NORTH CAROLINA'S RACIAL POLITICS: *DRED SCOTT* RULES FROM THE GRAVE

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INTRODUCTION

The right and ability of African-Americans to vote and participate in the political process in North Carolina is aggressively being attacked. This is not the first time in North Carolina history that similar attacks have occurred. In the past, the attacks have been successful, but African-Americans have battled back to regain and reassert the right.

This article reviews that long history of disenfranchisement and discusses how the North Carolina General Assembly has supported these campaigns, and at critical points, how the federal courts have resisted efforts and devices that have been imposed in an attempt to prohibit political participation by African-Americans. The discussion will trace how governmental embracing of white supremacy and right wing politics have cooperated to deny African-Americans the right to vote and is presently threatening to restore the political vision announced in the infamous *Dred Scott v. Sandford*[1] decision that African-Americans have no rights which whites are bound to respect. With each of these battles, African-Americans have fought back, but the many victories have never been permanently enshrined into the legal fabric of North Carolina politics—despite the right to vote being guaranteed by the state constitution.

Dating back to slavery, there has been a consistent theme that has guided political decisions relating to the right of African-Americans to vote in North Carolina. That central theme has been undergirded

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1. 60 U.S. 393 (1857).

by the national resolve of right wing white political leaders that the United States is a nation which was created for whites, by whites and neither Africans nor African-Americans can ever be qualified to vote or participate in the political affairs of this nation and state. This central theme has been based on the belief in racial superiority and an undying belief in white supremacy. In North Carolina, the belief in and devotion to white supremacy has been as fervently held and embraced as it has been in any other state in this country.

The disregard and disdain that whites held for Africans—free or slave—during the early history of this country were graphically described by Chief Justice John F.A. Taney in his epic decision in *Dred Scott*. In that opinion, Taney, in a comprehensive decision, concluded that, as a matter of American law, Africans had no rights which whites were bound to respect because they were unworthy of respect as humans and the framers of the country's constitution never intended that Africans could ever be elevated to the status of human beings or citizens.[2]

The acceptance of Taney's widely held opinion has been a fundamental principle which has been and presently is held by right wing political operatives who control state and national political power. When elevated to political control of the government, this political philosophy has been articulated as the justification that supports efforts to prevent African-Americans from voting. More often than not during United States history, these political forces have regularly engaged in robust efforts to deny or minimize the right of African-Americans to vote and participate in the governance of this country. In this article, we will explore that history.

I. VOTING BY FREE AFRICANS DURING SLAVERY AND RESISTANCE

From the colonial period through slavery, North Carolina's population was composed of a large number of free Africans. The number of free African varied based on the region of the state. During the colonial period, 18% of the indentured servant population that resided in the Albemarle region was non-whites as were 16.7% who resided in the Lower Cape Fear region, but they only constituted 2.2% of those residing in the western region of the state.[3] During the

2. *Id.* at 407.

3. JEFFREY J. CROW, PAUL D. ESCOTT & FLORA J. HATLEY, A HISTORY OF AFRICAN AMERICANS IN NORTH CAROLINA 8 (1992).

Revolutionary War period, free Africans served in the militia with no apparent discrimination until the nineteenth century when they were limited to being musicians.[4]

While there are no records that free Africans voted prior to the Revolutionary War, they did vote in North Carolina from the end of the Revolutionary War until 1835.[5] Jeffery Crow, a noted North Carolina Historian, reported that the 1776 North Carolina Constitution did not prohibit free Africans from voting and they did participate in the political process.[6] At the time, North Carolina was one of six states that allowed free Africans to vote and was the only southern state to do so.[7] The federal constitution left the issue of voting rights to the states.[8]

At various periods during slavery that population of free Africans varied, but with each passing year, the numbers significantly increased. For example, in several eastern North Carolina counties, free Africans constituted as much as 15% of the population.[9] When the slave population is added, the number of Africans equaled or exceeded that of whites in several of these eastern counties where the vast majority of Africans resided.[10] In 1850, North Carolina had a white population of 553,028, a free African population of 27,463 and a slave population of 288,548.[11] By 1860, those numbers increased to 631,100 whites, 30,463 free Africans and 331,059 slaves.[12]

As previously mentioned, the 1776 North Carolina constitution did not prohibit free Africans who owned property from voting.[13] In order for anyone of any race to vote during the slavery period, they had to be a property owner.[14] "Enfranchisement was looked upon as a right of all free men, and for a time, law enforcement officials failed to

4. *Id.* at 8–9.
5. *Id.*
6. *Id.* at 9.
7. Steven Mintz, *Winning the Vote: A History of Voting Rights*, J. OF THE GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights. Maryland, Massachusetts, New York, Pennsylvania and Vermont were the other states. *Id.*
8. *Id.*
9. JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 1790-1860 105–06 (1943).
10. *Id.* at 18 n.11.
11. *Id.*
12. *Id.*
13. *Id.* at 12.
14. *Id.*

show that they saw any difference between free white men and free Negroes."[15]

Not only were free Africans able to vote during slavery, but their votes were eagerly sought.[16] Despite the fact that free Africans constituted a small number of voters, disgruntled whites regularly campaigned against this political participation. This campaign succeeded in 1835 when the North Carolina General Assembly, over a vigorous debate among legislators, enacted a law to disfranchise these Africans.[17] During that debate, several legislators made note of the fact that North Carolina was the only southern state that allowed free Africans to vote.[18] The collective attitude of those who sought to enact this political participation ban was explained by Representative Wilson of Perquimans County who warned fellow legislators, "[t]here are already 300 colored voters in Halifax, 150 in Hertford, 50 in Chowan, 75 in Pasquotank, etc., and if we foster and raise them up, they will soon become a majority – and we shall have Negro justices, Negro Sheriffs, etc."[19] Even though the record does not evidence that free Africans had ever been elected to any political office, the prevailing sentiment of that day was to guard against the possibility of Africans being elected to any political office. This possibility was deemed to be an unthinkable and unimaginable consequence and would thereafter become the focus of future campaigns to prevent African-Americans from voting. The fear among whites of "Black Domination" was a clear and present day danger and reality.[20]

Other legislators, who were involved in this debate, made it clear that only white property owners should vote and that this reality had already existed in all southern states.[21] Representative James W. Bryan of Carteret County made this point when he stated, "North Carolina is the only southern state . . . that ha[d] permitted [free Africans] to enjoy this privilege; and so far as [his] experience and observation extend[ed], her interests have not been promoted by the concession of the privilege."[22] Supporting this point of view, the President of the

15. *Id.* at 105–06.
16. *Id.* at 106.
17. *Id.* at 111.
18. *Id.*
19. *Id.*
20. Irving Joyner, *African American Political Participation in North Carolina: An Illusion or Political Progress?*, 6 WAKE FOREST J.L. & POL'Y 85, 87 (2016).
21. *Id.* at 116.
22. *Id.* at 110–11.

Convention, Representative Nathaniel Macon, argued that "free Negroes never were considered as citizens and no one had the privilege of voting but citizens."[23]

The banning of the right to vote was a part of a larger effort to restrict the participation of free Africans and to guard against assistance for future slave resistance and rebellions. Among whites, there was an increasing fear of rebellions as a result of increased activism from abolitionists and increased resistance and rebelliousness among the slave population.[24] The South had recently experienced the Nat Turner slave uprising in Southampton County, Virginia in 1831 in which sixty whites were killed. This revolt increased fear and panic among whites in North Carolina because Southampton County was located just across the border.[25]

In addition, whites in the state were aware of "David Walker's Appeal," which was published in 1829 and was widely circulated in North Carolina since Walker was a native of Wilmington.[26] Walker's Appeal presented a thundering "fire and brimstone" attack against slavery and strongly urged Africans, free and slave, to rise up and destroy the system. Walker made clear that whites and slave owners, in particular, were engaged in a calculated campaign to heap the insupportable insult upon Africans that they were not of the human family, an oft repeated myth that sought to cast Africans as "the most degraded, wretched and abject set of being[s] that had ever lived since the beginning of the world."[27]

Whites had no way of knowing the effects of the Nat Turner uprising or Walker's Appeal and whether free Africans would join with slaves, many of whom were family members by blood or marriage, to direct, encourage or support slave uprisings as forthrightly encouraged by Walker and the other forces of abolition. This fear created a mindset and system which mandated that "[s]laves and free [Africans] were constantly under white surveillance, and the organized power of [slave] patrols, the state militia, and the federal army was close at hand to suppress any uprising."[28]

23. *Id.* at 111 n.11.
24. CROW ET AL, *supra* note 3, at 49.
25. *Id.*
26. *Id.* at 49–50.
27. *Id.* at 50.
28. *Id.* at 51.

The fears of slave rebellions produced changes in the laws that restricted the permitted activities of free Africans and gave greater powers to slave owners and slave patrols. These enactments began in 1826 and prohibited free Africans from entering the state and, leading up to 1835, prohibited Africans from preaching in public, buying or selling liquor, owning or possessing a gun without a special license and attending public schools.[29] In 1830, the North Carolina General Assembly prohibited anyone from teaching a slave to read or write.[30] It also made it more difficult for a slave owner to free a slave and required that the slave owner post a $500 bond for those manumitted slaves who remained in the state; otherwise, a manumitted slave had to leave the state and never return.[31]

In the 1835 legislative debate, which resulted in the enactment to prohibit free Africans from voting, Judge Gaston of Craven County argued that legislators that "the majority of free Negroes in North Carolina were the offspring of white women and were 'therefore entitled to all the rights of free men.'"[32] He contended that disfranchisement would be forcing free Negroes "down yet lower in the scale of degradation, and encouraging ill-disposed white men to trample upon and abuse them as beings without a political existence and scarcely different from slaves."[33] This prophetic view was cemented into the law when Chief Justice Taney delivered the legal justification for white supremacy in his *Dred Scott* decision.

To free Africans and slaves, it was clear that whites sought to subject them to the rawest form of brutality, but Africans knew that they had to resist the brutality and inhumanity in a manner, which would guarantee their survival. And survive they did, as the African population in North Carolina increased from 140,000 in 1800 to 361,522 in 1860: an increase from 29.3% of the population to 36.5%.[34] The number of free Africans in the state increased to 30,463 in 1860, a six-fold increase from 1790.[35]

The consequence of this population explosion was that the Union Army had a ready pool of military conscripts when the Civil War was

29. *Id.* at 48.
30. *Id.* at 49.
31. *Id.*
32. *Id.* at 114–15.
33. *Id.*
34. *Id.* at 51.
35. *Id.* at 52.

finally waged. The brutality used by the slave masters was enforced by white patrollers who regularly roamed the surroundings looking for escaping or errant slaves. Their actions were condoned by the state's law, which determined this was necessary to keep this growing mass of labor in check. To whites, slaves, and even free Africans, were legally determined to be property that could be beaten, maimed, used, bought and sold at the will and caprice of the master, who was deemed to be the property owner; the patrollers, were authorized to use whatever force was necessary to keep the Africans under control; and the brutal treatment imposed upon Africans was fully sanctioned by law.[36]

In support of this legal authority, Chief Justice Thomas Ruffin of the North Carolina Supreme Court declared, "The power of the slave master must be absolute to render the submission of the slave perfect."[37] State law authorized wide discretion to whites to do what they had to do with the knowledge that there would be no legal consequences for their action no matter how brutal the conduct directed toward Africans, slave or free.[38] "Whites regarded the lash as an essential instrument of labor control and discipline. They relied on whippings to punish individual slaves who were disobedient and to frighten and intimidate the much larger number who merely witnessed a whipping. Thus, beatings strengthened authority and supported plantation order."[39]

The treatment of Africans resulted from an attitude of whites that they were inferior, undisciplined, ignorant, and provided to whites to be their source of labor, entertainment and pleasure. Slavery was not just a source of labor for the large plantation owner, but was also widely used by the average white person as a status symbol. In 1860, the typical slave owner owned no more than one slave and 53% of the white population owned just five or fewer slaves.[40] Only 2.6% of slaves were owned by plantation owners who had more than fifty slaves.[41] As such, the status, treatment and condition of Africans were thoroughly engrained into the cultural fabric and social psychic of the entire white society and were accepted as an integral part of their

36. *Id.* at 53–60.
37. *Id.* at 49. *See also* North Carolina v. Mann, 13 N.C. 263 (1830).
38. CROW ET AL, *supra* note 3, at 49.
39. *Id.* at 58.
40. *Id.* at 56.
41. *Id.*

daily lives. Even the poorest of whites could, and most did, own at least one slave which they could treat any way that they wanted. In this environment, "there was no guarantee that Africans would receive good physical treatment. The physical benefits provided to Africans were meager and their treatment reflected the fact that they were a despised and oppressed race."[42]

While a few Africans received decent treatment by their owners, most whites "looked down on [Africans] and assumed they neither needed nor deserved the level of care that would be considered essential among whites."[43] "The basic purpose of slavery was exploitation, and the slaves knew it."[44]

This institutionalized mindset was articulated and deeply held by the white political leadership that initially banned the right of free Africans to vote in 1835. There were no claims of voter fraud, but rather the basic white supremacy narrative that free Africans were not entitled to participate in the political affairs of North Carolina merely because of their race and inferior status. This mindset would continue to control the destiny of African-Americans in North Carolina.

II. CONFIRMATION OF WHITE SUPREMACY BY *DRED SCOTT V. SANDFORD*

Dred Scott v. Sandford is one of the most celebrated and infamous legal opinions to be issued by the United States Supreme Court. This decision detailed the absence of legal rights and constitutional protections that were available to Africans during the pre-civil war period and undergirds the political narrative used by many white political leaders to justify their efforts to disenfranchise African-Americans presently. The decision focused on the intent of the "floundering father," the drafters of the original United States Constitution, regarding the purpose for which the American political union was formed. The legal conclusion articulated in *Dred Scott* was that Scott was a slave and, as such, not a citizen—nor could he ever be a citizen of the United States because the Constitution's framers never intended that result.[45] In interpreting the Constitution, an over-riding principle that is designed to support the appropriate legal

42. *Id.* at 58.
43. *Id.*
44. *Id.* at 63.
45. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

conclusion, is a determination of what the original framers of the constitutional provision intended.

In his opinion, Taney reasoned that the framers intended to include among the population of citizens just that class of people who were citizens of the several colonies or sovereigns that existed when the Declaration of Independence was drafted and adopted:

> And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their place in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.[46]

In his answer to that question, Taney concluded that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in the [Declaration of Independence]."[47]

Explaining his view of the mindset of whites regarding Africans when the Declaration of Independence and the Constitutions were approved, Taney wrote:

> [Africans] had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound respect; and that [Africans] might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[48]

46. *Id.*
47. *Id.*
48. *Id.*

Taney's description of the political and social attitudes of whites in the United States and among English people was cited in support of the brutal treatment and demeaning conditions in which Africans were forced to endure. According to Taney, the English:

> [N[ot only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.[49]

Flowing from this history and practices, Taney concluded that in the United States, "a negro of the African race was regarded by them as an article of property, and held and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States."[50]

Taney further concluded that this history of slavery and the attendant treatment and conditions imposed upon Africans:

> [Showed] that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, . . . but this stigma, of the deepest degradation, was fixed upon the whole race."[51]

Using the degrading treatment imposed upon free Africans who resided in several slave and non-slave states—Connecticut, Massachusetts, New Hampshire, Kentucky, Maryland and Rhode Island—and laws enacted within those states which limited the ability of Africans to interact with whites as further support for his conclusion, Taney reasoned that the inferiority of Africans was a view which was universally held in both slave and non-slave states.[52]

Taney's decision also examined various provisions of the Constitution, which supported a conclusion that slavery was not prohibited by the "floundering fathers." Provisions identified included the clause which allowed for the importation of slaves until 1808 and the pledge by states to maintain the property right of slave owners by

49. *Id.* at 408.
50. *Id.*
51. *Id.* at 409.
52. *Id.* at 412.

returning escaped slaves who were found in the other states.[53] These provisions were used by Taney to support the conclusion that the drafters did not intend to confer on the Africans or their posterity the blessings of liberty, or any of the personal rights that were so carefully provided to citizens in the plain wording of the document.[54] Taney concluded, "It is obvious that [Africans] were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a state in every other part of the Union."[55]

While Taney's opinion was designed to support his conclusion that Dred Scott was not a citizen and could not file a legal claim in the U.S. courts, he also enshrined into the law a narrative and national consciousness of African inferiority forever. *Dred Scott,* as the law of the land, expressed the view of whites as to what the relationship that Africans were to have with the government of the United States, its member states, and its citizens. This view of the then-existing national consciousness endorsed the action of the North Carolina General Assembly when it banned free Africans from participating in the political franchise. It also developed, in law, the expectation that the political disabilities that Africans were subjected to would continue throughout the life of this country. In fact, the racial attitudes, hostilities, bias and brutality described by Taney are present today in interactions between African-Americans, other people of color and whites.

III. RECONSTRUCTION AND THE RISE OF THE AFRICAN-AMERICAN VOTE

Just five years after *Dred Scott* was issued in 1856 and following the election of Abraham Lincoln, seven southern states seceded from the United States and formed a separate nation.[56] This new southern nation, which was devoted to the continuation of slavery, was called the Confederate States of America.[57] It elected its own President and legislature, fielded an army, and drafted its own Articles of Confederation.[58] Under the leadership of its President, Jefferson

53. *Id.* at 411.
54. *Id.*
55. *Id.* at 412.
56. CROW ET AL, *supra* note 3, at 70.
57. *Id.*
58. *Id.*

Davis, it entered into a war with the United States on April 12, 1861, after which North Carolina and three other southern states joined the Confederacy.[59] With the assistance of more than 20,000 African-Americans from North Carolina, the confederacy was defeated after a long destructive Civil War in which between 618,000 and 700,000 people were reportedly killed, 20,602 of the casualities lived in North Carolina.[60]

After the Civil War ended in 1865, the leadership of the free African and former slave communities convened in Raleigh as a part of the North Carolina Freedmen Convention to discuss and chart strategies to advocate for and protect the interests of African people in this state.[61] Convention organizers included able leaders like Abraham Galloway, a former run-away slave from New Bern; James Harris, a carpenter, teacher, minister and barber from Raleigh; Bishop John Hood, the presiding bishop of the African Methodist Episcopal Church; Isham Swett; Henry Cherry; and Parker David Robbins.[62] The Convention brought together 117 delegates from 42 North Carolina counties who debated and ultimately determined the specific provisions, which they would demand to be included in the new North Carolina constitution.[63]

The Convention lasted for three days and at its conclusion, the delegates issued an agenda which demanded universal suffrage or the right to fully participate in political affairs, free education, civil liberties, labor rights, prohibition against peonage, equality within the court system, women's rights and care for the infirm, orphans and disabled.[64] As they met, delegates were keenly aware of not only the oppressive history and impact of slavery, but also of the sliver of voter empowerment that free Africans had experienced before the 1835 disfranchisement legislation.[65] The latter produced a hope that the newly emancipated Africans could become a productive part of the American-style democracy and its theoretical promises.

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59. *Id.*

60. *See generally* BURKE DAVIS, THE CIVIL WAR: STRANGE & FASCINATING FACTS (1988).

61. CROW ET AL, *supra* note 3, at 77.

62. *Id.*

63. *Id.*

64. *Id.*

65. DAVID S. CECELSKI, THE FIRE OF FREEDOM: ABRAHAM GALLAWAY & THE SLAVES' CIVIL WAR, UNIV. OF NORTH CAROLINA PRESS 185 (2016).

This Freedman's Agenda was ignored by white political leaders who drafted a new constitution that returned all political power to them and relegated the newly freed slaves to a position of servitude.[66] When presented to Congress, this Constitution was rejected because the newly enfranchised African-Americans were not allowed to participate and it did not provide for the protection of their rights and welfare.[67] In Congress, northern representatives rebelled against efforts by President Andrew Johnson to pardon and allow former confederate officials to resume political control of the southern states.[68]

In North Carolina, these confederate leaders sought to enact a constitution and laws that would return these newly freed Africans to conditions of servitude and dependence.[69] As a result, northern congressional representatives intervened and drafted new conditions that controlled how and when the southern states would be re-admitted to the Union.[70] In order to rejoin the Union, the Reconstruction Act of 1867 required the former confederate states to enact a new constitution, which granted African-Americans the right to vote.[71] Those conditions demanded the forming of new governments, which extended to and guaranteed freed Africans the right to vote and to participate fully in politics.[72] In addition, the Reconstruction Act of 1867 restored federal military control in North Carolina to insure that violence and physical intimidation would not be used to prevent political participation.[73] High-ranking former confederate officers were also barred from participating in the political process.[74]

As a result of the rejection of the initial constitution, a constitutional convention was convened in January 1868 in which the newly enfranchised Africans attended and fully participated.[75] This convention lasted for three months from January to March 1868 due to many hostile and contentious race-based debate between African-

66. CROW ET AL, *supra* note 3, at 77.
67. *Id.* at 83–84.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *See* CECELSKI, *supra* note 65, at 199–201.

American and white representatives.[76] Understanding the power of lawmakers to extinguish the right to vote at any time and the necessity of gaining support from white constituents, African-American leaders eagerly organized political coalitions with like-minded whites, under the Republican Party banner. These leaders were well aware of the disfranchisement vote in 1835 and the ongoing efforts by former slave-owners and confederate officials to exclude African-Americans from political participation.[77] The organization of the multi-racial Republican Party was a critical achievement and resulted in the party winning 107 of the 120 seats in the constitutional convention; fifteen of those delegates were African-Americans.[78]

A. The New Constitutional Guarantees

For African-Americans, the key to political power and governmental participation has always been the right to vote. This right has depended upon how the federal courts and the United States Congress have chosen to enforce and protect it. The fundamental right to vote is guaranteed by the state constitution, not the U.S. constitution. In North Carolina, that expanded concept was made a part of the state constitution as a result of the political influence of African-American delegates to the 1868 constitutional convention. The North Carolina Constitution provided, "Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualification set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided."[79] This provision was enacted long before the 1870 ratification of the Fourteenth Amendment to the U.S. constitution.

African-Americans, led by Abraham Galloway and Bishop John Hood, who served as the chairs or co-chairs of many powerful legislative committees, aggressively pushed for the enactment of a number of legislative reforms, which allowed for the education, growth, and development of the interests of their communities.[80]

76. CECELSKI, *supra* note 65, at 199–201. Tennessee was re-admitted to the Union in 1866, North Carolina was re-admitted in 1868 along with Arkansas, Florida, South Carolina, Louisiana, and Alabama. *Id.* Virginia, Mississippi, Texas, and Georgia were re-admitted in 1870. *Id.*

77. *Id.*

78. *Id.* at 84.

79. N.C. CONST. art VI. § 1 (1868).

80. See Cecelski, *supra* note 65, at 199.

These enactments also greatly benefitted a large number of whites who were not wealthy landowners, were not able to attend schools, could not vote or participate in the political franchise, or enjoy the economic success of the state. Although small in number, these African-American legislators, in conjunction with white colleagues with similar views, were able to promote progressive legislation that advanced the rights and power of the larger African-American community.[81]

Drawing upon the resolutions that were adopted during the 1865 Freedman's Convention, the African-American delegates aggressively fought for and won the inclusion of revolutionary provisions into the North Carolina Constitution.[82] In the Constitution's Preamble, the drafters articulated a new political reality that Africans were included in the phrase "We the people."[83] The preamble also established the authority under which the Constitution was established. The Preamble conveyed a definite religious tone, but focused on the absolute power of "the people" as the controlling force of the state government.[84]

In Article I, Section 1, the drafters declared, "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[85] This provision became a crucial statement in light of the U.S. Supreme Court's infamous decision in *Dred Scott v. Sandford*, which declared that the official definition of the term "We the People" was never intended to refer to or include anyone other than white people.[86]

With the understanding of who was included in the concept of "the people," Article I, Section 2 boldly proclaimed that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their

81. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1777–82 (1992).

82. *Id.*

83. *Id.*

84. *Id.*

85. N.C. CONST. art I. § 1.

86. *See* Dred Scott v. Sandford, 60 U.S. 393, 407 (1856) ("In the opinion of the court . . . neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in [the Declaration of Independence].").

will only, and is instituted solely for the good of the whole."[87] This constitutional provision was designed to support the proposition that popular sovereignty is the basis of North Carolina's democracy. This provision was followed by Article I, Section 3 that reaffirmed the state's right mandate with respect to the internal regulation of state governmental affairs, which must follow the law, but recognizes that this right must be exercised consistent with the federal constitution.[88]

In another bold departure from the decision of pre-war state leaders who seceded from the United States in 1861, Article I, Section 4 prohibited the state from secession in the future[89] and Section 5 provided that "every citizen of this State owes paramount allegiance to the Constitution of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force."[90]

With the intent of keeping the tenure of legislators tied directly to the consent of the people, Article I, Section 9 mandated frequent elections for citizens to allow them to redress their grievances against their legislators and the State and to provide for amending and strengthening the laws.[91] As a final blow to the exclusive nature of previous governments, which restricted who could vote and hold office, Article I, Section 11 prohibited the imposition of property qualifications in order to exercise the right to vote or to hold political office.[92] With this constitution, African-Americans had faith that the new North Carolina government would finally recognize and protect their rights and interests.

Once the powers and rights of the people were defined, the framers identified the qualifications of who had a right to vote. Article VI, Section 1 provided:

> Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualification set out in this article, shall be entitled to vote at any election by the people of the State, except as herein provided.[93]

87. N.C. CONST. art I. § 2.
88. *Id.* art I. § 3.
89. *Id.* art I. § 4.
90. *Id.* art I. § 5.
91. *Id.* art I. § 9.
92. *Id.* art I. § 11.
93. *Id.* art VI. § 1.

In Article VI, Section 2, the Constitution decreed a one-year residency in the State and 30-day residence within the election district in order for a person to qualify to vote.[94] These are the only constitutional qualifications, which must be satisfied before a person can vote. The State, through Article VI, Sections 3 and 4, is allowed to require qualified voters to register, but registration is not a constitutional qualification to vote.[95] A prior requirement that a person demonstrate that they are able to read and write any section of the constitution before they can vote, the literacy test, has been voided by federal law, although it remains as a provision in the State Constitution.[96] Before the enactment of the 14th and 15th Amendments to the U.S. Constitution, North Carolina had already guaranteed the right to vote and provided for equal rights and due process protections in its state constitution.

B. Impact of Constitutional Enactments

African-Americans were finally in a position to exert political influence and they did. Led by Galloway, Harris and Hood, the new Constitution enacted many of the reforms which were demanded by the 1865 Freedmen Convention.[97] For the first time in history, universal suffrage, which enfranchised former slaves and whites who did not own real property, was guaranteed.[98] In addition, the new Constitution abolished the property qualification for holding political office, provided for the election of judges, mandated a free public education system, and created elected county commissions to govern each county.[99]

Elected as a part of the first General Assembly under the 1868 Constitution were seventeen African-Americans in the House of Representatives and three in the Senate. Many of these representatives were leaders and participants in the 1865 Freedmen's Convention.[100] Most of them had been slaves, but several were free Africans before the war.[101] This group included:

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94. *Id.* art VI. § 2.
95. *Id.* art VI. §§ 3, 4.
96. *See generally* Gaston Cty. v. United States, 395 U.S. 285 (1969); Voting Rights Act of 1965, 52 U.S.C.A. § 10304 (1965).
97. CROW ET AL, *supra* note 3, at 84.
98. *Id.*
99. *Id.* at 84–85.
100. *Id.*
101. Earl Ijames, *Constitutional Convention, 1868: Black Caucus*, NCPEDIA (2008), http://www.ncpedia.org/history/cw-1900/black-caucus.

- Bishop James Walker Hood was a free African who had been captured by slave patrols and sold into slavery. Bishop Hood escaped this captivity, became a minister and had served as Chair of the Freedmen's Convention. Hood later served as the Assistant Superintendent of the State Board of Education and was the founder of Livingston College in Rowan County and Fayetteville State University in Cumberland County.[102]
- Parker David Robbins was a free African from the Winton community who was part-Chowanoke Indian and part-mulatto. Robbins was a member of the U.S. Colored Troops in the Second Colored Calvary during the Civil War. Robbins was an inventor who built the first modern saw mill, constructed houses and piloted a Cape Fear River steamboat.[103]
- Clinton D. Pierson was a free African who was reared in the prosperous, free African communities of James City and New Bern.[104]
- Henry C. Cherry was born a slave, but was trained to be a carpenter who could read and write. He built some of the finest antebellum homes in Tarboro and became one of the wealthiest citizens in Edgecombe County.[105]
- Cuffie Mayo was a free African from Virginia who moved into Granville County where he worked as a blacksmith and painter. Mayo became one of the richest citizens in the county.[106]
- Henry Eppes was born a slave in Halifax County, but learned to read. He later became a minister and worked as a brick mason and plasterer.[107]
- John Adam Hyman was born a slave in Warren County; after serving four terms in the General Assembly. He became North Carolina's first Congressional representative during the 1875 and 1876 terms.[108]
- Abraham Galloway was born a mulatto slave in Wilmington, but escaped and organized the escape of other slaves before

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*

> the Civil War. Galloway also recruited slaves to join the Union Army as soldiers. While a slave, he hired himself out to other whites as a brick mason and paid his owner $15.00 per month for this privilege. By every account, he was the most radical and daring of the African-Americans who were elected to serve in the General Assembly. Galloway was never seen without his guns and constantly demanded that whites treat African-Americans in a civil and respectful manner. He was a strong advocate of women's rights and for using the State's taxing authority to split up large land holdings in order that former slaves could buy land.[109]

Also elected to political office, during this first reconstruction period were African-Americans who served in the U.S. Congress.[110] Those elected included John Hyman (1875-1877), James E. O'Hara (1883-1887), Henry Cheatham (1889-1893), and George H. White (1896-1900); all of whom served from the "Black Second" Congressional District, located in eastern North Carolina.[111] Congressmen Cheatham and White married the two daughters of Representative Henry C. Cherry who were proclaimed the most beautiful women of their day.[112]

After the Civil War, African-American communities were heavily invested in the successful development of the democratic political franchise.[113] While some newly freed slaves chose to emigrate out of the country, the vast majority chose to stay. They recognized that they had built the southern economy and, because of the lengthy estrangement and separation from the African homeland, they did not have any other place to go. Some travelled north, but most remained in North Carolina and other southern states in order to receive a return on the investment which they and their ancestors had already made to this country's development.[114]

North Carolina was unique in many respects. There was a large cadre of free Africans, who developed an economy base, acquired significant land holdings, and possessed "nation-building" skills. Many

109. *Id. See also* CECELSKI, *supra* note 65, at 185.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. CROW ET AL., *supra* note 3, at 78–79.

slaves were educated as well as or better than most whites. Although it was illegal to educate slaves, many of them were educated while many whites were unable to afford an education. Many free Africans and slaves learned and possessed essential and relevant skills and their labor became a significant force in any economic development that North Carolina was to experience. Despite these assets, most whites directed significant animosities and hostilities toward the newly nationalized Africans.[115] Many whites vigorously resisted the assertions of freedom, often through the use of force, by Africans particularly when they sought to exercise the right to vote.[116]

There was also determination by the African-American leaders and white Populists to make this new democracy work. Being able to join with like-minded and similarly positioned whites, Africans saw a hope that this experiment would work. This faith was evidenced by the fact that African-Americans eagerly and faithfully participated in the total life of the state. Even though Democrats engaged in systematic campaigns of violence, terror and intimidation in an effort to undermine the African-American vote, 90% of eligible African-Americans participated in the voting process between 1868 and 1898. Throughout North Carolina, most African-Americans participated in educational programs and were active partners in the economic progress which was experienced.[117]

C. Political Participation During Reconstruction

Despite the plain meaning of the constitutional mandates, political leaders within North Carolina did not fully and eagerly protect the right to vote for African-Americans and regularly engaged in "patterns and practices" which sought to deny or abridge that right. After the enactment of the state constitution in 1868, the ability of African-Americans to fully participate in the political franchise was only made possible by the passage of federal laws which governed the re-admission of North Carolina into the Union and the use of federal troops to protect the exercise of that right during what has been entitled "The First Reconstruction."[118] During that period, which lasted from 1868 to 1898, many African-Americans were able to

115. *Id.*
116. *Id.* at 78–81.
117. FRANKLIN, *supra* note 9, at 129–30.
118. CROW ET AL, *supra* note 3, at 90–93; LERAE UMFLEET, 1898 WILMINGTON RACE RIOT REPORT, N.C. DEP'T OF CULTURAL RESOURCES 22 (2006), http://www.history.ncdcr.gov/1898-wrrc/report/front-matter.pdf

successfully compete and participate in every area and venue of life in North Carolina.[119]

The protections of constitutional rights became more challenging after the removal of federal troops from the South. Because of the infamous Hayes-Tilden compromise in 1877, Republican political leaders in Congress struck a compromise with white southern Electors to secure the election of Rutherford Hayes as U. S. President.[120] The deal required President Hayes, once certified as President, to remove all federal troops from the southern states in exchange for the votes of southern members of the Electoral College.[121] When the troops were removed, the bulk of police authority, which protected African-Americans, totally disappeared.[122] Despite the loss of these troops, African-Americans in North Carolina were able to maintain political influence and participation until the 1898 Wilmington coup d'etat.[123]

From 1868 to 1898, 146 African-Americans served in the General Assembly.[124] Of that number, 121 were elected to the House of Representatives and 25 served in the Senate.[125] African-Americans were elected or appointed as magistrates, sheriffs, local school board members, town councilmen, and county commissions.[126]

The coalition of African-Americans and white populists, operating under the banner of the Republican Party, dominated North Carolina politics from 1868 through 1876.[127] Beginning in 1876, "Ku Klux Klan terrorism swept the south" and North Carolina was swept up in it.[128] As the power of the federal government eroded in the South following the Hayes-Tilden Compromise and the removal of federal troops , the Democratic Party, which consisted of wealthy, working

119. HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 36 (2005).

120. CROW ET AL, *supra* note 3, at 93.; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 532 (1988).

121. FONER, *supra* note 120, at 581–82; *see also* CROW ET AL, *supra* note 3, at 95–118.

122. FONER, *supra* note 120, at 582.

123. UMFLEET, *supra* note 118, at 24–26; *see also* Timothy Tyson, *The Ghosts of 1898*, NEWS & OBSERVER (Nov. 17, 2006), http://media2.newsobserver.com/content/media /2010/5/3/ghostsof1898.pdf.

124. Tyson, *supra* note 123; *see also* MILTON JORDAN, HISTORY OF NORTH CAROLINA LEGISLATIVE BLACK CAUCUS: RULES AND OPERATIONS OF THE SENATE (2013).

125. Tyson, *supra* note 123.

126. *Id.*

127. *Id.*

128. *Id.*

class and rural whites, gained control of the state and local governments.[129]

During this period, Democrats actively sought to diminish the votes of African-Americans.[130] The Democratic coalition began to unravel in 1894 due to an emerging depression, which produced a revolt among the white agrarian sector as the Democratic policies heavily favored the wealthy banking and railroad interests.[131] "As the ruling order discredited itself through its inability to meet human needs, many of the economic dissidents became racial dissidents, too."[132] As a result, white Populists, white Republicans and African-Americans were, once again, able to form an alliance, which swept the Republicans back into political power.[133]

The Fusion Movement was between 1894 and 1900 the North Carolina Republican and Populist Parties cooperated in state elections and in state government. That cooperation was labeled "Fusion" by its Democratic opponents, although Republicans and Populists maintained separate organizations and did not describe their actions as fusion. In the middle and late 1890s Republican-Populist cooperation resulted in newly configured delegations from North Carolina to the U.S. Congress, Populist-Republican control of the General Assembly, Republicans and Populists in state executive offices, and a non-Democratic state supreme court. A significant number of cooperationist officeholders were African-American. Fusion produced the only departure from Democratic Party hegemony after Reconstruction.[134]

The origin of the so-called Fusion was the rise of the People's Party, or Populist Party, after years of economic depression and hardship had motivated small farmers, who suffered the most, to take political action.[135]

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129. *Id.*
130. CROW ET AL, *supra* note 3, at 113–14.
131. *Id.* at 108.
132. *Id.*
133. *Id.* at 113–14.
134. *See* RONNIE W. FAULKNER, FUSION POLITICS, NORTH CAROLINA HISTORY PROJECT, JOHN LOCKE FOUND. (2015).
135. Ijames, *supra* note 101.

In the 1894 and 1896 elections, the Fusion movement[136] won every statewide office, swept the legislature races and elected its most prominent white leader, Daniel Russell, to the governorship."[137] During these elections, 87% of eligible African-Americans voted even though African-American leaders had initially supported another candidate.[138]

Even though a fusionist coalition was formed, it was not one of equals as the white Populists and Republicans refused to give African-Americans a fair share of the political offices or power.[139] Despite the fact that African-Americans voted with and for Republican candidates, they had many complaints about the neglect that they experienced from the party's leaders. "Most [African-American] leaders had substantial complaints against Republicans. Because [African-American] voters had no alternative, they stayed with the Republican Party, but they resented the way the party treated them."

"Republicans relied upon the votes of [African-Americans] but provided them with few nominations for office, even to minor positions."[140] In urban areas and in eastern North Carolina, where large African-American populations resided, African-Americans began to win more political positions, but the power, which these elected officials were able to exercise, was minor.[141] For example, in the General Assembly, those African-Americans who were elected after 1876 were vastly outnumbered and faced significant hostility from their white counterparts; these legislators could not pass many bills, but they could and did speak up and fight for the interests of African-Americans.[142]

Despite misgivings about the inequalities, African-Americans enjoyed more political success in the North Carolina democracy than ever before in history. They eagerly participated in subsequent elections for local and state offices and enjoyed political success as they joined with whites to elect African-American and whites to

136. As discussed in this article, the Fusionist Movement involved decisions made in 1894 to 1898 by members of the Republican Party, which was composed of African Americans and whites from the mountain region of North Carolina, and white populists, who were basically white farmers and laborers, to join into a political alliance that successfully defeated the race-based Democratic Party. CROW ET AL, *supra* note 3, at 113–14.

137. *Id.* at 108–09.

138. *Id.* at 113.

139. *Id.* at 114.

140. *Id.* at 108.

141. *Id.*

142. *Id.* at 109.

legislative positions from 1894 through 1898.[143] This eager political participation regularly produced election turnouts of more than 90% of eligible African-Americans who voted in elections and actively participated, where possible, as candidates.[144] During this period, thousands of African-Americans were elected to local governing positions, hundreds were elected to the state House and Senate, and four were elected to the U.S. Congress.[145] Despite this political success, African-Americans regularly had to resist efforts by white Republicans and Democrats to undermine their right to vote and further their participation in the political franchise.[146]

During this period, African-Americans and their Populist allies were instrumental in reforming the state's election laws which sought to guarantee full and fair access to the political franchise for all citizens.[147] Legislation was enacted which allowed elected local clerks of court to create voting precincts in local communities which allowed for citizens to vote closer to their homes and to appoint local precinct officials, from both political parties, who would administer and supervise the voting process.[148] Legislation also criminalized efforts by employers and others to intimidate, harass or punish voters for exercising the right to vote and required employers to allow workers to leave work in order to vote without penalty or repercussions.[149] The effort to expand the franchise also included legislation to make special provisions for illiterate voters who could not read and desired to vote, a very progressive idea in the 1890s.[150]

Even with this successful alliance, the weaknesses within the structure, as discussed above, along with relentless racially hostile statewide efforts that the Democrats conducted, created a breach between the alliance's African-American and white members and effectively drove a wedge into this partnership. As a result, as discussed next, the political success of the Fusion Movement was destroyed and democracy in North Carolina was undermined.

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. Tyson, *supra* note 123, at 4H.
148. CROW ET AL, *supra* note 3, at 86–88.
149. Tyson, *supra* note 123, at 1H.
150. *Id.*

IV. THE DESTRUCTION OF THE DEMOCRACY IN NORTH CAROLINA

Despite their economic progress, educational advancement, and political involvement, African-Americans were the victims of "exclusion, harassment, discrimination and a range of violence that included the horrors of lynching."[151]

Across North Carolina, the Democratic Party was engaged in an active campaign to demonize African-Americans and to destroy the shaky political coalition which elevated Republicans into power. This white supremacy campaign was engineered by Furnifold Simmons, the State Chairman of the Democratic Party; Josephus Daniels, the owner and publisher of the Raleigh News and Observer; and Charles Aycock, a wealthy Goldsboro lawyer who became Governor in 1900.[152] These men and others orchestrated the statewide campaign of racial antagonism and division. Going into the 1890 political campaign, they developed a race-based political campaign which had the "'redemption' of North Carolina from 'Negro domination'" as its theme.[153]

The goal of this campaign was to disfranchise African-Americans and justify it by creating an image across the state that African-American men controlled the state and sought widespread sexual relations with white women. To that end, the term "Negro Domination" was widely used and repeated throughout every discussion, speech, and news article which was circulated around the state.[154] Josephus Daniels, joined by other white newspapers publishers "spearheaded a propaganda effort that made white partisans angry enough to commit electoral fraud and mass murder."[155]

Daniels described Furnifold Simmons's strategy of committing racial violence and intimidation against African-Americans as a "genius in putting every body to work – men who could write, men who could speak and men who could ride – the last by no means the least important. By ide, Daniels employed a euphemism for vigilante terror. [African-Americans] had to be kept from the polls by any means necessary."[156]

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151. CROW ET AL, *supra* note 3, at 113–16.
152. Tyson, *supra* note 123, at 6H.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

Led by the News and Observer, front page headlines constantly proclaimed and decried "the dreaded specter of Negro rule hung over North Carolina and no white man or woman was safe from insult or humiliation at the hands of ignorant, degraded, half savage [African-Americans]."[157]

Dr. Helen Edmonds, Historian and scholar from North Carolina Central University, who described the political success of African-Americans in North Carolina during 1898, debunked the notion of "African-American Domination of Whites"[158]:

> An examination of [the claim of] 'Negro Domination' in North Carolina revealed that one negro was elected to congress; ten to the state legislature; four aldermen were elected in Wilmington, two in New Bern, two in Greenville, one or two in Raleigh, one county treasurer and one county coroner in New Hanover; one register of deeds in Craven; one Negro jailer in Wilmington; and one county commissioner in Warren and one in Craven."[159]

To the race conscious and hate hurling Democratic Party leadership, having some African-Americans elected to office was described as "Domination" and this myth was promoted and hyped-up in the minds of gullible whites in order to justify the use of physical terror to destroy and remove the right of African-Americans to vote.

Outside of the use of terror, intimidation and physical violence, including lynching, "the Democrats mounted a massive program of fraud, intimidation and violence to assure their victory in the 1898 general election."[160] Thousands of votes were stolen through ballot-box stuffing and the destruction of African-American votes. The Red Shirts—made up of white supremacists who were prosperous white men and former confederate officers, labeled as a paramilitary group—conducted a campaign of violence and were devoted to the Democratic Party.[161] They appeared throughout the state at meetings, speeches and political rallies, well-armed, dressed in red clothing, and mounted on horses.[162] Their distinctive clothing displayed their determination that the Democratic Party would prevail.[163]

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157. *Id.* at 115.

158. HELEN G. EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA, 1894-1901 (1951) (conducting the first scholarly research of the Wilmington coup).

159. *Id.* at 219.

160. *Id.* at 220.

161. *Id.*

162. *Id.*

163. CROW ET AL, *supra* note 3, at 115; *see also* Tyson, *supra* note 123, at 10.

This campaign of racial vilification featured a series of offensive caricatures of African-Americans that were drawn by News and Observer cartoonist Norman Jennett and reproduced on the front pages of the state's newspapers.[164] "Jennett's masterpiece was a depiction of a huge vampire bat with 'Negro rule' inscribed on its wings, and white women beneath its claws, with the caption 'The Vampire That Hovers Over North Carolina.' Other images included a large Negro foot with a white man pinned under it. The caption: 'How Long Will This Last?'"[165]

Other newspapers in the state followed the lead of the News and Observer as other Democratic Party operatives crisscrossed the state making inflammatory racist speeches to fire-up the crowds.[166] During that campaign, "[t]he king of oratory, however, was Charles B. Aycock" who often mesmerized standing-room only crowds of whites by "pounding the podium for white supremacy and the protection of white womanhood."[167] Charles Aycock is the person who described Wilmington as the "storm center of the white supremacy movement" because it was the largest city in the state, had a majority African-American population and an African-American daily newspaper; several African-Americans had been elected as aldermen and held other elected or appointed positions.[168] "Wilmington represented the heart of the Fusionists' threat, therefore, it became the focus of the Democrats' campaign."[169]

A. The Wilmington Coup D'Etat[170]

The area of the state where African-Americans more aggressively embraced the ideals of the Republican/Populist return to power was Wilmington where a bi-racial coalition won a majority of the seats on that town's Board of Aldermen in 1896.[171] Despite Wilmington being a

164. *Id.*
165. Tyson, *supra* note 123, at 7H.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. For a more detailed account and description of the Wilmington coup d'etat, see generally DAVID S. CECELSKI & TIMOTHY B. TYSON, DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (1998). *See also* EDMONDS, *supra* note 158; H. LEON PRATHER, WE HAVE TAKEN A CITY: WILMINGTON RACIAL MASSACRE AND COUP OF 1898 (1984); UMFLEET, *supra* note 123.
171. Tyson, *supra* note 123, at 5H.

majority African-American town,[172] the new Board of Aldermen consisted of four African-Americans and six whites.[173] As successful as the bi-racial coalition was in electing its members to office, there were continuing racial issues, which developed among party members, and these issues threatened the solidarity of the coalition.[174]

In 1898, Wilmington was the port city with a vibrant and bustling economy. At the time, it was the most prosperous town in North Carolina and was a symbol for African-American progress in the South.[175] Unlike other portions of North Carolina, there were electric lights and streetcars in Wilmington.[176] The town's prosperity was amply supported by strong African-American businesses and boasted of having the only African-American daily newspaper in the country, the Daily Record, which was owned and edited by Alexander Manley, the mixed race grandson of former North Carolina Governor Charles Manley.[177] During this time, the African-American literacy rate was higher than that of whites.[178]

The actual organizing of the Wilmington overthrow and mass killing was left to Alfred Waddell, an unemployed lawyer and former newspaper publisher. [179] Waddell had been a lieutenant colonel in the Confederate cavalry and served three terms in Congress before being defeated by Daniel Russell.[180] Waddell worked under the direction of the "Secret Nine," a collection of white businessmen who wanted to immediately change the multi-racial Republican Board of Aldermen.[181] Under Waddell's direction, an armed militia was organized to take control of the streets and a list of African-American and white Fusionists was made and the order was given to banish or kill them.[182]

The "overthrow" organizing campaign became heated after Alexander Manley printed a vocal response to a speech delivered by a

172. *See id.* at 4 (stating in 1898, Wilmington's population consisted of 11,324 African-Americans and 8,731 whites).
173. Tyson, *supra* note 123, at 4H.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* (listing the "Secret Nine" as J. Alan Taylor, Hardy L. Fennell, W.A. Johnson, L.B. Sasser, William Gilchrist, P.B. Manning, E.S. Lathrop, Walter L. Parsley, and Hugh MacRae).
182. *Id.*

white woman in Georgia about the need to lynch African-American men for raping white women.[183] In his response, Manley denounced the call for lynching and argued that there were white men and women who willingly engaged in sexual acts with African-Americans and that the claim that African-American men were dedicated to sexual acts with white women was hypocrisy.[184] Waddell and his followers used this response article to successfully exacerbate racial hostilities among whites and to incite and ignite them to burn down the newspaper building.[185]

In a Goldsboro political rally that preceded the overthrow, Waddell promised a rabid crowd of 8,000 whites that he would "throw enough [African-American] bodies into the Cape Fear River to block its passage to the sea."[186] Before the November 8, 1898 statewide elections, Waddell told a white crowd in Wilmington:

> [Y]ou are Anglo-Saxons. You are armed and prepared, and you will do your duty. If you find the [African-American] out voting, tell him to leave the polls, and if he refuses, kill him, shoot him down in his tracks. We will win tomorrow if we have to do it with guns.[187]

On November 8th, Election Day, many African-Americans refused to go to the polls to vote; those who went were met by armed Red Shirts who were stationed on every block that surrounded each polling site in the city.[188] To insure the victory for the Democratic Party, officials stuffed the ballot boxes with bogus votes.[189] Votes in other areas of the state followed a similar pattern and the Democrats regained control of the state legislature.[190] Prior to the election, Red Shirts members had roamed the state disrupting meetings of African-Americans and patrolled the streets of Wilmington intimidating and attacking African-Americans.[191]

On November 9, 1898, the "Secret Nine" presented to its organizers and supporters a "White Declaration of Independence" which declared, among other things, "never again would white men of

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

New Hanover County permit [African-American] political participation."[192] The Declaration was presented to the community as a sign that whites would no longer be subjugated to any political involvement of African-Americans. The preamble of the Declaration proclaimed:

> Believing that the Constitution of the United States contemplated a government to be carried on by an enlightened people; believing that its framers did not anticipate the enfranchisement of an ignorant population of African origin; believing that the men of the State of North Carolina who joined in forming the Union did not contemplate for their descendants a subjection to an inferior race;
>
> We, the undersigned citizens of the City of Wilmington and county of New Hanover, do hereby declare that we will no longer be ruled, and will never again be ruled, by men of African origin. This condition we have in part endured because we felt that the consequences of the war of secession were such to deprive us of the fair consideration of many of our countrymen.
>
> We believe that, after more than thirty years, this is no longer the case. The stand we now pledge ourselves to is forced upon us suddenly by a crisis, and our eyes are open to the fact that we must act now or leave our descendants to a fate too gloomy to be borne.
>
> While we recognize the authority of the United States and will yield to it if exerted, we would not for a moment believe that it is the purpose of more than 60,000,000 of our own race to subject us permanently to a fate to which no Anglo-Saxon has ever been forced to submit.[193]

The Declaration then proclaimed, on behalf of Wilmington's white citizens, their intent to re-take control of the city and "to enforce what we know to be our rights."[194] It declared that "the [African-American] has demonstrated, by antagonizing our interest in every way, and especially by his ballot, that he is incapable of realizing that his interests are and should be identical with those of the [white] community."[195] Although this Declaration spoke to a change in the political power structure of Wilmington, it reiterated and was undergirded by the societal views regarding African-Americans as

192. *Id*. at 10H.
193. UMFLEET, *supra* note 123, at 115 (including complete text of the Declaration).
194. *Id.*
195. *Id.* ¶ 3 of Declaration.

were initially determined and articulated in the infamous *Dred Scott* decision.

After the Declaration was officially adopted, Waddell, per instruction from his membership, called a meeting of thirty-two prominent African-Americans at the courthouse and told them that they had twelve hours to accept their demands.[196] Backed by armed members of the Red Shirts, Waddell "firmly explained the white conservatives insistence that [African-Americans] stop antagonizing [their] interests in every way, especially by the ballot, and that the city give to white men a large part of the employment heretofore given to [African-Americans].[197] He demanded that the Daily Record stop publication and its editor leave the city."[198]

On November 10th, a heavily armed group of military-trained Red Shirts, Ku Klux Klan and local militia members marched into the African-American (Brooklyn) section of town where the Daily Record newspaper was located and burned its offices down.[199] They then began to indiscriminately shoot African-Americans who they found in the streets.[200] The Red Shirts forcefully entered the homes of elected and appointed officials and escorted them down to Thalian Hall, which housed the official city offices. One-by-one, these officials were marched into the auditorium and surrounded by over 500-armed whites who gave them an option to resign their position or be shot. As each official resigned, Waddell appointed a replacement. The officials were taken to the train station, placed on a train and driven out of town with a promise that they would be killed if they returned to Wilmington for any reason.[201]

During the invasion, the Wilmington African-American community was virtually defenseless.[202] Federal troops, which had been the primary defender in the city, had been removed from the North Carolina as a result of the Hayes-Tilden Comprise in 1877.[203] In the face of this massive military assault, North Carolina's Governor, David Russell, a Populist Republican, refused to send state law enforcement into Wilmington to defend that community or to restore

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

the status quo.[204] African-Americans, individually, did not have military training and were not heavily armed. They were confronted with a superior, military trained, armed force that entered the community with the intent to kill as many people as possible.[205] Some African-Americans fought back, but were overwhelmed.[206] An accurate count of the number of African-Americans who were killed has never been made, but estimates range from double digits to hundreds.[207]

At the end on that day, every elected and appointed African-American, Republican and Populist, was forced to resign from office under the threat of death.[208] As each resignation was recorded in front of a mob of armed white men, a white person, who had been chosen by the Secret Nine, was appointed to the vacated position; Alfred Waddell was anointed as the new Mayor.

This coup d'etat ignited a reign of terror across North Carolina that resulted in African-Americans in other parts of the state also abandoning their political positions and participation. The overthrow of the legally elected Wilmington municipal government was part and parcel of an orchestrated political war by the Democratic Party to seize control of every organ of North Carolina State government and send a message that this was a "white only" state.[209]

The right of African-Americans to participate in the political franchise was violently taken away when the all-white Democratic Party led the state-wide campaign to destroy that right and they used terror and military might to suppress its exercise in 1898-1900. The loss of the ability to vote reduced African-Americans to the status of second-class citizens and supported the legal, but immoral, racial segregation and discrimination that existed, as a matter of law and social convention, for over 70 years.[210] This suppression controlled North Carolina politics until well after the passage of the 1965 Voting Rights Act when African-Americans were finally able to use federal law and federal courts to regain the right to vote and to more fully participate in the governance of the state and country. This new

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

period of political participation has been described as "The Second Reconstruction."

The white supremacy campaign, which resulted in the overthrow of a legally elected city government and the forced removal of state governmental officials, was justified as being necessary for whites to "take back their state." This articulation was simply another way of saying that the African-Americans who had been elected to public office were intellectually incapable of participating in the governance of Wilmington and of holding political office in the state. The constant false claim of "Negro Domination" was designed to demonize African-American elected and appointed officials and to justify, in the minds of whites, that the city's overthrow was deigned to save the white population from barbaric conduct. This mentality originated with the 43-year-old justification and mandate, which were announced by the U.S. Supreme Court in its infamous *Dred Scott v. Sandford* decision. That court's proclamations that the United States was created for whites and that it was never intended that Africans should or could be citizens or be protected by its laws continued to resonate in the thoughts and expectations of a vast majority of whites.

The exercise of military force in order to overthrow the legitimately elected Wilmington government was sanctioned by the Democratic Party, the intended beneficiary of this assertion of lawlessness, and was condoned by elected Republican and federal officials who allowed it to occur and failed to use the legitimate police powers of the state to defend against or redress these illegal acts. At the same time, this campaign successfully cemented in the hearts and minds of whites that African-American lives did not matter and could be extinguished at will.

B. Consequences of the Betrayal of Democracy

Beginning in 1899, the state government enacted a series of repressive legislation that was intended to, and did, remove African-Americans from political participation at the local, state, and national level. By constitutional amendment, the new Democratic majority ordered an entirely new registration which applied to all voters.[211] The amendment also required literacy tests, poll taxes, and other devices that were introduced into North Carolina law for the sole purpose of

211. N.C. CONST. art. VI, § 4 (1899); *see also* Testimony of Dr. James L. Leloudis at 18, N.C. Conference of the NAACP v. McCrory, No. 1:13-CV-658 (2015).

removing African-Americans from any political participation.[212] Among these provisions was the one that was enacted to assist illiterate citizens to vote.[213] Other "Jim Crow" laws were enacted which intentionally stripped African-Americans of the ability and legal protections to participate, on an equal basis, in any other area of social, business, education, and housing by legalizing segregation and reduced African-Americans to second-class citizenship.[214]

Legal efforts to overturn these legislative enactments were unsuccessful until 1954 when *Brown v. Board of Education*[215] was issued by the United States Supreme Court. *Brown* overturned the infamous *Plessy v. Ferguson*[216] doctrine of "separate but equal." *Plessy* held that while political rights of African-Americans were required to be provided by the state, any social benefits and protections were outside of the intent and scope of the Equal Protection Clause of the 14th Amendment.[217] Thus, this decision sanctioned the state's legal ability and the extra-legal activities of its people to deny African-Americans any legal protections or benefits as citizens and further embedded into minds and hearts of whites the myth of the inferiority of African-Americans.

North Carolina's political leadership and many whites eagerly adopted *Plessy*'s permission to discriminate. Immediately after gaining control of the General Assembly, the Democrats amended the state constitution to mandate a literacy test for voters:

> Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or

212. *Id.*
213. *Id.*
214. *Id.*
215. 347 U.S. 483 (1954).
216. 163 U.S. 537 (1896).
217. *Id.* at 552.

> before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State.[218]

At the same time, the General Assembly enacted a "Grandfather Clause," which served as an escape valve and permitted whites to register to vote without passing the literacy test or paying the poll tax if their father or grandfather was registered to vote before 1867.[219] This enactment was buttressed by a statewide campaign of economic and military terrorism, which was conducted by members of the Red Shirts and former confederate soldiers against those African-Americans who sought to register to vote.[220] In an enactment directed primarily against Congressman George H. White, the General Assembly created new political boundaries for the election of federal and state legislative offices. As a result, Congressman White left office in 1900 due to the gerrymandering of his congressional district and was the last African-American to represent North Carolina in Congress until 1992.[221]

In order to legally cement its efforts to destroy the political status and humanity of African-Americans, the General Assembly enacted a constitutional mandate which compelled the separation of the races in public education and in every other area of life. This enactment was consistent with the permissive *Plessey v. Ferguson* decision.[222] In response to this legislation, which imposed state-sponsored and societal endorsed racial segregation, African-Americans retreated from the political spectrum, developed, and maintained separate, yet successful, parallel institutions across the state. Compelled to be segregated, African-Americans banded together to create economic, social and religious institutions, which sought to provide protections and opportunities to obtain the educational and social skills which would allow for the growth and development of young African-Americans to escape the racial oppression which was present in North Carolina.[223]

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218. N.C. CONST. art. VI, § 4 (1899).
219. *Id.*
220. TYSON, *supra* note 123, at 9.
221. *See* Testimony of Leloudis, *supra* note 211, at 3.
222. *See* TYSON, *supra* note 123, at 9.
223. *Id.*

The effort to frighten and intimidate African-Americans who sought to register to vote was aggressive. My grandparents, Allen and Georgia Wooten Joyner, were victims of this campaign. Several times, they sought to register in Lenoir County and were refused. Thereafter, they were visited by whites who belonged to the local Democratic Party who discouraged them from continuing that efforts. Other family members and friends of the family met the same fate and, as a result, the larger African-American community was deterred. Although none were lynched, they were threatened. The economic pressure imposed against my grandparents was ineffective because my grandfather was an independent carpenter and brick layer who worked for himself and my grandmother was a house-keeper who was able to obtain an independent source of income, and from their eight children who had either escaped from Lenoir County or were school teachers. Because there was no law, which protected them, and law enforcement was an enemy, Allen and Georgia Joyner would never vote.

Rather than staying in North Carolina, many African-Americans, after graduating from High School, joined the "Great Black Migration" and left North Carolina. Usually, most headed north to Washington, D.C., Philadelphia, Newark, or New York in Brooklyn where they were able to use their education and other skills in order to obtain better jobs than were available to them in North Carolina. Literally, millions of young African-Americans left for new communities where they gain a different level of freedom from the more brutal forms of "Jim Crow" discrimination. One of the new features available to them after escaping southern "Jim Crow" was that they could vote and they did so in large numbers.[224]

C. Cracks in the Jim Crow Barriers

After Democrats seized total political control, African-Americans were forced to live under "Jim Crow" laws, social conventions and segregation practices, which permanently retarded the ability to grow and develop on the same level as whites for the next seventy years.[225] When African-Americans achieved a modicum of political success, the controlling political forces would enact new legislation to thwart that

224. Joyner, *supra* note 20, at 116–17; *see also* Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African American Schools and the Mis-Education of African American Students*, 35 N.C. CENT. L. REV. 160, 160–70 (2013).

225. Joyner, *supra* note 224, at 202; Testimony of Leloudis, *supra* note 211, at 18–20.

effort and prevent this apparent success from being repeated. An example was the election of Rev. Kenneth Williams in 1947 to a City Council position in Winston-Salem, the first time that an African-American had successfully challenged a White opponent in the South.[226] The Williams election was made possible due to the organizing of the CIO – the Congress of Industrial Organization – Labor Union, a predominately African-American workforce at R.J. Reynolds Tobacco Company, which conducted a voter registration campaign that increased African-American voters from 300 to more than 3,000 in two years. Williams served from 1947 to 1951.[227]

This victory resulted in a single member political district in which a large concentration of African-Americans lived and voted.[228] As a result, the North Carolina General Assembly created multi-members legislative districts in all areas of the State which contained large African-American populations.[229] These multi-member political districts had the intent and effect of merging or subsuming large African-American populations who voted in a particular electoral district into a larger district that contained two or more political districts populated mainly by whites.[230]

The development of multi-member political districts resulted in African-Americans using a "single-shot" voting tactic in which the voter would only cast a ballot for the lone African-American candidate who appeared on the ballot with several whites and leave the other positions blank.[231] After this tactic proved successful, the General Assembly outlawed "single-shot" voting.[232] Despite this anti-single-shot legislation, African-Americans were successful in several town and city council races:

> By 1954, another ten [African-American] politicians had won election to local offices: [Fred] J. Carnage, Raleigh school board, 1949; William R. Crawford, Winston-Salem City Council, 1961; Dr. [William] Devane, Fayetteville City Council, 1951; Dr. William M. Hampton, Greensboro City Council, 1951; Nathaniel Barber, Gastonia City Council, 1951; Dr. G.K. Butterfield, Wilson City

226. CROW ET AL, *supra* note 3, at 149; *see also* Testimony of Leloudis, *supra* note 211, at 22.
227. H.R. Res. 1251, Reg. Sess. 1999-2000 (N.C. 1999).
228. CROW ET AL, *supra* note 3, at 149.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*

> Council, 1953; Nicholas Rencher Harris, Durham city council, 1953; Hubert Robertson, Chapel Hill Board of Alderman, 1953; and Dr. David Jones, Greensboro school board, 1954.[233]

While the election of each was historic, neither of these officials wielded significant political power without being able to negotiate cooperation with other members of their respective boards.

Along the way, African-Americans launched legal challenges to their total exclusion from participation in the political franchise in the absence of any law which supported these claims. For example, in *Lassiter v. Northampton*,[234] there was a challenge to the constitutionality of the literacy test requirement. Because of this challenge, the U.S. Supreme Court, in its opinion authored by liberal Associate Justice William O. Douglas, determined that the literacy test was constitutional since it was race neutral and did not violate the Equal Protection Clause of the 14th Amendment.[235] Justice Douglas reasoned that although literacy and intelligence are not synonymous, a state might constitutionally require that "only those who are literate should exercise the franchise."[236] In *Bazemore v. Bertie County Board of Election*,[237] the North Carolina Supreme Court declared that the literacy test required "nothing more than the mere ability to read and write any section of the State Constitution in the English language."[238]

The state's poll tax requirement was declared to be constitutional by the U.S. Supreme Court in *Breedlove v. Suttles*[239] on the ground that the Equal Protection Clause did not require absolute equality, another legal endorsement and reaffirmation of white supremacy.[240] This determination, however, was later reversed in *Harper v. Virginia Board of Elections*[241] when the Court determined that a state could not condition the right to vote on the affluence or the ability of the voter to pay any fee as an electoral standard.[242] Despite this decision, the Court never retreated from the notion that equal protection did not require absolute equality. The earlier decisions occurred before

233. Testimony of Leloudis, *supra* note 211, at 22 n.46.
234. 360 U.S. 45 (1959).
235. *Id.*
236. *Id.* at 52.
237. 119 S.E.2d 637 (1961).
238. *Id.* at 642.
239. 302 U.S. 277 (1937).
240. *Id.* at 284.
241. 383 U.S. 663 (1966).
242. *Id.* at 685.

the enactment of the 1965 Voting Rights Act and at a time when no law protected the right for African-Americans to vote.

In the face of such legislative enactments that attempted to suppress African-American registration, some communities organized and engaged in efforts to fight back and, where possible, seek political concessions. Such was the case with the Durham Committee on Negro Affairs,[243] which was organized in 1935 by Charles Clinton "C.C." Spaulding, a founder of the N.C. Mutual Life Insurance Company, and Dr. James E. Shephard, the founder of North Carolina College.[244] The Durham Committee immediately became a powerful political force in a city which had a strong economic base of independent African-American businesses, was heavily unionized with a large African-American labor force that was tied into the tobacco industry and possessed a large, highly-educated and professional class of African-Americans that was connected to North Carolina College.[245] The strength of the Durham Committee and its ability to participate effectively in that city's politics made it the most powerful African-American political and civic organization in the state.[246] The Durham Committee also served as the prototype for other large urban communities to replicate in their efforts to improve the position and condition of their communities. The Durham Committee always involved itself in voter registration, was successful in securing the election of Rencher Nicholas Harris as the first African-American city council member in 1953, and effectively influenced the election of more moderate white politicians.[247]

D. Post-1965 Voting Rights Act

When the 1965 Voting Rights Act was enacted, only 21% of North Carolina's African-Americans were registered to vote.[248] This percentage did not quickly increase because many African-Americans, particularly those in rural areas who were more economically dependent on white farmers and landowners, were

243. The Durham Committee on Negro Affairs was subsequently renamed the Durham Committee of the Affairs of Black People.

244. This institution was later re-named North Carolina Central University.

245. *See* Durham Black History, DURHAM N.C. MAPS & INFO, http://www.durhamnc.com/maps-info/black history; Durham Committee on the Affairs of Black People, https://www.dcabp.org/.

246. Biography of R.N. Harris, R.N. Harris Integrated Arts/Core Knowledge Magnet Sch., http//www.edlinesites.net/pages/R_N_Harris/About_Us/Biography-of-R_N_Harris.

247. Testimony of Leloudis, *supra* note 211, at 23.

248. *Id.*

fearful of registering to vote and others did not have a history of political participation. As the voter registration efforts intensified, it was not unusual for violence to be directed against African-American leaders. Efforts to increase registration in Charlotte during 1965 resulted in the bombing of the homes of Civil Rights leaders Attorney Julius Chambers, Dr. Reginald Hawkins, a noted Charlotte dentist, NAACP President Kelly Alexander, and his brother Fred Alexander.[249]

Despite the violence and in an effort to increase the voting registration and political participation of African-Americans, in 1968, Dr. Reginald Hawkins ran for Governor of the State in the Democratic Party primary and Eva Clayton, a civil rights activist from Warrenton, sought a congressional seat from the "Old Black Second" District—the same district from which George H. White had previously been elected at the end of the first reconstruction period. These campaigns focused mainly on voter registration and increased political participation because of the realization that gaining political power in North Carolina was impossible if African-Americans did not register and vote. Joining this campaign were Mickey Michaux in Durham, Fred Alexander in Charlotte, and Henry Frye in Greensboro. It was clear to these leaders that the lingering impact of past and ongoing racial harassment, intimidation, and economic coercion would continue to plague African-American communities as long as they were politically impotent.

The Voting Rights Act was designed to outlaw various practices which were recognized to have negatively impacted the registration of, and voting and participation by African-Americans. The U.S. Supreme Court determined in *South Carolina v. Katzenbach*[250] that Congress had the power to enact the Act and to intrude upon the states' rights due to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[251] North Carolina was one of the states that was named as a source of laws and procedures "which were specifically designed to prevent [African-Americans] from

249. RICHARD A. ROSEN & JOSEPH MOSNIER, JULIUS CHAMBERS: A LIFE IN THE LEGAL STRUGGLE FOR CIVIL RIGHTS 97–98 (UNC Press 2006); *see also* CROW ET AL, *supra* note 3, at 199.

250. 383 U.S. 301 (1966).

251. *Id.* at 309.

voting."[252] In opposition to the Act, North Carolina and other supporting states argued that the existence of "states' rights" empowered them to institute any voting provision, which they deemed to be in the best interest of a majority of its citizens, and that Congress exceeded its constitutional authority when it enacted the Act.[253]

Under the Act, it became illegal, pursuant to Section 2, to engage in any conduct or activities, which were intended to prevent qualified racial minorities from participating in the political franchise.[254] It also created a mechanism, under Section 5, that identified states which had previously been engaged in preventing minorities from political participation, and required those states to obtain pre-clearance from the Civil Rights Division of the U.S. Department of Justice or a special three-judge panel in the District of Columbia Court of Appeals.[255] This pre-clearance mechanism required a review of every proposed change in a voting practice in order to determine if the change would have a racially discriminatory impact.[256] This protection was critical at the time of its passage, but proved to be insufficient in spurring greater minority voting participation.[257]

While the focus of Section 2 of the Voting Rights Act is preventive, the quest to obtain, use, and maintain political power was left to the people. The slow growth in the number of African-Americans registering in North Carolina was an example of this. Among white political leaders, the Voting Rights Act was viewed as an unlawful attack and intrusion upon "states' rights" that authorized a state to enact any legislation that it deemed necessary or best suited for the majority of its inhabitants.[258] African-Americans have never been the majority and have not been viewed as an intended beneficiary of this right wing doctrine.

In 1968, seventy years after the 1898 Wilmington overthrow, an African-American, Henry Frye, who later became the first African-

252. *Id.* at 310.
253. *Id.* at 323–26.
254. 52 U.S.C. § 10301(a) (2012) (formerly 42 U.S.C. § 1973(a)).
255. 52 U.S.C. § 10304 (2012) (formerly 42 U.S.C. § 1973(c)).
256. *Id.*
257. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 52 U.S.C. § 10101 (2006)).
258. "States' rights" is a doctrine and strategy in which the rights of the individual states are protected from infringement by the federal government pursuant to the 10th Amendment to the U.S. Constitution.

African to serve as a Chief Justice of the North Carolina Supreme Court, was elected to the North Carolina General Assembly.[259] In 1970, Reverend Joy Johnson won election to the General Assembly from the tri-racial communities of Roberson County as the result of a coalition that was formed between African-Americans and Lumbee Indians.[260] Efforts to elect an African-American from Durham finally succeeded when Attorney Mickey Michaux was elected in 1972. Fred Alexander was elected to the State Senate in 1972 from Charlotte.[261]

These early legislators recognized the burden that they carried in the General Assembly as being more than making a presence. Each of them wanted to make an impact and knew that they had to create allies in order to make a difference with the legislative process. "'When I went there' [said] Henry Frye, North Carolina's first [African-American] legislator in this century, 'I knew I wouldn't get very far with allegations. So I never charged anyone with anything. I always spoke of the problems we faced as third-party entities.'"[262] When Reverend Johnson, a Baptist minister from Robeson County and the second elected African-American legislator, entered the General Assembly, Frye explained that "their tactics expanded. 'Joy could preach to our colleagues,' Frye [recalled] 'and he would fire them up with his oratory, and then [Frye] would sit and negotiate with them.'"[263]

Frye's strategy worked as he convinced enough legislators to place the literacy test on the ballot for a referendum during his first term in office. Although the referendum was defeated by a 56% to 44% statewide vote, Frye established his political savvy by his success in placing an issue on the ballot which challenged the six decade old literacy test as a provision in the North Carolina Constitution.[264] The 1965 Voting Rights Act declared the literacy test unlawful and the U.S. Supreme Court upheld the ban of its use in *Gaston County v. United*

259. Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N. C. INSIGHT 40–41 (1989).

260. *Id.* at 41.

261. *Id.*

262. Jordan, *supra* note 259, at 40.

263. *Id.* at 41.

264. *See id.* (describing how after graduating from law school and returning to his hometown of Ellerbe, Justice Frye sought to register to vote and was denied because he did not interpret a provision of the state constitution to the satisfaction of the county's election registrar).

States.[265] Although, it cannot be enforced, the literacy test provision remains in the North Carolina Constitution.[266]

The first group of African-American legislators understood that they were elected to make a difference, but the fact that they were only a few of them required that they form coalition with other legislators in order to have their legislation enacted. As their numbers increased, Frye said that they "could target more of [their] colleagues to work with."[267] In subsequent years, the numbers and influence of African-American legislators did increase. This increase was aided considerably by the *Thornburg v. Gingles*[268] decision and their influence increased due to the political savvy which they exhibited.

By 1982, the number of African-Americans elected to serve in the General Assembly had increased to four out of the 120 members of the House and one out of the fifty (50) members of the Senate. The ability to elect representatives of their choice did not result in a significant change in the number of African-Americans who were elected. The number of African-American legislators did not significantly change until after *Gingles* in which the Supreme Court declared that North Carolina's use of multi-member political districts constituted a violation of Section 2 of the 1965 Voting Rights Act. In 1982, when *Gingles*[269] was filed, only 52% of African-Americans were registered to vote; by 1986, when the case was decided, 57% were registered.[270]

In *Thornburg v. Gingles*, the United States Supreme Court issued its first interpretation of the amended Voting Rights Act.[271] In this case, the Court examined whether North Carolina's use of multi-member political districts, which submerged substantial African-American populations into a few white districts, violated Section 2 of the Voting Rights Act. The history discussed by the *Gingles* Court presented a series of racial based acts by the North Carolina General

265. 395 U.S. 285 (1969).

266. N.C. CONST. art. VI, § 4.

267. Jordan, *supra* note 259, at 41.

268. 478 U.S. 30 (1982).

269. *Id.*

270. Earls, Wynes & Quatrucci, *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUSTICE, 577, 580 (2008).

271. The Voting Rights Acts was amended in June 1982 in order to address a Supreme Court opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), which declared that a plaintiff was required to establish an intent to discriminate in order to prove a violation of Section 2 of the Act. *Id.* at 74. The amended language substituted an "effects test" as the standard, which had to be established in order to prove a Section 2 claim. *See id.*

Assembly and white Democratic candidates which were directed at preventing African-Americans from registering and participating in the political process by electing representatives of their choice. In *Gingles*, the Court condemned overt racially polarizing campaigns which resulted in racially polarized voting. Such campaigns closely mirrored efforts to portray African-Americans as unworthy of being elected to political office merely because of their race, a strategy used successfully since *Dred Scott* was decided.

The General Assembly's use of multi-member districts was designed to dilute the voting strength of several African-American communities and relied upon "racially polarized" voting by whites to prevent the election of African-American candidates.[272] Multi-member political districts were widely situated in the eastern portion of North Carolina, where approximately 70% of the African-American population lived, and successfully submerged substantial African-American populations into districts composed of several white communities.[273] In these districts, voters could elect a number of representatives, but everyone in the district was allowed to vote for their choices. In these conjoined districts, the African-American community became a minority, but separately would have been able to constitute a separate legislative district.[274] The opinion explains:

> [T]he court found that [B]lack citizens constituted a distinct minority in each challenged district. The court noted that at the time the multimember districts were created, there were concentrations of [B]lack citizen within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts.[275]

Utilizing a "totality of the circumstances" test, the Court determined that North Carolina had discriminated against African-Americans from 1900 to 1970 with respect to the exercise of the voting franchise "by employing, at different times, a poll tax, a literacy test, a prohibition against bullet (single-shot) voting and designated seat plans for multi-member districts."[276] The Court also determined that the low African-American registration rate of 52.7% was directly traceable to the long history of official discrimination by the state

272. *Gingles*, 478 U.S. 30 at 75–76.
273. *Id.* at 76–80.
274. *Id.*
275. *Id.* at 36–39.
276. *Id.* at 39.

against African-Americans and this produced depressed levels of African-American voter registration.[277]

The Court also concluded "historical discrimination in education, housing, employment and health services had resulted in a lower socioeconomic status for North Carolina's [African-Americans] as a group than for whites."[278] This historical discrimination created special group interests and hindered the ability of African-Americans to "participate effectively in the political process and to elect representatives of their choice."[279]

Additionally, the Court determined that "white candidates in North Carolina [had] encouraged voting along color lines by appealing to racial prejudice" and identified specific blatant, subtle, and furtive racial appeals which had occurred in North Carolina from 1900 through the 1984 U.S. Senate race.[280] "The Court determined that the use of racial appeals in political campaigns in North Carolina persist[ed] to the present day and that its current effect [was] to lessen to some degree the opportunity of [African-Americans] to participate effectively in the political processes and to elect candidates of their choice."[281] In line with this conclusion, the Court found that racially polarized voting existed in each of the multi-member districts that had been challenged.[282] The racist-oriented conduct described by the Court in *Gingles* and the justification for their use were not materially different than those which were used by the Democratic Party in 1898.

The Court's decision in *Gingles* dismantled those multi-member districts that negatively impacted African-Americans and severely disrupted this long-standing successful discriminatory device that had been used by the Democratic Party to retard political participation by African-Americans. As a direct result, the number of African-American legislators leaped from four to sixteen. Thus, the dismantling of this device finally served as a serious set-back to the results from the 1898 betrayal of the democracy which was led by Charles Aycock, Furnifold Simmons, Josephus Daniels, and Alfred

277. *Id.*
278. *Id.* at 76–80.
279. *Id.*
280. *Id.*
281. *Id.*
282. Michael Crowell, *Coates Canon Blog: Do Election Law Affect Voter Turnout?* N.C. LOCAL GOV'T LAW (Mar. 7, 2014), http://canons.sog.unc.edu/? P=7557.

Waddell. As a direct result of the Voting Rights Act, an eight-decade long practice of racial discrimination was successfully dismantled.

By 1982, the percentage of African-Americans who were registered to vote increased to 53% of age-qualified African-Americans while 67%of whites were registered. In 1965, when the Voting Rights Act was enacted, only 21% of African-Americans had been registered to vote. This voter registration increase occurred over a seventeen-year period. Although the registration numbers increased and this continued to be a necessary first step, there was not a noticeable increase in voter-turnout; in 1982, the turnout rate in this non-presidential year was only 30%.[283]

Through the legislative efforts of Representative "Mickey" Michaux, legislation was enacted in 1986 which allowed for a cadre of "floating" voter registrars who would go into African-American communities in order to register people to vote. Previously, voter registrars worked in their offices from 9:00 a.m. to 5:00 p.m. and would not go into African-American communities to register potential voters. This restricted registration pattern retarded the ability and opportunities for African-Americans, who were mainly hourly workers, to register and vote. As a direct result of the presence and participation of "floating" registrars, the registration of African-American voters increased.

During these early days, African-Americans were able to secure more than six million dollars in an appropriation to improve and expand the North Carolina Central University School of Law. This sum represented more than the law school had received in total appropriations that had been received in the thirty-nine years of it existence. Earlier, in 1976, some of these same legislators successfully defended the existence of the law school when white legislators had sought to close it.

In 1981, Representative Kenneth Spaulding led an effort to create single member political districts during the pendency of the *Gingles* litigation. African-American legislators also created an alliance, which changed the method of nominating and electing Superior Court Judges in the state. Prior to this legislation, only two African-Americans, Judges Clifton Johnson and Terry Sherrill, had been elected as a Superior Court Judge; after this legislation was enacted, thirteen were elected in the next election. In 1987, the African-

283. *Id.*

American legislators led a successful campaign to have Dr. Martin Luther King's birthday declared as a paid state holiday for state workers.[284]

In 1989, African-American legislators led a re-write of a seventy-four-year-old runoff primary law, which required a political office candidate to receive more than 50% of the primary votes in order to represent the party in the general election. This rule was responsible for the defeat of Representative Mickey Michaux when he ran for election in the second congressional district and received the most votes in the primary, 44% of the votes cast, but was forced into a run-off against a white conservative candidate, Lawrence "L.H." Fountain, who only received 33% of the vote.[285] Michaux lost the run-off in a controversial campaign, which was heavily laden with racially polarized voting.[286]

Despite the victories, there were significant and frustrating losses. Chief among those were repeated failures to increase appropriations for the historically underfunded HBCUs in the state and efforts to make voting easier and more convenient. Representative Michaux had introduced a bill in 1989 to provide for same day voter registration, but the House Judiciary Committee refused to endorse it.[287] There was also the failure of Representative Sidney Locke and Senator Ralph Hunt to pass anti-discrimination and ethnic intimidation legislation in 1989.[288] There were other failures, but it was clear that the African-American legislators were in an ongoing fight to improve the condition and positions of African-Americans, a sign that their presence was needed and beneficial.

A sad reminder of the continuing impact of racial discrimination was that from 1968 to 1989, only thirty African-Americans had been elected to the modern-day General Assembly while more than one-hundred and forty-two had been elected to similar positions during 1868 through 1898, the first reconstruction.[289] Nevertheless, the elected legislators had proved that they were as savvy and efficient as were those who were elected during the first reconstruction. In both

284. Jordan, *supra* note 259, at 42.
285. Adam Clymer, *GOP Seeks Gains in North Carolina*, N.Y. TIMES, July 15, 1982 (on file with author).
286. Jordan, *supra* note 259, at 42.
287. *Id.* at 58.
288. *Id.*
289. *Id.*

periods, coalition politics, which demanded the ability to attract support from like-minded white legislators from either party, was a necessary strategy.

The racist nature of the political process continued to be as pervasive in 1990 as it had been in 1898. For example, in the bitterly and racially divisive U.S. Senate campaign between Harvey Gantt, an African-American, who was the former two-term Mayor of Charlotte, and Senator Jesse Helms, the arch segregationist, who switched his Democratic Party registration to the Republican Party in 1960, the racial antagonistic tactics of 1898 were widely replicated. After Gantt's Democratic Party primary campaign victory, Helms launched an aggressive campaign to mobilize white voters by warning them about the dangers of electing an African-American.[290] He used racial code words in his campaign and fund-raising materials. In the closing days of the campaign, when Helms was trailing in the polls, he released the infamous "white hands" ad in which whites were warned that, if elected, Gantt would widely employ and support affirmative action programs that would deny jobs and other benefits to whites. The advertisement showed a pair of white hands, which held a rejection slip for a job as the narrator, and stated that:

> You needed that job and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. You'll vote on this issue next Tuesday. For racial quotas, Harvey Gantt. Against racial quotas, Jesse Helms.[291]

In those closing days, the Helms campaign, through the Republican Party, also sent more than 125,000 mailers to registered African-American voters that lied and told them that if they had moved from their residence within 30 days of the election, it would be illegal for them to vote and, if they attempted to vote, they would be prosecuted.[292]

At the time, the Gantt-Helms race became the most expensive political campaign in history. Trailing by eight points in the polls on October 20, 1990, before the "white hands" ad was shown on

290. Sandy Grady, *Helms-Gantt race is a matter of race*, BALT. SUN (Oct 15, 1990), http://articles.baltimoresun.com/1990-10-15/news/1990288141_1_harvey-gantt-helms-north-carolina. *See also* Robin Toner, *In North Carolina's Senate Race, A Divisive TV Fight Over 'Values,'* N.Y. TIMES, Sept. 23, 1990, at 2 (describing the Helm's television commercial).

291. Testimony of Leloudis, *supra* note 211, at 29.

292. Earls, et al., *supra* note 270, at 589.

statewide television, Helms won the election with 53% of the vote.[293] In the Gantt race, Helms demonstrated his willingness and inclination to continue to play the "race card" in order to stimulate his supporters. Jesse Helms' political races, like his ideological rants as U.S. Senator, regularly invoked his racist ideology and strident opposition to issues and concerns that would benefit African-Americans.

African-Americans were able to use the racist tactics employed by politicians like Jesse Helms to try to motivate African-Americans to register and vote. On election night in November 1990, lawyers who monitored the polling sites for Gantt were forced to seek court-orders to keep many polling sites open to accommodate the large number of African-Americans who had turned out to vote, many of them crowding polling sites after they left work for the day. When voting was confined to just one day in November, many African-Americans, mainly hourly workers, could not vote until they ended the work day. This reality created a situation where a large number of African-Americans were reduced to being 5:00 to 7:00 p.m. voters.

During the Gantt-Helms race, it became obvious to many African-Americans that the voting right struggle had moved past the contours of the 1965 Voting Rights Act and now needed to develop additional opportunities for African-Americans to register and vote. The relatively high African-American voter participation in the Gantt-Helms race resulted from an increase in the voter registration, which now stood at 63%, but only resulted in a 41% turnout among African-Americans.[294]

Expanding upon the political successes which resulted from the enactment of the Voting Rights Act, African-Americans engineered another phase of the "Second Reconstruction" as it expanded the participation of African-Americans to record-breaking numbers in local, county, and state elections. By this time, nineteen African-Americans served in the General Assembly and hundreds more had been elected locally.[295] The political savvy of this group was never

293. *United States Senate Election in North Carolina, 1990*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_Senate_election_in_North_Carolina, 1990).

294. *See* Earls, et al., *supra* note 270, at 580; Testimony of Leloudis, *supra* note 211, at 31; Crowell, *supra* note 282; *see also* William R. Keech & Michael P. Sistrom, *North Carolina*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 161 n.12 (Chandler Davidson & Bernard Grofman eds., 1994).

295. Testimony of Leloudis, *supra* note 211, at 29; Earls, et al., *supra* note 270, at 581.

more apparent than when they joined with white allies in 1991 to elect Representative Dan Blue as the Speaker of the House, the first such victory of an African-American in North Carolina or in any southern state. Blue's victory resulted from a coalition effort between African-American and white Democratic legislators.

During Blue's tenure, some progressive voter-related legislation was enacted in the General Assembly. Chief accomplishments were the drawing of congressional redistricts which resulted in the election of two African-Americans to Congress. Eva Clayton was elected as the congressional representative in the revised "Black Second," the same district from which George H. White was elected in 1896. Clayton was the first African-American elected to Congress from North Carolina since White's tenure ended in 1900.

Soon after the Clayton campaign concluded, Mel Watt was chosen as the congressional representative in the newly drawn twelfth district, which resulted from an increase in North Carolina's population. The twelfth congressional district was initially drawn as a majority-minority district, but was the subject of extensive litigation, which resulted in the African-American presence in the district being reduced. Notwithstanding this reduction in the number of African-American voters in this district, Watt was repeatedly elected until he accepted a cabinet position with President Obama in 2014.

The election of Blue as Speaker of the House was viewed as a major breakthrough in North Carolina politics. Blue became the most powerful African-American to ever serve in the General Assembly and wielded "real power."[296] Blue's election symbolized what was expected from the Democratic coalition that had come to depend heavily on the African-American vote to remain in office.[297] To win, Blue "had to win the votes of rural white legislators who, although Democrats, represented districts that routinely voted for Jesse Helms."[298] Instead of Blue's election serving as a stepping stone for African-American politicians in state politics, it became a "glass ceiling" that inhibited rather than escalated the acquisition of power. African-Americans expected the Democratic coalition to produce white voters that supported the rise of African-American leaders, but instead, the Party could not deliver white voters in the same way that

296. Jason Zengerle, *Code Blue*, THE NEW REPUBLIC (Apr. 1, 2002), http://www.newrepublic.com/article/code-blue.

297. *Id.*

298. *Id.*

African-Americans were able to deliver their voters for the benefit of Democrats.[299] In many instances, those white Democratic leaders and voters abandoned the Party and became Republicans rather than cast their votes for African-Americans, similar to what the white Populists and Republicans did to African-Americans in 1898.

E. Congressional Redistricting Challenged

The redistricting of the state's newest congressional districts did not advance without legal challenges. In an oddly induced legal challenge, the Civil Rights Division of the U.S. Justice Department initially affirmed the redistricting plan for District 1 (the old "Black Second"), but concluded that the drawing of boundaries for District 12 was unconstitutional.[300]

Under the leadership of Speaker Dan Blue, the General Assembly had initially developed a redistricting map, which included only one minority-majority district. When this redistricting plan was submitted to the Republican controlled Department of Justice for pre-clearance, it was rejected.[301] At the insistence of the Republican-controlled Department of Justice, the state was required to submit a new plan, which contained two minority-majority districts. This mandate resulted from the Department's adoption of a "Black Max" strategy to govern congressional redistricting around the country.[302] This plan was devised based on the voting history of African-Americans who normally voted for Democratic candidates and provided the margin of victory in contests with Republicans.[303] The "Black Max" strategy was designed to pack African-Americans into congressional districts which were already majority-minority and remove them as political influences in other contests in the state.[304]

The second redistricting plan created by the General Assembly included two districts with very irregular shapes which were majority-minority. District 1 was described by the Court as being "hook

299. *Id.*

300. *See* Shaw v. Hunt, 517 U.S. 899 (1996). The litigation in Shaw v. Hunt was filed initially by parties who sought a declaration that the creation of minority-majority congressional districts violated the Equal Protection Clause because it was not narrowly tailored to serve a compelling state interest. *Id.* at 915.

301. *Id.*

302. *See* Miller v. Johnson, 515 U.S. 900, 924–25 (1995).

303. *Id.*

304. *Id.*

shaped" and covered most of the northeastern section of the state.[305] District 12 had a "snakelike" shape which covered more than one-hundred and sixty miles and extended from the urban areas of Durham County, through five rural counties into the urban area of Charlotte and ended in the African-American section of Gastonia.[306] At significant points, the district boundaries were no wider than Interstate 85. In the initial drawing of District 12, African-Americans constituted 64% of that district's population.[307]

The mandate to create two minority-majority districts originated with the Republican-controlled Department of Justice. Once enacted, although in a different area of the state than initially suggested, the plan was attacked in court by five white Republicans and the State Republican Party. The principle objectives of the Justice Department were to maximize the number of African-Americans who were packed into the fewest number of districts, remove them from mostly white area because they tended to vote for Democrats and to increase the number of Republican congressional districts.[308] This process is called "stacking and packing" and was designed to significantly reduce the number of African-Americans who could vote for white Democratic Party candidates, who opposed Republicans in the remaining majority white congressional districts in the state.

It was clearly presented to the Court that the essential purpose of the districts was to create two minority-majority districts from which African-Americans would be able to elect representatives of their choice.[309] The Court concluded that the application of traditional equal protection principles in the voting rights context required the Court to declare that this redistricting plan for District 12 was unconstitutional. "After a detailed account of the process that led to the enactment of the challenged plan, the District Court found that the General Assembly of North Carolina 'deliberately drew' District 12 so that it would have an effective voting majority of [B]lack citizens."[310]

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305. *Id.* at 903.

306. *See id.* at 903. ("It [wound] in snakelike fashion through tobacco country, financial centers and manufacturing areas 'until it gobbles in enough enclaves of Black neighborhoods.'").

307. *Id.*

308. *Id.* at 906.

309. *Id.* at 903.

310. *Id.* at 905.

The Court dismissed the challenge to District 1 because it was "ameliorative, having created the first majority-[B]lack district in recent history."[311] The General Assembly's initial explanation for only creating one minority-majority district was:

> [T]o keep precincts whole, to avoid dividing counties into more than two districts, and to give [B]lack voters a fair amount of influence by creating at least one district that was majority [B]lack in voter registration and by creating a substantial number of other districts in which [B]lack voters would exercise a significant influence over the choice of congressmen.[312]

The Court determined that this explanation satisfied the constitutional and Section 2 requirements.

As for District 12, however, the Court concluded that the same justification did not apply and its composition was not supported by traditional districting principles. At the same time, the Court rebuked the Justice Department for insisting upon the maximizing of the number of African-American majority districts, which could be drawn, in particular states. The Court also explained: "In utilizing [Section] 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the [Voting Rights Act] beyond what Congress intended and we have upheld."[313] Additionally, the failure to maximize the creation of African-American districts cannot be the measure for a Section 2 violation.[314]

In a very real sense, *Shaw v. Hunt* was merely another effort by the Republican Party to undermine the growing influence of African-American voters in the south. The *Shaw v. Hunt* decision mirrored an earlier decision by the Court in *Miller v. Johnson* where the Court had declared a similar redistricting plan unconstitutional.[315] In subsequent decisions, the Court rendered the same decision in other "Black Max" congressional redistricting cases involving other southern states, which were also forced to re-draw their congressional districts to comply with the Department of Justice's African-American maximization plan.[316] *Shaw v. Hunt* resulted in a re-drawing of the state's

311. *Id.* at 912.
312. *Id.* at 902.
313. *Id.* at 924–25.
314. *Id.*
315. 515 U.S. 900, 909 (1995).
316. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1996); Johnson v. DeGrandy, 512 U.S. 997 (1994); United States v. Hayes, 515 U.S. 737 (1995); Bush v. Vera, 517 U.S. 952 (1996).

congressional map and a decrease in the number of African-Americans who were placed in that particular congressional district. Prior to *Shaw v. Hunt*, African-Americans constituted 64% of District 12; after the decision, the percentage decreased to 48%. By the time that this decision was issued in 1996, Congressman Watt had been re-elected three times and never encountered serious opposition to re-election even without having an African-American majority. Before he resigned to join the Obama Administration, Watt won election ten times with overwhelming support in each campaign that ranged from a low of 55% to a high of 70%.[317]

F. Legislative Successes Under Blue's Speakership

Under Blue's leadership, the General Assembly awarded significant appropriations to the five HBCU campuses which were used to construct and repair buildings and infrastructure. This special appropriation was deemed "make-up" money for some of the historic underfunding of these campuses.[318] In the previous legislative session, the General Assembly had provided significant funds for the majority white campuses and African-American legislators had vigorously objected to the inequitable nature of that earlier funding.[319] In the 1989 legislative session, appropriations for the historic white campuses were considerably higher than was the paltry $10 million which was allocated for the five HBCU campuses and the one historically Indian campus; in addition to other funding, N.C. State received $2 million for a new basketball palace.[320] Blue and other African-American legislators, most of whom had graduated from one of the state's HBCUs, targeted increased funding for the HBCUs as one of its top priorities. In a separate attempt, Representative Michaux was unsuccessful in obtaining an additional appropriation for the HBCU campuses as part of a proposal sway support for a constitutional amendment that would give veto power to the Governor.[321]

Despite the apparent successes, African-Americans continued to experience significant problems at polling places. Even with the

317. Mel Watt, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Mel_Watt&printable=yes (last viewed on September 1, 2015).

318. Jordan, *supra* note 259, at 49.

319. *Id.*

320. *Id.* at 49; *see also* Capital Improvement Appropriations Act of 1989, ch. 754, 1989 N.C. SB 1042 (1989).

321. Jordan, *supra* note 259, at 54.

Voting Rights Act in place, "it [was] still difficult for [B]lack citizens to register, vote and elect candidates of their choice. In North Carolina [B]lack voters also report[ed] voter intimidation at an alarming rate. Voter intimidation [was] not a relic of the past, but rather, a strategy used with disturbing frequency in recent years."[322]

In 1995, the newly reconstituted Republican Party gained control of the House of Representative, ousted Blue and installed Harold Brubaker as its new Speaker. During the first reconstruction period from 1868 through 1898, African-Americans were active members of the Republican Party. During the Great Depression of 1930, African-Americans began to turn away from the Republican Party due to the enticing promises of President Franklin Roosevelt and his "New Deal" policies. As the Republican Party became more dismissive of issues of racial equality and failed to address increased racial violence by white supremacist groups, this political switch became more evident during the 1936 presidential election. As more African-Americans joined the Democratic Party and increased their participation in it, whites, following the lead of former Senator Jesse Helms, began to gravitate to the Republican Party beginning in the 1960s. That transformation is largely responsible for the upsurge in the membership and power base of the newly formed present-day Republican Party.[323]

For two election cycles, Republicans controlled the House but Democrats maintained control of the Senate. Despite the advances of the Republican Party, African-Americans were able to form some bi-partisan agreements in order to advance legislation which they sought to enact. In 1999, Democrats regained control of the House and an effort to form a bi-partisan coalition to re-elect Dan Blue as Speaker of the House failed by two votes in a hotly contested campaign because two African-American legislators defected from the pro-Blue coalition.

Armed with additional African-American legislators and supportive white legislators, a successful effort was undertaken to enact an Early Voting provision which proved to be of significant benefit in increasing the opportunities for African-Americans to vote. Strongly supported by African-American legislators, Civil Rights and

322. Earls, et al., *supra* note 270, at 589.

323. Flora Bryant Brown, *African American Civil Rights in North Carolina*, TAR HEEL JUNIOR HISTORIAN 44:1 (2004).

community groups, this legislation was generally enacted with strong bi-partisan support.

In 1996, North Carolina ranked 43rd in the nation for voter turnout during a Presidential election. African-American legislators convinced some white legislators that improvements in this turn-out rate needed to occur. In the 1995 legislative session, Representative Michaux, along with a Republican co-sponsor, introduced legislation to rewrite the absentee ballot law by removing the excuse provision from both one-stop and mail-in absentee voting requirements.[324] This legislation also would have allowed local boards of election to designate multiple early voting sites.[325] This legislation failed, but had the effect of focusing more legislative attention on this issue. In 1999, Senator Ellie Kinnaird introduced legislation to establish "no excuse" early voting in the general elections in even numbered years and authorized the local boards of election to create multiple election sites around the county.[326] This bill was successful. The basic focus of this legislation was to make voting easier particularly for those voters who encountered barriers in voting on the traditional elections day.

The effort initiated by African-American legislators to make voting more convenient continued in 2001 when the General Assembly passed a law which provided for 17 days of early voting, authorized early voting on weekends and required counties to offer early voting on the last Saturday before the election.[327] In 2003, the General Assembly authorized out of precinct voting during the early voting period which made voting considerably easier.[328] This legislation was re-affirmed in 2005 in order to clarify that out of precinct voting could be cast outside of the voters' precinct on elections day.[329] In reaffirming this provision, the General Assembly noted that out-of-precinct African-Americans cast votes at a disproportionately high rate.[330]

While making it easier for all voters to participate in elections, these legislative enactments had a profound impact on African-American voter participation as those rates increased dramatically

324. Absentee Voting Revision, H.B. 27, N.C. Gen. Assemb., Reg. Sess. 1 (1995).
325. *Id.*
326. S.J., 1st Sess., at 217221 (N.C. 1999).
327. N.C. GEN. STAT. § 163-227.2 (2000).
328. N.C. GEN. STAT. § 163-166.11 (2003).
329. Act of Mar. 2, 2005, ch. 2, 2005 N.C. Sess. Laws 2.
330. *Id.*

between 2000 and 2004. In an escalation of the right to vote, the General Assembly authorized same-day registration in 2007, which allowed voters to register and vote on the same day during the early voting period.[331] Then in 2009, the General Assembly passed legislation that allowed 16 and 17 year olds to pre-register to vote and this process would allow their registration to automatically be placed on the voters roll when they turned 18.[332]

As a result of the enactment of these voter-friendly legislations, North Carolina voter participation rates rose from 43rd to 11th for presidential campaigns by 2008. Of the 1.46 million voters added to North Carolina voter roll between 2000 and 2012, 35% were African-Americans, even though they only constituted 20% of the voting-age population in 2000.[333]

The increase in voter registration by African-Americans resulted from an increase in qualified African-Americans who have competed for election to political office at the local and state levels. This increase was aided by the ease of registering and voting particularly same day voting, out of precinct voting, seventeen days of early voting, and the availability of local voter registrars who have been able to register individuals in their communities, at churches and at shopping malls. By 2008, African-American registration rate had risen to a level that surpassed that of whites with 94.9% of the voting age population registered as compared with 90.7% of the white voting age population. In 2012, this figure stood at 95.3 of African-Americans and 87.8% of whites.[334] With respect to turnout, the turnout rate for African-Americans, for the first time in modern history, exceeded that of whites.[335]

Of particular importance, voter registration and participation rose to the highest level than it had ever been during the modern era. In 2008, the tremendous increase in voter registration and participation by African-American voters resulted in the election of 25 members of the House and ten members in the Senate.[336] In 2008 and 2012, the participation rates of African-American voters, which were inspired

331. N.C. GEN. STAT. § 163-82.6 (2007).
332. N.C. GEN. STAT. § 163-82.1 (2009).
333. Exhibits of the Deposition of Charles Haines Stewart, III, Transcript of Record at 17, N.C. Conference of the NAACP v. McCrory, No. 1:13-CV-658 (2015).
334. *Id.*
335. *Id.*
336. *See* JORDAN, *supra* note 124.

by the campaign of Barack Obama for President, surpassed the participation rates of white voters.[337]

V. POLITICAL SUCCESS UNDER ATTACK

As has regularly occurred in North Carolina, the success of African-Americans in the political arena has drawn challenges. This latest challenge results from the election in 2010 of a conservative band of Republicans who have evidenced an intention to undermine the political strength and past successes of African-Americans. The first salvo came when the Republicans authored redistricting plans for the election of state and congressional districts that "stacked and packed" African-Americans into a few political districts in an attempt to prevent African-American voters from supporting white Democratic Party candidates.

In 2010, North Carolina voters, for the first time since 1894, elected a majority of Republicans in the House and Senate of the General Assembly. Following this election, Republican legislators made it clear that it would pursue a conservative agenda which sought to reverse many of the policies and priorities which had been implemented by the Democrats. Pursuant to this agenda, the General Assembly enacted new redistricting plans for the House, the Senate and congressional districts. The focus of these plans was to "segregate, stack and pack" African-Americans into a small number of majority-minority voting districts which would allow for the election of a limited number of African-Americans, but would remove them from other majority white populated districts. This plan followed the design and intent of the failed "Black Max" scheme, which was attempted at the congressional level in the 1990s and had already been condemned by the United States Supreme Court in *Shaw v. Reno*[338] and *Miller v. Georgia*.[339]

As a result of the new redistricting plans, the Republican Party won super-majorities at each state electoral level and a majority of the congressional seats. North Carolina has 13 congressional districts, 50 senate districts and 120 house districts. Prior to the 2010 redistricting, neither of the two congressional districts in which an

337. Bob Hall, *Analysis: Who Voted In 2016 & Who Didn't*, DEMOCRACY NORTH CAROLINA (Jan. 26, 2017), http://nc-democracy.org/wp-content/uploads/2017/01/WhoVoted2016.pdf.

338. *See* 509 U.S. 630, 634 (1993).

339. *See* 515 U.S. 900, 918–20 (1995).

African-American was elected were majority-minority nor were any of the ten African-American-represented senate districts. In the House, of the 23 house districts from which African-Americans were elected, only ten were majority-minority. As a result of the "stacking and packing," that the General Assembly engaged in, two congressional districts became majority-minority, as did nine of the ten senate districts and 23 house districts.[340]

As of this writing, 25 African-Americans have been elected to serve in the 120-member House of Representative. Ten African-Americans serve in the 50-member State Senate and two of the 13 congressional representatives are African-American. By increasing the number of African-Americans who have now been placed into super-large minority districts, support for those white Democrats who competed in majority white districts was minimized or eliminated. This mix created an environment where Republicans were able to gain a super majority in each level of the legislative process. Following several legal challenges, these redistricting plans were determined to be unconstitutional by the Fourth Circuit Court of Appeals.[341]

Addressing the particulars claims which were presented by the Petitioners, the Fourth Circuit concluded that race was the predominant fact which motivated the drawing of the districts which were challenged and ordered that new district lines be drawn immediately. The U.S. Supreme Court stayed the order which directed that new district lines be immediately drawn. The legal issues which are present in this redistricting case are the same ones that were litigated and decided adverse to the states in *Miller v. Johnson*,[342] *Shaw v. Hunt*,[343] *Bush v. Vera*,[344] and *Bethune-Hill v. Virginia State Board of Elections*.[345]

VI. MONSTER VOTER SUPPRESSION BILL

With the election of super majorities for conservative Republicans, the ruling party has shown no inclination or need to work with the African-Americans or white Democratic legislators. The net result

340. Jess Bravin, *Supreme Court Revives Challenge to North Carolina Redistricting*, WALL ST. J. (Apr. 20, 2015).

341. *See* Covington v. North Carolina, No. 1:15-cv-399, 2016 U.S. Dist. LEXIS 106162 (M.D.N.C. Aug. 11, 2016) (stay currently pending).

342. 515 U.S. 900 (1995).

343. 517 U.S. 899 (1996).

344. 517 U.S. 952 (1996).

345. 137 S. Ct. 788 (Mar. 1, 2016).

was an increase in the number of African-American legislators, but they now serve with little political power to adequately represent their constituents. Unlike past history where African-Americans were able to forge agreements with white legislators, the new right-wing Republican membership was totally unwilling to entertain cooperative efforts with African-American legislators.

A vivid example of this powerlessness occurred in 2013, after the U.S. Supreme Court ruled that Section 4 of the Voting Rights Act was unconstitutional.[346] This decision negated the Section 5 pre-clearance requirement by concluding that Section 4, which identified which jurisdiction had a history of voter discrimination, was outdated and unconstitutional. Section 5 would have required that changes to election procedures or practices had to be approved by the Civil Rights Division of the U.S. Department of Justice or a three-judge Panel from the District of Columbia Court of Appeals. Within days of the issuance of the *Shelby* opinion, the General Assembly passed legislation which repealed or significantly altered each of the progressive voter empowerment provisions which the General Assembly had enacted between 1999 and 2010.[347]

Today, the political progress that African-Americans have made during this "second reconstruction" is under a relentless attack. This effort is an attempt to destroy or abridge the political gains which have occurred since 1980 and which resulted in a substantial increase in African-American registration and voter participation.

In the present environment, the current attack centered on:

- Institution of a stringent Voter Identification requirement which will disproportionately impact African-Americans and Hispanics/Latinos
- Elimination of a week from the Early Voting Period
- Elimination of Same-Day Voting
- Prohibition of Straight Ticket Voting
- Elimination of Out-Of-Precinct Voting
- Expansion of the ability of individuals to challenge voters at polling sites
- Elimination of the early registration of 16 and 17 year olds

346. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
347. H.R. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

The legislative maneuvering, which surrounded the enactment of HB 589, is an example of the present political impotency of African-American legislators and their colleagues. HB 589 was initially a single issue, House-passed bill which mandated a voter ID requirement with moderate provisions that swiftly expanded into an omnibus bill that eliminated the many progressive voting provisions and mandated a strict voting ID requirement.[348] After the initial bill was approved in the House, it was sent to the Senate for concurrence.[349] The Senate delayed consideration of this bill until after the *Shelby County v. Holder* opinion that gutted the Voting Rights Act Section 5 pre-clearance requirement.[350] Within a day of this opinion and after obtaining racial usage data regarding the use of early voting by African-Americans, HB 589 changed from being a moderate Voter ID bill and became an all-inclusive attack on the several voting provisions which were primarily responsible for the tremendous increase in African-American registration and political participation during the previous 25 years.[351] Within two days, the bill passed the Senate and was sent to the House for a concurrence vote.[352] In the House, the revised HB 589 was immediately placed on the floor for a vote, over the strenuous objections of African-American legislators who had not seen the bill until it was presented on the floor, and was passed in two hours.[353] Without a hearing or the opportunity to debate these significant amendments to the bill, African-American and Democratic Party legislators were simply allowed to make statements of opposition for the record.[354] Immediately after its passage, the House and Senate adjourned the 2013 legislative session.[355]

Although it concluded that African-Americans heavily relied upon the outlawed voting provisions, the U.S. District Court Judge refused to conclude that the enactments violated Section 2 of the Voting Rights Act.[356] On appeal, the Fourth Circuit Court of Appeals found that the District Court's factual conclusions were more than

348. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 216–18 (4th Cir. 2016).
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *See* N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320, 422 (M.D.N.C. 2016).

sufficient to support a legal conclusion that the General Assembly's legislation was enacted with racially discriminatory intent in violation of the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act.[357]

The decision found that the General Assembly had obtained information which showed that African-Americans were less likely than whites to possess a state issued picture identification just before it imposed a stringent requirement that voters present a photo ID in order to vote.[358] The Court also concluded that legislators secured information which showed that the progressive reforms, which the General Assembly enacted earlier, were disproportionately used by African-Americans before it voted to decrease the early voting period and eliminated other progressive voting provisions.[359] A review of the District Court factual conclusions convinced the Court of Appeals that the General Assembly had targeted those voting provisions, which African-Americans relied upon, for elimination with "surgical precision" and this evidenced invidious racial discrimination.[360] "Voting in many areas of North Carolina is racially polarized. That is, 'the race of voters correlates with the selection of a certain candidate or candidates.'"[361] Supporting this conclusion, the Court explained:

> Using race as a proxy may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. State legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.[362]

The Court recognized that Democratic controlled Legislatures had enacted the progressive voting procedures between 1999 and 2007 in an effort to eliminate the many barriers which existed for African-Americans and racial minorities to vote, but concluded that the right-wing Republicans could not re-erect those barriers and call it "politics as usual."[363] In addition, the evidence showed that "[t]he

357. *See N.C. State Conference of NAACP*, 831 F.3d at 235.
358. *Id.* at 230.
359. *Id.* at 229.
360. *Id.* at 214.
361. *Id.*
362. *Id.* at 225.
363. *Id.* at 227.

General Assembly enacted [these changes] in the immediate aftermath of unprecedented African-American voter participation in a state with a troubled racial history and racially polarized voting."[364]

The Fourth Circuit's decision invalidated the photo ID requirement, restored the full seventeen days of early voting, re-instated same day registration and out of precinct voting and re-authorized the registration of 16 and 17 year olds. That decision has been appealed to the U.S. Supreme Court; the McCrory administration appealed, but the newly elected Governor and Attorney General filed a notice with the Court to withdraw the certiorari petition. A request by the North Carolina General Assembly to join this litigation as a party is presently pending a decision from the Supreme court.

CONCLUSION

For African-Americans, the most important constitutional rights are the right to vote and to participate in the political franchise. Unless, those right are protected, the other constitutional rights become meaningless since they can be withdrawn at any time and for any reason. Even though African-Americans are significantly out-numbered, the vote provides a potent weapon which can be used to reward those political leaders who seek to protect interests and concerns which are important to that community and to repel those legislators who have demonstrated antipathy to the protection of these interests.

At no point in U.S. history have African-Americans sought to dominate whites politically even though that claim has often been repeated as a part of coordinated efforts to disenfranchise this community. Throughout this country's history, African-Americans gained the privilege to vote as long ago as the Revolutionary War, but white political leaders have revoked that right several times by statutes and constitutional amendments. The usurpation of this right has normally been supported by force of arms and terroristic activities in which the white populist has engaged or by the failure of responsible whites to join in the protection of this precious right.

Throughout this country's history, African-Americans have successfully fought back attempts to eliminate their voting rights. From the outset of this history, the opposition to political

364. *Id.* at 226.

participation by African-Americans has been race-based and predicated upon the notion that America is a nation established only for whites and political participation by African-Americans poses a threat to this historic doctrine of white supremacy. That race-based opposition continues today when African-Americans find that their ability and right to vote is undergoing a vicious attack by right wing forces.

The doctrine of white supremacy clearly supported the disfranchisement of free Africans in 1835. Even with strong support from white legislators, the General Assembly revoked a privileges that free Africans were able to exercise. At that time in United States history, citizenship and its privileges were determined exclusively by each state. What became clear in North Carolina in 1835 was that white supremacist did not support the ability of Africans, who lived, worked, and owned real property in North Carolina, to vote. At that point in history, not one African had been elected or appointed to any political office, but the justification used to explain this disenfranchisement was the fear of domination by those free Africans.

Within twenty years of this disfranchisement of 1835, this political narrative of a "white only" citizenship and country was affirmed by the United States Supreme Court in the infamous *Dred Scott v. Sandford* decision, which established that neither the framers of the United States Constitution nor its people ever intended that Africans, free or slave, could be American citizens. Chief Justice Joseph Taney took pains to elaborate on the social and political views of whites, as it existed up to and including 1856. That view has been reiterated, time and time again in American history, in attempts to justify efforts to prevent African-Americans from voting and participating in the political franchise. Several different terminologies have been used, but the meaning has always been the same, African-Americans have no rights that whites are bound to respect or protect.

For political purposes, the doctrine of white supremacy, which prevailed in 1835, became the law of North Carolina either in form or in substance. Historically, this view has supported a political doctrine of the basic inferiority of African-Americans, which has been promoted and continues to be engrained in the hearts of many whites. Even when the doctrine was slowly erased as a legal doctrine in *Brown v. Board of Education* and subsequent cases, the ideology continued to live in the hearts and souls of many white conservative political leaders.

In spite of the continuing determination of many whites to memorialize this doctrine, African-Americans have made repeated attempts to dismantle it and continue to engage in struggle in order to sustain the promises of an equal and race-neutral path to participation in the American promises of justice, democracy, and equality.

The promises of justice, democracy, and equality for African-Americans did not become a reality until after the Civil War and the enactments of the North Carolina Constitution, and the 13th, 14th and 15th Amendments to the U.S. constitution. Since that time, African-Americans have waged successful battles to realize the full benefits of these promises. Setbacks in the political arena, which have been propelled and supported by the white supremacy doctrine, have taken place, but have not permanently been fatal to efforts to achieve those goals. Years before the enactment of the 1868 North Carolina Constitution, Frederick Douglas warned that "without struggle, there is no progress." This prophetic declaration has been true for African-Americans.

The struggles by African-Americans to succeed during the first reconstruction are instructive for later efforts toward obtaining freedom, justice, and equality. Those early African-American leaders were insistent on being a part of the political process and possessed the political resolve and savvy necessary to cultivate and develop alliances with like-minded whites who understood the commonality of their interests. From 1868 through 1898, those early leaders experienced the successes available from coalition or fusion politics and suffered from the dissolution of this common vision and political cooperation. The political successes of those days expanded the opportunities for African-Americans to participate in the breadth of the society, as it existed at that time, but by doing so, also expanded the constitutional protections and opportunities for powerless whites.

Through the next 87 years, almost nine decades, which included the Civil Rights and Black Power movements, the vast majority of whites continued to overtly and covertly support this white supremacy agenda. It was not until 1984, after the *Thornburg v. Gingles* decision, that African-Americans returned to meaningful political participation in North Carolina. Along the way, African-American leaders grew to understand that a minority group must find common ground with others, in this case white voters and political leaders, in order to advance a political agenda and fully participate in the breadth and benefits of this society.

A perfect example was the political success of Representative Henry Frye to convince the General Assembly to place a referendum on the 1969 ballot to repeal the literacy test, a device which had been used to suppress the ability of African-Americans to register to vote. Even though the referendum failed, it evidenced that it was possible to create common ground with some whites on particular issues even if it is in a racially hostile environment.

In order to pursue efforts to protection and benefit their constituents, African-American legislators repeatedly used that political "common bond" or coalition strategy. The high point of that coalition politics strategy resulted in the election of Dan Blue as the first African-American to be elected as the Speaker of the House anywhere in the South.[365]

The successes, which the General Assembly achieved under and after the Blue Speakership, accrued to the benefit of whites who have been traditionally ignored and under-appreciated. Yet, it is that same group of under-privileged whites who constantly fail to understand the common ground that they share with African-Americans and have become the strongest supporters of white supremacy. Testimony presented during the voter suppression July 2015 trial in Winston Salem by plaintiffs and defendants experts affirmed the conclusions that racial polarized voting has controlled North Carolina politics and continue to do so.[366] These experts testified that a person's race is a better predictor of how he or she will vote, even more so than party identification.[367] On average, African-American voters in North Carolina currently support Democratic candidates, African-American or White, at near unanimous levels, while nearly two-thirds of white voters support Republican candidates.[368]

As a result of the 1965 Voting Rights Act and the U.S. Supreme Court's decision in *Thornburg v. Gingles*, white political leaders have accepted that African-Americans will have to win some legislative races. The Court struck a fatal blow to the use of multi-member election districts which were used to submerge large African-

365. Rob Christensen, The Paradox of Tar Heel Politics: The Personalities, Elections and Events that Shaped Modern North Carolina, 278, University of North Carolina Press ed. (2008). Only one other African-American, Willie Brown, had reached this position of influence in a state when he was elected as Speaker in the California legislature. In Bold Move, Willie Brown Wins Again, N.Y. TIMES (January 25, 1995).

366. Testimony of Leloudis, *supra* note 211, at 1, 3, 4, 7.

367. *Id.*

368. *Id.*

American populations and, thereby, to minimize the opportunities for the election of African-American political candidates. As a result, the strategy has shifted from an outright banning of political participation by racial minorities to efforts to limit those political opportunities. As a result of the clout of the Voting Rights Act, the vocal cry of "Negro Domination" has been replaced by the new national battle cry of protecting against voter fraud.

Since its passage, a consistent conservative message that is aggressively advocated, is that the Voting Rights Act constitutes an over-reaching by Congress and rules and regulation that control voting should be returned to the states as a part of the renewed "states' rights" campaign. Under this "states' rights" banner, African-Americans have suffered the greatest political harm and the Voting Rights Act has served as an effective wedge against its abuses. In light of *Shelby County v. Holder*, a partial "states' rights" victory, right wing political leaders now hope Neil Gorsuch, Associate Justice of the U.S. Supreme Court, will join in the overturning the remaining portion of the Voting Rights Act or, in the alternative, that the new conservative Congress and President will repeal it.

The creation of apartheid-like majority-minority electoral districts, as have occurred in North Carolina and was previously addressed in *Thornburg v. Gingles*, is an attempt to limit the ability of African-American voters to decide who will control the State Legislature and represent the state in Congress. Although it is not as prevalent as it existed when *Thornburg v. Gingles* was decided, racially polarized voting continues to exist in the state and limits the willingness of many whites to vote for African-American candidates. The existence of this polarized voting maintains a political environment in which legislators can continue their efforts to minimize political participation by African-Americans and embolden those groups and organizations which have racial disfranchisement as their goal.

While African-American voters have eagerly voted for attractive and promising African-American political candidates, they have repeatedly voted for white candidates. In most white communities, there is not the same response from or reciprocity with African-American candidates. In order for a legislator to win an election in a district which has racially diverse voters, candidates have to win support from both African-American and white voters. This requirement makes it necessary for the candidate to develop a campaign that appeals to and supports the diverse interests of that

racially diverse community. This configuration represents coalition politics at its best.

This is not the case when a district has none or an ineffective few African-American voters. In order to succeed, the winning candidate, in these type districts, is not required to seek votes from African-Americans or to be concerned with those issues which impact that group. As a result, in these heavily white only districts, conservative Republicans can resort to racially polarized sentiments and campaigning. In these districts, candidates can rely upon the absence of African-American because they have been segregated into apartheid-type political districts with the understanding that they are better able to exploit and appeal to racial polarized voting. Based upon North Carolina history, many white voters will vote again and again for the white supremacy agenda whenever that choice is presented to them. It is in this race conscious environment that apartheid political districts can be devised and voter friendly legislation can be ignored or revoked because of the false claim that African-Americans will benefit.

The sad consequence, which presently exists in North Carolina, is that while African-Americans have more elected legislators in the General Assembly today than ever before, they possess less power and influence than they possessed when only a few were in office. This lack of political power was remarkably demonstrated when those legislators could do no more than protest when the General Assembly engaged in the race base redistricting of political district and when the legislature repealed several of the progressive voting changes which made voting easier for racial minorities.

This powerlessness is now more threatening following the dismantling of Section 4 of the Voting Rights Act by the Supreme Court which rendered the Section 5 pre-clearance mandate moot. These results have been magnified by the "take-over" of the political process, at the state and national levels, by right wing forces, which pose a realistic threat to the continued existence of the Voting Rights Act. As long as African-American legislators and their allies remain in the minority in legislative bodies, which embodies and promotes the doctrine of white supremacy, the future political influence of African-American voters is once again under threat of extinction. Although that political narrative has been regularly resisted by African-Americans over the years, the underlying racial sentiments and political ideology which were expressed in the *Dred Scott* opinion

continues to rule present day political thought as it relates to the right of African-Americans to participate in the political franchise, the dead hand continues to rule from the grave.