA, while undermining the ideals that gave rise to it; it used race with racial quotas as a

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32. *See generally* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011) (defining racial and political gerrymandering and discussing the interplay between the two).

33. Vieth v. Jubelirer, 541 U.S. 267, 305 (2004). In his concurring opinion in *Harris*, Judge Cogburn, while fully joining the court's opinion, noted that "unfettered [political] gerrymandering is negatively impacting our republican form of government." *Harris*, 2016 WL 482052 at 64–67 (Cogburn, D.J. concurring).

34. Shaw v. Reno, 509 U.S. 630, 658 (1993).

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

36. *See generally* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH 1888–1908 (2001) (discussing how southern states became enmeshed in debating disfranchisement and built electoral campaigns to implement it); Curtis, *supra* note 1 (describing methods used to disrupt the black-white Republican coalition in North Carolina during and after Reconstruction).

37. *See* Voter Information Verification Act, 2013 N.C. Sess. Laws 1505 (cutting the number of early voting days and prohibiting same-day registration).

primary tool to disrupt multiracial coalitions and to limit the political power of black voters and their allies.[38] In short, it used its dubious reading of the VRA to disadvantage black voters. That is the story of the legislature's 2011 majority-black-voting-age-population districts in North Carolina. The rest of the story is how the courts are responding. Of course, in the "right" circumstances, such racial quota techniques, if permitted, can be used against other races and other minorities as well.

This Article will look briefly at the historical background of the VRA and minority voting; at the actions of the North Carolina legislature; at the ensuing lawsuit; at the decision of the trial court;[39] at the vacated decision of the North Carolina Supreme Court;[40] and, finally, at the second of the two North Carolina Supreme Court decisions upholding the dual racial quotas—most recently, the case decided after remand from the Supreme Court for reconsideration in light of the decision in *Alabama Legislative Black Caucus v. Alabama*.[41] Still, in spite of the first reaction of the North Carolina Supreme Court to the remand, the *Alabama* decision may hold promise of an escape from the racial-gerrymandering, antidemocratic cul-de-sac in which we are currently imprisoned. That promise is enhanced by the recent federal decision in *Harris v. McCrory*, finding that the legislature's racial gerrymander of two congressional districts violated the Fourteenth Amendment.[42] Whether the North Carolina courts and ultimately the Supreme Court will eventually recognize the current racial gerrymander for what it is or will strike the political gerrymander remains an open question. My hope is that they will then apply strict scrutiny to the gerrymander and finally strike down the districting—but more about that later.

Finally, this Article makes some suggestions for reconceptualizing the law and following the deeper purposes of our democratic and egalitarian Constitution.[43] The Constitution has evolved over time, approaching—but falling ever short of—the

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38. *See* Blythe, *supra* note 25.

39. Dickson v. Rucho (*Dickson I*), No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013), *aff'd*, No. 201PA12-3 (N.C. Dec. 18, 2015).

40. *Dickson II*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015).

41. 135 S. Ct. 1257 (2015); *Dickson IV*, 781 S.E.2d 404 (N.C. 2015).

42. Harris v. McCrory, No. 1:13-cv-949, 2016 WL 482052, at *2 (M.D.N.C. Feb. 5, 2016).

43. *See* U.S. CONST. pmbl.; *id.* art. I, § 2; *id.* art. IV, § 4 (guaranteeing a republican form of government to the states); *id.* amend. XIII, § 1 (banning slavery); *id.* amend. XIV, § 1 (guaranteeing due process, liberties, privileges and immunities, and equal protection of the laws); *id.* amend. XV, § 1 (banning discrimination in voting based on race); *id.* amend. XVII (directing election of senators); *id.* amend. XIX (guaranteeing a woman's right to vote); *id.* amend. XXIV, § 1 (banning the poll tax in federal elections); *id.* amend. XXVI, § 1 (guaranteeing the right to vote to people eighteen years of age and older).

Declaration of Independence's ideals of equality, liberty, and popular sovereignty.[44]

I. A BRIEF HISTORICAL OVERVIEW

The story has twists and turns. During Reconstruction—for a brief time—a black-white Republican coalition won elections and governed North Carolina.[45] A national recession and political terrorism helped to drive the Republicans from power. Initially, the victorious, oligarchic, antidemocratic anticoalition party creatively used voting rules—which on their face seemed racially neutral—to hobble the black vote and the Republican Party that depended on it.[46] After a period of "Conservative" rule, a Republican-Populist coalition returned briefly to power in the 1890s.[47] During the initial period of Republican rule during Reconstruction, North Carolina had a constitution and election laws that were far more democratic.[48] When the "Conservatives" (later called "Democrats") regained power, they instituted many facially neutral but antidemocratic laws and devices designed to disproportionally disadvantage black and poor voters.[49] During the brief Republican-Populist period, more democratic rules and local government rules were restored.[50]

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44. Abraham Lincoln stated,

> The authors of the Declaration of Independence] meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

2 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy Blaser ed. 1953).

45. Curtis, *supra* note 1, at 79.

46. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 535–63, 575 (1988) (explaining multiple factors contributing to the waning of Southern Republicans).

47. 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, 58–59 (2014); *see* DEBORAH BECKEL, RADICAL REFORM: INTERRACIAL POLITICS IN POST-EMANCIPATION NORTH CAROLINA 152–54, 176 (2011).

48. Curtis, *supra* note 1, at 77–78.

49. *Id.* at 86–87.

50. HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 465, 515–16 (2d ed. 1963).

But in 1898, in an election marked by force and fraud,[51] the "Conservatives"—now ironically calling themselves "Democrats"—regained power.[52] Once again election laws were "reformed" in ways that, at first, seemed neutral but disadvantaged black voters—the most vulnerable part of the black-white Republican coalition.[53] The reforms included the institution of a poll tax and literacy tests, and other new voter qualifications difficult for many blacks to meet.[54] Election reforms, force, fraud, and a new white-only primary (which abandoned the veneer of racial neutrality) drove nails into the coffin of multiracial democracy.[55] In North Carolina, as in much of the South, blacks were effectively disenfranchised until 1965.[56]

Though blacks could not vote in much of the South, blacks in the North could.[57] Blacks had traditionally been Republican.[58] During and after the New Deal, an increasing number of blacks became Democrats.[59] President Harry Truman integrated the military[60] and set up the first national forerunner of the President's Committee on Civil Rights.[61] When the 1948 Democratic Party platform called for a broadly protective Civil Rights Bill, South Carolina and some other Deep South states bolted the Democratic Party.[62] Then-Democratic (later Republican) Senator Strom Thurmond ran as a candidate of the segregationist States Rights' Party.[63]

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51. *Id.* at 517–27.
52. *Id.* at 526–27.
53. *See id.*
54. Curtis, *supra* note 1, at 71–72.
55. LEFLER & NEWSOME, *supra* note 50, at 517–27.
56. Curtis, *supra* note 1, at 93.
57. The importance of the black vote in the North was a factor in the actions President Harry Truman took before the 1948 presidential election to advance civil rights. *E.g.*, DAVID MCCULLOCH, TRUMAN 590–91 (1992) at 590; *see also* 589–590 (describing the importance of the black vote in the North and how ideals and advantage influenced Truman aide Clark Clifford to advocate strong support for civil rights).
58. *Black Leaders During Reconstruction*, HISTORY, http://www.history.com/topics/american-civil-war/black-leaders-during-reconstruction (last visited Apr. 25, 2016).
59. Jesse Merkel, *How the GOP Lost the African American Vote, and Their Civil Rights Reputation*, POLICY.MIC (Aug. 1, 2012), http://mic.com/articles/12137/how-the-gop-lost-the-african-american-vote-and-their-civil-rights-reputation#.orh7bhbN6.
60. Exec. Order No. 9981, 3 C.F.R. 722 (1948).
61. Exec. Order No. 9808, 3 C.F.R. 590 (1946).
62. Alonzo L. Hamby, *1948 Democratic Convention: The South Secedes Again*, SMITHSONIAN MAG. (Aug. 2008), http://www.smithsonianmag.com/history-archaeology/1948-democratic-convention.html.
63. *Compare* John Woolley & Gerhard Peters, *Election of 1944*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1944#axzz2jLQoRCG0 (last visited Apr. 25, 2016) (showing the presidential nominees for the election of 1944 consisted of only Democratic and Republican party candidates), *with* John Woolley & Gerhard Peters, *Election of 1948*, AM.

In 1964, facing rising civil rights activism, sit-in movements, demonstrations, and a violent response to the struggle for equal rights that seared the conscience of the nation, President Lyndon B. Johnson and a bipartisan majority in Congress passed a civil rights act preventing discrimination in employment and places of public accommodation.[64] In 1965, as civil rights activists in the South struggled and died fighting for the right to vote, President Johnson pressed for a voting rights act, and Congress passed it.[65]

The right to vote was restored to blacks in the South and, soon after 1965, soon more and more blacks were voting.[66] In 1964, the Republican Party nominated Senator Barry Goldwater who opposed the Civil Rights Act of 1964 on "states' rights" grounds.[67] He later opposed the VRA of 1965.[68] This accelerated a long process by which the Democratic Party became a multiracial party and the Republican Party became mostly a one-race party.[69] While this is arguably changing to some degree—with the recent elections of Governor Bobby Jindal, an Indian-American, in Louisiana[70] and Senator Tim Scott, currently one of only two black United States Senators, in South Carolina[71]—blacks continue to be heavily Democratic. Most of the Deep South has become more Republican, and the national Republican Party has become more Southern, more conservative, and whiter thanks in part to racial districting.[72]

A. *The Strange Career of the Voting Rights Act of 1965*

The 1965 VRA is one of the great monuments of American democracy. President Johnson's speech urging Congress to pass it

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PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1948#axzz2jLQoRCG0 (last visited Apr. 25, 2016) (showing the presidential nominees for the election of 1948 consisted of Democratic, Republican, and States' Rights party candidates).

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

65. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

66. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 211–12 (rev. ed. 2009).

67. Curtis, *supra* note 1, at 93.

68. Joseph A. Loftus, *Goldwater Hits Vote-Rights Bill*, N.Y. TIMES, Apr. 2, 1965, at 24.

69. *See* Curtis, *supra* note 1, at 93–94.

70. Raakhi Jagga, *Why a Malerkotla Village Is Looking Forward to Greet 'President' Bobby Jindal*, INDIAN EXPRESS (June 25, 2015, 7:10 PM), http://indianexpress.com/article/india/india-others/why-a-malerkotla-village-is-looking-forwards-to-greeting-president-bobby-jindal/#sthash.343UXcwl.dpuf.

71. Ian Millhiser, *Only Four African Americans Have Ever Been Elected to the U.S. Senate in All of American History*, THINKPROGRESS (Oct. 17, 2013, 9:00 AM), http://thinkprogress.org/justice/2013/10/17/2795201/african-americans-elected-senate-american-history/.

72. *See* Curtis, *supra* note 1, at 95.

ranks as one of the greatest speeches in American history.[73] Initially, the VRA was aimed at, and swept away, obstructions to the right to vote for Americans of African descent.[74] It was a great success: after the Act, black registration and voting increased dramatically.[75] Still, in the early years, black candidates had difficulty getting elected to Congress and to state legislatures, especially in the South.[76] As a result, a curious alliance of Republicans, the American Civil Liberties Union ("ACLU"), the Department of Justice, and the National Association for the Advancement of Colored People ("NAACP"), among others, began to insist on a change to ensure that a greater number of blacks were elected to office.[77]

B. *The Evolution of Section 2*

The language of the VRA and subsequent court decisions evolved over time in the direction, in limited circumstances, of requiring black-majority or other majority-minority districts under Section 2 of the Act.[78] That was so where certain conditions were met.[79] Under the most recent amendment in 1982, Section 2 provides that:

> 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 . . . .[80]

The Act continues:

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73. *See Voting Rights Address*, C-SPAN, http://www.c-span.org/video/?153273-1/president-lyndon-johnson-address-voting-rights (last visited Apr. 25, 2016).

74. Samantha Lachman & Amber Ferguson, *The Voting Rights Act Is 50 Years Old Today. So Why Do Things Still Seem So Bad?*, HUFFINGTON POST (Aug. 6, 2015, 7:31 AM), http://www.huffingtonpost.com/entry/voting-rights-act-50-years_55c12a20e4b05c05b01f6a0c (stating that in the states with the most egregious voting rights records, black voter registration rose from 29.3% in 1965 to over 52% by 1967).

75. *Id.*

76. *See Black Elected Officials*, PBS, http://www.pbs.org/fmc/book/10politics4.htm (last visited Apr. 25, 2016).

77. David Tell, *Race to the Bottom*, WKLY. STANDARD, July 21, 2003, at 11, 11. For the Department of Justice's maximization policy and its repudiation by the court, see Harris v. McCrory, No. 1:13-cv-949, 2016 WL 482052, at *13 (M.D.N.C. Feb. 5, 2016).

78. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 17 (2009) (plurality opinion) (holding that only majority-minority districts, not crossover districts, could be required by § 2).

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

80. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act of 1965, 52 U.S.C. § 10301(a) (Supp. II 2015).

> A violation of subsection (a) is established if, based on the 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.[81]

This part of the Act was national in scope.[82] In *Thornburg v. Gingles*, the Supreme Court of the United States construed the Act to mean that a party challenging districting and seeking, for example, one or more black majority districts, was required to prove three things before the court should order a majority-minority district: (1) that the minority group is compact enough and large enough to constitute a majority in a single member district, (2) that the minority group is politically cohesive and able to agree on a preferred candidate or candidates, *and* (3)(a) that the majority "votes sufficiently as a bloc [(b)] to enable it . . . usually to defeat the minority's preferred candidate."[83] If, *and only if*, all of these three conditions were met—including *both* parts (a) and (b) of condition three—could a majority-minority district be ordered. In that case, courts were still to examine the totality of the circumstances.[84] I have added (a) and (b) to the third part of the *Gingles* conjunctive preconditions for purposes of clarity and economy. Both conditions are clearly required in precondition three and the (a) and (b) labels simply help to focus on both parts of the third precondition.

In early years, the NAACP, the ACLU, as well as other plaintiffs and the Department of Justice sought districts with a large TBVAP—so-called "max-black" districts—to assure election of a candidate preferred by black voters.[85] Often, these districts had a supermajority of TBVAP voters.[86] As years went on, it developed that, in many districts, supermajorities or even bare majorities of black voters were often not required in order for black voters to have

81. 52 U.S.C. § 10301(b) (Supp. II 2015).

82. *Id.* § 10301.

83. *Gingles*, 478 U.S. at 51.

84. *Dickson I*, No. 11 CVS 16896, slip op. at 19 (N.C. Super. Ct. July 8, 2013).

85. *See* David M. O'Brien, *A Civil Rights Ruling Dear to South's GOP*, L.A. TIMES (May 6, 2001), http://articles.latimes.com/2001/may/06/opinion/op-59876.

86. Linda Greenhouse, *Supreme Court Takes Case on Black Voting Districts*, N.Y. TIMES (Jan. 18, 2003), http://www.nytimes.com/2003/01/18/us/supreme-court-takes-case-on-black-voting-districts.html.

an equal opportunity—or, often in fact, a virtual certainty—to elect a candidate of their choice.[87]

In spite of general opposition to affirmative action and quotas, the Republican Party joined the NAACP and the ACLU in their effort to seek majority or supermajority black districts.[88] The political advantage to Republicans was clear: by concentrating supermajorities or even majorities of black voters in black districts, those in charge of drafting voting districts could undermine the ability of blacks to help elect like-minded Democrats who might be white—leaving black and white Democrats an isolated minority in the legislature and in congressional delegations.[89] The Court often decreed single-member districts instead of multimember districts.[90] These could help to elect more African-Americans. Figure 1 is an oversimplified model showing how this change could also be a boon for Republicans. Still, moving blacks into their own mostly black districts meant, among other things, that Republicans in Congress or state legislatures had few black constituents and less incentive to respond to concerns of many black voters.

FIGURE 1: DISTRICT A (42% REPUBLICAN, 58% DEMOCRAT). AS SINGLE MEMBER DISTRICTS, THERE ARE THREE REPUBLICANS AND ONE DEMOCRAT. AS ONE MULTIMEMBER DISTRICT, THERE ARE FOUR DEMOCRATS AND NO REPUBLICANS.

District 1 53% Republican 47% Democrat	**District 2** 53% Republican 47% Democrat
District 3 53% Republican 47% Democrat	**District 4 (minority majority district)** 10% Republican 90% Democrat

87. 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, 1537–38 (2002).
88. Tell, *supra* note 77.
89. O'Brien, *supra* note 85.
90. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

C. Section 5 Undergoes a Significant Overhaul in the 2000s

Section 5 was not national in scope, instead requiring states with VRA districts to receive preclearance before making changes to voting laws.[91] The covered districts were initially those in which fewer than 50% of eligible voters voted in the 1964 election.[92] In 2006, Section 5 was amended to provide that:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing 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."[93]

States could, and Alabama did, argue that any diminution of the TBVAP in a district was a forbidden retrogression—even if such reduction had minimal impact on minority voters' equal opportunity to elect their preferred candidate of choice.[94] As discussed later, this stringent interpretation produced rigid, potentially problematic approaches to Section 5 compliance.[95]

D. North Carolina: Electoral Triumph Followed by Intense Racial Gerrymandering

The Republican Party won a smashing victory in the 2010 off-year election.[96] Because the legislators elected in 2010 would be responsible for the drawing of new districts for North Carolina's congressional delegation and for the seats in the state senate and house of representatives, supporters of Republican candidates poured an unprecedented amount of cash into state legislative races[97] and into a supposedly nonpartisan judicial race.[98] The

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91. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304 (Supp. II 2015)).

92. *Id.* § 4(b), 79 Stat. at 438 (codified as amended at 52 U.S.C. § 10303(b) (Supp. II 2015)), *invalidated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

93. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(b), 120 Stat. 577, 580–81 (2006) (codified as amended at 52 U.S.C. § 10304(b) (Supp. II 2015)).

94. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1287 (2015) (Thomas, J., dissenting).

95. *See infra* pp. 454–56.

96. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2010, at 10, 12 (2011), http://www.fec.gov/pubrec/fe2010/federalelections2010.pdf; *2010 General Election Results*, *supra* note 13.

97. Jane Mayer, *State for Sale*, NEW YORKER (Oct. 10, 2011), http://www.newyorker.com/magazine/2011/10/10/state-for-sale.

98. Alan Suderman & Ben Wieder, *Secret Money Is Now Swaying State Judicial Elections*, MOTHER JONES (June 13, 2013, 5:40 AM), http://www.motherjones.com/politics/2013/06/state-supreme-court-election-spending.

Republican success in legislative races was dramatic.[99] In the state house, Republicans gained 15 seats—from 52 to 67—and in the senate they gained 11 seats—from 20 to 31.[100] Meanwhile, senate Democrats dropped from 30 to 19 seats and house Democrats dropped from 68 to 52.[101]

Some black Democrats lost seats, as did white Democrats.[102] In the state senate, black Democrats lost 3 of 10 seats and white Democrats lost 8, falling from 20 white senators to 12—the white senators lost 40% of their seats; black senators lost 30%.[103] In the state house, white Democrats dropped from 46 to 33, a loss of 13 seats; black Democrats fell from 22 seats to 19 seats, a loss of 3.[104] These results occurred under the previous districting plan that had been passed by Democrats.[105]

These results raise an interesting issue. For equal opportunity to elect a candidate, what should we compare? We should compare the comparative opportunity of white and black Democrats. In 2010, even with some defeats, blacks had a more than equal opportunity.

In any case, the problem for the newly elected Republicans was to lock in and improve these results, and to make the gains as impervious as possible to later elections.

In the 2008 congressional elections, Democrats won 54.7% of the statewide vote and Republicans won 45.3%.[106] Elections are by congressional districts. And in 2008, Democrats won 8 of the 13 seats and Republicans won 5.[107] In the 2010 election, before the legislature's racial gerrymander, but in a bad year for Democrats across the country, Democrats won 7 seats of 13 and Republicans won 6.[108] The 2012 and 2014 congressional elections took place

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99. *See supra* note 96.

100. *N.C. General Assembly Party Affiliations*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/library/Documents/GAPartyAffiliations.pdf (last updated Jan. 16, 2015).

101. *Id.*

102. Curtis, *supra* note 1, at 58 fig.1.

103. *Id.*

104. *Id.*

105. *House Voting Roll Call on 2003 Districting Plan*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2003E1&sChamber=H&RCS=8 (last visited Apr. 25, 2016); *Redistricting Archives*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/representation/Content/Archives.aspx (last visited Apr. 25, 2016); *Senate Voting Roll Call on 2009 Districting Plan*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2009&sChamber=S&RCS=556 (last visited Apr. 25, 2016).

106. *2008 General Election Results*, N.C. ST. BOARD ELECTIONS, http://results.enr.clarityelections.com/NC/7937/21334/en/summary.html (last updated Mar. 17, 2010).

107. *Id.*

108. *2010 General Election Results*, *supra* note 13.

under the 2011 redistricting.[109] In 2012, Democrats won 50.9% of the popular vote statewide and Republicans won 49.1%.[110] Yet, in a tribute to the power of their gerrymander, Republicans won 9 of 13 congressional seats.[111] In 2014, the congressional statewide vote was 44.2% Democratic and 55.8% Republican,[112] with Republicans winning 10 of 13 seats.[113]

Similar results came about in the state legislature. In the 2012 election, Republicans held 77 seats in the House of Representatives, while Democrats held 43.[114] This majority largely stayed intact in 2014; Republicans held 74 seats to 46 held by Democrats.[115] In the state senate, the story was the same. In 2012, Republicans won 33 of 50 seats, and Democrats won the remaining 17.[116] In 2014, this margin increased with Republicans taking home 34 seats, to the Democrats' 16.[117]

How are these remarkable results to be explained? There are, no doubt, multiple causes. Racial gerrymandering is an important one. With computer programs and demographic information available to the line drawers for the legislative majority, precincts or voter tabulation districts, or even city blocks, can be divided so as to add voters of one selected race to a district and to subtract voters of other races.[118] What follows may not be the only reason for

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109. Gary D. Robertson, *North Carolina Justices Ponder 2011 Redistricting Again*, CITIZEN-TIMES (Aug. 31, 2015, 6:44 PM), http://www.citizen-times.com/story/news/politics/2015/08/31/north-carolina-justices-ponder-2011-redistricting-again/71489038/.

110. *2012 General Election Results*, N.C. ST. BOARD ELECTIONS, http://app.ncsbe.gov/webapps/elecresults/resultsby_contest_summary.asp?ED=11xx06xx2012AGENERAL2012REPUUS%2520SENATE&B1=Submit (last visited Apr. 25, 2016).

111. *Id.*

112. *See 11/04/2014 Official General Election Results—Statewide*, N.C. ST. BOARD ELECTIONS, http://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0 (last visited Apr. 25, 2016). In 2014, the Republican candidate for congressional District 9 ran unopposed. *Id.* If this election is not included in the statewide total, Republicans won 53% of the congressional statewide vote while Democrats won 47%. *See id.*

113. *Id.*

114. *See 2012 General Election Results*, *supra* note 110.

115. *See 11/04/2014 Official General Election Results—Statewide*, *supra* note 112.

116. *See 2012 General Election Results*, *supra* note 110.

117. *See 11/04/2014 Official General Election Results—Statewide*, supra note 112.

118. Christopher Ingraham, *This Computer Programmer Solved Gerrymandering in His Spare Time*, WASH. POST: WONKBLOG (June 3, 2014), http://www.washingtonpost.com/news/wonkblog/wp/2014/06/03/this-computer-programmer-solved-gerrymandering-in-his-spare-time/ (detailing how algorithms and computers can be used to create districts for the redistricting process).

Republican success in 2012 and 2014 in the legislature, but it is a major part of it.

The Republican leaders who managed redistricting gave explicit marching orders to their line drawers.[119] They were to pursue two racial quotas.[120] Though, of course, that word was avoided in favor of a euphemism—a substitution of a mild or indirect expression for a blunt one.[121] To the greatest extent possible, the legislature was to have black senators and representatives in proportion to the black-voting-age population of the state (quota one).[122] And while pursuing this quota, line drawers had another quota: to create as many as possible black-majority districts with 50% plus TBVAP.[123]

As districting was being considered, Senator Rucho and Representative David Lewis made clear that they were not open to modifying their numerical racial quotas.[124] The following statement comes from Senator Rucho and Representative Lewis. It is quoted in the plaintiffs' brief on appeal, though the facts are uncontested. By the Rucho-Lewis edict, changes in minority-majority districts to make them more compact could be considered, but the two racial quotas must not be deviated from. These were not negotiable:

> However, we would entertain any specific suggestions from the Black Caucus or others identifying more compact majority black populations to form the core of alternative majority black districts, provided the total districts proposed provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Strickland v. Bartlett*, and be drawn at a level that constitutes a true majority of black voting age population.[125]

In fact, as we will see, the United States Supreme Court did not require 50% plus TBVAP districts unless racially polarized voting frustrated the ability of black voters to elect the candidates of their choice.[126]

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119. *Dickson II*, 766 S.E.2d 238, 263 (N.C. 2014).

120. *See* Plaintiff-Appellants' Brief, *supra* note 3.

121. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 450 (2d ed. 1997).

122. *See Dickson II*, 766 S.E.2d at 255; Plaintiff-Appellants' Brief, *supra* note 3.

123. *Dickson II*, 766 S.E.2d at 247–48; *see* Plaintiff-Appellants' Brief, *supra* note 3.

124. Plaintiff-Appellants' Brief, *supra* note 3, at 11–12.

125. *Id.* at app. 18 (emphasis added).

126. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (setting out the preconditions of a claim that multimember districting impedes minority voters' ability to elect their preferred candidates); Bartlett v. Strickland, 556 U.S. 1, 24 (2009) (plurality opinion). In language relevant to "safe harbor" or "inoculation" theories used in an attempt to justify a minority-majority district to protect against a meritorious VRA suit, the plurality opinion noted that such a district is required by Section 2 only if "the other *Gingles* factors are also satisfied." *Id.*

The result neared quota perfection. Twenty-one percent of the state's voting-age population is black.[127] Eighteen percent of the senate seats and 19.1% of the house seats were in 50% plus TBVAP districts.[128] The districting produced 20% black state senators and 18.3% black state house members.[129]

As the consequences of packing blacks into black districts have become starker, the parallel goals between the Republican Party, black legislators, and the NAACP have, in a number of states, diverged.[130] So it has been in North Carolina and Alabama.[131] The North Carolina plaintiffs—a group including black and white legislators, citizens, and the state NAACP—sued.[132] They lost in the state trial court,[133] and they lost in the state supreme court,[134] but the U.S. Supreme Court vacated that decision and remanded it to the state supreme court for further consideration in light of the U.S. Supreme Court's recent decision in *Alabama*.[135] After the remand for reconsideration on December 18, 2015, the North Carolina Supreme Court again approved the legislature's districting.[136]

II. FLASHBACK: THE DECISIONS OF THE TRIAL COURT (*DICKSON I*) AND THE NORTH CAROLINA SUPREME COURT (*DICKSON II*) IN RESPONSE TO THE PLAINTIFFS' CHALLENGES TO THE REDISTRICTING PLAN

Before discussing the *Alabama* case that produced a remand to the North Carolina Supreme Court, it is useful to flesh out some of the factual background and to look at the decisions against the plaintiffs in the North Carolina courts. The plaintiffs' initial brief to the North Carolina Supreme Court and their brief on remand set

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at 18. In addition, the plurality noted that "[i]t is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Id.* at 16. For a more extended discussion of *Strickland*, see Curtis, *supra* note 1, at 104–09.

127. *Dickson I*, No. 11 CVS 16896, slip op. at 26 (N.C. Super. Ct. July 8, 2013).

128. *See id.* at 25 tbls.1 & 2.

129. *See* Curtis, *supra* note 1, at 58 fig.1.

130. *See* Greenhouse, *supra* note 86.

131. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1263–64 (2015); *Dickson II*, 766 S.E.2d 238, 257 (N.C. 2014).

132. *Dickson II*, 766 S.E.2d at 243.

133. *Dickson I*, No. 11 CVS 16896, slip op. at 5 (N.C. Super. Ct. July 8, 2013).

134. *Dickson II*, 766 S.E.2d at 242.

135. *Dickson III*, 135 S. Ct. 1843 (2015) (mem.), *vacating* 766 S.E.2d 238 (N.C. 2014).

136. *Dickson IV*, 781 S.E.2d 404, slip op. at 83–84 (N.C. 2015), *aff'g* No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013).

out some ways in which the districts they challenged had been created.[137] The pattern shows the quotas at work:

TABLE 1: BVAP IN VARIOUS DISTRICTS[138]

District	BVAP set in 2003	BVAP set in 2011	% Increase in 2011
SD 14 (Wake County)	41.62%	51.27%	9.65%
SD 20 (Durham County)	44.64%	51.04%	6.40%
SD 21 (Cumberland County)	44.93%	51.53%	6.60%
District 28 (Guilford County)	47.20%	56.49%	9.29%
SD 38 (Mecklenburg County)	46.97%	52.51%	5.54%
SD 40 (Mecklenburg County)	35.43%	51.84%	16.41%
HD 12 (Craven, Lenoir, Greene Counties)	46.54%	50.60%	4.06%
HD 21 (Wayne, Sampson, Duplin Counties)	46.25%	51.90%	5.75%
HD 29 (Durham County)	39.99%	51.34%	21.35%
HD 31 (Durham County)	47.31%	51.81%	4.68%
HD 48 (Richmond, Scotland, Hoke, Robeson Counties)	45.56%	51.27%	5.75%
HD 99 (Mecklenburg County)	41.26%	54.65%	13.39%
HD 107 (Mecklenburg County)	47.14%	52.25%	5.11%

137. *See* Plaintiff-Appellants' Brief, *supra* note 3, at app. 62–75; Plaintiff-Appellants' Brief on Remand at 36–38, *Dickson IV*, 781 S.E.2d 404 (N.C. 2015).
138. Plaintiff-Appellants' Brief on Remand, *supra* note 137.

TABLE 2: VOTING PERCENTAGE FOR BLACK VOTERS' CANDIDATES OF CHOICE[139]

	2004	2006	2008	2010
SD 14 (Wake County)	64.1%	65.9%	69.45%	65.9%
SD 20 (Durham County)	90.2%	Unopposed	73.58%	73.11%
SD 21 (Cumberland County)	61.21%	61.6%	Unopposed	67.6%
District 28 (Guilford County)	Unopposed	Unopposed	Unopposed	47.84%
SD 38 (Mecklenburg County)	Unopposed	Unopposed	73.33%	68.67%
SD 40 (Mecklenburg County)	57.88%	61.47%	66.96%	58.16%
HD 12 (Craven, Lenoir, Greene Counties)	64.69%	66.27%	69.13%	60.20%
HD 21 (Wayne, Sampson, Duplin Counties)	Unopposed	Unopposed	Unopposed	65.59%
HD 29 (Durham County)	Unopposed	Unopposed	90.37%	Unopposed
HD 31 (Durham County)	85.79%	Unopposed	Unopposed	75.5%
HD 48 (Richmond, Scotland, Hoke, Robeson Counties)	Unopposed	Unopposed	Unopposed	73.75%
HD 99 (Mecklenburg County)	x	x	65.32%	72.01%
HD 107 (Mecklenburg County)	68.2%	Unopposed	75.26%	67.26%

The plaintiffs also challenged two congressional districts that did not purport to be VRA districts and two legislative districts.[140] The legislature increased the TBVAP in Congressional District 12

139. *Id.*
140. *Dickson II*, 766 S.E.2d 238, 256 (N.C. 2014).

and in Congressional District 1.[141] In Congressional District 12, the total TBVAP had been 43.77% in 2001.[142] Under the Rucho plan, it was increased to 50.66%,[143] though the candidate preferred by black voters had been winning by hefty margins since the 2001 creation of the District.[144] In Congressional District 1, the TBVAP was increased from 48.63% in 2001 to 52.65% under the Rucho plan.[145]

The picture of prior districts and election results is complicated because the districts in question were often underpopulated or overpopulated by one-person, one-vote standards.[146] Congressional District 12 was only minimally overpopulated by 0.39%; it had an excess of only 2,847 voters.[147] District 1 on the other hand was 13.30% underpopulated and needed an additional 97,563 voters.[148] State house districts ranged from an underpopulation of 2.52% to 36.04% and an overpopulation ranging from 0.10% to 41.34%.[149] Likewise, state senate districts ranged from an underpopulation of 1.98% to 14.43% and an overpopulation ranging from 21.92% to 28.59%.[150]

Though most districts required population adjustments, adjustments keyed to the two racial quotas were not required, and in a few cases, as in Congressional District 12, no substantial adjustment—except to meet a rigid racial quota—was needed.[151] Still, Congressional District 12 was significantly altered in effect to comply with a rigid racial quota.

A. *The Racial Gerrymander in the Trial Court (*Dickson I*)*

With reference to the twenty-six alleged VRA districts and the four as to which that claim was not made, the plaintiffs had made three major federal claims. First, race had predominated in the

141. *See* Complaint at 92, 96–97, *Dickson I*, No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013).

142. *Id.* at 97.

143. *Id.*

144. *See id.* (showing that Representative Mel Watt won 71.55% of the votes in 2008 and 63.88% of the votes in 2010).

145. *Id.* at 92.

146. Plaintiff-Appellants' Brief, *supra* note 3, at app. 20.

147. Exhibit 3, North Carolina v. Holder, No. 1:11-cv-01592 (D.D.C. Nov. 8, 2011), http://redistricting.lls.edu/files/NC%20preclear%2020110902%20congress.pdf.

148. *Id.*

149. Exhibit 2, *Holder*, No. 1:11-cv-01592, http://redistricting.lls.edu/files/NC%20preclear%2020110902%20house.pdf.

150. Exhibit 1, *Holder*, No. 1:11-cv-01592, http://redistricting.lls.edu/files/NC%20preclear%2020110902%20senate.pdf.

151. *See* Exhibit 3, *infra* note 182 (showing that Congressional District 12 was overpopulated by only 0.39%).

creation of these districts.[152] Second, because of the use of race, strict scrutiny was required, meaning that the changes in the districts by adding more blacks and subtracting whites and other minorities had to be necessary to satisfy a compelling state interest and be narrowly tailored to achieve that interest.[153] Third, and finally, no compelling interest was present: complying with Section 2 of the VRA might be a compelling state interest, but *only if* all parts of the *Gingles* preconditions are met.[154] As evidenced by the thirteen districts referenced above, though there was some racial polarization, the preferred candidates of black voters were consistently winning by quite a lot, in spite of any racial polarization.[155] Because *Gingles* actually requires the majority voting bloc *usually* to prevent election of the preferred candidate of black voters in the district in question, precondition 3(b) was missing. So, no violation of the VRA was present to be cured.

Anticipatory protection against a VRA suit requires a strong basis in evidence that the possibility of a violation existed at the time of the redistricting.[156] Focusing intensively on each district, it is hard to believe that this was consistently so. Retrogression under Section 5 of the VRA, if still functioning,[157] was not relevant at least for many of the districts. That was so since maintaining the prior black-voting-age population did not threaten to diminish the ability of black voters to elect their candidate of choice. For example, that seems starkly true for Congressional District 12.

As to most of the challenged districts, the *Dickson I* trial court found a racial classification and applied strict scrutiny.[158] In setting out its understanding of the law, the trial court stated that strict scrutiny was appropriate "when plaintiffs establish[ed] that 'all other legislative districting principles were subordinated to race and that race was the predominant factor motivating the legislature's redistricting decision.'"[159] For strict scrutiny to apply, the court explained that the districts' population shifts must not be

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152. *See Dickson I*, No. 11 CVS 16896, slip op. at 14–15 (N.C. Super. Ct. July 8, 2013); Complaint, *supra* note 141 (alleging throughout that race was the predominant factor behind the redistricting).

153. *See* Complaint, *supra* note 141, at 24 ("District 4 constitutes an unconstitutional racial classification unless it is narrowly tailored to meet a compelling interest.").

154. *Dickson I*, slip op. at 18; Complaint, *supra* note 141.

155. *See supra* Table 2.

156. *Dickson II*, 766 S.E.2d 238, 249 (N.C. 2014).

157. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2648 (2013) ("The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional."); *see also* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015) ("[W]e do not here decide whether . . . continued compliance with § 5 remains a compelling interest . . . .").

158. *Dickson I*, slip op. at 15.

159. *Id.* at 13 (quoting Cromartie v. Hunt, 133 F. Supp. 2d 407 (2000)).

explainable on nonracial grounds, and plaintiffs must show that "the legislature neglected all traditional redistricting criteria such as compactness, continuity, respect for political subdivisions and incumbency protection."[160] In order to determine that race was the predominant factor, short of the legislature outright admitting it, the court would be required to rely on a factual inquiry into circumstantial and direct evidence.[161] Turning to the particulars of North Carolina's redistricting, the court wrote:

> The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"]. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.[162]

So the trial court concluded strict scrutiny was required, but it concluded that the plan passed strict scrutiny.[163]

B. Dickson v. Rucho *in the State Supreme Court (Round 1)*

The North Carolina Supreme Court held that the trial court had found too few facts to justify a finding that race predominated, citing a case[164] where the Supreme Court of the United States found race had not predominated and had issued cautions about finding race

160. *Id.* (first citing *Cromartie*, 133 F. Supp. 2d at 407; then citing Bush v. Vera, 517 U.S. 952, 959 (1996)).
161. *Id.* at 13–14 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).
162. *Id.* at 14–15 (footnotes omitted) (citations omitted).
163. *Id.* at 15, 44.
164. In *Dickson II*, 766 S.E.2d 238, 246 (N.C. 2014), the North Carolina Supreme Court quotes *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995), in its warning, stating "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus" (alteration in original).

predominated.[165] The North Carolina Supreme Court announced that "[a]s a court considers which standard of review is appropriate, it should be mindful of the Supreme Court's observation that 'courts must "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race."'"[166]The North Carolina court continued: "A party challenging a redistricting plan has the burden of establishing that race was the predominant motive behind the state legislature's action."[167]

In *Miller,* the Supreme Court stated that:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."[168]

The North Carolina Supreme Court continued: "'Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.' If, on the other hand, the plans are not predominantly motivated by improper racial considerations, the court defaults to the rational basis test."[169]

Still, the facts highlighted by the trial court together with other facts in the record supported finding racial districting predominated. First, Senator Rucho and Representative Lewis, who were in charge of developing the redistricting plans for the state house and senate, gave instructions to the consultant hired by the legislature.[170] As noted above, the instructions were first, to see that the "voting rights districts" to be created contained more than half voting-age black citizens and second, to see to it that black representatives in the state senate and house would be proportional to the state's

165. *Dickson II,* 766 S.E.2d at 246–47 (citing *Miller,* 515 U.S. at 915–16).

166. *Id.* at 245 (quoting Easley v. Cromartie, 532 U.S. 234, 242 (2001)).

167. *Id.* at 247 (citing *Miller,* 515 U.S. at 916).

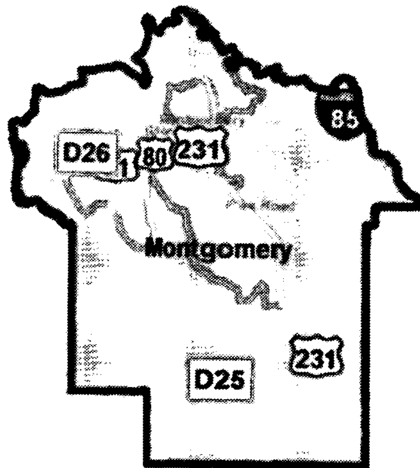
168. *Id.* at 244–45 (quoting *Miller,* 515 U.S. at 916).

169. *Id.* at 244 (alteration in original) (citation omitted) (first quoting Stephenson v. Bartlett, 562 S.E.2d 377, 393 (N.C. 2002); and then citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

170. *Id*at 263.

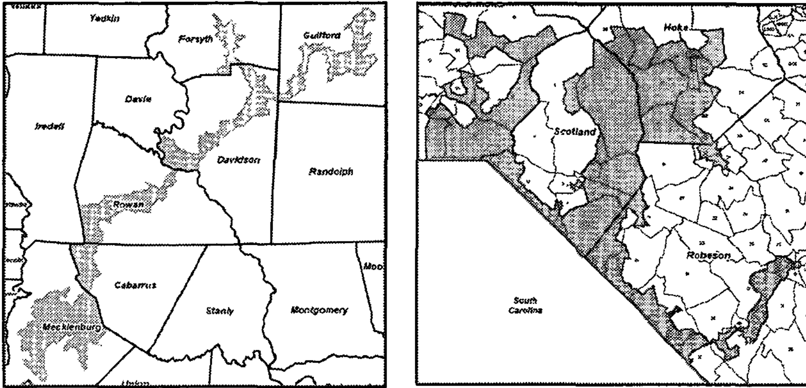
black-voting-age population.[171] Second, Representative Lewis and Senator Rucho issued a public statement saying they would consider, as alternatives, more compact black districts but only if the districts had a majority-black-voting-age population and met their proportionality test.[172] Third, the plaintiffs had asserted that during much of the litigation prior to remand, defendants had not contended that traditional districting criteria had been "more important than race in assigning voters to the challenged districts or explain those assignments better than race."[173] Finally, the shape of the districts supported a finding that race predominated, as did the extraordinary number of split precincts—one single district split forty-three precincts, for example.[174] The following district maps, taken from the plaintiffs' brief on remand, illustrate some of the unusual shapes of the districts. First, the reader sees District 26 focused on in the case from Alabama; then some of the North Carolina districts contested in the *Dickson* case:

FIGURE 2: A MAP OF ALABAMA'S SENATE DISTRICT 26, WHICH THE SUPREME COURT OF THE UNITED STATES CITED AS AN EXAMPLE OF IRREGULAR DISTRICT SHAPE.[175]



171. *Id.*
172. *Id.* at 267.
173. Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 11. Defendants, in their brief on remand, assert that the predominant motivation was compliance with the Whole County Provision of the North Carolina Constitution, but otherwise still fail to address the traditional principles referenced above. *See* Defendants-Appellees' Brief on Remand at 48, *Dickson IV*, 781 S.E.2d 404 (N.C. 2015).
174. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 11–12.
175. *Id.* at app. 14.

FIGURE. 3: MAPS OF NORTH CAROLINA CONGRESSIONAL DISTRICT 12 (LEFT) AND HOUSE DISTRICT 48 (RIGHT).[176]



The North Carolina Supreme Court agreed with the defendants that the trial court had not correctly found that race predominated in setting the districts.[177] It held that the situation called for careful and full consideration of the facts, factors, and the finding that race predominated was truncated.[178] The State Supreme Court noted that the legislature faced the tension between the Fourteenth Amendment's general ban on racial classifications and a VRA that sometimes required them.[179] The court also noted that all sorts of factors could have been involved—respect for political subdivisions, compactness, one person one vote, and others.[180] Still, the court found no remand to the trial court was needed.[181]

The North Carolina Supreme Court in *Dickson II*, assuming for the sake of argument that race predominated in populating the contested districts, noted that racial predominance would simply require strict scrutiny: a compelling state interest and means narrowly tailored to that interest.[182] These, the trial court had found, were met, and the North Carolina Supreme Court, with some elaboration, agreed.[183] The court (under the heading of "Compelling Governmental Interest") listed compliance with Section 2 of the VRA as the required compelling interests.[184] This compliance was achieved through: "[w]here possible, establishment of VRA districts

176. *Id.* at app. 29, 33.
177. *Dickson II*, 766 S.E.2d at 247.
178. *Id.* at 246–47.
179. *Id.* at 245.
180. *Id.* at 246.
181. *Id.* at 247.
182. *Id.* at 244, 247.
183. *Id.* at 256.
184. *Id.* at 248.

having a Total Black Voting Age Population above fifty percent, [and] . . . [e]xploration of 'the possibility of establishing a sufficient number of VRA legislative districts to provide African American voters with rough proportionality in [the legislature].'"[185]

Before continuing with the North Carolina Supreme Court's analysis in *Dickson II*, it is useful to review again both Sections 2 and 5 of the VRA. As to Section 2, the Supreme Court of the United States and the North Carolina Supreme Court have held that for a successful suit under the VRA to compel creation of a VRA district, the proposed minority district had to have a majority of black (or of whatever minority group is at issue) voting-age residents.[186] Each of the other *Gingles* conditions also needed to be met, including that (a) the majority "votes sufficiently as a bloc [(b)] to enable it . . . usually to defeat the minority's preferred candidate."[187] If, and only if, the three conditions were met, courts were also then to look at the totality of the circumstances.[188]

But what if candidates preferred by black voters were already prevailing in a district that was less than majority-minority? It seems that voting rights suits generally had not been brought since 2003 against districts where the black candidate of choice was prevailing quite handily. Of course, such districts had not needed more black voters to be added to the district to be able to elect candidates of their choice.[189] The lack of many lawsuits against the challenged districts before the 2011 racial bulking up is puzzling since Republicans had every reason to bring VRA cases against such districts. Why did they not do so, with so much political advantage at stake? Of course, they did not yet control the legislature, but a court order to put more blacks into the districts would help them in any case.

The reason seems clear: the Republicans did not bring many suits challenging such districts because they could not establish part 3(b) of the *Gingles* preconditions.[190] Since the minority candidates were consistently winning, and typically by a very large margin, it was impossible to show they were usually being defeated—or so it seemed.[191]

The North Carolina Supreme Court took a different tactic. It did not focus in detail on the third *Gingles* precondition in each

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185. *Id.*

186. *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986); Pender Cty. v. Bartlett, 649 S.E.2d 364, 367 (N.C. 2007).

187. *Gingles*, 478 U.S. at 51; *Pender Cty.*, 649 S.E.2d at 367.

188. *Gingles*, 478 U.S. at 50–51; *Pender Cty.*, 649 S.E.2d at 369.

189. Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2210 (2003).

190. *Id.* at 2220 n.67.

191. *See supra* Table 2.

predecessor of the later bulked-up majority-minority district.[192] The *Dickson II* court did not look in detail at whether there was a strong basis in evidence that the prior districts would have justified a successful VRA suit because bloc voting in those districts was consistently frustrating the black minority's choice.[193] Instead, perhaps it looked at whether the newly created racial-quota districts would be safe from a challenge under the VRA once they were enacted.[194] This should be the wrong question to ask. The court should have instead asked, did the VRA require creation of these districts? The flawed safe-from-challenge approach would fit with the inoculation theory used by the court, discussed later in this Article.[195] The plaintiffs' challenge, of course, was a Fourteenth Amendment Equal Protection challenge, so it also involved whether there is a compelling interest under the VRA.[196] A compelling interest would require a strong basis in evidence to show that a minority group's preferred candidate would be defeated because of bloc voting.[197]

Admittedly, what follows is a bit obscure, at least to this writer. Here is what the North Carolina Supreme Court said in *Dickson II*:

> Thus, to establish a compelling interest in complying with section 2 when the redistricting plans were developed, the legislature at that time must have had a strong basis in evidence that the Total Black Voting Age Population in a geographically compact area was fifty percent plus one of the area's voting population. Such evidence would satisfy the first *Gingles* precondition. *In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in Gingles*.[198]

Next, the *Dickson II* court cited trial court findings of fact that each of the newly created quota districts had a total TBVAP exceeding 50%.[199] The court asserted that "the maps [of the new districts presumably] are sufficient to satisfy the second and third *Gingles* preconditions, as each district demonstrates racially polarized voting according to Dr. Brunell's analysis."[200] This should be a clear error of law because polarized voting by itself is not

192. *See Dickson II*, 766 S.E.2d 238, 250 (N.C. 2014) (referring to the third precondition by combining it with the second precondition and assuming that the presence of racial polarization is sufficient to satisfy both preconditions).

193. *See id.* at 249–50.

194. *See id.* at 249.

195. *See infra* pp. 143–47.

196. *Dickson II*, 766 S.E.2d at 248.

197. *Id.* at 249 (citing Shaw v. Hunt, 517 U.S. 899, 910 (1996)).

198. *Id.* at 249–50 (emphasis added) (citations omitted).

199. *Id.* at 251–52.

200. *Id.* at 252.

enough.[201] What the defendants' experts never testified to, what the trial court never found, and what the *Dickson II* state supreme court opinion never said, was that in each of the 2003 or potential 2011 districts there had been racially polarized voting—such that the candidate of choice of black voters was, or would be, *usually* defeated, so these districts needed to be changed to avoid Section 2 liability. The court never said these things for a simple reason—because these things were not true in those prior districts or likely not true without racial packing in successor districts.

Instead, as to Sections 2 and 5, the North Carolina Supreme Court held that "the State has a compelling interest in preemptively factoring race into its redistricting process to ensure that its plans would survive a legal challenge."[202] The "survive-a-legal-challenge" approach is grossly misplaced. The change, which was not justified under the *Gingles* precondition 3(b) and which was based on two racial quotas, invites what should be a successful legal challenge from the other direction—unnecessary racial packing.

This survive-a-legal-challenge approach, as we will see, has been rationalized by a nautical metaphor (a safe harbor approach) or with a medical metaphor (an inoculation approach) and most recently with a shield metaphor. The problem is, of course, that one could construct a district that would ensure surviving a suit demanding a new VRA district without any showing that such a suit *before the change* or *after a change without a rigid racial quota and racial packing* had a strong probability of success. Surviving a VRA suit could occur, for example, where *Gingles* precondition 3(b) is not present. As we will soon see, the Alabama legislature used a similar rationale of ensuring against a successful Section 5 suit to justify keeping, for example, a district with a seventy percent TBVAP. But, the Supreme Court was deeply skeptical that seventy percent TBVAP, rather than say sixty-five percent TBVAP, was necessary.[203]

C. *The* Dickson II *Court Considers Section 5 of the Voting Rights Act*

The *Dickson II* court noted that "forty of North Carolina's one hundred counties were covered by Section 5 at the time of redistricting"[204]—prior to *Shelby County*.[205] The court correctly

201. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51, 74 (1986) (explaining that the third precondition is that the majority votes as a bloc and that bloc is able to usually defeat the minority's preferred candidate).

202. *Dickson II*, 766 S.E.2d at 249.

203. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1273 (2015).

204. *Dickson II*, 766 S.E.2d at 252.

205. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013). In *Shelby County*, the Supreme Court held Section 4(b) of the VRA to be unconstitutional. *Id.* at 2631. It remains an open question whether compliance with Section 5, in light of that

noted that the new and stringent requirements of the amended Section 5 banned retrogression, defined as any practice or procedure with the purpose or effect "of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice."[206] For the challenged districts that *were not covered* districts under Section 5, the nonretrogression standard (if still viable after *Shelby County*)[207] would seem inapplicable.

That is not the way the *Dickson II* court saw it. In *Georgia v. Ashcroft*, the Supreme Court had held that retrogression in one or two districts was not sufficient to show forbidden retrogression if overall the statewide plan showed gains that offset the losses.[208] From this, the *Dickson II* court suggests that Section 5's nonretrogression standard may apply to all challenged districts, whether they were ever covered districts or not.[209] In any case, it is hard to see how adjustments in prior districts leaving racial balance as it had been would be held to be retrogressive.

The *Dickson II* court did quote *Shaw v. Reno*, a racial gerrymander case: "Section 5 does not 'give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.'"[210] After this nod to *Shaw I*, the *Dickson II* court moved on to narrow tailoring.

D. The Dickson II *Court Considers Narrow Tailoring*

The North Carolina Supreme Court said that in the districting context,

> narrow tailoring" allows the states a limited degree of leeway in furthering such interests [as VRA compliance]. If the State has "a strong basis in evidence" for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the district[] "substantially addresses the § 2 violation," it satisfies strict scrutiny.[211]

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decision, remains a compelling interest. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.

206. *Dickson II*, 766 S.E.2d at 252 (quoting 52 U.S.C. § 10304(b)).

207. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1274; *Shelby Cty.*, 133 S. Ct. at 2631.

208. 539 U.S. 461, 479 (2003).

209. *Dickson II*, 766 S.E.2d at 253 (citing Georgia v. Ashcroft, 539 U.S. 461, 479 (2003)).

210. *Id.* (quoting Shaw v. Reno (*Shaw I*), 509 U.S. 630, 655 (1993)).

211. *Id.* (first alteration in original) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996)).

This rule seems to require a preexisting Section 2 violation in the challenged districts, but none of the challenged districts satisfied part 3(b) of the *Gingles* preconditions for Section 2 relief—that blacks in those districts were unable to elect their candidates of choice.[212] Believing that all of districts would satisfy 3(b) seems extremely unlikely.

The *Dickson II* court also noted that the new bulked up districts ranged from a low total black-voting-age population of 50.45% to a high of 57.33% with the *average* being 52.28%.[213] The court concluded:

> We are mindful that a host of other factors were considered [by the legislature] in addition to race, such as the Whole County Provision of the Constitution of North Carolina, protection of incumbents, one-person, one-vote requirements and partisan considerations. As a result, we are satisfied that these districts are sufficiently narrowly tailored. They do not classify individuals based upon race to an extent greater than reasonably necessary to comply with the VRA, while simultaneously taking into account traditional districting principles.[214]

As to the purported VRA districts, Senator Rucho and Representative Lewis had publicly and repeatedly denied political motives.[215] Still, the *Dickson II* court suggested that one possible state motive in moving black voters was political, not racial.[216] The plaintiffs attacking "legislatively drawn boundaries" had to show "that the legislature could have achieved its legitimate political objectives in alternative ways that [were] comparably consistent with traditional districting principles."[217]

There is the troubling fact that the districts undermined previous coalitions and bulked up the districts with black voters.[218]

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212. *See* Plaintiff-Appellants' Reply Brief on Remand at 22–29, *Dickson IV*, 781 S.E.2d 404 (N.C. 2015) (listing several districts where the candidate preferred by black voters had been winning handedly in the previous election cycles despite having less than a majority of black voters in those districts); *supra* Table 2.

213. *Dickson II*, 766 S.E.2d at 254.

214. *Id.*

215. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 16. From the plaintiff's brief: "[The redistricting leaders] issued another public statement responding to criticism that the 'proposed VRA districts plan is solely an attempt to maintain Republicans' political power.' Defendants summarily denied that charge. They responded[,] '[t]he State has an obligation to comply with the Voting Rights Act.'" *Id.* (third alteration in original) (citations omitted).

216. *Dickson II*, 766 S.E.2d at 255.

217. *Id.* at 254 (quoting Easley v. Cromartie, 532 U.S. 234, 258 (2001)).

218. *See id.*

The *Dickson II* court quoted a U.S. Supreme Court warning and responded:

> We are aware of the Supreme Court's warning that "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." In addressing this possibility, we note that the average Total Black Voting Age Population in the twenty-six VRA districts is 52.28% of the total voting age population. This figure indicates that minority voters were moved out of crossover districts only to the extent necessary to meet *Pender County's* safe harbor provision, while simultaneously pursuing other legitimate political goals, including those mentioned above. Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial. Accordingly, we conclude that plaintiffs have failed to demonstrate improper packing or gerrymandering based upon race.[219]

So while the legislature's means were mechanically driven by numerical racial quotas,[220] the *Dickson II* court found the means justified by the alleged end of avoiding a successful VRA suit.[221] But a lawsuit against what? Against the prior districts? Or against the newly created racial-quota bulked-up districts? Political objectives—though present in part—were not forbidden, the North Carolina court insisted.[222] So, the court suggested that there is no problem with packing more Democrats into Democratic districts,[223] though, of course, the Democrats in question were almost all black. When voters needed to be extracted to meet a quota, they were typically almost all white.[224] The racial classification was used with a subset of voters—black versus white Democrats. Then there is the additional problem that all thirty contested districts had been coalition districts and in each case a multiracial coalition district was destroyed and replaced with a minority-majority district.[225]

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219. *Dickson II*, 766 S.E.2d at 254–55 (citations omitted) (quoting Bartlett v. Strickland, 556 U.S. 1, 24 (2009) (plurality)).

220. *See id.* at 265–66.

221. *See id.* at 253.

222. *See id.* at 255.

223. *Id.* ("Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial.").

224. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 33–34; *see also* Ari Berman, *How the GOP Is Resegregating the South*, NATION (Jan. 31, 2012), http://www.thenation.com/article/how-gop-resegregating-south/.

225. *See Dickson II*, 766 S.E.2d at 245–46, 257.

E. *Proportionality in* Dickson II

The trial court had found that the General Assembly's plans "endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina."[226] While the word "roughly" does make the racial quota look a bit less rigid, the intended outcome is the same.

Plaintiffs claimed the legislature engaged in patently unconstitutional racial balancing in violation of United States Supreme Court precedent, and that the racial balancing was not required by Section 2 or Section 5.[227] Therefore, it was not a compelling state interest.[228] To satisfy strict scrutiny, the state's means and ends must always be constitutionally permissible.[229] The Supreme Court of the United States has rejected racial balancing:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[230]

In response to these claims, the *Dickson II* court quoted from the VRA, stating 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."[231] And the *Dickson II* court recognized that proportionality could not be justified as providing a safe harbor against successful VRA suits.[232] It acknowledged that, "[c]onsistent with this proviso, the Supreme Court has repeatedly held that proportionality does not provide a safe harbor for States seeking to comply with Section 2."[233] The *Dickson II* court further acknowledged that the United States Supreme Court, in *Johnson v. De Grandy*, had held that treating proportionality as a safe harbor was inconsistent with the text of the VRA, as amended, and with

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226. *Dickson I*, No. 11 CVS 16896, slip op. at 26 (N.C. Super. Ct. July 8, 2013).
227. *Dickson II*, 766 S.E.2d at 255.
228. *Id.* (first citing Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013); then citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729–30 (2007) (plurality); and then citing Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).
229. *Id.* at 244.
230. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995) (plurality opinion)).
231. *Dickson II*, 766 S.E.2d at 255 (quoting 52 U.S.C. § 10301(b) (2012)).
232. *Id.* at 255–56.
233. *Id.* (citing League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 436 (2006)).

"the ideal that the Voting Rights Act of 1965 attempts to foster."[234] The Court had further warned that safe harbor claims "could allow 'the most blatant racial gerrymandering . . . so long as proportionality was the bottom line.'"[235]

Still, the *Dickson* court noted that proportionality could be part of the totality of the circumstances under Section 2 and its probative value could vary based on the facts.[236] Curiously, the *Dickson II* court announced:

> In light of these standards, the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population. We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause. Instead, the General Assembly considered rough proportionality in a manner similar to its prophylactic consideration of the *Gingles* preconditions, as a means of inoculating the redistricting plans against potential legal challenges under section 2's totality of the circumstances test.[237]

Still, it seems one only reaches the totality of the circumstances after establishing all the *Gingles* preconditions—including 3(a) and 3(b). So instead of a constitutionally dubious "safe harbor" (a nautical metaphor now seemingly exiled from the discussion), the court declared that the legislature was engaged in a sort of vaccination, an "inoculation" (a medical metaphor).[238] Why inoculations do not raise the same concerns as safe harbors, including "blatant racial gerrymandering," is not clear.

In the end, the *Dickson II* court managed to have its cake and eat it too. If the legislature's purpose had been political and not to comply with the VRA or to avoid suits under it, then it could dodge an equal protection challenge. In that case, however, the legislature would have to contend with many of the districts that violate the North Carolina Constitution's ban on breaking up whole counties for

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234. *Id.* at 256 (quoting Johnson v. De Grandy, 512 U.S. 997, 1018 (1994)).

235. *Id.* (alteration in original) (quoting *Johnson*, 512 U.S. at 1019).

236. *Id.* (citing *Johnson*, 512 U.S. at 1000, 1020–21).

237. *Id.* (citation omitted).

238. *See id.*; *see also id.* at 267–68 (Beasley, J., concurring in part and dissenting in part) (stating that the inoculation characterization "compounds the trial court's error and purports to establish the use of race as a legislative safe harbor in derogation of the clear prohibition against such use set forth by the Supreme Court of the United States").

state legislative districting purposes.[239] The ban is a wholesome limit on political gerrymandering. If racial sorting of voters and racial quotas were the predominant means used for VRA ends, then, it seems, there would be serious equal protection problems. But in spite of the quotas or "goals," the *Dickson II* court found many goals were in play and race was not the predominant one.[240] The plaintiffs' reply brief tells a different story, with whites moved out of overpopulated districts slated to be black majority and blacks moved into underpopulated districts.[241] Even if race had predominated, the *Dickson II* court agreed with the trial court that the challenged districting survived strict scrutiny and narrow tailoring.[242]

III. *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA*, 135 S. CT. 1257 (2015)

A. *Background, déjà vu*

After the 2010 election, Alabama reapportioned its state legislature using data from the 2010 Census.[243] Like other states, it needed to comply with one-person, one-vote.[244] In addition, counties in Alabama were covered under Section 5 of the VRA.[245] In the 1980s, as noted above, Alabama's NAACP, the ACLU, and the Republican Party had a parallel goal—creating as many "max-black" districts as possible.[246] As it became apparent that black legislators could be elected in their districts with less than supermajorities of black voters, the interests of the Republican Party diverged from those of black legislators and the NAACP.[247]

The Alabama Republican legislators in charge of the 2010 redistricting gave two assignments to the expert they had chosen to draw the state legislative district lines: (1) population differences between the districts in the state could be no more than one percent; and (2) in each of the thirty-five districts in which black voters were a majority, the TBVAP percentage in the district population could not be reduced from the levels set during the previous redistricting.[248] These legislators in charge of redistricting "told

239. "No county shall be divided in the formation of a senate district." N.C. CONST. art. II, § 3, subsec. 3. "No county shall be divided in the formation of a representative district." N.C. CONST. art. II, § 5, subsec. 3.

240. *Dickson II*, 766 S.E.2d at 254.

241. Plaintiff-Appellants' Reply Brief on Remand, *supra* note 11, at 27–29.

242. *Dickson II*, 766 S.E.2d at 256.

243. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1275 (2015).

244. *See id.* at 1263; Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 379–80 (1963)).

245. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

246. *See id.* at 1284 (Thomas, J., dissenting); Tell, *supra* note 77, at 11.

247. *See* Greenhouse, *supra* note 86.

248. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

their technical adviser[] that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible."[249] The plan included preserving large black majorities in districts by maintaining high percentages of black voting-age populations in a district, often between sixty percent and seventy percent, and some over seventy percent, as in the case of Senate District 26: one of the districts challenged in *Alabama Legislative Black Caucus v. Alabama* ("*Alabama*").[250] Put another way, existing black supermajorities had wasted black votes by packing more blacks than needed into that district. By keeping the same percentages of black voters in the district, the waste of black votes was locked in—diminishing black political power.

Some of the black Alabama legislative districts were underpopulated.[251] The legislative redistricting committee therefore deliberately chose additional black voters to move into underpopulated districts;[252] the committee's expert was to add the necessary population to these districts without reducing the overall percentage of black voters.[253] That would mean adding blacks and almost only blacks. Of the 15,785 people that the redistricting added to Senate District 26, only thirty-six were white.[254]

The plaintiffs in *Alabama* sued claiming an impermissible racial gerrymander.[255] The Supreme Court explained the plaintiffs' claim and, at the same time, illuminated the meaning of a constitutionally forbidden racial gerrymander: "[A] gerrymander [occurs] . . . when the State adds more minority voters than needed for a minority group to elect a candidate of its choice . . . ."[256] Such a gerrymander, the Court noted, "might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help."[257]

In response to the racial gerrymander claim, the *Alabama* defendants argued, as the state legislative leaders had also, that these very heavily black districts could not be changed without running afoul of Section 5 of the VRA, understood to ban retrogression in the ability of minorities to elect candidates of their choice.[258] Here, some recent history is helpful. In *Georgia v. Ashcroft*, the Court had considered a plan enacted by white and

249. *Id.* at 1271.
250. *Id.* at 1263; *id.* at 1282 (Thomas, J., dissenting).
251. *Id.* at 1263 (majority opinion).
252. *See id.*
253. *Id.* at 1266 (citing Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1277 (M.D. Ala. 2013)).
254. *Id.* at 1271.
255. *Id.* at 1263.
256. *Id.*
257. *Id.*
258. *Id.*

black Democrats in the Georgia legislature.[259] They had created more districts with a substantial black vote, but short of the prior black majorities.[260] The Court held that the lower court's retrogressional analysis of whether the Georgia legislature had committed the statutory sin of retrogression—when it had spread minority voters over a greater number of districts in which minority voters were likely, but not quite as likely, to elect candidates of choice—was incorrect.[261] The legislature could draw these districts "even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts."[262]

Congress responded by amending Section 5 to provide that the right to vote was denied when the change had the effect of "*diminishing* the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice."[263] This seems to make it harder for blacks, whites, and others to create political multiracial coalitions in legislative races. Might packing fewer black voters diminish the reelection prospects of some incumbents who were the choice of black voters in sixty-percent- or seventy-percent-black districts?[264] Racial districting as required, or claimed to be required by the VRA, has raised many unanswered questions.

In *Alabama*, the Court provided some significant guidance for challenges to racial gerrymandering. First, analysis needs to proceed district by district, and therefore the issue was whether race predominated in moving voters in and out of *that* district.[265] The Court noted that "the harms that underlie a racial gerrymandering claim . . . are personal."[266] The harms included "being 'personally . . . subjected to a racial classification,' [and] being

259. 539 U.S. 461, 469 (2003), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as recognized in* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

260. Georgia v. Ashcroft, 539 U.S. 461, 470–71 ("[T]he new plan reduced by five the number of districts with a black voting age population in excess of 60%. Yet it increased the number of majority-black voting age population districts by one, and it increased the number of districts with a black voting age population of between 25% and 50% by four.") (citation omitted), *superseded by statute*, 120 Stat. 577, *as recognized in Ala. Legislative Black Caucus*, 135 S. Ct. 1257.

261. *See id.* at 481, 490.

262. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1287 (Thomas, J., dissenting) (citing *Ashcroft*, 539 U.S. at 481).

263. 120 Stat. 577, 580–81 (emphasis added).

264. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273 ("Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate.").

265. *Id.* at 1265.

266. *Id.*

represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group."[267]

Second, one-person, one-vote is a background principle, and the desire to comply with that rule cannot be used as a predominant motive to defend a racial gerrymander claim under the Fourteenth Amendment.[268] One-person, one-vote is to be weighed against racial predominance.[269] The question "is not about whether a legislature believes that the need for equal population takes ultimate priority."[270] The question instead is "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'"[271]

Third, the Court further clarified racial predominance.[272] The issue is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[273] To establish predominance, "the 'plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations.'"[274] Traditional race-neutral districting principles include "'compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation."[275]

Fourth, rigid and mechanical mathematical goals (or quotas)—as used by the Alabama legislature—are deeply flawed.[276] The district court and the legislature asked: "How can we maintain present minority percentages in majority-minority districts?"[277] This, the Supreme Court concluded, was the wrong question.[278] The right question is: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[279] Insisting on no

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267. *Id.* (omission in original) (citation omitted) (first quoting Bush v. Vera, 517 U.S. 952, 957 (1996); and then quoting Shaw v. Reno, 509 U.S. 630, 648 (1993)).

268. *Id.* at 1270–71.

269. *Id.*

270. *Id.* at 1271.

271. *Id.*

272. *Id.* at 1270.

273. *Id.* (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

274. *Id.* (quoting *Miller*, 515 U.S. at 916).

275. *Id.* (citation omitted) (quoting *Miller*, 515 U.S. at 916) (citing Bush v. Vera, 517 U.S. 952, 964, 968 (1996)).

276. *Id.* at 1272 ("Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice.").

277. *Id.* at 1274.

278. *Id.*

279. *Id.*

deviation from a rigid mathematical rule (no reduction in the prior percentage) was not responsive to the right question.

Fifth, if race predominates in drawing a particular district, strict scrutiny and narrow tailoring are required.[280] Narrow tailoring requires a strong basis in evidence that the existing percentage is reasonably necessary to allow the minority to elect the candidates of its choice.[281]

The Court assumed, without deciding, that after the decision in *Shelby County v. Holder*, Section 5 was still viable, even though preclearance was not.[282] Still, under Section 5 of the VRA a detailed analysis of a district is required to show that, for example, a seventy-percent black-voting-age population is necessary not to diminish the right of the black voters (in that one district) to elect a candidate of their choice.[283] The Court reserved the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional redistricting principles were subordinated to race, triggers strict scrutiny.[284]

While the Court remanded *Alabama*, it pointed to several factors (in addition to the rigid mathematical goals) to suggest that race predominated (e.g., the very odd shape of District 26 and the number of precincts split to add in the required number of black voters).[285] The Court did not simply reverse—it sent the case back to the lower court for reconsideration under the Court's proper legal standards.[286]

The Court held that under strict scrutiny and narrow tailoring, Alabama needed a strong basis in evidence to believe that its seventy-percent-plus figure—as opposed to sixty-five percent or sixty percent—was necessary to comply with Section 5.[287] The Court expressed strong skepticism that a change from seventy percent to sixty-five percent would violate Section 5.[288] The Court was also skeptical that the mathematical movement of voters in and out based on race was not predominantly racial, in which case strict scrutiny would be required and could result in a violation of the Fourteenth Amendment's Equal Protection Clause.[289] As the Court put it,

280. *See id.* at 1262 (quoting Shaw v. Hunt, 517 U.S. 899, 907–08 (1996)).
281. *Id.* at 1274.
282. *Id.* ("[W]e do not here decide whether, given *Shelby County v. Holder*, continued compliance with § 5 remains a compelling interest . . . .") (citation omitted); Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (holding that the preclearance formula is unconstitutional).
283. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273.
284. *Id.* at 1272.
285. *Id.* at 1271.
286. *Id.* at 1272.
287. *Id.* at 1273–74.
288. *Id.* at 1273.
289. *See id.* at 1266–67.

> [O]nce the legislature's "equal population" objectives are put to the side—i.e., seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.[290]

B. The Supreme Court Vacates Dickson II *and Remands the Case to the North Carolina Supreme Court for Reconsideration in Light of* Alabama

In addition to *Alabama*, the United States Supreme Court considered *Dickson II*'s challenge to the 2011 North Carolina redistricting plan as a racial gerrymander.[291] As we have seen, the North Carolina Republican majority in the legislature had explicitly set two numerical racial quotas—making many more 50% plus TBVAP districts *and* having black legislators in the General Assembly in proportion to the black voting age population of the state.[292]

The legislature's stated goal was to protect the state from a successful VRA challenge.[293] In the alleged service of this goal, thirty districts—including general assembly districts and several congressional districts—all of which had already been electing the black candidate of choice by large margins with *less than* 50% TBVAP, had more black voters added and more non-blacks removed, with the additions ranging from almost five percent to ten percent more, and in one case to twenty percent more.[294] The plaintiffs' reply brief on remand set out the following examples:

> Based on 2010 census data, [Senate District] 14, in Wake County as enacted in 2003 was overpopulated by 41,804. As of 2010, 75,610 white voting age citizens and 70,421 black voting age citizens resided in the district. At the 2010 election, Senator Blue defeated his Republican opponent in this majority white district by a 2 to 1 ratio (40,746 votes to 21,067 votes). To correct the overpopulation problem in SD 14 and at the same time meet their 50% plus TBVAP goal for revised SD 14, despite the landslide victory of the preferred candidate of black voters in 2010, Defendants moved 26,960 white citizens out of the district, but only 642 black citizens out of the district.[295]

290. *Id.* at 1271.

291. *Dickson* III, 135 S. Ct. 1843 (2015) (mem.), *vacating* 766 S.E.2d 238 (N.C. 2014).

292. *Dickson* II, 766 S.E.2d 238, 262 (N.C. 2014); Plaintiff-Appellants' Brief, *supra* note 3, at 11.

293. Plaintiff-Appellants' Brief, *supra* note 3, at app. 27–28.

294. *See supra* Tables 1, 2.

295. Plaintiff-Appellants' Reply Brief on Remand, *supra* note 11, at 26–27.

The plaintiffs cited other examples, some of which were less extreme. All had a common characteristic—black incumbents winning by almost 2-to-1 margins, but the state nonetheless overwhelmingly moving in black voters and moving out whites to correct underpopulation or overwhelmingly moving out whites to correct overpopulation. For example:

> Based on 2010 census data, SD 21, in Cumberland County as enacted in 2003 was under populated by 26,593. As of 2010, 55,371 white voting age citizens and 54,173 black voting age citizens resided in the district. At the 2010 election, Senator Mansfield defeated his Republican opponent in this majority white district by a 2 to 1 ratio (21,004 votes to 10,062 votes). To correct the under-population problem in SD 21 and at the same time meet their 50% plus TBVAP goal for revised SD 21, despite the landslide victory of the preferred candidate of black voters in 2010, Defendants moved 13,184 black citizens into the district and moved 5,535 white citizens out of the district.[296]

Alabama resembles and differs from *Dickson II* in several ways. Like *Dickson II*, *Alabama* also concerned an equal protection challenge to a racial gerrymandering claim;[297] but in *Alabama*, the state sought to justify the districting by a nonretrogression principle in Section 5 of the VRA.[298] *Dickson II* also involved an equal protection challenge to claimed racial gerrymandering,[299] where the state sought to justify the racial districting under both Sections 2 and 5 of the VRA.[300] In *Alabama*, the state sought to maintain racially packed districts.[301] The North Carolina legislature sought to create new racially packed majority-minority districts in districts that were not previously majority-minority, but where candidates preferred by black voters had been doing just fine.[302] Alabama claimed that any reduction in the percentages of black voters in the questioned districts would violate the VRA.[303] North Carolina's claim was that the addition of black voters to districts already handily electing the black voters' candidate of choice was reasonably necessary to provide a safe harbor (a phrase later changed to an "inoculation" and most recently to a "shield") against a VRA suit.[304]

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296. *Id.* at 27. Although the figures come from the plaintiffs' brief (with citations to the record), they do not appear to be in dispute.

297. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262 (2015).

298. *Id.* at 1263.

299. *Dickson* II, 766 S.E.2d 238, 244 (N.C. 2014).

300. *Id.* at 247.

301. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

302. *See supra* Tables 1, 2.

303. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1266.

304. *See Dickson II*, 766 S.E.2d at 254.

In *Dickson II*, the legislature had embraced mechanical, numerical racial targets (or quotas), districts with weird shapes, changes in districts without a showing that the prior districts met the *Gingles* third precondition for a successful suit in *that* district, and used many more split precincts than in *Alabama*.[305] In North Carolina, to mention just one example, one challenged district split forty-three precincts;[306] by comparison, in *Alabama*, the Supreme Court found that seven split precincts in one Alabama district was potentially problematic[307]. In both North Carolina and Alabama, the legislatures and the lower courts assumed an actual (Alabama) or potential (North Carolina) violation of the VRA if the bulked up districts were not preserved (Alabama) or created (North Carolina).

Both state legislatures and the lower courts assumed a compelling need for more majorities or very large majorities of black voters in a district without demonstrating that unless the state maintained the existing percentage of black voters in a district (Alabama) or increased it (North Carolina), black voters would be denied the opportunity to elect candidates of their choice.[308] The result was that no violation was shown or likely, and even assuming a possible violation, the remedy was not narrowly tailored. This was because there was no showing that the addition of black citizens or removal of white citizens in North Carolina districts or preservation of black majorities (Alabama districts) was reasonably necessary to give black voters an equal opportunity to elect candidates of their choice (Section 2) in that district or to protect against retrogression in that district. In both cases the lower courts focused heavily on out-of-district evidence, further undermining narrow tailoring.[309]

The United States Supreme Court found rigid numerical quotas, implemented to supposedly comply with Section 5, could undermine the purposes of the VRA.[310] The same is true for the use of quotas for Section 2 purposes. If anything, arguments used to construe new majority-minority districts under Section 2 were even weaker than

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305. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 26, app. 13–33 (comparing maps of Alabama's Senate District 26 with maps of challenged North Carolina districts).

306. *Id.* at 12.

307. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1271–72.

308. *Id.* at 1274; *Dickson II*, 766 S.E.2d at 252 (upholding the trial court's conclusion that North Carolina had a compelling interest in preemptively creating majority-minority districts), *vacated by* 135 S. Ct. 1843 (2015) (mem.).

309. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265 ("The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*."); *Dickson II*, 766 S.E.2d at 254 (stating the *average* TBVAP of the districts in question was 52.28% as evidence that the districts had not been overly packed).

310. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273.

Alabama's nonretrogression arguments under Section 5 because of the difference in the language between the two sections.[311]

The Supreme Court vacated *Dickson II* and remanded it in light of the *Alabama* decision.[312] While the *Alabama* case involved Section 5 of the VRA, and *Dickson II* involved a claimed justification for racial districting under both Section 5 and Section 2, if the principles announced in *Alabama* also apply to the North Carolina districting and to Sections 2 and 5 of the VRA, the legislature's plan should be indefensible. That, we will see, is not how the North Carolina court saw the matter on remand.

Like the Alabama legislature in *Alabama*, the North Carolina legislature had set inflexible numerical quotas.[313] Voters were moved in and out of districts because of their race.[314] Indeed, these quotas were ones Senator Rucho and Representative Lewis publicly announced they were unwilling to modify when they asked for comments on the plan.[315] These quotas were supposedly based on protection against a Section 2 suit, or where applicable, a Section 5 suit.[316] Of course, protection against a suit that is very likely to be successful should be required, at a minimum. The absence of any one of the conjunctive *Gingles* preconditions should demonstrate the lack of a credible threat. If a flawed but superficially plausible claim under misinterpretations of the VRA is sufficient to justify creation of racialized districts against an equal protection challenge, the Equal Protection Clause has become a shield for a powerful method of racial gerrymandering, creating more and more overwhelmingly white and more majority-black racialized districts.

In a notably weaker version of the position of the Alabama district court in *Alabama*, the North Carolina Supreme Court

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311. *Compare* Voting Rights Act, 52 U.S.C. § 10301(b) (Supp. II 2015) ("A violation . . . is established if, based on the 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 [protected] citizens . . . 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."), *with* 52 U.S.C. § 10304(b) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing 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 . . . .").

312. *Dickson* III, 135 S. Ct. 1843 (2015) (mem.), *vacating* 766 S.E.2d 238 (N.C. 2014).

313. *See Dickson II*, 766 S.E.2d at 255.

314. *Id.*

315. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 10.

316. *Dickson II*, 766 S.E.2d at 247.

suggested that race *might* not have predominated.[317] All sorts of factors *might* have been involved—respect for political subdivisions, compactness, one-person one-vote, politics, and others.[318] So, by this view, the trial court had failed to adequately find facts.[319] From the perspective of the rules announced in *Alabama,* that decision seems no longer viable. Here is what the *Dickson I* trial court had said:

> The Enacted House Plan contains 23 districts with a TBVAP in excess of 50% as compared to 10 such districts in the 2009 House Plan—the last plan in effect before the Enacted House Plan. The Enacted Senate Plan contains 9 districts with a TBVAP in excess of 50% as compared to zero in its predecessor, the 2003 Senate Plan. . . .
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> . . . .
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> The undisputed evidence establishes that the General Assembly, in drafting the Enacted Plans, endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was "any part Black," the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.[320]

In addition, the trial court found, as the North Carolina Supreme Court acknowledged: "'[T]he General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts"' that would include a Total Black Voting Age Population of at least fifty percent."[321]

The North Carolina legislature changed existing districts to add more black voters in the districts the plaintiffs challenged.[322] There was no showing that maintaining the current percentage of black voting-age population in the districts would have triggered a Section 2 or Section 5 suit—indeed the claim is curious.[323] The choice of which voters to move in and out of existing challenged districts was admittedly based on race.[324] The rules for the line drawers were to

317. *Id.* ("[W]e do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate standard of review.").

318. *Id.* at 246.

319. *Id.*

320. *Dickson* I, No. 11 CVS 16896, slip op. at 24, 26 (N.C. Super. Ct. July 8, 2013).

321. *Dickson II,* 766 S.E.2d at 245–46.

322. *Id.* at 255.

323. *See supra* Tables 1, 2.

324. *See Dickson II,* 766 S.E.2d at 255.

draw district lines to meet two racial quotas.[325] Voters were added or subtracted from the districts the plaintiffs challenged based on race.[326] The proportionality quota for blacks in the legislature was also based on race.[327] Rigid numerical goals (quotas) were pursued.[328] Indeed, if race did not predominate, what did?

Because the North Carolina Supreme Court suggested other *possible* predominant purposes in its first (preremand) opinion, it is useful to look at each. As to compactness and respect for political subdivisions, a brief look at the maps shows these did not predominate over race.[329] Again and again these were sacrificed in the interest of racial sorting. The map of District 26 that the Court found problematic in *Alabama* is far less weird and far more compact than many of the North Carolina districts.

The legislative leaders were clear that other traditional redistricting objectives were subordinate to race. In the statement inviting comments on the plan, Senator Rucho and Representative Lewis did invite comments on more compact minority districts, but only if the plan was consistent with their quotas.[330] In short, racial quotas predominated over compactness (and, for that matter, over respect for political subdivisions). If these are not interests the legislature used in a racially neutral way, they do not predominate.[331] Racial considerations shaped the districts. As to respect for political subdivisions, many counties and precincts were divided for purposes of racial sorting.[332]

The North Carolina Supreme Court cited one-person, one-vote,[333] but it did not have the benefit of the *Alabama* decision. We now know that one-person, one-vote is not an interest to be weighed against racial predominance.[334]

In a creative suggestion, the state argued that compliance with the Whole County Provision (which forbids dividing state house and senate districts for purposes of legislative districting—unless required by supreme federal law such as one-person, one-vote or the VRA)[335] accounted for the weird shape of districts and could be a nonracial basis.[336] Why it should not be a background principle like

325. *Id.* at 263; *see* Plaintiff-Appellants' Brief, *supra* note 3, at app. 2.

326. *See Dickson II*, 766 S.E.2d at 255.

327. *Id.*

328. *Id.* at 255, 263.

329. Plaintiff-Appellants' Brief on Remand, *supra* note 137, at app. 13–33.

330. *Id.* at 10.

331. *See Dickson II*, 766 S.E.2d at 245 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

332. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 12–13.

333. *Dickson II*, 766 S.E.2d at 254.

334. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1270 (2015).

335. N.C. CONST. art. II, § 3, subsec. 3; *id.* art. II, § 5, subsec. 3.

336. Defendants-Appellees' Brief at 48, *Dickson* II, 766 S.E.2d 238 (N.C. 2014) (No. 201PA12-2).

one-person, one-vote is not clear. Of course, a number of the challenged districts were within one county so the rule cannot work as a *deus ex machina* there.[337] At any rate, the argument seems circular: the state's unjustified use of racial quotas is said to be required by the VRA, which supposedly compelled the legislature to divide whole counties in a number of cases. Then the Whole County Provision, trumped by the claimed need for inoculations (by racial quotas) to prevent a VRA suit, is used to provide an alternative nonracial justification for the districting.[338]

What about political advantage? Of course, Senator Rucho and Representative Lewis seem to have denied any such motivation in public statements about the VRA districts.[339] Still, the state court could perhaps find these statements were a veneer and the predominant motive was old fashioned, extreme, ugly, antidemocratic, and in essence a political gerrymander hidden under a purported concern for the VRA.

Of course, the claim could be that black citizens did not have their votes wasted and were not assigned to districts simply because of the rigid racial quotas used, but rather the two racial quotas were used because blacks were mostly Democrats and blacks were a more convenient target for packing.[340] In addition, the defense could be that applying two racial quotas to blacks helped to disrupt multiracial coalitions and so disadvantaged the coalition party.

The "party not race" claim confronts a booming smoking cannon we have previously encountered. Incumbent white state senator Linda Garrou had been preferred by black and white voters in her district.[341] She was intentionally carved out of her district by the legislative line drawers.[342] In his deposition in *Dickson I*, to his great credit, Senator Rucho candidly admitted that she would not have been removed if she had been a black incumbent.[343] The

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337. *See* Defendants-Appellees' Brief on Remand, *supra* note 173, at 50.

338. *See id.* at 48–50.

339. *See* Plaintiff-Appellants' Brief on Remand, *supra* note 137, at 10.

340. *See Dickson* II, 766 S.E.2d 238, 255 (N.C. 2014) (stating "[w]here racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial" (citing Hunt v. Cromartie, 526 U.S. 541, 551–52 (1999))).

341. Affidavit of Linda Garrou, *supra* note 6.

342. *Id.*

343. Deposition of Senator Robert Rucho, *supra* note 9; *see also* Wesley Young, *Garrou, Forsyth Democrat, Won't Run for Re-Election to State Senate*, WINSTON-SALEM J. (Feb. 7, 2012, 5:32 PM), http://www.journalnow.com/news/local/garrou-forsyth-democrat-won-t-run-for-re-election-to/article_92db4eb2-c548-5da8-b6fe-449a776e2137.html (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

legislature removed a white incumbent Democratic senator who had been preferred by black voters in prior elections to clear the field for a presumed black Democratic senator,[344] who incidentally might be expected to win without 50% plus TBVAP. This was obviously not just about political affiliation. The racial proportionality quota was enforced with a vengeance and predominated over party affiliation alone.

In a racial gerrymandering case, the Court teaches that the "plaintiff must prove that the legislature subordinated traditional *race-neutral districting principles* . . . to racial considerations."[345] The conclusion should be that the traditional districting principles used to defend against strict scrutiny for a racial gerrymandering claim *must be race neutral*.[346] If black voters are being racially gerrymandered for political advantage because they vote heavily Democratic, that should not be race neutral. It would be a use of the VRA to undermine its deeper purposes. Undermining black political power should not be acceptable simply because most blacks are Democrats, nor should undermining black political power have been acceptable when a motive was that blacks were (during Reconstruction and after) voting Republican.

The legislature's use of political gerrymandering, if that is what supposedly predominated, was not race neutral. If that is what was going on, the legislature's tools were racial quotas used to pack more *black* Democrats into black districts. This is—without question—not racially neutral. Crafting redistricting to get rid of a white incumbent preferred by black and white voters because she was the wrong color is not race neutral either.

Since race neutral alternative explanations are specious, strict scrutiny and narrow tailoring are required.[347] In *Alabama*, the Court warned that the sort of mechanical line drawing used in that

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chairman of the redistricting committee, recommended that Garrou "not be included in the proposed Senate District 32" since, in his opinion, there was no way she could be the candidate of choice of a majority-minority population. Affidavit of Linda Garrou, *supra* note 6. The view is curious, since Garrou had consistently won the black 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 a black candidate, Earline Parmon. Chanel Davis, *Longtime Public Servant Earline Parmon Gives Up N.C. Senate Seat*, CHRONICLE (Jan. 22, 2015), http://www.wschronicle.com/2015/01/longtime-public-servant-earline-parmon-gives-up-n-c-senate-seat/. Senator Parmon had previously served terms in the state house representing a majority-white district. *See id.* She 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 id.*

344. *See* Affidavit of Linda Garrou, *supra* note 6.

345. *Dickson II*, 766 S.E.2d at 245 (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

346. *See id.* (quoting *Miller*, 515 U.S. at 916).

347. *See id.* at 244–45.

case could undermine the ideals and deeper purposes of the VRA.[348] Ironically, in North Carolina, under the veneer of allowing black citizens the opportunity to elect candidates of their choice, the legislature denied black and white voters in Senator Garrou's district the opportunity to elect their preferred candidate because she was the wrong color to get past the net cast by the quotas.[349] This undermined the political power of black voters by packing.

To pass strict scrutiny and narrow tailoring, *Alabama* required a showing that the racial sorting was reasonably necessary to comply with Section 5—that is, to assure black voters an opportunity to elect candidates of their choice.[350] The question was whether, for this purpose, the legislature needed to keep the percentage of black voters *in that district* at seventy percent, rather than say sixty-five percent.[351] In North Carolina, the prior districts' black candidates, or in one case the white candidate they preferred, were winning handily without the infusion of more black votes.[352] So the claim that they were unable to elect candidates of choice is spurious. Indeed, it is so spurious that the state made a different but equally spurious claim—not that there would have been Section 2 or 5 liability but that the districts needed the infusion ("inoculation" in the North Carolina Supreme Court's word) to protect the state from a suit.[353]

There is no justification for finding the *Gingles* precondition that blacks *in these specific districts* were blocked by the majority from being able to elect candidates of their choice in those districts. Mechanical, rigid, numerical racial quotas were used, which were neither necessary nor narrowly tailored. As to a Section 5 claim, many of the districts were not covered by Section 5 of the VRA[354]—assuming it is still viable (and in any case there is no evidence that preserving the prior districts' racial composition would result in retrogression). As a result, there is overwhelming evidence that changes in the prior districts were racial, not justified by the VRA, and thus fail strict scrutiny and violate the Equal Protection Clause of the Fourteenth Amendment.

The claim that black voters in the soon to be bulked-up districts need the support of more black voters in order to elect candidates of their choice—what one would have to show for a successful Section 2 suit—fails because black candidates of choice were winning elections in these districts over many years by substantial margins. For a

348. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1273 (2015).
349. Affidavit of Linda Garrou, *supra* note 6.
350. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1273.
351. *Id.*
352. *See supra* Tables 1, 2; *see also* Affidavit of Linda Garrou, *supra* note 6.
353. *Dickson* II, 766 S.E.2d 238, 256 (N.C. 2014).
354. *Id.* at 256.

Section 2 suit, one would need to show that a majority was voting as a bloc so as to defeat candidates preferred by black voters in the specific challenged districts.[355] This would need to be done on a district-by-district basis and based on the facts and voting history of that district. In accordance with *Alabama*, the state would have the burden to show a strong basis in evidence that blacks could not elect candidates of their choice in those districts without the changes mandated by the racial quotas.[356] In addition to not having a constitutional or adequate safe harbor (or inoculation) basis to protect against a Section 2 or Section 5 claim, the remedy of the racially bulked-up districts was not narrowly tailored, because the defendants did not show the changes were reasonably necessary to allow black citizens to elect candidates of their choice.[357]

The "safe harbor" or "inoculation" defense against a successful VRA suit does not work for the same reasons. The state should have the burden of proving in those prior districts that these changes were reasonably necessary in each challenged district to protect against a meritorious suit, and that is not the case. In addition, the safe harbor defense and its twin, the inoculation defense, are deeply suspect and dangerous for the reasons articulated by Justice Souter's opinion of the Court in *Johnson v. De Grandy*.[358]

What is left is a naked, race-based political gerrymander. But this is no ordinary disgusting political gerrymander. This is a political gerrymander where the means used are explicitly and rigidly racial, with not one but two racial quotas. So a "just politics" defense does not work. Even if it did, the North Carolina Constitution's Whole County Provision limits and would often void the sort of grotesque gerrymander used in this case once the veneer of the VRA safe harbor, inoculation, or shield is stripped away.[359]

C. *The North Carolina Case After Remand by the Supreme Court of the United States (*Dickson IV*)*

On December 18, 2015, the North Carolina Supreme Court filed its opinion in response to the remand from the United States Supreme Court.[360] Justice Newby's opinion for the majority followed much of the North Carolina Supreme Court's prior majority opinion—both in what it included and in what it omitted. As Justice

355. *See* Thornburg v. Gingles, 478 U.S. 30, 51 (1986).
356. *See Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.
357. *See id.*
358. 512 U.S. 997, 1019–20 (1994) ("[W]e reject the safe harbor rule because of a tendency the State would itself certainly condemn, 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.").
359. N.C. CONST. art. II, § 3, subsec. 3; *id.* art. II, § 5, subsec. 3.
360. *Dickson IV*, 781 S.E.2d 404 (N.C. 2015).

Beasley explained in dissent, "[T]he majority reads [*Alabama*] so narrowly that its implications for the case before this Court are negligible at best."[361]

In *Dickson IV*, the North Carolina Supreme Court attempted to show why the *Alabama* decision was not relevant to the *Dickson IV* case.[362] For example:

> First, the Supreme Court in *Alabama* held that the district court erred by considering the state "as a whole," rather than conducting a "district-by-district" analysis of the racial gerrymandering claims. This ruling does not affect our case because North Carolina's three-judge panel conducted the required individualized, district-by-district analysis.[363]

In *Alabama*, the Supreme Court suggested a detailed analysis was required for each district to determine applicability of Section 5 and whether a strong basis in the evidence justified maintaining the large prior percentage of black voters in order to ensure black voters did not suffer retrogression in their ability to elect their candidate of choice.[364] As we will see in more detail, no such Section 2 or Section 5 analysis was done for each challenged North Carolina district in light of its prior racial composition and electoral history. The questions should have been: (1) was there a strong basis in evidence that the increase in the percentage of black voters in each specified district to 50% plus was necessary to prevent retrogression that would threaten their ability to elect their preferred candidates (Section 5 assuming it is still applicable); and (2) was the 50% plus TBVAP quota (with its increase of the black voting-age population of that specific district) supported by a strong basis in evidence that it was necessary to assure black voters an equal opportunity to elect their preferred candidates, especially in light of the prior voting history. In short, an inquiry would be required about *Gingles* precondition 3(b) for *each specific* district. That racially polarized voting existed is not sufficient because causation—whether racially polarized voting usually prevents the minority from being able to elect its candidate of choice—was not addressed in that district.[365] If a proper reading of *Alabama* (and the *Dickson III* remand) indicates these things needed to be done, then when it again ratified the trial court opinion on these matters, the North Carolina Supreme Court failed to take steps to correct these problems.

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361. *Id.* at 441 (Beasley, J., concurring in part and dissenting in part).

362. *See id.* at 420–21 (majority opinion).

363. *Id.* at 420 (citation omitted).

364. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1273–74 (2015).

365. *Dickson IV*, 781 S.E.2d at 447 (Beasley, J., concurring in part and dissenting in part).

As to omissions, the North Carolina Supreme Court failed to note that candidates preferred by black voters had been winning, typically by thumping majorities, in the prior districts that had been reconstituted and bulked up, supposedly to protect against a successful VRA suit. The court failed to note the admission that Linda Garrou, a white incumbent senator who had been carved out of her district, would not have been excised if she had been a black incumbent. This fact strongly suggests that race predominated in fulfilling the proportionality quota. The majority failed to note statements by the senator and representative in charge of redistricting that they would not consider changes to their plans which failed to adhere to either of their two racial quotas—50% plus TBVAP and black senators and representatives in the legislature as nearly as possible to the percent of the voting-age population that was at least in part black.

D. *Racial Predominance*

The *Dickson IV* court again summarized a number of findings and conclusions by the three-judge trial panel bearing on predominance of race in the general assembly's districting.

First, the *Dickson IV* court noted again that "the panel unanimously found that 'it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts"' that would include a TBVAP of at least fifty percent."[366] In addition, the *Dickson IV* court noted that the three-judge panel had found that in its enacted plans:

> [The General Assembly] endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was "any part Black," the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.[367]

In her dissent, Justice Beasley added an additional sentence about the trial court's findings: "The trial court found that the General Assembly used rough proportionality as a 'benchmark' for the number of VRA districts it would create . . . ."[368]

The majority in *Dickson IV* continued:

366. *Id.* at 424 (majority opinion).
367. *Id.* at 435.
368. *Id.* at 450 (Beasley, J., concurring in part and dissenting in part).

> The three-judge panel then reached a second conclusion that drawing VRA districts "necessarily requires the drafters of districts to classify residents by race," that "the shape, location and racial composition of each VRA district was predominantly determined by a racial objective," and that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."[369]

But the majority noted that things might not be as they seemed. It explained that "the General Assembly's consideration of race to the degree necessary to comply with Section 2 does not rise to the level of a 'predominant motive' as a matter of course."[370] The majority continued: "[I]t appears from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se. In other words, race was only a factor insomuch as required by federal law."[371]

So, for the majority, use of numerical racial quotas did not predominate because the General Assembly was required to use them by federal law. But, of course, this proposed escape only works if the law did require these racial quotas and required that 50% plus quotas be applied in *each* supposed and challenged VRA district.

If (1) the state was required to show a strong basis in the evidence that the various 50% plus quotas mechanically applied in *each* district (and not some lesser percent) were in fact reasonably necessary to enable minority voters to elect their preferred candidates in that district because majority bloc voting in *that* district was frustrating minority voters' ability to do so, and if (2) the defendants have not shown that is so in *each* district, based on evidence from that district, then the "the law made them do it" justification is an ingenious exercise in begging the question. It assumes the truth of the very point raised.

Of course, population shifts meant that redrawing district lines was often required to comply with one-person, one-vote. Still, the general assembly majority decided systematically to destroy multiracial coalition districts and to place more blacks in the selected districts, making them majority black.[372] In addition, in an apparent effort to further its second quota, the leaders removed one or more white incumbents from districts they apparently hoped would be represented by a black legislator instead.[373] That was

369. *Id.* at 424 (majority opinion).

370. *Id.*

371. *Id.* at 425.

372. Michael Curtis, *North Carolina: Using Race (Again) as a Tool to Disrupt Multiracial Political Coalitions*, HUFFINGTON POST (Mar. 13, 2014, 12:47 PM), http://www.huffingtonpost.com/michael-kent-curtis/north-carolina-multiracial-political-coalitions_b_4949546.html.

373. *See id.*

clearly the case in removing Democratic State Representative Linda Garrou from her district in apparent hopes of getting a Democrat of a different color. Nothing in the VRA mandated such systematic destruction.[374] The legislative leaders chose a new racial goal and then sought to rationalize it as consistent with the VRA.

E. Compliance with Section 2 to the Rescue?—A Compelling and Narrowly Tailored State Interest?

The *Dickson IV* majority seemingly read the trial court's findings—polarized voting in counties where the challenged districts or parts of them were located, some defeats of black Democratic candidates elsewhere, and a few prior court decisions from earlier times—as supporting a finding of *each* of the *Gingles* preconditions for each district.[375] Two observations are in order about the *Dickson IV* court's effort to salvage its prior decision on remand. First, there was and could not be any finding—in the challenged districts as they existed before bulking up—of white bloc voting sufficient to defeat the black voters' candidates of choice. Second, the *Alabama* precedent mandated district-by-district analysis.[376] So looking at other elections in other places and court decisions in other times simply cannot justify a general approval of *each* district.

As far as establishing a strong basis in the evidence to justify adding black voters to contested districts as a defense against a Section 2 or Section 5 suit, the *Dickson IV* majority seems to have invoked a range of tests. Sometimes it referred to possibly successful suits.[377] Sometimes it referred to a strong basis in the evidence of a likely successful suit.[378] The majority also announced that "[t]he three-judge panel made specific findings of fact for each of the twenty-six VRA districts."[379] These findings, however, failed to include a finding that in the challenged districts minority voters had been usually unable to elect their candidate of choice due to white bloc voting, or that would have been the case, without the bulking up. This was absent for the reasons noted above.

F. Compelling State Interest and Narrow Tailoring

Still, based on its findings, the *Dickson IV* court explained that "the three-judge panel concluded that the twenty-six VRA districts survive strict scrutiny because they were narrowly tailored to achieve a compelling governmental interest in 'avoiding *future* liability under § 2 of the VRA and ensuring *future* preclearance of

374. *See* Berman, *supra* note 224.
375. *See Dickson IV*, 781 S.E.2d at 416.
376. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1265 (2015).
377. *See Dickson IV*, 781 S.E.2d at 429.
378. *Id.*
379. *Id.* at 416.

the redistricting plans under § 5 of the VRA.'"[380] Since preclearance is now defunct, it remains an open question whether this deceased interest is still compelling.

So, the legislature destroyed some thirty legislative and congressional districts that were multiracial-coalition districts and that, even with any needed population adjustments to comply with one-person, one-vote, appeared quite safe from a VRA challenge.[381] Having done this, the legislature supposedly needed to replace the prior districts with 50% plus TBVAP districts to be safe from a VRA suit against each and every new district. The entire ordeal calls to mind the allegory of the teenager who killed his parents and sought protection from the consequences of his deed because he was an orphan.

Once again, as it had in *Dickson II*, the *Dickson IV* court upheld the three-judge panel's finding of compelling state interest and narrow tailoring.[382] Narrow tailoring comes into play after one assumes racial predominance, strict scrutiny, and an adequate voting rights rationale for changing the districts.[383] Strict scrutiny and narrow tailoring should require a showing of a strong basis in evidence that:

> (1) the packing of black voters and expulsion of white ones and other ethnic groups from each district were reasonably needed based on the facts of that district so the white or other non-black majority would no longer be able to use bloc voting to frustrate the ability of black voters to elect their candidate of choice;
>
> (2) the extent of the packing black individuals and expelling white individuals was not more than necessary in each district;
>
> (3) the use of dual racial quotas was necessary;
>
> (4) both of these quotas complied with United States Supreme Court precedent; and
>
> (5) they were needed to shield the legislature's gerrymander from a likely successful section 2 or section 5 suit.

The *Dickson IV* majority put the best possible face on the panel's findings and conclusions, but the findings suffered from the same *Gingles* 3(b) problem as before—no district-by-district finding that without the change or without the amount of packing and expelling used in each district, white bloc voting would have prevented blacks from electing their candidate of choice.

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380. *Id.*
381. *See id.* at 441; *see supra* Tables 1, 2.
382. *Dickson IV*, 781 S.E.2d at 435.
383. *See id.* at 431.

G. Defending the Dual Racial Quotas Against an Equal Protection Challenge

The plaintiffs claimed that the dual racial quotas, as applied in the facts of this case, violated the Equal Protection Clause of the Fourteenth Amendment.[384] There are two interrelated issues to keep straight here: (1) what the VRA as interpreted and authoritatively construed requires; and (2) whether the legislature's radical gerrymander is a racial gerrymander that violates the Fourteenth Amendment.

If the VRA required or ratified an unconstitutional racial gerrymander, that fact would not save the gerrymander from a successful constitutional attack. The Supremacy Clause provides that "[t]his Constitution, and the *Laws of the United States which shall be made in Pursuance thereof*[,] . . . shall be the supreme Law of the Land."[385] If any part of the VRA itself, or as authoritatively construed, violates the Constitution, it is, to that extent, void. A void provision, of course, could not preempt a provision of the North Carolina Constitution such as the Whole County Provision, which in effect is a mild antigerrymander rule for districting by the state legislature. Of course, where possible, the doctrine of constitutional avoidance would counsel against reading the VRA to mandate unconstitutional conduct.

The *Dickson IV* court implicitly argued that the legislature's dual quotas were not really quotas but that these numerical targets (by whatever name) were required by the Supreme Court's interpretation of the VRA. I now turn to these issues.

IV. REQUIREMENTS OF THE VOTING RIGHTS ACT OR OF THE EQUAL PROTECTION CLAUSE?

A. The VRA Act and the Equal Protection Clause

The *Dickson IV* court insisted that the plaintiffs' claims were inconsistent with controlling United States Supreme Court precedent, and it cited and quoted from *Bartlett v. Strickland*,[386] a case from North Carolina: "[*T*]*he VRA* 'does not mandate creating or preserving crossover districts.'"[387]

In considering such passages from *Strickland*, it is important to recall the procedural posture of that case. These passages are about the VRA, not the law under the Fourteenth Amendment. In *Strickland*, the state argued that the VRA *required* creating a

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384. *Id.* at 422.

385. U.S. CONST. art. VI, cl. 2 (emphasis added).

386. 556 U.S. 1 (2009).

387. *Dickson IV*, 781 S.E.2d at 434 (emphasis added) (quoting Bartlett v. Strickland, 556 U.S. 1, 23 (2009) (plurality)).

crossover or influence district and dividing Pender County to do so.[388] The division of Pender County was said to be required by the VRA; without this interpretation of the VRA, the division of Pender County would violate the Whole County Provision of the North Carolina Constitution.[389] Justice Kennedy's controlling plurality opinion held that since the total black voting population was not a majority of the proposed district, the *Gingles* preconditions did not justify *mandating* the creation of a minority coalition or influence district.[390] A district mandated by the VRA had to have a 50% plus TBVAP.[391]

But, the *Strickland* decision also indicated that mandating the crossover or influence district likely failed for a second reason. Since minority voters in the proposed district would apparently be able to elect the minority's candidate of choice with crossover or coalition votes, *Gingles* precondition 3(b) would not be satisfied—a white bloc voting would not usually defeat the minority's preferred candidate.[392] That was a second reason, assuming those facts, that the VRA might not have trumped the Whole County Provision. This observation is pertinent to the legislature's and the *Dickson II* & *IV* majorities' VRA justification for creating the challenged bulked-up districts in the first place. Without a VRA justification, the racial quotas should undermine the racial districting; and lack of a viable VRA justification would undermine the many parts of the gerrymander that violated the Whole County provision. How to escape these formidable problems?

Here is the strongest version of the majority opinion: the VRA does not require the preservation of coalition districts in which blacks had regularly been able to elect their preferred candidates by substantial margins without a 50% plus TBVAP. Therefore, the legislature acted fully within its rights in systematically destroying thirty such coalition districts. No VRA justification is required for the destruction. Once it had destroyed them and replaced them with new districts, defendants needed to be sure the new districts complied with the VRA. Therefore, bulking up the prior districts by adding more blacks and expelling more whites and people of other races was justified first as a "safe harbor," then, as an "inoculation," and finally as a "shield" against a successful VRA suit that would be based either on Section 2 or Section 5 or both.[393]

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388. *Strickland*, 556 U.S. at 14.

389. *Id.* at 7.

390. *See id.* at 24. Two justices, Justices Thomas and Scalia, would have held the mandate of the act violated equal protection. *Id.* at 26 (Thomas, J., concurring in the judgment).

391. *Id.* at 18 (majority opinion).

392. *Id.* at 16.

393. *Dickson IV*, 781 S.E.2d 404, 432 (N.C. 2015).

The two racial quotas were therefore justified as a "shield"—as a protective device.[394] Getting rid of a white Democratic senator who had been preferred by blacks (by drawing her out of her district) in hopes of a black replacement who would help fulfill the defendants' proportionality "benchmark" or quota was also a useful safety device. Because the old VRA-compliant coalition districts had been destroyed, new compliant districts were needed and the defendants needed leeway to be sure they got things right.[395] Dividing counties in violation of the state constitution, dividing precincts or city blocks to pick up additional blacks or to expel whites, dividing districts into weird shapes, and all the rest were now justified by the VRA—as a protective device against future lawsuits. Of course, the new arrangement paid political dividends—packing more blacks into the newly minted VRA districts wasted black votes and diminished black political power. But, one argument says, blacks were targeted not because they were blacks, but because they mostly voted Democratic. The VRA rationale allowed an exceptionally efficient gerrymander now that state constitutional barriers were plowed down and assuming that targeting blacks because of their political preferences was fine. What a mangled wreck this approach makes of our once proud VRA. But, of course, there is another issue.

B. *The Equal Protection Issue*

In addition to finding that the VRA did not require preservation of crossover districts, the U.S. Supreme Court in *Strickland* made a second pertinent observation, one quoted at length in Justice Beasley's dissent in *Dickson IV*:

> 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

394. *Id.* at 427.

395. *See id.* at 448 (Beasley, J., concurring in part and dissenting in part) (discussing the trial court's opinion).

> 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.[396]

Systematic destruction of coalition or crossover districts in which blacks of voting age were not a majority of the total voting population but were nonetheless able to elect their candidate of choice is the situation faced by the North Carolina Supreme Court in *Dickson IV*.[397] Each of the challenged districts met this criteria.[398] Systematic destruction of coalition or crossover districts together with other factors present in these cases ought to justify an inference of discriminatory intent.

In support of its misplaced reliance on *Strickland*, the court had noted that the panel found that the plaintiffs had failed to produce plans "contain[ing] VRA districts in rough proportion to the black population in North Carolina" and failed to provide VRA districts that "compl[ied] with the General Assembly's decision . . . to populate each VRA district with more than fifty percent TBVAP, or . . . [to] comply with [what little is left of, after *Dickson IV* of] the state constitution's Whole County Provision."[399] Of course the plaintiffs did not do these things. Each of these quotas was relied on by the plaintiffs to show violation, not only of the VRA, but also of the Fourteenth Amendment.[400]

Even if race had predominated, the *Dickson IV* majority opined, the state had a compelling interest in constructing a "shield"[401] to protect against a future (presumably) successful VRA suit and to achieve preclearance from the Justice Department (as required when the legislature acted, though not now).[402] Perhaps the legislature or the lower courts thought the shield was strengthened by "rough" racial proportionality in the state legislature. But this idea is puzzling. Curiously, the *Dickson IV* majority admitted the perils of proportionality, but still thought it important for the totality of the circumstances.[403] As Justice Beasley noted in dissent:

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396. *Id.* at 448–49 (quoting *Strickland,* 556 U.S. at 23–24).
397. *See id.* at 432 (majority opinion).
398. *See id.* at 434.
399. *Id.* at 417.
400. *Id.* at 421–22.
401. *Id.* at 421, 427.
402. *Id.* at 416.
403. *Id.* at 435–36.

> The majority concludes that "the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population." The majority is only able to draw this conclusion by overlooking the trial court's determination—based upon "the undisputed evidence"—that the General Assembly used proportionality as a "benchmark." The majority's conclusion becomes more confusing given its statement that "[w]e believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." I agree "that such an effort . . . would run afoul of the Equal Protection Clause," and its use in this instance has that effect.[404]

As to the new gerrymandered districts, evidence of the third precondition in each potential district—in the absence of the racial packing used—is thin. The majority again responded by citing a Supreme Court decision from North Carolina which said:

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.[405]

The "legitimate political objective" would be to pack more Democrats—black Democrats as it turns out—into Democratic districts and to divide counties and precincts to do so. The legitimate political objective claim should fail. First, a legitimate political objective should be permissible under the state constitution and be race neutral.[406] Using dual rigid racial quotas to pack more black voters into the former multiracial coalition districts with the objective of making them black majority districts, and doing so on the theory that it will provide a VRA justification for violating the state's Whole County Provision with its antigerrymander effect, should not be a legitimate political objective.

While even the most outrageous political gerrymander does not yet give rise to a federally justiciable claim with an agreed on

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404. *Id.* at 451 (Beasley, J., concurring in part and dissenting in part) (alteration in original) (omission in original) (citation omitted).

405. *Id.* at 432 (majority opinion) (quoting Easley v. Cromartie, 532 U.S. 234, 258 (2001)).

406. *See* N.C. CONST. art. II, § 3, subsec. 3; *id.* art. II, § 5, subsec. 3.

remedy, if the political gerrymander divides whole counties it violates the North Carolina Constitution. Unless preempted by federal law, a violation of the Whole County Provision is justiciable and prohibited.[407] There is no reason to treat as legitimate the objective of expanding the meaning of the VRA by preemptive "safe harbors," "inoculations," or "shields" so as to negate an essential part of the Gingles preconditions (part 3(b)) and to do this so that the state constitution can be violated to advance partisan, systematic, multiracial, coalition-destroying gerrymandering.

Without the façade of applying the VRA, with these district-by-district and statewide quotas, the legislature cannot have as effective of a political gerrymander. But there is no federal statutory or constitutional right to a political gerrymander and no state or federal constitutional right to construct a political gerrymander by dividing whole counties.

V. THE *DICKSON IV* DISSENT

Justice Beasley, joined by Justice Ervin and Justice Hudson, filed a lengthy dissent. The dissenters would have held that the trial court had made insufficient findings of fact to support its twin conclusions of law that strict scrutiny and narrow tailoring were satisfied.[408] The dissenters set out their understanding of the basic rules: when plaintiffs have shown by circumstantial evidence or otherwise that race was the predominant factor and the legislature subordinated race neutral considerations to race, redistricting legislation can only be upheld if it satisfies strict scrutiny—"[the] most . . . exacting standard of constitutional review."[409]

In *Alabama*, the Supreme Court had explained the test for predominance. It was "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'"[410] In light of instructions to the line drawers about the 50% plus rule and the proportionality "benchmark," and in light of statements by legislators in charge of redistricting, the dissenters found there was ample evidence from which the trial court could find race predominated and strict scrutiny would be required.[411]

The dissenters cited Supreme Court authority to show that once predominance was shown the burden of showing compelling interest and narrow tailoring was on the state defendants and remained on

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407. Stephenson v. Bartlett, 562 S.E.2d 377, 390 (N.C. 2002).

408. *Dickson IV*, 781 S.E.2d at 447–48 (Beasley, J., concurring in part and dissenting in part).

409. *Id.* at 442–43 (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)).

410. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1271 (2015).

411. *Dickson IV*, 781 S.E.2d at 444 (Beasley, J., concurring in part and dissenting in part).

the defendants.[412] The dissenters also found that the trial court had failed in its compelling interest analysis with respect to Section 2 of the VRA.[413] This was because "the trial court's findings were insufficient as they relate to determining whether the challenged districts met all three *Gingles* preconditions."[414]

Under the *Alabama* opinion, the dissenters noted "'[a] racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district.' . . . The trial court's conclusion that the preconditions were present 'in substantial portions of North Carolina' suggests that the trial court did not engage in a district-by-district analysis as required by law."[415] The evidence of racially polarized voting used by the trial court was not sufficient to show the presence of the third *Gingles* precondition in each contested district.[416]

In addition, the dissenters cited the North Carolina Supreme Court case of *Pender County v. Bartlett*, affirmed in *Strickland*: "[W]hen defendants use § 2 as a defense against claims that redistricting plans are unconstitutional, defendants bear the burden of demonstrating the existence of all three mandatory preconditions."[417]

The crucial defect in the trial court's finding of fact was its failure to make a finding in each district "as to whether the majority usually bloc votes to defeat the minority's preferred candidate."[418] Without adequate findings of fact related to the third precondition, the trial court and the majority's conclusion of law on compelling interest and narrow tailoring were not supported by suitable findings of fact.[419] The dissenters drove the key point home:

> If the third precondition is not satisfied with respect to any district in a case such as this in which there is substantial evidence to suggest that race predominated the General Assembly's redistricting decisions for the twenty-six VRA districts, it follows that the General Assembly developed a race conscious redistricting plan that was not justified by § 2 as a compelling state interest.[420]

412. *Id.* at 445 (first quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996); and then quoting Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013)).

413. *Id.* at 446.

414. *Id.*

415. *Id.* at 446 (alteration in original) (citation omitted) (first quoting *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265).

416. *Id.* at 447.

417. *Id.* at 446 (citing Pender Cty. v. Bartlett, 649 S.E.2d 364, 367 (2007), *aff'd sub nom.* Bartlett v. Strickland, 556 U.S. 1 (2009) (plurality)).

418. *Id.* at 447.

419. *Id.*

420. *Id.* at 448.

The dissenters also found the trial court majority's approach to narrow tailoring defective.[421] Because the trial court had failed to find adequate facts as to the presence of the third *Gingles* precondition, it could not rely on *Strickland* "to conclude that creating VRA districts with a TBVAP greater than 50% was necessary to avoid liability under § 2."[422] In addition, the plan failed narrow tailoring because it was tied to numerical targets rather than focusing on what, if any, infusion of black voters was required to allow black voters to elect their candidate of choice.[423] Finally, as noted above, the dissent found that the use of racial proportionality to establish the total number of VRA districts (for a shield[424] against a possible VRA suit) was impermissible under Supreme Court precedent.[425] As the dissenters explained:

> By characterizing the General Assembly's consideration of race as a "precautionary consideration" used "as a means of protecting the redistricting plans from potential legal challenges under section 2's totality of the circumstances test," the majority appears to join the trial court in using race as a legislative safe harbor in derogation of the clear prohibition against reliance upon such criteria set forth by the Supreme Court of the United States.[426]

As to the four challenged non-VRA districts, the dissenters noted that equalizing population was a factor used in determining whether race predominated.[427] This violated the rule set out in *Alabama*. As to the oddly shaped 12th congressional district, the dissenters pointed to a factor suggesting that race predominated.[428] While the trial court found that racial data was not used for District 12,[429] what was used was the percentage of the vote for President Obama in the 2008 election.[430] The dissenters found that political affiliation was being used as a proxy for race and that the success of this approach "creates an incentive for legislators to stay 'on script'

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421. *Id.*
422. *Id.*
423. *Id.* at 449.
424. Three metaphors dominate the effort to justify the excessive racial quotas as protections against lawsuits: inoculation (a medical metaphor), safe harbor (a nautical metaphor), and shield (a battle metaphor). The metaphors help to obscure the question of whether under the law an inoculation, a shield, or a safe harbor is required or justified in the first place.
425. *Dickson IV*, 781 S.E.2d at 449 (Beasley, J., concurring in part and dissenting in part).
426. *Id.* at 451 (quoting Johnson v. De Grandy, 512 U.S. 997, 1018–20 (1994)).
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*

and avoid mentioning race on the record."[431] In this case, the dissenters found it "disingenuous to suggest that race is not the predominant factor."[432]

In contrast to the strongly suggested version of the majority opinion, the dissenters suggest that, as an initial matter, the creation of newly bulked-up districts needed to be justified as necessary under the *Gingles* preconditions.[433] "[T]he trial court should begin by determining how many majority-minority districts, if any, need to be created and where those districts should be located in order to comply with § 2 and § 5."[434] In this connection, the dissenters said "the trial court must look to § 2 and consider whether defendants have established the existence of the three mandatory *Gingles* preconditions for each majority-minority district that defendants created."[435]

As to Section 5, the dissent said on a district-by-district basis the trial court needed to determine what actions were needed to avoid retrogression.[436] "In doing so, the court should look to the districts as they existed under the prior redistricting plan to discern the TBVAP of each district and whether the minority group had the ability to elect its candidate of choice in that district."[437] If the answer was yes, the trial court needed to determine if defendants "impermissibly increased the TBVAP in that district."[438]

VI. *HARRIS V. MCCRORY*: A FEDERAL DECISION ON TWO NORTH CAROLINA CONGRESSIONAL DISTRICTS AND A SPLIT BETWEEN THE FEDERAL AND STATE COURT

As noted above, on February 5, 2016, a three-judge federal court decided *Harris v. McCrory*, a separate challenge (made by a different group of plaintiffs) to the legislature's gerrymander of Congressional Districts 1 (a VRA district) and Congressional District 12.[439] The issue was whether the gerrymander was an impermissible racial gerrymander.[440] Contrary to *Dickson IV*, the North Carolina case filed in state court, *Harris* found, as drawn,

431. *Id.* at 454.
432. *Id.*
433. *Id.* at 447, 450 (warning against creation of "majority-minority districts even when they may not be necessary to achieve equal opportunity for a minority voter to elect his or her preferred candidate" (citing Johnson v. De Grandy, 512 U.S. 997, 1019–20 (1994))).
434. *Id.* at 452.
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. Harris v. McCrory, No. 1:13-cv-949, 2016 WL 482052, at *1 (M.D.N.C. Feb. 5, 2016).
440. *Id.* at *6–7.

Congressional Districts 1 and 12 violated the Fourteenth Amendment.[441]

The *Harris* decision held that the North Carolina legislature had created the two districts using racial quotas, that race predominated in their creation, and that the districts were a racial gerrymander that violated the Fourteenth Amendment.[442] *Harris* was decided after this Article was initially drafted. It does not deal with the North Carolina state legislative districts or with the proportionality quota or with the Whole County Provision. Still, as we will see, the rationale of *Harris* supports many of the conclusions reached here.

Here I will focus on the analysis of Congressional District 1 ("CD 1"). Though it dealt only with two congressional districts, an analogy to *Harris* supports the challenge to the VRA districts contested in *Dickson IV*.

A. *Did Race Predominate?*

The evidence of predominance relied on by the court in *Harris* as to CD 1 is parallel to evidence we have seen that also supports the challenges to the 50% plus TBVAP legislative districts in *Dickson IV*.[443] As the *Harris* court noted:

> CD 1 presents a textbook example of racial predominance. There is an extraordinary amount of direct evidence—legislative records, public statements, instructions to Dr. Hofeller, the "principle architect" of the 2011 Congressional Redistricting Plan, and testimony—that shows a racial quota, or floor, of 50-percent-plus-one-person was established for CD 1. . . . [T]he quota operated as a filter through which all line-drawing decisions had to pass.[444]

Statements from legislative leaders and the legislature's chosen line drawer showed "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[445] "The legislative record [was] replete with statements indicating that race was the legislature's paramount concern in drawing CD 1."[446] The *Harris* court's rule was clear. Race predominates when "the legislature has subordinated traditional districting criteria to racial goals, such as

441. *Id.* at *2.
442. *Id.* at *2, *7.
443. *See id.* at *8–11.
444. *Id.* at *8.
445. *Id.* at *7–8 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).
446. *Id.* at *8.

when race is the single immutable criterion and other factors are considered only when consistent with the racial objective."[447]

Harris quoted the Court's decision in *Alabama*: "'[M]echanical racial targets' are highly suspicious."[448] It also noted the Supreme Court's long standing skepticism of racial quotas.[449] According to *Harris*, here, as in *Alabama*, there was strong direct evidence that the legislature's numerical racial target was prioritized over other districting criteria.[450] Dr. Hofeller, the legislature's designated line drawer, testified that he split counties and precincts when needed to meet the 50% plus TBVAP quota.[451]

B. *Harris on Strict Scrutiny and Narrow Tailoring*

Since race predominated in drawing CD 1 (as it does by analogy for the VRA legislative districts challenged in *Dickson*), the *Harris* court applied strict scrutiny—requiring a compelling state interest and narrow tailoring.[452] For CD 1, as for the legislative districts in *Dickson*, the defendants suggested the compelling interest was avoiding liability under the VRA.[453] But in *Harris*, the redistricting failed strict scrutiny "because the defendants did not have a 'strong basis in evidence' for concluding that creation of a majority-minority district—CD 1—was reasonably necessary to comply with the [VRA]."[454] Therefore, the district was not narrowly tailored.[455] This was so because the defendants failed to show "'a strong basis in evidence' of racially polarized voting in CD 1 significant enough that the white majority routinely votes as a bloc to defeat the minority candidate of choice."[456]

Harris noted that racial bloc voting cannot be assumed, but must be proved and proved for the specific district in question.[457] The General Assembly was required to show "that the white majority was actually voting as a bloc to defeat the minority's preferred candidates" in the district in question (CD 1 in this case).[458] The *Harris* court noted that in the prior versions of CD 1—

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447. *Id.* (quoting Bethune-Hill v. Va. State Bd. of Elections, No. 14-cv-852, 2015 WL 6440332, at *63 (E.D. Va. Oct. 22, 2015) (Keenan, J., dissenting)).

448. *Id.* at *10 (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1267 (2015)).

449. *Id.* (citing Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); then citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

450. *Id.*

451. *Id.*

452. *Id.* at *17.

453. *Id.*

454. *Id.* (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015)).

455. *Id.*

456. *Id.* at *18.

457. *Id.*

458. *Id.* at *19.

though not majority-minority districts—"the white majority did not vote as a bloc to defeat African-Americans' candidates of choice. In fact, precisely the opposite occurred . . . ."[459] That was also so in the state legislative districts challenged in *Dickson IV*.[460]

Since the defendants failed to meet the *Gingles* third precondition, Section 2 did not require creation of a majority-minority district.[461] And because the state went beyond what was reasonably necessary to avoid retrogression, the plan was not narrowly tailored to protect voting rights under Section 5.[462]

In CD 1, the general assembly had increased the TBVAP from 47.76% to 52.65%.[463] Though blacks had not made up a majority of the voting age population, black candidates easily and repeatedly won reelection under earlier CD 1 plans.[464] In sum, the *Harris* majority concluded, "the legislators had no basis—let alone a strong basis—to believe that an inflexible racial floor of 50% plus one person was necessary in CD 1."[465] The three-judge court issued its decision in *Harris* on February 5, 2016.[466] The court gave the legislature until February 19, 2016 to enact a new congressional districting plan.[467] The Supreme Court rejected the defendants' motion for a stay.[468]

VII. ABOUT FACE: THE LEGISLATURE REDISTRICTS AGAIN AND SEEKS TO JUSTIFY ITS CONGRESSIONAL PLAN AS A PURE POLITICAL GERRYMANDER

Faced with a deadline, the majority of the North Carolina legislature passed a new congressional districting plan. The defendants announced that the *Harris* decision held that any consideration of race in districting was improper; the plaintiffs asserted that was a clear misreading of *Harris*.[469] Accordingly, Representative Lewis and Senator Rucho who led the legislature in redistricting, said that racial data was not used to create the map;[470] they had instructed their line drawer to ignore race.[471]

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459. *Id.*
460. *Dickson IV*, 781 S.E.2d 404, 447 (N.C. 2015) (Beasley, J., concurring in part and dissenting in part).
461. *Harris*, 2016 WL 482052, at *19.
462. *Id.* at *20.
463. *Id.*
464. *Id.*
465. *Id.* at *21.
466. *Id.*
467. *Id.*
468. McCrory v. Harris, 136 S. Ct. 1001 (2016) (mem.).
469. Plaintiff's [Proposed] Objections and Memorandum of Law Regarding Remedial Redistricting Plan at 21–25, Harris v. McCrory, No. 1:13-CV-00949 (M.D.N.C. filed Feb. 29, 2016).
470. *Id.* at 9 (citing Ex. 3, Tr. 40:4-7).
471. *See id.*

Instead of a racial gerrymander, Republican leaders declared that the plan was to be a "political gerrymander."[472] And political gerrymandering, they asserted, was not against the law.[473]

The issue is muddled. While the Court has not found partisan gerrymandering constitutional; it has also not agreed on a remedy, and political gerrymandering may, as one of the current justices has asserted, be a political question, in effect a wrong without a judicial remedy.[474] At any rate, legislative leaders announced that their new plan was designed to maintain a Republican majority of 10–to-3 in North Carolina's congressional delegation.[475] Their latest plan is another extreme gerrymander, a remedy for a state where voters have been closely divided along party lines with Democrats carrying 50.9% of the total congressional vote in 2012 compared to a Republican majority of 55.8% in the off-year election of 2014.[476]

The plaintiffs attacked the legislature's new gerrymander on two grounds. First, the plaintiffs asserted that it undermined the representation of black voters by scattering them—dispersing then and leaving blacks with little ability to elect candidates of their choice.[477] Second, the plaintiffs averred that the districting was "an intentional manipulation of district lines out of a singular desire to erect barriers to the political process for a subset of its citizens."[478]

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472. *Id.* at 10 (citing Ex. 3, Tr. 46:5–11).

473. *Id.* at 31–32 (citing Ex. 3, Tr. 46:5–11).

474. *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Scalia, J., plurality opinion) (holding that political gerrymandering is a political question); *id.* at 314 (Kennedy, J., concurring in judgment) (agreeing with the plurality that the case should be dismissed but noting that a limited and precise rationale might exist under which judicial relief for political gerrymandering cases would be available). The other justices also believed the plurality's holding was incorrect, but were unable to agree on an administrable remedy. *See id.* at 319 (Stevens, J., dissenting) (believing the plaintiff had "stated a claim that . . . Pennsylvania's redistricting plan violate[d]" equal protection principles); *id.* at 347 (Souter, J., dissenting) (stating that political gerrymandering plaintiffs should be required to prove a prima facie case of five elements, after which the defendants would bear the burden of "justify[ing] their decision by reference to objectives other than naked partisan advantage); *id.* at 362 (Breyer, J., dissenting) ("[W]hether political gerrymandering does, or does not, violate the Constitution in other instances, gerrymandering that leads to entrenchment [of a minority in power] amounts to an abuse that violates the Constitution's Equal Protection Clause."). For a state, voter-driven solution, see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2658, 2659 (2015) (upholding an Arizona voter initiative to vest redistricting authority in an independent commission).

475. Plaintiff's [Proposed] Objections and Memorandum of Law Regarding Remedial Redistricting Plan, *supra* note 469, at 10–11 (citing Ex. 3, Tr. 47:18–48:10).

476. *Id.* at 16.

477. *Id.* at 27.

478. *Id.* at 38.

In its redistricting after the *Harris* decision, the legislature reduced the BVAP in North Carolina congressional district 1 from 52.7% to 44.5% and in district 12 from 50.7% to 36.2%.[479] Meanwhile, in other districts, black voters were dispersed, with new districts ranging from a high of 22.41% BVAP to lows of 3.27 and 11.9%.[480] Typically the BVAP was around 19%, 20%, or 21%.[481]

The North Carolina legislature's daring racial and political gerrymanders of the North Carolina legislature are an ongoing saga. In *Covington v. North Carolina*[482] a new complaint filed May 19, 2015 challenges the racial quotas in the state legislative districts. If following the rationale of the Alabama case and *Harris*, the gerrymander is stripped of its VRA façade, the Whole County provision of the North Carolina Constitution may limit the legislature's ability to use political gerrymander justification and excuse.

VIII. SUGGESTED APPROACHES

A. *Some Principles that Should Govern Racial Gerrymandering Cases and the Right to Vote*

One effective solution for gerrymanders like North Carolina's would be a judicial rule correcting gross political or racial gerrymanders that tend to make majorities into minorities or large minorities into tiny minorities and to disadvantage voters because they vote for the wrong kind of candidates.

1. *Racial Gerrymanders*

Under current law, as we have seen, in a racial gerrymandering case, "the 'plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations.'"[483] The principle should apply to defenses as well. When a defendant contends, in a racial gerrymandering case, that the predominant motive was political, not racial, the defendant should be required to show that the political objective was pursued by race-neutral means. Such a claim would be defeated by, for example, racial targets or quotas used for political purposes, explicit or implicit. A requirement that the plaintiff show the political

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479. *Id.* at 14.

480. NORTH CAROLINA GENERAL ASSEMBLY, STAT PACK 3 (2016), http://www.ncleg.net/GIS/Download/District_Plans/DB_2016/Congress/2016_Contingent_Congressional_Plan__Corrected/Reports/DistrictStats/rptStatPack.pdf.

481. *See id.*

482. Complaint at 2, Covington v. North Carolina, No. 1:15-CV-00399 (M.D.N.C. filed May 19, 2015).

483. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1270 (2015) (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

gerrymander could be achieved just as well without the racial gerrymander tool is paradoxical, for it is the specious use of the VRA as a shield against a possible suit that permits the state to avoid the anti-gerrymander effects of the Whole County Provision. The state constitution forbids dividing whole counties in the formation of state senate and state house districts.[484] So, by this paradoxical argument, the legislature must be permitted a racial gerrymander with two quotas because a political gerrymander without the veneer of the VRA defense will be unconstitutional and less effective under North Carolina's law.

As a corollary to the first suggestion, if racial *means* (e.g., identifying and concentrating black voters) predominate in districting designed to achieve political dominance, that fact should at least trigger strict scrutiny. It should not be enough to show that members of one race (e.g., blacks) overwhelmingly support the opposition political party. The "we identify and pack blacks not because they are blacks, but because they vote for Democrats" defense should not work. If the means is identifying and packing blacks, rather than Democrats of other races, that should trigger strict scrutiny.

In that connection, courts should recall history and avoid repeating the sort of judicial reasoning that facilitated historical disasters. In the awful disenfranchisement of black citizens in the South after the overthrow of Reconstruction, lawmakers in Mississippi and other southern states recognized that after the Fifteenth Amendment they could not simply pass laws banning black voters.[485] At first, they looked for and used facially neutral laws—laws that did not explicitly refer to race but that used tests that predominantly disadvantaged black voters and some poor whites too.[486] As the Mississippi Supreme Court put it, "[r]estrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone."[487] The United States Supreme Court did not find this objectionable.[488] Though the purpose to disproportionally disenfranchise blacks was proclaimed, the United States Supreme Court found it "within the field of permissible action under the limitations imposed by the

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484. N.C. CONST. art. II, § 3, subsec. 3; *id.* art. II, § 5, subsec. 3.

485. *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 [disenfranchising Mississippi constitutional] convention discriminate[d] against its characteristics"); Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).

486. LEFLER & NEWSOME, *supra* note 50, at 526–27 (describing devices such as the literacy test, poll taxes, and partisan control of election machinery).

487. *Ratliff*, 20 So. at 868.

488. *Williams*, 170 U.S. at 222–23.

federal constitution."[489] The Court noted, "the operation of the [Mississippi] constitution and laws is not limited by their language or effects to one race."[490] Today, such an intent would doom the law.[491]

Protecting the right to vote should not be torpedoed today by a justification that we target black voters because they vote for Democrats. In addition to tolerating legal devices to destroy the black-white political coalition, the U.S. Supreme Court also undermined congressional efforts to punish political terror that had the same objective.[492] In a circuit court opinion, Circuit Court Justice Bradley said that a congressional law could not reach Klan-type political terror *if the terrorists' motive was political rather than racial.*[493] In North Carolina, white as well as black Republicans were murdered.[494]

It is worth recalling that the early attempts to overthrow the black-white coalition in the Reconstructed Southern states used race for purposes of political dominance—even though they sometimes used facially neutral means.[495] Use of race for political purposes of polarization and isolation of black voters is no more attractive today than it was in the 1870s and 1890s. Political advantage should not sanitize tactics focusing on disadvantaging black voters and

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489. *Id.* at 222.

490. *Id.*

491. *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985) ("Under the view that the Court of Appeals could properly take of the evidence, an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . . .").

492. United States v. Cruikshank, 92 U.S. 542, 559 (1876) (abrogating congressional anti-Klan statutes by use of the state action syllogism). *See generally*, James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Cannon*, 49 HARV. C.R.-C.L. L REV., 385-44 2014; Michael Kent Curtis, *Reflections on Albion Tourgee's 1896 View of the Supreme Court: A "Consistent Enemy of Personal Liberty and Equal Rights"?*, 5 ELON L. REV. 19, 44-55 (2013) (discussing how Cruikshank hobbled action against political terrorists).

493. *See* United States v. Cruikshank, 25 F. Cas. 707, 713–14 (C.C.D. La. 1874). Congress could not protect a person's right to vote under the Fifteenth Amendment against violence by "private" persons unless based on race. In fact, that described the private Klan-type terror that was beyond the reach of Congress under the Fourteenth or Fifteenth Amendment. Excluded terror activities "may include whites as well as blacks," as it did when aimed at Republicans. *Id.* at 713. Circuit Court Justice Bradley continued describing, without calling it out directly, political terror in the South: "It may have reference to the particular politics of the parties." *Id.* at 713. As to the Fourteenth Amendment, the Court soon invoked the state action syllogism. United States v. Harris, 106 U.S. 629, 638 (1883); *see* Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1423–24 (2009).

494. Curtis, *supra* note 1, at 80–81.

495. *Id.* at 80–82.

disrupting multiracial coalitions. If the search for political dominance sanitizes racial classifications, racial segregation might reasonably have been justified. Its purpose and effect was to make blacks into a pariah race, effectively hobbling multiracial coalitions.

Today, the declaration of discriminatory intent would sink the statute because of its admitted discriminatory purpose.[496] But without that admission, a whole raft of 2011 and later laws that disproportionally disadvantage black voters may be below the Court's radar screen, as intentional discrimination using facially neutral statutes once was.[497] We should look at the larger context. Instead of seeing isolated dots, courts should connect the dots and see the larger picture. Districting decisions come in the context of a host of laws that disproportionally disadvantage black voters and require immense efforts to counter. This should be a factor in seeing a racial gerrymander.

2. *The Use of Race*

Laws that categorize people based on race require strict scrutiny and rarely survive a challenge. In the racial intermarriage case of *Loving v. Virginia*, one claim made by Virginia was that bans on racial intermarriage were not problematic because blacks and whites were all treated the same.[498] While blacks could not marry whites, neither could whites marry blacks.[499] But of course there was a pernicious racial classification: the racial discrimination was against mixed race marriages as opposed to one-race marriages. At least where the legislature is broadly and systematically destroying functioning multiracial coalitions and multiracial districts in favor of districts that are predominantly one-race majority, that itself should be recognized as a racial classification triggering strict scrutiny and as an action that violates the Equal Protection Clause and the Fifteenth Amendment.

The North Carolina legislature has recently provided more evidence of its attack on multiracial coalitions. The government of Greensboro, North Carolina had eight council members and a

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496. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (considering a disenfranchisement scheme, similar to Mississippi's, under the Alabama Constitution of 1901).

497. *See* Voter Information Verification Act, 2013 N.C. Sess. Laws 1505 (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).

498. Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.").

499. *See id.*

Mayor.[500] The Mayor and three of the council members were elected at-large.[501] Five of the council members were elected in districts.[502] The result was that citizens of Greensboro had potential multiracial coalitions—both for the three at-large council members and between some or all of the five elected from districts. In 2015, the legislature—without a referendum by the residents of the city—abolished the existing plan for Greensboro's government, got rid of the three at-large council members, and provided instead for eight council members elected from districts.[503] The act also forbade Greensboro from making changes in the form or structure of local government.[504]

Though it does not seem strongly implicated in *City of Greensboro v. Guilford County Board of Elections*, the amendment to section 5 of the VRA provides that the right to vote is denied when the change "has the effect of *diminishing* the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice."[505] To an uncertain extent this provision burdens the ability of legislatures to create multiracial coalitions and potentially impedes changes in favor of more racially diverse districts—and, to some extent, it militates in favor of majority-white and majority-black districts. This racial classification should require strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

3. *The Right to Vote*

Congress should provide strong national standards to protect the right to vote and to ease access to the polls, at least under its Article I power and to the extent possible under the Fourteenth and Fifteenth Amendments. As it now stands, parts of southern states may still be covered by some of the provisions of Section 5—excepting, of course, preclearance—and all states are covered by Section 2, though so far, for too many courts, both seem an anemic protection of the right to vote.[506] Most parts of northern, western, and midwestern states are not covered by whatever is left of Section

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500. Complaint at 17, City of Greensboro v. Guilford Cty. Bd. of Elections, No. 1:15-CV-559 (M.D.N.C. July 23, 2015), 2015 WL 4493790.

501. *Id.* at 13.

502. *Id.*

503. *Id.* at 1–2, 13.

504. *Id.* at 14–15.

505. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5(b), 120 Stat. 577, 580–81 (2006) (codified as amended at 52 U.S.C. § 10304(b) (Supp. II 2015)) (emphasis added).

506. *See* Orville Vernon Burton, *Tempering Society's Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 18, 20 (2015).

5.[507] A myopic focus on genuine problems in the South may have obscured the extent to which northern states are engaging in disreputable conduct quite similar to that reemerging in the South. For some, the prevalence of these tactics in the North may palliate their use in the South. The same is true for racial gerrymanders which seem as prevalent in the North as in the South.

CONCLUSION

The North Carolina legislature's districting (and similar devices elsewhere) are producing a political world of "separate but unequal" that is contrary to the ideals that produced the VRA in 1965—an act passed the year after the Civil Rights Act of 1964 banned discrimination in public accommodations and employment.[508] It is also contrary to the ideals of the Fourteenth Amendment.

To decide, as the majority of the North Carolina legislature has, and for no acceptable reason, that black voters should be denied the ability to continue to vote for their favored state senatorial candidate *because she is white* is a personal affront to the dignity of black voters as well as to that of the white state senator who was scooped out of her district for racial reasons. And to decide, as the majority of the legislature has, that white voters—many of whom supported Senator Blue—had to be moved out of his district *because of the color of their skin* is a personal affront to the dignity of those voters as well as an affront to the dignity of Senator Blue. These shocking departures from the anticaste principle of the Fourteenth Amendment and these grossly repugnant uses of race should be firmly rejected—by legislators, judges, and citizens alike.

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507. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., http://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (last updated Aug. 6, 2015).

508. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).