THE FORBIDDEN FRUIT OF ALABAMA LEGISLATIVE BLACK CAUCUS V. STATE OF ALABAMA: RACIAL PREDOMINANCE IN REDISTRICTING

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INTRODUCTION

Racial gerrymandering as a cause of action has been called a tragedy, a label it earned when the United States Supreme Court dealt a blow to what it termed an "unconstitutional racial gerrymander" in *Shaw v. Reno*.[1] Classifying citizens solely on the basis of race is by its "very nature odious to a free people whose institutions are founded upon the doctrine of equality."[2] A principal reason for treating race "as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[3]

Racial classifications cannot be made legitimate by arguing that everyone suffers them in equal degree, especially when these racial classification "principles apply to the drawing of electoral and political boundaries."[4]

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[1] Shaw v. Reno (*Shaw I*), 509 U.S. 630, 634 (1993).

[2] *Id.* at 643 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[3] Rice v. Cayetano, 528 U.S. 495, 517 (2000).

[4] Johnson v. De Grandy, 512 U.S. 997, 1029-30 (1994) (Kennedy, J., concurring in part and concurring in the judgment).

The Supreme Court has held that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest."[5] "Applying traditional equal protection principles in the voting-rights context is 'a most delicate task,' however, because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts."[6]

The landmark racial gerrymandering decision of *Shaw v. Reno* hastened the demise of extreme racial classifications and blatant racial assignments to voters in the redistricting process.

I. BACKGROUND

A. Sauce for the Goose

Two decades after *Shaw v. Reno*, the Supreme Court faced a unique twist on the racial gerrymander claim. Minority voters in the pre-*Shaw* era had used racially gerrymandered districts offensively in devising race-based remedial and alternative plans, often consisting of bizarrely shaped demographic manipulations that were forced upon covered jurisdictions as the price for preclearance under Section 5 of the Voting Rights Act (VRA)(Section 5). *Shaw* led to the demise of many of those racially gerrymandered districts created by collaborative efforts between minority voters and the Department of Justice (DOJ).

Some states formerly covered by Section 5 preclearance were freed from federal oversight with the Supreme Court's 2013 decision in *Shelby County v. Holder*, and they pushed the envelope by creating or enhancing majority-minority districts in a manner that resembled packing of minority voters into what were already safe majority-minority districts. Minority voters attacked the resulting demographic manipulations as racial gerrymanders. As Justice Scalia suggested during oral argument in *Alabama Legislative Black Caucus v. Alabama*, the shoe was on the other foot, as the parties who had created and had to defend the racially

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[5] *Shaw I*, 509 U.S. at 643.

[6] Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 905 (1996) (citation omitted) (quoting Miller v. Johnson, 515 U.S. 900, 905 (1995)).

gerrymandered districts in the post-*Shaw* era now found themselves attacking racially gerrymandered districts as unconstitutional racial classifications in which race was a predominant factor.

B. Alabama Legislative Black Caucus v. State of Alabama

After *Shelby County v. Holder* immobilized Section 5, many jurisdictions freed of the shackles of preclearance quickly enacted legislative districting schemes and other electoral measures. One such measure was a districting plan crafted by the Alabama legislature. Black voters attacked that plan as a racial gerrymander, claiming that they had been overpacked in certain districts so the Republican Party would maintain political dominance in surrounding Alabama districts. Specifically at issue was the alleged packing of minority voters into what were already safe majority-minority legislative districts.

This unique twist on the racial gerrymander claim in *Alabama Legislative Black Caucus v. Alabama*[7] was a defensive invocation in contrast to its previous offensive use. The majority of the Court articulated that the Black Voting Age Population (BVAP) of a proposed district cannot be viewed in a vacuum and that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in majority-minority districts.[8] Rather, the Court noted, it is the ability to elect a preferred candidate of choice, not "a particular numerical minority percentage" that should be the relevant point of reference.[9] The Court required a district-by-district analysis, in which the federal equal population requirement was simply a "background" rule.[10] In so holding, the Court clarified that federal "equal population" requirements cannot serve as a "traditional race-neutral districting principle[]" in the predominant motive analysis.[11] The Court thus rejected the Alabama legislature's reliance on equality of population as one of the several traditional principles under the one person, one vote standard, relegating population equality to the

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[7] 135 S. Ct. 1257 (2015).
[8] *Id.* at 1272.
[9] *Id.*
[10] *Id.* at 1271.
[11] *Id.* at 1270.

status of a background principle considered prior to undertaking the crafting of a redistricting plan.

The Court recounted the steps that led to this plan's creation. Inasmuch as the Alabama legislature sought to justify its districting scheme in an effort to avoid retrogression under then-viable Section 5, the Court noted that Section 5 requires legislatures to ask the following question: "[t]o what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[12] In evaluating what amounts to a retrogressive reduction in minority voting strength, the Court explained that "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive," but for any use of racial classifications, the legislature must have a "strong basis in evidence."[13]

This is not a perfunctory exercise in legislative district bean-counting. According to the majority, it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression."[14] For example, a redistricting plan using racial criteria to maintain the population of African-American voters in a majority-minority district that "has long elected to office black voters' preferred candidate" would not likely be "'narrowly tailored' to achieve a 'compelling state interest'" without evidence that any reduction in the minority population would impact African-American voter' ability to elect their preferred candidate. [15] The Alabama legislature's error was complete when it increased the BVAP of a safe majority-minority district using a BVAP threshold, while relying heavily on a mechanically numerical view as to what counts as forbidden retrogression without a "strong basis in evidence" for doing so.

The racial gerrymandering shoe was on the other foot. Two decades later, the minority litigants in redistricting litigation were leveling the same racial classification argument that had been leveled at them and their colleagues in the DOJ at the time of the *Shaw v. Reno* decision in 1994.

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[12] *Id.* at 1274.
[13] *Id.* at 1273-74.
[14] *Id.* at 1273.
[15] *Id.*

C. Immediate Aftermath of Alabama Legislative Black Caucus

Following the *Alabama Legislative Black Caucus* decision, three-judge district courts in Virginia and North Carolina reached diametrically opposite results while ostensibly applying the same legal standards. Both states rushed to the Supreme Court for a resolution—tragically, however, this occurred at the same time the Court lost one of its most conservative Justices, Antonin Scalia. At the heart of the decisions in Virginia and North Carolina was whether and to what extent a state legislature can rely upon race in the drawing of districts; more specifically whether avoidance of potential liability under the Section 2 and Section 5 of the VRA can justify such race-based districting. This issue goes to the heart of our Nation's much-tattered, but still intact, concept that the United States Constitution is colorblind.

This is not the kind of legal issue that can be resolved with any degree of certainty by an eight-member Court, evenly divided in its political ideology. To understand the predicament in which Virginia and North Carolina have been placed, we will start with *Shaw v. Reno* and identify the controlling principles of Equal Protection jurisprudence that the Court delineated in *Shaw I*, *Shaw II*, and *Miller v. Johnson*. Those principles were applied in *Alabama Legislative Black Caucus* following the Supreme Court's ruling in *Shelby County v. Holder*, which effectively immobilized Section 5, which was, up until that time, one of the most potent weapons wielded by the DOJ in policing the redistricting process in covered jurisdictions. We will then review the course of the proceedings and the history of the Virginia and North Carolina litigation, leading up to the present, where both cases have been brought to the steps of the United States Supreme Court for resolution.

Those Equal Protection principles have been applied with sharply divergent results in Virginia and North Carolina, and racial gerrymander litigation again seeks resolution by an ideologically divided United States Supreme Court. A quick and complete solution would be nothing short of miraculous.

II. RACIAL MAXIMIZATION

Shaw v. Reno[16] was a watershed decision in the development of voting rights jurisprudence. It laid down a clear standard rejecting a racial maximization agenda that up to that time forced many states, counties and cities covered by Section 5 of the VRA to engage in race-based assignments of voters as the price for preclearance. It plagued the Civil Rights Division of the DOJ until the Court stepped in.

Writing for the majority, Justice Sandra Day O'Connor led the Court to a principled analysis of the two complex and sensitive issues, what the constitutional right to vote means and whether race-based redistricting by a state "designed to benefit members of historically disadvantaged racial minority groups" could be continually allowed.[17] The case centered on North Carolina's creation of a reapportionment plan that initially included one majority-minority congressional district. After the United States Attorney General objected to the plan on the ground that the state could have created a second majority-minority district giving effect to minority voting strength in that area of the state, the North Carolina General Assembly created a second majority-minority district in which the boundary lines were dramatically irregular in shape. The Attorney General did not object to this revised plan, but a number of North Carolinians did, including the Plaintiffs challenging it as an unconstitutional racial gerrymander. Specifically, the Plaintiffs alleged that, at the DOJ's urging, the state deliberately created the two congressional districts where a majority of Black voters was arbitrarily concentrated without regard to compactness, contiguousness, geographical boundaries, or political subdivisions with the purpose of creating districts along racial lines to assure the election of two Black representatives.

The Court was asked to hold that the Plaintiffs had stated a cognizable claim under the Fourteenth Amendment. Addressing the two majority-minority districts at issue, the Court described the first as "somewhat hook shaped."[18] It had been compared to a

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[16] 509 U.S. 630 (1993).

[17] *Shaw I*, 509 U.S. at 633.

[18] *Id.* at 635.

"Rorschach ink-blot test," [19] and a "bug splattered on a windshield."[20] Turning to the second district, the Court noted that it was "even more unusually shaped,"[21] and that for much of its 160 mile length, it was no wider than the I-85 corridor as it wound "in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'"[22] According to one state lawmaker, "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."[23]

At the outset of its opinion, the Court found it "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."[24] Turning to the constitutional issue under the Equal Protection Clause of the Fourteenth Amendment, the Court framed the question raised by the Plaintiffs, all of whom were white North Carolinians. According to the Court, while it had never held that race-conscious state decision making was impermissible in all circumstances, the question before it was whether redistricting legislation can run afoul of the Equal Protection Clause when it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[25]

A. Racial Assignments from Gomillion *to* UJO

Following a review of racial assignments and race-based state action precedent from *Gomillion v. Lightfoot*[26] to *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[27] Justice O'Connor signaled the majority's holding:

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[19] Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C. J., concurring in part and dissenting in part).

[20] *Review & Outlook: Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14.

[21] *Shaw I*, 509 U.S. at 635.

[22] *Id.* at 635-36 (quoting *Barr*, 808 F. Supp. at 476-77 (Voorhees, C. J., concurring in part and dissenting in part)).

[23] Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting; White Voters Challenge Black-Majority Map*, WASH. POST, Apr. 20, 1993, at A4.

[24] *Shaw I*, 509 U.S. at 641.

[25] *Id.* at 642.

[26] 364 U.S. 339 (1960).

[27] 430 U.S. 144 (1977).

> Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. . . . *Edmonson v. Leesville Concrete Co*., 500 U. S. 614, 630-631 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.[28]

Based on this rationale, Justice O'Connor concluded for the majority that, on the facts presented, Plaintiffs had stated a claim sufficient to defeat the state's Rule 12(b)(6) motion to dismiss:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[29]

Justice O'Connor closed with this note about the societal harm resulting from racial classifications in the redistricting context:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even

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[28] *Shaw I*, 509 U.S. at 647-48 (citation omitted).

[29] *Id.* at 649.

> for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.[30]

Up until that point in VRA jurisprudence, racial gerrymandering and racially maximized majority-minority districts were used as blunt instruments by civil rights plaintiffs, aided and abetted by a less-than-colorblind Voting Section of the Civil Rights Division of the DOJ. These two groups often worked in tandem to force jurisdictions covered by Section 5 to engage in unilateral, step-by-step increases in minority voting age population of districts, at both the state and local levels, to achieve the lofty goals of equal access to the electoral process and equal opportunity for minority voters to elect candidates of their choice. The effective goal, however, was to maximize minority voting strength in electoral districts, the building blocks of redistricting plans, in order to provide safe seats for minority-elected officials.

B. A New Analytical Framework

In *Shaw v. Reno*, the Court established an analytical framework for applying equal protection principles governing a state's drawing of district boundary lines. In carrying out this most delicate task, the Court grounded its analysis on the foundational premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." [31] Applying this basic Equal Protection analysis in the voting rights context, the Court held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' . . . demands the same close scrutiny that we give other state laws that classify citizens by race."[32]

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[30] *Id.* at 657.

[31] *Id.* at 642.

[32] *Id.* at 644 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

C. Skepticism About Expressive Harm and the Disconnect with Vote Dilution

Noted election law scholar Richard L. Hasen has criticized the *Shaw*-based claim of racial gerrymandering as "a shaky, ephemeral claim based solely on appearances."[33] Hasen noted that *Shaw* "was harshly criticized by some liberals and others," and left open many questions, such as why there should be a cause of action for race-conscious districting in the absence of evidence of vote dilution, why shape should matter, and what evidence showed that the district's shape affected representation in the way suggested by the O'Connor majority.[34] Hasen also found it odd for the Court to talk, as it did in *Miller v. Johnson*, about a state's "predominant motive" and the use of race as a predominant factor in redistricting without a compelling governmental interest or justification.[35] To Hasen, such talk was odd given that Georgia had drawn the number of majority black or majority-minority districts that the DOJ demanded, with its predominant motive being to obtain Section 5 preclearance, by including in its Section 5 submission the number of majority black districts required by the Voting Section of the Civil Rights Division.[36] Consequentially, drawing and placing these majority black districts was motivated by party and incumbency considerations, not race.[37]

Racial gerrymandering claims, according to Hasen, "seemed to wither away" within a decade after *Shaw*, as the Supreme Court found other means to put the brakes on the DOJ's overbroad reading of the VRA.[38] In the 2015 *Alabama Legislative Black Caucus v. Alabama* decision, in which the Supreme Court very strongly suggested that at least some of the districts were unconstitutional gerrymanders, the Court held that it was error for the three-judge court below to consider whether Alabama's legislative redistricting plan was an unconstitutional racial

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[33] Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 365 (2015).

[34] *Id.* at 370.

[35] *Id.* at 371.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 365.

gerrymander as a whole, and remanded for consideration of the issues on a district-by-district basis.[39] Calling the whole exercise from *Shaw* to *Miller* to *Easley* to Ala*bama* "a nonsensical one," Hasen found the Court's analysis "problematic" when it relegated compliance with the one person, one vote standard to a mere "background rule" and removed it from the list of traditional neutral redistricting factors for redistricting, leaving only three potential predominant factors: political considerations, racial motivations, and discretionary districting principles, such as creating compact or competitive districts.[40]

Hasen concluded that racial gerrymandering is "an unsupportable jurisprudential theory, whether offered by Republicans to stop potential excesses of the Department of Justice in reading the Voting Rights Act or when offered by Democrats to stop fake reliance by Republicans on the Voting Rights Act."[41] The Court, he argued, blundered by breathing life into a "nonsensical racial gerrymandering cause of action" that has no principled connection to proof of actual vote dilution, and should simply "abandon the pretense that this is all about appearances and focus on what really matters: the allocation of political power by self-interested actors in a situation [where] race and party are inextricably intertwined."[42] Perhaps there is a silver lining in Hasen's critique of *Shaw* claims and the most recent iteration of those claims in *Alabama Legislative Black Caucus*; the courts now have one more weapon to call into check the ability of states to use VRA compliance as a pretext to secure partisan advantages and harm minorities for partisan purposes.[43] In short, the racial gerrymander claim in its newly minted structure may provide a more effective means of policing and limiting "bad political behavior" that allocates political power to the disadvantage of minority voters.[44]

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[39] *Id.* at 376.
[40] *Id.* at 381-82.
[41] *Id.* at 384.
[42] *Id.* at 385.
[43] *Id.* at 384.
[44] *Id.*

III. THE POLITICAL LANDSCAPE SHIFTS

As Hasen and other scholars have observed, Equal Protection jurisprudence in the wake of the new analytical framework of *Shaw v. Reno* gave rise to an interesting variety of alleged "*Shaw* violations." The law was now clearly established that a state or local government would be prohibited from classifying citizens by race unless that classification survived strict scrutiny analysis. In "exceptional" circumstances, a facially race-neutral redistricting plan could constitute an unconstitutional racial gerrymander subject to strict scrutiny.[45] *Shaw* dictated that a plaintiff asserting an Equal Protection claim based on an unlawful racial classification was required to meet "the demanding burden of proof to show that a facially neutral law is unexplainable on grounds other than race."[46] A *Shaw* violation could occur when "race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations."[47]

Under this new framework, as fleshed out during the remainder of the 1990s, deference to legislative decision-making still provided a cautionary backstop for courts to exercise restraint when called on to invalidate facially-neutral redistricting plans "[b]ecause the underlying districting decision falls within a legislature's sphere of competence."[48] "[C]ourts [must] exercise extraordinary caution in adjudicating [*Shaw*] claims,"[49] and a "presumption of good faith . . . must be accorded [to] legislative enactments."[50]

A. Miller v. Johnson*: Maximization Agenda*

It was less than two years after *Shaw v. Reno* that the Supreme Court addressed, and roundly condemned, the DOJ's racial maximization agenda in *Miller v. Johnson*. The Court

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[45] *Shaw I*, 509 U.S. 630, 646-47 (1993).
[46] Easley v. Cromartie (*Cromartie II*), 532 U.S. 234, 235 (2001).
[47] *Shaw II*, 517 U.S. 899, 907 (1996).
[48] *Cromartie II*, 532 U.S. at 235.
[49] Miller v. Johnson, 515 U.S. 900, 916 (1995).
[50] *Id.*

provided another strong example of its presumptive skepticism of racial classifications, and refused to defer to the DOJ's conclusion that racial districting was necessary under the VRA. The Court made it clear that race must be "the predominant factor motivating the legislature's decision" in order to trigger strict scrutiny.[51] However, its core holding invalidated Georgia's congressional districting plan because it was predominantly based on race and failed to subordinate race to traditional neutral districting principles.

Miller is also significant because of the Court's caustic view of the DOJ. The Court's strong language laced throughout its opinion was matched by the outrageous actions of the DOJ in relying on various versions of a "max-black" plan throughout the preclearance process, from Assistant Attorney General John Dunne's first objection letter to the final submission that triggered this constitutional challenge.[52]

Throughout that process, operatives of the DOJ had argued ad nauseam that three majority-minority districts could be, and therefore had to be, squeezed out of the Georgia countryside, even if such demographic manipulation entailed roping in unpopulated land bridges to connect disparate black population concentrations connected only by the common characteristic of race. Though the DOJ denied that the max-black plan was the "benchmark" against which Georgia's efforts were compared, its role as such soon became obvious to the General Assembly, and is now obvious to this Court.[53]

A three-judge district court held that Georgia's legislative redistricting plan was invalid under *Shaw*.[54] It sharply criticized the Black maximization plan advocated by the DOJ and its American Civil Liberties Union (ACLU) colleagues, and specifically condemned the DOJ "for its use of partisan advocates in its dealings with state officials and for its close cooperation with the ACLU's vigorous advocacy of minority district maximization."[55] The three-judge court found that it was ultimately made clear to the Georgia

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[51] *Id.*

[52] *Id.* at 907.

[53] *Id.*

[54] *See* Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994).

[55] *Miller*, 515 U.S. at 909.

General Assembly that preclearance would not be granted by the DOJ unless the Georgia Legislature adopted the creation of three majority-minority districts at any cost.[56]

As found by the three-judge court, the ACLU was a special interest group that had the ear of the DOJ. The DOJ during the early stages of the Georgia redistricting process "cultivated a number of partisan 'informants' within the ranks of the Georgia legislature."[57] The DOJ "regularly received from them information on the General Assembly's redistricting sessions," and that in doing so, and in derogation of applicable regulations such as 28 C.F.R. § 51.29 that were intended to facilitate outside notification to the DOJ of impending changes in voting procedure in covered jurisdictions, "[p]oliticians and other parties in interest found a discrete forum. Here, 'whistleblowers' became 'secret agents.' They reported to DOJ throughout the section 5 review process. DOJ used that information even to question the integrity of State legislators who could not know their accusers."[58]

As a result of this distortion and misapplication of the regulatory provisions for outside notification, the ACLU and certain minority elected officials, including Congresswoman Cynthia McKinney, gained a special perch on the DOJ's window sill as it evaluated submissions from the Georgia Legislature. These "secret agents" became instruments of change who "were concerned only with racial percentages," not with the interests of all Georgia citizens, and any factor other than race.[59]

The Georgia Legislature was forced to return to the Section 5 preclearance trough (for a second and third time) with submissions that were not as narrowly focused on race, but which genuinely sought to provide equal political and electoral access to black voters. However, the DOJ, believing to have unfettered discretion, "could then compare Georgia's plans to the max-black plan and find the latter a more effective means of magnifying the minority vote. The max-black plan reflected nothing but its drafters' concerns: race and technical contiguity. DOJ's mistake was in assuming that

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[56] *Id.*

[57] *Johnson*, 864 F. Supp. at 1367.

[58] *Id.*

[59] *Id.* at 1368.

Georgia's plan must be so conceived."[60] Unfortunately, the DOJ was blind to the fact that the Georgia Legislature was not free, consistent with the Equal Protection Clause of the Fourteenth Amendment, to engage in reapportionment as a simplistic exercise in patching together black and white population groups.[61] The DOJ would not have the Georgia Legislature genuinely seeking to develop some alignment between geographically contiguous areas so that they could function as practical political districts for the next ten years.[62]

In the face of its intransigence and amidst attempts later to dissemble and misrepresent its actions to the district court once this charade was revealed, the DOJ could not avoid revelations that were nothing short of shocking, particularly for those who were unaware of the DOJ-ACLU manipulation that had driven the redistricting process for far too long. The district court's explicit factual finding was that the Georgia plan reflected a DOJ maximization agenda, a finding upheld by the United States Supreme Court, and was one that virtually foreclosed any argument that the Eleventh Congressional District was narrowly tailored to comply with VRA requirements.[63]

As the district court noted, "DOJ's agents provided an irrebuttable source of intelligence of which the General Assembly was completely unaware. We find this practice disturbing."[64] The Court made the concomitant finding, moreover, that "it was DOJ that demanded an alternative plan that boosted black voting strength and completely ignored legitimate nonracial interests."[65] This whipsaw had a calculated impact on the redistricting process.

1. The Unholy Alliance

The district court in *Miller* laid bare the embarrassing alliance that the John Dunne-led DOJ had formed with the ACLU and advocates of a 'max-black' plan premised on the Georgia Legislature caving in and creating three majority black districts at any cost.

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1384.
[64] *Id.* at 1368.
[65] *Id.* at 1384.

The picture that emerged from the behind-the-scenes demographic manipulation of Georgia's Eleventh Congressional District, was described by the court as one which,

> under virtually any other set of circumstances, would be clearly impermissible, almost unthinkable. The concept of government allocations on the basis of race, coupled with drawing lines tracing concentrations of black citizens, smacks of government-enforced ghettoization. The contours of [that congressional district] [were] so dramatically irregular as to permit no other conclusion than that they were manipulated along racial lines. This conclusion is cemented with the copious amounts of direct evidence discussed here.[66]

The district court criticized this process as a distortion of the purpose, spirit and intent of the Section 5 preclearance process, stating:

> It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear: the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU and the preclearance requirements imposed by DOJ.[67]
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> . . . .
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> We are simply troubled by the result. It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote. That right is vital to citizens of a democracy, and of poignant importance to African-Americans. For many blacks Jim Crow is living memory, and the presence of black luminaries and ordinary citizens at our hearings is a testament to their concern. This Court does not underestimate the emotional investment in our decision of blacks still

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[66] *Id.* at 1378.
[67] *Id.* at 1368.

> resisting the vestiges of racial discrimination, and we have been placed in the unenviable position of depriving black citizens of a privilege the Justice Department never had the right to grant: maximization of the black vote, whatever the cost.[68]

2. Application of Strict Scrutiny

Because race was shown to be the overriding, predominant force in the redistricting process, strict scrutiny applied. Based on evidence of the Georgia legislature's purpose and intent in creating the final congressional districting plan, and evidence of the district's irregular shape evident from "several appendages drawn for the obvious purpose of putting black populations into the district," the lower court found that race was the overriding and predominant force in the districting process.[69] The lower court further found that even if compliance with the VRA was a compelling governmental interest, the VRA did not require three majority black districts, and the state's plan was not narrowly tailored to the goal of complying with the VRA.[70]

3. Avoidance of Racial Balkanization

In its decision enjoining elections under the Georgia redistricting plan based on a violation of *Shaw I*, the district court concluded in *Miller*:

> Elected governments are obviously entrusted with enormous responsibilities, and when confronted with fundamental issues of race and democracy, they are obliged to govern with insight and care. . . . Single-member majority-black districts are not a constitutional or statutory requirement. The assumption that the sole means of enhancing blacks' political influence is to pack them into such districts is unimaginative. The time has come to contemplate more innovative means of ensuring minority representation in democratic institutions. Otherwise,

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[68] *Id.* at 1368-69 (footnotes omitted).

[69] Miller v. Johnson, 515 U.S. 900, 910 (1995).

[70] *Johnson,* 864 F. Supp. at 1392-93.

> the United States face a steady transmogrification into racially balkanized voting units.[71]

This use of Section 5 to require a state to create majority minority districts wherever possible constituted an expansion of the DOJ's authority under the VRA beyond what Congress intended and beyond what the Court had upheld. The Supreme Court dramatically checked that expansion. Like rats on a sinking ship, DOJ lawyers mounted a hasty retreat.

4. Affirmance by the Supreme Court

On appeal, the Supreme Court affirmed. When *Miller* was finally heard by the Supreme Court, moreover, the DOJ attempted to disavow being driven by its policy of maximizing majority black districts,[72] but that disingenuous position flew in the face of the lower court's well-documented factual finding that the DOJ did adopt a maximization policy and followed that policy in objecting to Georgia's first two plans. As Justice Kennedy noted in his opinion for the majority in *Miller*:

> One of the two Department of Justice line attorneys overseeing the Georgia preclearance process himself disclosed that "what we did and what I did specifically was to take a . . . map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength."[73]

In affirming the judgment of the district court, the Supreme Court rejected the DOJ's automatic invocation of racial stereotyping and its efforts to carve electorates into racial blocs. It concluded:

> The Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the

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[71] *Id.* at 1393.

[72] *See* Brief for United States at 35, *Miller*, 515 U.S. 900 (Nos. 94-929, 94-631, 94-797).

[73] *Miller*, 515 U.S. at 925 (quoting *Johnson,* 864 F. Supp. at 1362 n.4).

> legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.[74]

Further, the Supreme Court expanded the concept of *Shaw* claims and the predominant motive analysis by holding that when a party challenges a redistricting plan as an unconstitutional racial classification, the challenger carried the burden of establishing that race was the predominant motive behind the action of the state legislature.[75] The Court explained what a plaintiff must prove in order to carry this burden of showing a predominantly racial motive:

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

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[74] *Id.* at 927-28 (citation omitted) (quoting Edmondson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)).

[75] *Id.* at 915-16.

> are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."[76]

B. Page v. Virginia State Election Board

The political landscape dramatically changed when the Supreme Court decided *Shelby County v. Holder* and again when it handed down *Alabama Legislative Black Caucus v. State of Alabama*. One of the first cases to struggle with the application of the racial gerrymandering principles enunciated and somewhat revised in *Alabama Legislative Black Caucus* arose in Virginia. Some discussion of the historical background will help understand the context of this case.

On October 7, 2014, the Court for the Eastern District of Virginia invalidated the Virginia Congressional Redistricting Plan, concluding that compliance with Section 5, and accordingly, consideration of race, predominated in the drawing of the Third Congressional District's boundaries, and that the redistricting plan could not survive the strict scrutiny required of race-conscious districting because it was not narrowly tailored.[77]

Intervenor-Defendants appealed this decision to the United States Supreme Court, and on March 30, 2015, the Supreme Court vacated the lower court's judgment and remanded it for reconsideration in light of *Alabama Legislative Black Caucus v. Alabama*.[78] In obedience to the Supreme Court's mandate, the district court reconsidered the case and, once again, concluded that Virginia's Third Congressional District was an unconstitutional racial gerrymander. The court incorporated into its 2015 opinion the parts of its now-vacated opinion that were consistent with the Supreme Court's decision in *Alabama Legislative Black Caucus*.

In its 2014 decision invalidating the Third Congressional District, the court set out what it understood to be the applicable standard for determining whether the district was constitutional under the Equal Protection Clause:

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[76] *Id.* at 916 (quoting *Shaw I*, 509 U.S. 630, 647 (1993)).

[77] Page v. Va. State Bd. of Elections, 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated*, *sub nom*. Cantor v. Personhuballah, 135 S. Ct. 1699 (2015).

[78] *Cantor*, 135 S. Ct. 1699, *vacated by* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

> To successfully challenge the constitutionality of the Third Congressional District under the Equal Protection Clause, Plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race. If they make this showing, the assignment of voters according to race triggers the court's "strictest scrutiny." Then, the burden of production shifts to Defendants to demonstrate that the redistricting plan was narrowly tailored to advance a compelling state interest.[79]
>
> For the reasons that follow, we find that Plaintiffs have shown race predominated. We find that the Third Congressional District cannot survive review under the exacting standard of strict scrutiny. While compliance with Section 5 was a compelling interest when the legislature acted, the redistricting plan was not narrowly tailored to further that interest. Accordingly, we are compelled to hold that the challenged Third Congressional District violates the Equal Protection Clause of the Fourteenth Amendment.[80]

1. Intervening Decision in *Alabama Legislative Black Caucus*

Three months later, the Supreme Court decided *Alabama Legislative Black Caucus v. State of Alabama*. Following a second appeal of the district court's liability determination in *Page*, the Supreme Court remanded for reconsideration in light of *Alabama Legislative Black Caucus v. Alabama.*[81] On remand, the district court, in a split 2-1 decision handed down on June 5, 2015, conducted a reanalysis of Virginia's Third Congressional District and found it wanting.

The *Page* court concluded that race was a predominant consideration in the redistricting of Virginia's Third Congressional District, providing a primer on Equal Protection jurisprudence that had been developed since *Shaw*:

> As with any law that distinguishes among individuals on the basis of race, "equal protection principles govern a State's drawing of congressional districts." "Racial classifications with

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[79] *Page*, 58 F. Supp. 3d. at 540 (citation omitted) (quoting *Miller*, 515 U.S. at 915; *Shaw II*, 517 U.S. 899, 908 (1996)).

[80] *Id.* at 540-41.

[81] *Cantor*, 135 S. Ct. 1699.

> respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters. . . ." As such, "race-based districting by our state legislatures demands close judicial scrutiny."[82]

"To trigger strict scrutiny, Plaintiffs first bear the burden of proving that race was not only one of several factors that the legislature considered in drawing the Third Congressional District, but that race 'predominated.'"[83]

The Supreme Court in *Miller* cited several specific factors as evidence of racial-line-drawing: "statements by legislators indicating that race was a predominant factor in redistricting";[84] "evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised";[85] "creation of non-compact and oddly shaped districts beyond what is strictly necessary to avoid retrogression";[86] "use of land bridges in a deliberate attempt to bring African-American population into a district";[87] and "creation of districts that exhibit disregard for city limits, local election precincts, and voting tabulation districts ('VTDs')."[88] "As we demonstrate below, all of these factors are present here."[89] As one district court has stated, "Moreover, we do not view any of these factors in isolation. We consider direct evidence of legislative intent, including statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles."[90]

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[82] Page v. Va. State Bd. of Elections (*Page II)*, No. 3:13cv678, 2015 WL 3604029, at *6 (E.D. Va. June 5, 2015) (quoting *Miller*, 515 U.S. at 905; *Shaw I*, 509 U.S. 630, 657 (1993)) (citations omitted).

[83] *Id.* at *7 (quoting Bush v. Vera, 517 U.S. 952, 963 (1996)).

[84] *Id.* (citing *Miller*, 515 U.S. at 917-18).

[85] *Id.* (citing *Shaw II*, 517 U.S. 899, 906-07 (1996)); *see Miller*, 515 U.S. at 916-18.

[86] *Id.* (citing *Shaw I*, 509 U.S. at 646-48); *see Miller*, 515 U.S. at 916-17.

[87] *Id.* (citing *Miller*, 515 U.S. at 917).

[88] *Id.* (citing *Bush*, 517 U.S. at 974).

[89] *Id.*

[90] *Id.*

Applying this formulation based on *Miller*, the *Page* court then considered each of the factors of shape and compactness, non-contiguousness, splits in political subdivisions, and predominance of race over politics. It concluded that the record presented a picture similar to the demographic manipulation in *Shaw II* that was sufficient in that case to warrant strict scrutiny.[91] The *Page* court's conclusion was based in part on evidence of the serpentine Third Congressional District's highly irregular shape and geographical non-compactness by any objective standard, meriting a comparison to the district in *Shaw II*, which was referred to in that case as "the least geographically compact district in the Nation."[92] The *Page* court also considered direct evidence from hearings in the House of Delegates that was similar to the direct evidence presented to the Court in *Shaw II*.[93] These and other statements of legislative intent were treated by the *Page* court as "explicit and repeated admissions" of racial predominance, "compel[ling] the conclusion that race was the legislature's paramount concern."[94]

2. Compliance with VRA as Compelling Governmental Interest

A finding that race predominated when the state legislature drew Virginia's Third Congressional District in 2012 did not end the *Page* court's constitutional analysis. Under the strict scrutiny standard, the districting plan could still pass constitutional muster even if it was based predominantly on race if it was narrowly tailored to serve a compelling governmental interest.[95] While such scrutiny is not necessarily "strict in theory, but fatal in fact,"[96] the

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[91] *Id.* at *15.

[92] *Id.* (quoting *Shaw II*, 517 U.S. at 905-06).

[93] *Id.* (quoting *Shaw II*, 517 U.S. at 905-06). For reference, in *Shaw II* the "State's submission for preclearance expressly acknowledged that [the] *overriding* purpose was to comply with the dictates of [the DOJ] and to create two congressional districts with effective black voting majorities." 517 U.S. at 906.

[94] *Page II*, 2015 WL 3604029, at *15.

[95] *Id.* (citing Abrams v. Johnson, 521 U.S. 74, 91 (1997); Miller v. Johnson, 515 U.S. 900, 920 (1995)).

[96] *Id.* (quoting Johnson v. California, 543 U.S. 499, 514 (2005)).

state was required to establish the "most exact connection between justification and classification."[97]

The *Page* court accepted as a given that the Virginia legislature had taken the position that compliance with the VRA was a compelling state interest, and it agreed that the redistricting plan would not fail under the Equal Protection analysis if it had been narrowly tailored to serve that compelling interest, a burden that could be satisfied by proof that "the legislature ha[d] a 'strong basis in evidence' in support of" its use of race.[98] On this record, however, the *Page* court found that "[w]hile the [Virginia] legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5, [the state] . . . failed to show that the 2012 [redistricting] Plan was narrowly tailored to further that interest."[99]

Bearing in mind that *Shelby County v. Holder* had relieved the state of its Section 5 obligations a year after the 2012 plan was drawn, the *Page* court reasoned that this case law development did "not answer the question of whether Section 5 compliance in 2012 was a compelling state interest."[100] According to the court, the proper inquiry was whether, at the time of the 2012 redistricting decision, the Virginia legislature's reliance on racial considerations was justified by a compelling state interest, not whether it could be "justified in hindsight."[101]

While the Supreme Court had not yet decided whether VRA compliance was a compelling state interest, it assumed without deciding that compliance with Section 2 or Section 5 could be a compelling interest.[102] Since the parties in *Page* did not dispute

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[97] *Id.* (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007)).

[98] *Id.* at *16 (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015)).

[99] *Id.*

[100] *Id.*

[101] *Id.* (citing Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1307-08 (M.D. Ala. 2013) (three-judge court) ("We evaluate the plans in the light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted [the State] from future coverage under section 5 of the [VRA]."), *vacated on other grounds*, 135 S. Ct. 1257 (2015)).

[102] *Id.* (citing *Shaw II*, 517 U.S. 899, 915 (1996) ("We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling

that compliance with Section 5 was a compelling interest pre-*Shelby County*, neither did the *Page* court.

3. Narrow Tailoring Analysis

The *Page* court then turned to the question of whether the 2012 plan had been "narrowly tailored to advance [such] a compelling interest."[103] The court stated, "The Supreme Court has repeatedly struck down redistricting plans that were not narrowly tailored to the goal of avoiding 'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'"[104] It continued, "Indeed, 'the [VRA] and our case law make clear that a reapportionment plan that satisfies [Section] 5 still may be enjoined as unconstitutional,' as Section 5 does not 'give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression.'"[105]

4. Nonretrogression Invoked in Absence of Narrow Tailoring

Similar to the manner in which the Alabama legislature had allegedly packed minority voters into what were already safe majority-minority districts, the *Page* court found that the 2012 plan increased the total number of black voting age residents in the Third Congressional District from a BVAP of 53.1% to a BVAP of 56.3%, even though this district had been a safe majority-minority district for twenty years.[106]

Comparing the redistricting plan that was invalidated in *Bush*, the *Page* court found that the Virginia legislature's decision to increase the BVAP of the Third Congressional District was similar. It stated:

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interest . . . ."); Bush v. Vera, 517 U.S. 952, 977 (1996) ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . can be a compelling state interest.")).

[103] *Id.* at *6 (quoting *Shaw II*, 517 U.S. at 908).

[104] *Id.* at *16 (quoting *Bush*, 517 U.S. at 983); *id.* (citing *Shaw II*, 517 U.S. at 915-18) (concluding that districts did not meet the narrow tailoring standard to comply with the VRA).

[105] *Id.* (quoting *Shaw I*, 509 U.S. 630, 654-55 (1993)).

[106] *Id.* at *17.

> In *Bush*, a plurality of the Supreme Court held that increasing the BVAP from 35.1% to 50.9% was not narrowly tailored because the [interest of the State of Texas] in avoiding retrogression in a district where African-American voters had successfully elected their representatives of choice for two decades did not justify 'substantial augmentation' of the BVAP.[107]

The Court in *Bush* held that "such an augmentation could not be narrowly tailored to the goal of complying with Section 5 because there was 'no basis for concluding that the increase to a 50.9% African-American population . . . was necessary to ensure nonretrogression.'" [108] Quoting *Bush*, the court noted, "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[109]

The *Page* court noted by way of comparison that while the BVAP increase in Virginia's Third Congressional District was smaller than the BVAP increase in *Bush*, "the principle [was] the same."[110] The *Page* defendants had failed to show a "basis for concluding that an augmentation of the Third Congressional District's BVAP to 56.3% was narrowly tailored when the district had been a safe majority-minority district for two decades."[111] Virginia was hoisted upon a Texas-crafted petard. The *Page* court also noted that other district courts had rejected "similar ad hoc uses of racial thresholds" under a narrow tailoring analysis, including invalidation of a plan in *Smith*, whose 55% threshold was deemed "arbitrary without supporting evidence."[112] Absent a more sophisticated analysis of racial voting patterns, the *Page* court concluded that the Virginia legislature's use of a BVAP threshold suggested that voting patterns in the Third Congressional District

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[107] *Id.* (quoting *Bush*, 517 U.S. at 983).
[108] *Id.* (quoting *Bush*, 517 U.S. at 983).
[109] *Id.* (quoting *Bush*, 517 U.S. at 983).
[110] *Id.*
[111] *Id.*
[112] *Id.* at *18 (citing Smith v. Beasley, 946 F. Supp. 1174, 1210 (D.S.C. 1996)).

were not "considered individually."[113] The court concluded that the 2012 Plan was not narrowly tailored to achieve compliance with Section 5 and failed strict scrutiny.[114]

Based on its findings, the *Page* court afforded the Virginia legislature an opportunity to meet constitutional requirements by adopting a substitute measure rather than have a federal court devise its own plan, allowing the Virginia legislature until September 1, 2015 to create and enact a constitutional remedial districting plan.[115] However, the General Assembly failed to act, and an appeal of the liability ruling to the Supreme Court was perfected by the Commonwealth of Virginia and Intervenors.

On November 13, 2015, the Supreme Court noted that it would hear argument in the Intervenor-Defendants' appeal of the liability judgment, and requested the parties to also address whether the Intervenors had standing to bring their appeal.[116]

5. Judge Payne's Dissent

Senior District Judge Payne, in a lengthy dissent, took the majority to task for invalidating the Third Congressional District, concluding instead that the Plaintiffs had failed to carry their burden of proving an unconstitutional racial gerrymander. Judge Payne's dissent was based on his perspective of *Alabama Legislative Black Caucus*, with which similar proceedings in North Carolina were in remarkable accord.

Judge Payne noted that he had "reassessed the record in perspective of *Alabama Legislative Black Caucus v. Alabama* and the Supreme Court's remand order" and that in his view, both the original majority opinion and the original dissent had applied Alabama's analytic framework properly, as did the post-remand majority opinion and dissent.[117] His understanding of the record, however, was dramatically different.

Judge Payne's dissent was based on the following key points in which he differed with his colleagues:

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[113] *Id.* (quoting *Smith*, 946 F. Supp. at 1210).

[114] *Id.*

[115] *Id.*

[116] Wittman v. Personhuballah, 136 S. Ct. 499 (mem.) (2015).

[117] *Page II*, 2015 WL 3604029, at *19 (Payne, J., dissenting) (citation omitted).

> (1) "[T]he redistricting enactments of a legislature are entitled to a presumption of good faith, and the judiciary must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'"[118]
>
> (2) *Miller* and *Easley* mean the "courts must presume that a state legislature has not used race as the predominating factor in making its redistricting decisions because to do so would not be redistricting in good faith."[119]
>
> (3) "It is up to the Plaintiffs to dislodge that presumption by proving that the legislature subordinated traditional race-neutral redistricting principles to racial considerations and that race was the predominant factor in the redistricting decision at issue."[120]
>
> (4) "This is a 'demanding' burden that cannot be satisfied by a mere showing that the legislature was conscious of the racial effects of redistricting or considered race as one factor among several; what is required is proof that the racial considerations were 'dominant and controlling.' If the Plaintiffs meet their burden, then the challenged district will be subject to strict scrutiny, but 'strict scrutiny does not apply merely because redistricting is performed with consciousness of race.'"[121]

As Judge Payne understood the record, the Virginia Legislature was motivated by "a desire to protect incumbents and by the application of traditional redistricting precepts even though race was considered because the legislature had to be certain that the plan complied with federal law, including the [VRA] and, in particular, the non-retrogression provision of Section 5 of the VRA."[122] Notwithstanding that conclusion, the *Page* Plaintiffs' had not carried their "demanding burden to prove that the predominant factor in creating [the Third Congressional District]."[123]

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[118] *Id.* (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995); and citing *Cromartie II*, 532 U.S. 234, 257 (2001)).

[119] *Id.*

[120] *Id.* (citing *Miller*, 515 U.S. at 916; and *Cromartie II*, 532 U.S. at 257).

[121] *Id.* (quoting *Cromartie II*, 532 U.S. at 257; and Bush v. Vera, 517 U.S. 952, 958 (1996)) (citations omitted).

[122] *Id.* at *20.

[123] *Id.*

The Plaintiffs' chief expert had previously opined in a scholarly publication that Virginia's redistricting plan was driven by a desire to protect incumbents, but now that same expert was testifying under oath that race, not incumbent protection, was the predominant reason for the 2012 plan.[124] "[S]uch a 180 degree reversal on a key issue" deprived this expert's views of any credibility, according to Judge Payne.[125]

Other key testimony by a legislator, when viewed in context, showed that the predominant factor in the redistricting was protection of incumbents, that traditional redistricting factors were considered and played an important role, and that race, while necessarily considered, was not the predominant factor and was a factor only because federal law required it to be considered.[126] Based on this context-specific view of the record, Judge Payne concluded that the Plaintiffs had failed to meet their demanding burden of proof to show that race was the predominant factor.[127]

The opponents of the subject plan "had every reason to characterize the Enacted Plan in the harshest terms possible (*i.e.*, as race driven or as the product of a racial quota), [but] they did not do so[,]" thus proving that they did not see the plan as racial gerrymandering but one driven by the "goal of incumbency protection."[128]

6. Drawing the Remedial Plan

While that appeal was before the Supreme Court, the district court appointed Dr. Bernard Grofman as special master to assist and advise the court in drawing an appropriate remedial plan and directed all parties and interested nonparties to submit proposed plans.[129] Grofman submitted his report on November 16, 2015, and Intervenor-Defendants moved to suspend further proceedings and to modify the court's injunction pending Supreme Court review.[130]

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[124] *Id.* at *21-22.
[125] *Id.* at *22.
[126] *Id.* at *22-25.
[127] *Id.* at *26.
[128] *Id.* at *29.
[129] *See* Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 556 (E.D. Va. 2016).
[130] *Id.*

The district court ordered the parties to continue with their responsive briefing to the special master's report, and on December 14, 2015, held a "hearing on both the merits of the special master's recommendations and whether to stay . . . implementation of a remedy pending the Supreme Court's review of the liability judgment."[131] In an again-divided opinion, the court denied the motion to stay implementation of a remedy and ordered into effect a remedial plan devised by Dr. Grofman. The majority recited in its opinion that it had twice "found Virginia's Third Congressional District to be an unconstitutional racial gerrymander, in violation of the Equal Protection Clause of the Fourteenth Amendment," and that after reviewing all plans submitted by parties and nonparties, the "balance of equities favors" immediate imposition of a remedial redistricting plan.[132] Specifically, Congressional Plan Modification 16 (Plan 16) drawn by Grofman was found to be based on neutral, traditional criteria, to fulfill the court's remedial mandate, and to best remedy the constitutional violation described in *Page II*. The Defendants were directed to implement the redistricting plan for the 2016 U.S. House of Representatives election cycle.[133]

7. Remediation Revisited in Judge Payne's *Page* Dissent

Continuing in his dissent, Senior District Judge Payne concluded that a remedial plan was neither required nor permitted, since the Plaintiffs had not proved that race predominated over traditional redistricting principles in the redistricting, including that for the Third Congressional District.[134]

Judge Payne addressed this issue again in his majority opinion in *Bethune-Hill v. Virginia State Board of Elections*.[135] In light of the considerable uncertainty of current Supreme Court jurisprudence, Judge Payne concluded in *Bethune-Hill* that "deviations from neutral districting principles on the basis of political affiliation or preference may not always be constitutionally

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131 *Id.*

132 *Id.* at 555, 556.

133 *Id.* at 556.

134 *Page II*, No. 3:13cv678, 2015 WL 3604029, at *19-26.

135 Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505 (E.D. Va. 2015).

permissible,"[136] and that the Supreme Court remained quite fractured on the legitimacy of partisan political gerrymandering, including whether a claim complaining of such gerrymandering is even justiciable.[137]

8. Payne and Staying the Litigation

In Judge Payne's view, the law on political gerrymandering is unsettled and the resulting uncertainty:

> has led to the view among legislatures, lawyers, and even some courts that partisan political gerrymandering is constitutionally permissible in general when, as I understand it, the Supreme Court actually has approved such gerrymandering only in quite limited circumstances.[138]

This left the *Page* court using a political gerrymander as a remedy to maintain the 8-3 partisan split in the 2012 plan, which, in Judge Payne's view, the court could not do since political considerations "have no place in a plan formulated by the courts,"[139] and "gerrymandering purely for the purpose of achieving or maintaining partisan advantage is unconstitutional because it is a denial of the equal protection of law guaranteed by the Fourteenth Amendment."[140]

Judge Payne's dissenting opinion in *Personhuballah* concluded that implementation of the remedial plan should be stayed, since "the balance of the equities as between the parties calls for the exercise of our discretion to grant a stay so that the Supreme Court can decide the merits of this case before a remedial plan is implemented."[141] He continued:

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[136] *Id.* at 541 n.21.

[137] *Id.*; *see also* Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1123-33 (2016).

[138] Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 566 (E.D. Va. 2016) (Payne, J., concurring in part and dissenting in part).

[139] *Id.* (quoting Wyche v. Madison Parish Police Jury, 769 F.2d 265, 268 (5th Cir. 1985)).

[140] *Id.* at 567.

[141] *Id.* at 570-71.

> It also is appropriate in assessing the injury to the Plaintiff and the balance of the equities to remain mindful of the animating force for this case. In particular, this case was spawned not by a citizen who felt that his or her constitutional rights had been violated. Instead, this case was brought at the instance of the National Democratic Redistricting Trust.[142]

Judge Payne also concluded that staying implementation of the remedial plan until after the U.S. Supreme Court decided the two issues in this case, namely, (1) the effect of using a 55% BVAP in redistricting CD3 and (2) the proper application of the recent decision in *Alabama Legislative Black Caucus*, decided differently by two three-judge panels of this Court, would best serve the public interest.[143] Judge Payne noted that "[f]ive judges have split three to two on those issues on the merits," and "one of the key positions of the Intervenors on the remedy issue, (adherence to legislative partisan political objectives) is the subject of substantial uncertainty in the Supreme Court."[144]

Perhaps the most compelling basis for granting a stay pending appeal, according to the dissent, lay in the fact that if the majority's finding of liability were to be reversed on appeal,

> the implementation of the remedial plan beforehand will mean that many thousands voters will have been moved out of their current districts for the third time in less than a decade if the state is permitted to revert to the Enacted Plan . . . . [Such a] shuffling of voters will engender voter confusion, reduce voter participation, foster a disconnect between voters and their legislators, and create significant and avoidable administrative complexity and expense. With the 2016 election cycle quickly approaching, a stay pending appeal will mitigate the likelihood of public confusion during the electoral process for 2016 and potentially 2018 as well.[145]

As the dissenting judge concluded, "where important relevant issues are pending before the Supreme Court, we ought to stay our

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[142] *Id.* at 571.
[143] *Id.* at 571.
[144] *Id.*
[145] *Id.* at 571-72.

hand to await the judgment of the Supreme Court."[146] The Supreme Court nonetheless denied the application for stay pending appeal on February 1, 2016.[147]

C. Bethune-Hill *at Odds with* Page*: Confusion over* Alabama

Following the June 2015 *Page* decision invalidating Virginia's Third Congressional District on the grounds of a *Shaw* violation, a differently constituted three-judge court in Virginia issued another decision in *Bethune-Hill v. Virginia State Board of Elections*.[148] The decision in *Bethune-Hill* seemed to be at odds with the *Page* majority's use of a 55% BVAP threshold in the drawing of the district, and the decision in *Bethune-Hill* indicated that there was some confusion about how to apply the principles announced in *Alabama Legislative Black Caucus v. Alabama.*

In *Bethune-Hill,* the District Court addressed a *Shaw* racial gerrymandering claim directed against twelve Virginia House Districts, asserting that the districts violated the Equal Protection Clause. Following an exhaustive, intensely fact-specific inquiry into the legislative process, the factors and evidence considered and relied upon in constructing each of the twelve challenged Districts, and the guidance from *Alabama Legislative Black Caucus*, the court concluded that race was the predominant factor in the creation of House District 75; that the Virginia General Assembly was pursuing a compelling state interest, actual compliance with federal antidiscrimination law; and that the Virginia General Assembly used race in a manner narrowly tailored to achieve that interest.[149]

1. Background of *Bethune-Hill*

As a matter of background, at the time the Virginia redistricting process began, the twelve House Districts under challenge in this case had Black voting-age populations (BVAP)

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[146] *Id.* at 572.

[147] *Proceedings and Orders for* Wittman v. Personhuballah, SCOTUSBLOG (Mar. 26, 2016), http://www.scotusblog.com/case-files/cases/wittman-v-personhuballah/ [https://perma.cc/L2AA-VZ57] (noting application 15A724 denied by the Court).

[148] Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505 (E.D. Va. 2015).

[149] *Id.* at 511.

ranging from 46.3% to 62.7%, with three of the districts having BVAPs below 55% and the others above 55%.[150] According to several legislators, the twelve "ability-to-elect" districts found in the 2001 Benchmark Plan needed to contain a BVAP of at least 55% in that plan to avoid "unwarranted retrogression" under Section 5 and to comply with their own redistricting rules.[151]

At the outset, the court noted that the existence of a fixed racial threshold could have "profound consequences" for the Supreme Court's racial predominance and narrow tailoring inquiries in a racial gerrymandering ("racial sorting") claim.[152] There was no dispute that the 55% BVAP figure was used in drawing the twelve districts, but the parties did dispute whether the 55% BVAP was an "aspiration," a "target," or a "rule."[153] The court found in the final analysis that the Plaintiffs had failed to carry their burden and that all of the districts withstood constitutional scrutiny under the Equal Protection Clause.[154]

Its findings and conclusions regarding several of the challenged districts illustrated the district court's analytical approach and its application of the racial predominance standard, including the principles set forth in *Alabama Legislative Black Caucus*.

As its analysis showed quite clearly, the federal three-judge court's decision in *Page* zeroed in on what two of three federal judges considered an unconstitutional gerrymander, based on an analytical framework that appeared to follow the principles enunciated in *Alabama Legislative Black Caucus*. On the other end of the Virginia spectrum is *Bethune-Hill*, in which the federal three-judge court's decision on racial predominance turned largely on the allocation of the burden of proof, the plaintiffs' failure to carry that burden of proof, and a presumption of constitutionality that effectively insulated state legislative action involving the drawing of twelve legislative districts, with two of three federal judges declining to find any constitutional infirmity in any of the challenged districts.

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[150] *Id.* at 519.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 571.

D. Dickson v. Rucho *and North Carolina's Experience*

Following the North Carolina General Assembly's adoption of the 2011 Congressional Redistricting Plan, two groups of plaintiffs filed suits in state court for unconstitutional racial gerrymandering. One of the groups filed *N.C. Conference of Branches of the NAACP v. State of North Carolina*, and the other filed *Dickson v. Rucho*. A three-judge panel consolidated the two cases.

The three-judge panel in state court conducted a bench trial on June 5 and 6, 2013, after which the court denied the plaintiffs' motion for summary judgment and entered judgment for the defendants.[155] While acknowledging that the North Carolina General Assembly had used race as the predominant factor in drawing Congressional District 1, the court, applying strict scrutiny, concluded that North Carolina had a compelling interest in avoiding liability under the VRA and that the challenged districts had been narrowly tailored to avoid such liability.[156] The court also held that race was not the driving factor in the creation of Congressional District 12 and examined and upheld it under rational-basis review.[157]

On appeal, the North Carolina Supreme Court affirmed the three-judge panel's judgment in *Dickson v. Rucho*.[158] In the interim, the United States Supreme Court decided *Alabama Legislative Black Caucus v. Alabama*. The plaintiffs in *Dickson* then sought and were granted certiorari by the United States Supreme Court, and the Supreme Court vacated the North Carolina Supreme Court's decision and remanded the case to the North Carolina Supreme Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*.[159] On December 18, 2015, the North Carolina Supreme Court reaffirmed the trial court's judgment.[160]

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[155] Dickson v. Rucho (*Dickson I*), No. 11 CVS 16896, No. 11 CVS 16940, 2013 NCBC LEXIS 53, at *7 (N.C. Sup. Ct. July 8, 2013).

[156] *Id.* at *19-21, *29, *66, *138.

[157] *Id.* at *70-73.

[158] Dickson v. Rucho (*Dickson II*), 766 S.E.2d 238 (N.C. 2014).

[159] Dickson v. Rucho (*Dickson III*), 135 S. Ct. 1843 (2015) (mem.).

[160] Dickson v. Rucho (*Dickson IV*), 781 S.E.2d 404 (N.C. 2015).

The following is a necessarily tedious, but essential, recapitulation of the legal proceedings in *Dickson*, which reached a result that cannot be reconciled with the Virginia three-judge court's decision in *Page*. Both cases are now pending before the United States Supreme Court on emergency motions to stay elections and/or stay the rulings of the respective lower courts. The proceedings are exceptionally complicated by the fact that the United States Supreme Court, in the wake of Justice Antonin Scalia's untimely death, is now believed to be evenly divided with four conservative and four liberal Justices.

1. Dickson: Opposite Result Based on Application of *Shaw, Miller,* and *Alabama*

In comparison to *Page*, the dramatically different approach taken by the state court in *Dickson* reflected North Carolina's unique blend of state and federal redistricting principles, state constitutional provisions, and state and federal VRA precedent that has developed in North Carolina over the past several decades. The North Carolina case, predicated in part on North Carolina's whole county provision, resulted in that court affirming the original decision to uphold the North Carolina legislative redistricting plan following a similar remand for reconsideration in light of *Alabama Legislative Black Caucus*.

A detailed analysis of Dickson illustrates that this area of the law is far from settled. As the Court in *Dickson* stated:

> In compliance with the Supreme Court's mandate, we have reconsidered this case in light of *Alabama*. Specifically, *Alabama* requires a district-by-district analysis in which the federal equal population requirement is simply a "background" rule that does not influence the predominant motive analysis. After rebriefing and a careful review of the record in this case, we observe that the three-judge panel conducted the required detailed district-by-district analysis without giving improper weight to population equalization. The panel detailed its extensive findings and conclusions in a one hundred seventy-one page Judgment and Memorandum of Decision. Our careful review of that document leads us to conclude that, as to the twenty-six districts drawn to comply with the federal Voting Rights Act of 1965 ("Voting Rights Act" or "VRA"), the three-

> judge panel erred when it applied strict scrutiny prematurely; however, because these districts survive this most demanding level of review, plaintiffs were not prejudiced by the three-judge panel's error. As to the remaining challenged districts, we affirm the ruling of the three-judge panel that the predominant factors in their creation were the traditional and permissible redistricting principles encompassed within the mandatory framework as established by precedents of the Supreme Court and this Court.[161]

Uniquely the result of North Carolina's extensive litigation involving multiple challenges to congressional and state legislative redistricting in North Carolina, "redistricting does not proceed upon preferences or guidelines determined by the General Assembly."[162] As the court noted, the legislature's priorities in drawing new district lines is required to be implemented "within the mandatory framework recognized by this Court as required by federal law, federal and state constitutional mandates, and prior decisions of this Court."[163]

2. Whole County Provision

The North Carolina Constitution "enumerates several limitations on the General Assembly's redistricting authority."[164] Specific provisions of the North Carolina Constitution address State House and Senate Districts and both districts are subject to the Whole County Provision, which includes an equal population requirement. Under North Carolina's Whole County Provision, of which equal population is a component, a framework is established to address the neutral redistricting requirement that "political subdivisions" be respected.

In contrast to the *Page* court's approach to redistricting, the three-judge state court in Dickson was required to follow the

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[161] *Id.* at 410-11 (citations omitted) (citing *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015)).

[162] *Id.* at 411.

[163] *Id.* at 411 (citing Pender Cty. v. Bartlett, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom.* Bartlett v. Strickland, 556 U.S. 1 (2009) (plurality opinion); and Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377 (2002)).

[164] *Pender Cty.*, 649 S.E.2d at 366.

approach dictated by the state constitution's Whole County Provision. This approach was "fundamentally different from the federal one-person, one-vote requirement addressed in Alabama, which spoke only to the number of voters."[165]

Like the three-judge federal district court in *Page*, the three-judge state court panel in *Dickson* conducted a district-by-district review of the constitutionality of each challenged district. When the *Dickson* three-judge panel upheld the North Carolina General Assembly's redistricting plans, it recognized that: (1) "Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . ."; (2) "Political losses and partisan disadvantage are not the proper subject for judicial review. . . ."; and (3) "[T]he role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights—not their political rights or preferences—are secure."[166]

The three-judge panel in *Dickson* "first considered plaintiffs' claims that the General Assembly's redistricting plans violated the equal protection guarantees of the United States and North Carolina Constitutions."[167] It first had to determine which level of scrutiny to apply to each challenged district and "recognized that while generally 'all racial classifications [imposed by a government] . . . must be analyzed by a reviewing court under strict scrutiny,'[168] the "mere 'consciousness of race' is insufficient to trigger strict scrutiny in redistricting cases."[169] The three-judge panel noted that strict scrutiny was only proper when the plaintiffs could establish that "all other legislative districting principles were subordinated

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[165] *Dickson IV*, 781 S.E.2d at 412-13 (citing *Alabama*, 135 S. Ct. at 1271 (explaining that equal population goals play a role in determining the number of persons placed in a district, but do not necessarily control "which persons were placed in appropriately apportioned districts"); *see also Stephenson I*, 562 S.E.2d at 389 (distinguishing the "traditional districting principles" found in the North Carolina Constitution, including the Whole County Provision, from the federal "one-person, one-vote" standard)).

[166] *Id.* at 415.

[167] *Id.*

[168] *Id.* (citing Johnson v. California, 543 U.S. 499, 505 (2005); quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

[169] *Id.* (quoting Bush v. Vera, 517 U.S. 952, 958 (1996)).

to race and that race was the predominant factor motivating the legislature's redistricting decision."[170]

"[T]wenty-six of the thirty districts challenged by plaintiffs were created by the General Assembly to be VRA districts," and the General Assembly "intended to draw [the] districts so as to include at least fifty percent Total Black Voting Age Population (TBVAP)." [171] The three-judge panel concluded "even though legislative intent may have been remedial and the districts may have been drawn to conform with federal and state law," these VRA districts were "predominantly determined by a racial objective."[172] On this basis the court determined that strict scrutiny was the appropriate level of review for these twenty-six VRA districts; however, "a persuasive argument can be made that compliance with the VRA is but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate." [173] Nonetheless, the three-judge panel employed strict scrutiny because that standard provides a "convenient and systematic roadmap for judicial review," and because, if the plans survive strict scrutiny, in which the evidence is considered in a light most favorable to the non-prevailing party, then the plans would necessarily survive a lesser level of scrutiny.[174]

The court made specific findings of fact for each of the twenty-six VRA districts, all of which survived strict scrutiny because they were narrowly tailored to achieve a compelling governmental interest in "avoiding *future* liability under § 2 of the VRA and ensuring *future* preclearance of the redistricting plans under § 5 of the VRA."[175]

According to the court, avoiding Section 2 liability was a compelling interest because "the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions

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[170] *Id.* (quoting *Cromartie I*, 133 F. Supp. 2d 407, 425 (E.D.N.C. 2000); citing Miller v. Johnson, 515 U.S. 900, 916 (1995), *rev'd sub nom. Cromartie II*, 532 U.S. 234 (2001)).

[171] *Id.* (footnote omitted).

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* (quoting *Shaw II*, 517 U.S. 899, 915-16 (1996)).

was present in substantial portions of North Carolina,"[176] and based on the totality of the circumstances, "VRA districts were required to remedy against vote dilution."[177] Based on the General Assembly's "strong basis in evidence" to conclude that its plans were required to be precleared under Section 5, the court determined that Section 5 constituted a compelling governmental interest.

In contrast to *Page* and *Alabama Legislative Black Caucus*, the three-judge state court in *Dickson* found that the enacted plans did not contain a greater number of VRA districts than were reasonably necessary to comply with the VRA because "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."[178]

3. No Unnecessary Packing of Majority-Minority Districts

In further contrast to the findings of fact in *Page* and *Alabama Legislative Black Caucus* regarding the packing of black voters into what were already safe black or majority-minority districts, the three-judge court in Dickson found that the N.C. General Assembly "did not unnecessarily 'pack' VRA districts with black voters when it endeavored to create all VRA districts with at least fifty percent TBVAP in order to avoid liability under Section 2."[179] Under *Strickland*, "the State must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts, rather than cross-over districts, in those areas where there is a sufficiently

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[176] *Id.* (citing Thornburg v. Gingles, 478 U.S. 30 (1986)).

[177] *Id.*

[178] *Id.* at 416 (citing *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 438 (2006); *Shaw II*, 517 U.S. at 915-16; Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) ("[N]o violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population.")).

[179] *Id.* (citing Bartlett v. Strickland, 556 U.S. 1, 13 (plurality) (opinion of Kennedy, J.)).

large and geographically compact minority population and racial polarization exist[s]."[180]

The court in *Dickson* "concluded that plaintiffs failed to produce alternative plans that (1) contain VRA districts in rough proportion to the black population in North Carolina, (2) comply with the General Assembly's decision, as supported by *Strickland*, to populate each VRA district with more than fifty percent TBVAP, or (3) comply with the state constitution's Whole County Provision."[181] Consequently, the General Assembly had a strong basis in evidence for concluding that "the VRA districts in the Enacted Plans were . . . reasonably necessary to protect the State from anticipated liability under" Section 2 of the VRA and ensuring preclearance under Section 5 of the VRA.[182]

With respect to each non-VRA district, the court conducted a "detailed, district-by-district analysis," and made "specific findings of fact on whether race was the General Assembly's predominant motive in drawing these districts."[183] In addition to "complying with federal and state law and applying nonracial traditional redistricting criteria," the court found that the N.C. General Assembly desired to create districts "more competitive for Republican candidates."[184] The court noted that "rational basis review was the appropriate level of scrutiny for each of the non-VRA districts" and there was a "reasonably conceivable state of facts" articulated by the General Assembly that a rational basis for creating the non-VRA districts existed, other than a racial motivation.[185] "[T]he plaintiffs failed to proffer, as required by *Cromartie II*, 'any alternative redistricting plans that show that the General Assembly could have met its legitimate *political* objectives in alternative ways that are comparably consistent with traditional districting principles.'"[186] For these reasons, the court concluded that plaintiffs' racial gerrymandering claims failed.

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[180] *Id.* (citing *Strickland,* 556 U.S. at 13).
[181] *Id.* at 417.
[182] *Id.*
[183] *Id.* at 418.
[184] *Id.*
[185] *Id.*
[186] *Id.* (citing *Cromartie II*, 532 U.S. 234, 258 (2001)).

4. The Impact of *Alabama*

The court in *Dickson* noted that this case, like the *Alabama* case, involved a challenge to the state legislature's redistricting plans following the 2010 decennial census.[187] "Unlike North Carolina, where the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by this Court, the *Alabama* legislative committee adopted 'guidelines for drawing the new district lines.'"[188] "These guidelines provided that new districts should be drawn in a manner to achieve numerous traditional redistricting objectives, including compactness, not splitting counties or precincts, minimizing change, and protecting incumbents."[189] The guidelines acknowledged that not all of the redistricting goals could be accomplished, but placed

> the greatest emphasis on two of these goals: (1) minimizing the extent to which any district deviated by more than one percent from the theoretical precisely equal population ideal; and (2) avoiding retrogression under section 5 of the VRA by maintaining roughly the same black population percentage in existing majority-minority districts. To achieve population equalization while avoiding retrogression, the legislature adjusted existing, underpopulated, majority-minority districts by adding massive numbers of minority voters.[190]

Unlike the North Carolina constitution, Alabama's Constitution did not contain a Whole County Provision, and the legislative committee in Alabama "adopted guidelines that included compliance with the federal one-person, one-vote standard."[191]

Unlike Alabama, the North Carolina General Assembly "did not place special emphasis on compliance with federal one-person,

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[187] *Id.* at 419 (citing *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015)).

[188] *Id.* (citing Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1245 (2013), *vacated*, 135 S. Ct. 1257).

[189] *Id.* (citing *Alabama*, 135 S. Ct. at 1263; *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245).

[190] *Id.* (citation omitted) (citing *Alabama,* 135 S. Ct. at 1263).

[191] *Id.* at 420.

one-vote standards," but equal population served as a "background" criterion that influenced the formulation of the challenged congressional and state legislative districts as well as satisfying the Whole County Provision of the North Carolina constitution.[192] In this regard, the *Dickson* court reasoned that, in order to ensure compliance with *Alabama Legislative Black Caucus*, it carefully reviewed the record, transcripts, and the three-judge panel's findings to ensure that "federal population equalization [was] treated as a 'background rule' in conducting the predominance test." [193] The three-judge panel's finding that race was a predominant factor in forming the VRA districts was "unaffected." "[I]n its predominance analysis of the non-VRA districts, the three-judge panel properly weighed the relevant facts and made its findings, and the findings support its conclusion that race was not the predominant factor in drawing these districts."[194]

Finally, in *Alabama Legislative Black Caucus* the Supreme Court "held that the district court misinterpreted the requirements of Section 5 . . . in finding that the challenged districts were 'narrowly tailored' to satisfy strict scrutiny."[195] As instructed by the Supreme Court, Section 5 "'does not require a covered jurisdiction to maintain a particular numerical minority percentage' in order to avoid retrogression."[196]

The conclusion of the *Dickson* three-judge panel that the twenty-six challenged VRA districts survived strict scrutiny was consistent with the Supreme Court's clarification of the Section 5 narrow tailoring analysis. Each challenged VRA district subject to strict scrutiny was created because the State of North Carolina had a compelling interest in compliance with Section 2, and each district was narrowly tailored to accomplish that goal.[197] With respect to the "legislature's requirement that each of the challenged districts consist of a TBVAP exceeding fifty percent of the total voting age population in that district," that requirement was permissible, and

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[192] *Id.* at 420-21.
[193] *Id.* at 421 (citing *Alabama*, 135 S. Ct. at 1271).
[194] *Id.*
[195] *Id.* (citing *Alabama*, 135 S. Ct. at 1272-74).
[196] *Id.* (quoting *Alabama*, 135 S. Ct. at 1272).
[197] *Id.*

the TBVAP was no greater than needed to avoid retrogression, "while also avoiding liability under Section 2, even considering the Supreme Court's warning against a 'mechanical interpretation' of section 5."[198] The challenged VRA districts, thus, survived strict scrutiny under either a Section 2 or Section 5 analysis.

5. Dickson Plaintiffs' Federal Claims

With respect to the plaintiffs' claims brought under federal law, the court noted that, "if a redistricting plan [did] not satisfy federal requirements, it [would] fail[] even if it [was] consistent with the law of North Carolina."[199] The court then addressed the Plaintiffs' argument that the redistricting plans violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they impermissibly classify individuals based upon their race. In other words, the redistricting plans "constitute[d] impermissible racial gerrymandering" that denied the Plaintiffs equal protection under the law.[200]

In determining the appropriate level of scrutiny when considering allegations of racial gerrymandering, the court noted that strict scrutiny, "the highest tier of review, applies 'when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'"[201] "Race is unquestionably a 'suspect class,'"[202] and "if a court finds that race is the 'predominant, overriding factor' behind the General Assembly's plans, the plans must satisfy strict scrutiny to survive."[203] "Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest."[204]

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[198] *Id.* (citing Bartlett v. Strickland, 556 U.S. 1, 23 (2009).

[199] *Id.* at 422.

[200] *Id.*

[201] *Id.* (quoting White v. Pate, 304 S.E.2d 199, 204 (N.C. 1983) (citations omitted)).

[202] *Id.* (quoting Phelps v. Phelps, 446 S.E.2d 17, 23 (N.C. 1994)).

[203] *Id.* (quoting Miller v. Johnson, 515 U.S. 900, 920 (1995)).

[204] *Id.* (alteration in original) (quoting Stephenson v. Bartlett, 562 S.E.2d 377, 393 (N.C. 2002)).

However, if the plans were not predominantly motivated by improper racial considerations, the court would apply the rational basis test.[205] "Under rational basis review, '[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'"[206]

"The three-judge panel concluded that the twenty-six VRA districts were predominantly motivated by race and thus subject to strict scrutiny review," but "the remaining four challenged non-VRA districts were not predominantly motivated by race and thus were subject to rational basis review."[207]

a. VRA Districts Subject to Strict Scrutiny

Regarding the twenty-six state legislative VRA districts that the three-judge panel subjected to strict scrutiny, the panel unanimously found that "it is undisputed that the General Assembly intended to create 26 of the challenged districts to be 'Voting Rights Act districts' that would include a TBVAP of at least fifty percent."[208] This was an unchallenged finding of fact. The three-judge panel "reached a second conclusion that drawing VRA districts 'necessarily requires the drafters of districts to classify residents by race,' [and] that 'the shape, location and racial composition of each VRA district was predominantly determined by a racial objective.'"[209] The panel found that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."[210] The panel chose to apply strict scrutiny because "(1) strict scrutiny provides a 'convenient and systematic roadmap for judicial review,' and (2) if

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[205] *Id.* (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification" satisfy rational basis review.)).

[206] *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

[207] *Id.* at 423-24.

[208] *Id.* at 424.

[209] *Id.*

[210] *Id.*

the plans withstand strict scrutiny, when the evidence is considered in a light most favorable to plaintiffs, then [the plans] would necessarily withstand a lesser level of scrutiny, such as rational basis review."[211] The court then turned to the panel's conclusion as to the General Assembly's predominant motive.

b. Race as Predominant Motive

The challenges that the General Assembly faced while redistricting "were easy to express but persistently difficult to resolve." [212] In essence, the Fourteenth Amendment prohibits consideration of race during redistricting. Yet, the VRA, passed "'to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude,' specifically requires consideration of race.'"[213] "At the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution, including the 'background rule' of plus or minus five percent as required by our constitution." [214] Other "legitimate considerations, such as compactness, contiguity, and respect for political subdivisions," were appropriate to consider, including "political advantage" and "accommodation of incumbents."[215]

According to the North Carolina Supreme Court, "[d]espite this cat's cradle of factors facing the General Assembly, the three-judge panel found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant." [216] Considering all factors, the North Carolina Supreme Court held that the three-judge panel "erred in concluding as a matter of law that, just because the twenty-six districts were created to be VRA-

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[211] *Id.*

[212] *Id.*

[213] *Id.* (quoting Voinovich v. Quilter, 507 U.S. 146, 152 (1993)).

[214] *Id.* (citing Stephenson v. Bartlett, 562 S.E.2d 377, 395-97 (N.C. 2002).

[215] *Id.* at 424.

[216] *Id.* at 425.

compliant, the General Assembly was motivated predominantly by race," but this was not fatal error and did not invalidate the three-judge panel's decision.[217]

c. Compelling Governmental Interest

With regard to the factors that the defendants contended to constitute a "compelling governmental interest," the General Assembly "drafted the twenty-six districts both to avoid liability under section 2 of the VRA and to obtain preclearance under section 5 of the VRA by avoiding retrogression."[218] Retrogression is defined as "a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the opportunity to vote effectively."[219]

"Although the Supreme Court has never held outright that compliance with section 2 or section 5 can be a compelling state interest, [it] has issued opinions that expressly assumed as much."[220]

The North Carolina General Assembly's "desire to comply with the VRA" was also "justifiable" because "holding elections [was] a core State function, fundamental in a democracy," and "[e]stablishing voting districts [was] an essential component of holding elections."[221] In holding elections, "a State is subject to federal mandates in addition to those found in the [VRA] and the Fourteenth Amendment, such as the 'one-person, one-vote' requirement."[222] The court "assume[d] that North Carolina, and all states for that matter, would prefer to avoid the expense and delay

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[217] *Id.*

[218] *Id.* at 426.

[219] *Id.* (quoting *Stephenson*, 562 S.E.2d at 385).

[220] *Id.* (citing *Shaw II*, 517 U.S. 899, 915 (1996) ("assumed arguendo that compliance with section 2 could be a compelling state interest"); Miller v. Johnson, 515 U.S. 900, 921 (1995) ("adopted a similar approach regarding Section 5"); Bush v. Vera, 517 U.S. 952, 978 (1996) ("observed that 'deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.'")).

[221] *Id.*

[222] *Id.*

resulting from litigation" and held that "compliance with Sections 2 and 5 . . . may be a compelling state interest."[223]

d. Specific Past Discrimination and Strong Basis in Evidence

In considering whether compliance with either Section 2 or Section 5 constitutes a compelling state interest, the court found that "[t]hose goals may reach the level of a compelling state interest if two conditions are satisfied": (1) the North Carolina "General Assembly must have identified past or present discrimination with some specificity before it could turn to race-conscious relief"[224] and (2) the "General Assembly must also have 'had "a strong basis in evidence"' on which to premise a conclusion that the race-based remedial action was necessary."[225]

i. Compelling Interest Under Section 2 of the Voting Rights Act

The court then considered the application of Section 2 in the case before it, noting that "'[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" [226] The question of vote dilution has to be determined by the totality of the circumstances.[227] Under *Gingles*, the court does not reach the totality of circumstances test unless the challenging party is able to establish three preconditions: geographical compactness, minority political cohesion, and legally significant white racial bloc voting.[228]

"Unlike cases such as *Gingles*, in which minority groups use section 2 as a sword to challenge districting legislation," the court noted that here it was considering the North Carolina General Assembly's "use of Section 2 as a shield." [229] "[T]o establish a compelling interest in complying with section 2 when the

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[223] *Id.* at 427.
[224] *Id.* at 427 (citing *Shaw II*, 517 U.S. at 909).
[225] *Id.* (quoting *Shaw II*, 517 U.S. at 910).
[226] *Id.* (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
[227] *Thornburg*, 478 U.S. at 43.
[228] *See id.* at 50-51.
[229] *Dickson IV*, 781 S.E.2d at 427.

redistricting plans were developed," the North Carolina legislature at that time "must have had a strong basis in evidence that the TBVAP in a geographically compact area was fifty percent plus one of the area's voting population."[230] "Such evidence would satisfy the first *Gingles* precondition. In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in *Gingles*."[231] It was against this background that the three-judge panel correctly applied these standards in "discerning whether defendants . . . could legitimately claim a compelling interest in complying with section 2."[232]

"Based upon the totality of this evidence," the North Carolina Supreme Court concluded that the three-judge panel correctly found that the "General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid section 2 liability."[233] Further, it found that the General Assembly had "a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district." [234] On this basis, the court concluded that the three-judge panel's findings as to these VRA districts support its conclusion that defendants established a compelling state interest in creating districts that would avoid liability under Section 2.[235] While avoiding liability under Section 2 was sufficient to establish a compelling state interest, the North Carolina Supreme Court also addressed the State's additional desire to comply with section 5.[236]

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[230] *Id.* at 428.

[231] *Id.* (citation omitted) (citing Pender Cty. v. Bartlett, 649 S.E.2d 364, 372 (N.C. 2007); *LULAC*, 548 U.S. 399, 445 (2006)).

[232] *Id.*

[233] *Id.* at 430.

[234] *Id.*

[235] *Id.*

[236] *Id.*

ii. Compelling Interest Under Section 5 of the Voting Rights Act

"[F]orty of North Carolina's one hundred counties were covered by section 5 at the time of redistricting."[237] Section 5 proscribes retrogression and forbids any voting standard, practice, or procedure that has the purpose of or the effect of "diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice."[238] Whether Section 5 preclearance was provided by a submission to the DOJ or by a declaratory judgment action decided by a three-judge panel of the United States District Court for the District of Columbia, the nonretrogression mandate of Section 5 applied to any election procedure that is different from that in force on the relevant coverage date.[239] A covered state was required to "comply with the substantive requirements of section 5, not merely obtain preclearance from the DOJ."[240]

The North Carolina Supreme Court in *Dickson* concluded from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with Section 5 and that the General Assembly had a strong basis in evidence on which to conclude that "race-based remedial action was necessary."[241]

iii. Narrow Tailoring

In light of its determination that defendants had a "compelling interest both in avoiding Section 2 liability and in avoiding retrogression under Section 5," the court also undertook an evaluation of whether the redistricting was sufficiently narrowly tailored to advance those state interests as to the twenty-six districts created to comply with the VRA.[242]

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[237] *Id.*

[238] 52 U.S.C. § 10304(b) (2012).

[239] *See* Perry v. Perez, 565 U.S. 388, 390 (2012) (per curiam) (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 198 (2009)).

[240] *Dickson IV*, 781 S.E.2d 404, 431 (N.C. 2015) (citing Miller v. Johnson, 515 U.S. 900, 922 (1995)).

[241] *Id.* at 430.

[242] *Id.* at 431.

iv. Narrow Tailoring Under Section 2 of the Voting Rights Act

"[T]he 'narrow tailoring' requirement of strict scrutiny in the context of redistricting allows the States a limited degree of leeway in furthering such interests" as compliance with the VRA.[243] If a state has a "strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race substantially addresses the § 2 violation, it satisfies strict scrutiny."[244]

As determined by the three-judge panel, the N.C. General Assembly "designed each of the challenged districts to consist of a TBVAP exceeding fifty percent of the total voting age population in that district," and doing so was "permissible as a method of addressing potential liability under section 2."[245] "[T]he target of fifty percent plus one of the TBVAP chosen by North Carolina's General Assembly [was] consistent with the requirements of the first *Gingles* precondition."[246] The North Carolina Supreme Court reasoned that these districts were sufficiently narrowly tailored and did not classify individuals based upon race to an extent greater than reasonably necessary to comply with Section 2 of the VRA, "while simultaneously taking into account traditional districting principles."[247]

The North Carolina Supreme Court also rejected the Plaintiffs' argument that creating districts with a TBVAP percentage exceeding fifty percent constituted impermissible racial packing,[248] but in prior cases had found that a "bright line rule—that the presence of more than fifty percent of the TBVAP satisfied the first *Gingles* prong—was logical and gave the General Assembly 'a safe harbor for the redistricting process.'"[249]

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[243] Bush v. Vera, 517 U.S. 952, 977 (1996).

[244] *Id.*

[245] *Dickson IV*, 781 S.E.2d at 431.

[246] *Id.* at 432 (citing Bartlett v. Strickland, 556 U.S. 1, 19-20 (2009) ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.")).

[247] *Id.*

[248] *Id.* (citing *Vera*, 517 U.S. at 983; Missouri v. Jenkins, 515 U.S. 70, 88 (1995); and *Shaw I*, 509 U.S. 630, 655 (1993)).

[249] *Id.* (quoting Pender Cty. v. Bartlett, 649 S.E.2d 364, 373 (N.C. 2007)).

Where majority-minority districts are at issue and racial identification correlates highly with political affiliation, the court found that the party attacking the legislatively drawn boundaries "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and that "those districting alternatives would have brought about significantly greater racial balance."[250] In this case, where the evidence was undisputed that "racial identification correlate[d] highly with party affiliation, plaintiffs . . . failed to meet this obligation."[251] Therefore, the "General Assembly's plans [fell] within the safe harbor provisions of *Pender County* while respecting, to the extent possible, the Whole County Provision."[252]

v. Narrow Tailoring Under Section 5 of the Voting Rights Act

The court also concluded that the challenged VRA districts were also "narrowly tailored to advance the State's compelling interest in avoiding retrogression under section 5."[253]

The "purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[254] Section 5, however, does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[255]

In *Alabama*, the Supreme Court made it clear that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage in covered jurisdictions" but it does require a covered "jurisdiction to maintain a minority's ability to

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[250] *Id.* (quoting *Cromartie II*, 532 U.S. 234, 258 (2001)).
[251] *Id.*
[252] *Id.*
[253] *Id.* at 433.
[254] *Id.* (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).
[255] *Id.* (quoting *Shaw I*, 509 U.S. 630, 655 (1993)).

elect a preferred candidate of choice."[256] As an example, the Supreme Court noted that a "[one percent] reduction in a [seventy percent] black population district" is not "necessarily retrogressive."[257] The Supreme Court cautioned against heavy reliance "upon a mechanically numerical view as to what counts as forbidden retrogression," as opposed to "the more purpose-oriented view reflected in the statute's language."[258]

The *Dickson* court rejected the plaintiffs' argument that "by increasing the TBVAP in the challenged VRA districts to at least fifty percent plus one, the legislature improperly relied upon Section 5 to unnecessarily augment, not just maintain, black voters' ability to elect their preferred candidate of choice."[259] In essence, Plaintiffs were seeking to force North Carolina to "unpack" majority-minority districts and replace them with coalition, crossover, and influence districts. The "legislature adopted a fifty percent plus one threshold to avoid liability under section 2," and according to the court, that threshold was the "exact number that the Supreme Court approved in *Strickland* for a state to use in creating districts to comply with section 2."[260] "If, on the one hand, a TBVAP exceeding fifty percent is required to avoid section 2 liability, we cannot, on the other hand, conclude that this percentage is higher than necessary to avoid retrogression under section 5. In other words, section 5 cannot forbid what section 2 requires."[261]

The N.C. legislature "had a strong basis in evidence of racially polarized voting to justify creating majority-black districts with a TBVAP in excess of fifty percent even though that same action resulted in an increase in the TBVAP in former coalition districts."[262] Consequently, the court concluded that the challenged VRA districts were narrowly tailored to achieve a compelling interest in

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[256] *Id.* (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1272 (2015)).

[257] *Id.* at 433-34 (quoting *Alabama*, 135 S. Ct. at 1273).

[258] *Id.* at 434 (quoting *Alabama*, 135 S. Ct. at 1273).

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.* at 435.

complying with both Section 2 and Section 5 of the VRA, and they survived strict scrutiny.[263]

e. Proportionality

With respect to the General Assembly's consideration of proportionality, the three-judge panel found as fact that "'the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina,' adding that each VRA district had to be at least fifty percent black in voting age population."[264] On the basis of these and other findings, the three-judge panel correctly concluded that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."[265]

While proportionality does not provide a safe harbor for States seeking to comply with section 2, the "probative value assigned to proportionality may vary with other facts" and "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."[266]

The North Carolina Supreme Court concluded, in light of these standards, that the General Assembly "did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population."[267] "Proportionality was not a dispositive factor, but merely one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses."[268] Accordingly, the N.C. General Assembly's "consideration of rough proportionality was a means of ensuring against voter dilution and potential section 2 liability," but it was

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[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* at 435-36 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020-21 (1994)).

[267] *Id.* at 436.

[268] *Id.*

"not an attempt to trade 'the rights of some minority voters under § 2 . . . off against the rights of other members of the same minority class.'"[269] The proportionality factor thus did not provide grounds for a violation of section 2.

With respect to the VRA districts, the North Carolina Supreme Court held that,

> while the General Assembly considered race, the three-judge panel erred by concluding prematurely that race was the predominant factor motivating the drawing of the districts without first performing adequate fact finding. Nonetheless, because we held above that the three-judge panel correctly found that each of the twenty-six districts survives strict scrutiny, we need not remand the case for reconsideration under what may be a less demanding level of scrutiny.[270]

6. Justice Beasley's Dissent in *Dickson*

Justice Beasey's dissenting opinion in *Dickson* was a remarkable parallel to the 2-1 majority opinion in *Page*. The dissent complained that the majority had read *Alabama Legislative Black Caucus* too narrowly and had minimized its implications. The dissent urged vacature of the three-judge panel's judgment and remand for more complete factual findings "consistent with the guidance provided in *Alabama Legislative Black Caucus v. Alabama*."[271]

The dissent said more weight should have been given to the fact that the Supreme Court had seen fit to vacate and remand the previous North Carolina Supreme Court judgment for reconsideration in light of *Alabama Legislative Black Caucus*. This recognition prompted the dissenting justice to implore his colleagues to "give credence to the legal principles imparted in that decision" since it bolstered the dissenting justice's previous dissent concerning use of proportionality as a benchmark.[272]

The dissent acknowledged that, while the arguments made by the parties in *Alabama Legislative Black Caucus* were somewhat

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[269] *Id.* (quoting *De Grandy*, 512 U.S. at 1019).

[270] *Id.*

[271] *Id.* at 441 (Beasley, J., concurring in part and dissenting in part).

[272] *Id.*

different than those asserted here, the three-judge court's analysis of the plaintiffs' racial gerrymandering claims was not based on adequate factual findings and was not grounded on a correct application of the law in this case. He also conceded that it would pose constitutional concerns if majority-minority districts were to become entrenched by statutory concerns and that, here, there was no support to claim that § 2 could require the creation of crossover districts.[273] In the dissent's view, a court could not determine whether all the majority-minority districts created by the North Carolina General Assembly were required due to inadequate factual findings to satisfy the third *Gingles* precondition, which in turn indicated inadequate findings of fact for the conclusion that each of the 26 VRA districts was justified.[274]

The dissent further noted that Alabama and North Carolina had "sought to avoid retrogression differently."[275] Alabama, by drawing the challenged districts in a way that maintained the same percentage of minority voters, and North Carolina, by ensuring at least 50% TBVAP, erred by using a mechanical numerical target to achieve that goal, something forbidden by *Alabama Legislative Black Caucus*.[276]

According to the dissent in *Dickson*, a correct Section 5 retrogression analysis would require the trial court to take into account the extent to which the number of minority voters within each existing majority-minority district must change, but if a minority group within an existing majority-minority district was no longer able to elect the candidate of its choice due to demographic shifts, then Section 5 required that the percentage of minority voters be increased within that district to avoid retrogression.[277] In short, the dissent believed that the North Carolina General Assembly failed to ask the right question: "[T]o what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[278] As

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[273] *Id.* at 448 (quoting Bartlett v. Strickland, 556 U.S. 1, 23-24 (2009)).
[274] *Id.* at 449.
[275] *Id.* at 450.
[276] *Id.*
[277] *Id.*
[278] *Id.*

a consequence, the dissent argued there was no justification for the trial court to authorize the state legislature "to move minority voters into certain districts based solely on their race."[279]

Further, the dissent challenged the North Carolina General Assembly's attempt to achieve rough proportionality in the number of senate, house and congressional districts by trying to create as many VRA districts as needed in comparison to the black population of the state. The trial court, according to the dissent, misread *De Grandy* as calling for rough proportionality as a "benchmark" for the number of majority-minority districts it would create in order to avoid potential Section 2 liability.[280] The dissenting justice argued that *De Grandy's* analysis centered on the "role of proportionality in the totality-of-circumstances analysis in a Section 2 claim."[281] Since equality of opportunity, not proportionality, was the proper focus of this inquiry, the three-judge panel erred in concluding that the North Carolina General Assembly's "use of proportionality as an end [was] constitutionally permissible."[282]

Regarding the determination of how many and where any majority-minority districts needed to be created in order to comply with § 2, the dissent proposed that the trial court should determine, as needed, the percentages of TBVAP in each district that would ensure the minority group's present ability to elect its candidate of choice.[283] This would require a "district-by-district analysis" as directed by *Alabama Legislative Black Caucus* that would proceed as follows: (1) look to § 2 and consider whether defendants established the three *Gingles* preconditions for each majority-minority district created, (2) if so, determine if each of these districts was required by § 2 under the totality of the circumstances, including consideration of proportionality in that determination, and (3) to the extent defendants failed to establish that any of the majority-minority districts were required by § 2 based on the

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[279] *Id.*

[280] *Id.*

[281] *Id.* at 451 (citing Johnson v. De Grandy, 512 U.S. 997, 1013-14 (1994) ("The court failed to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity.")).

[282] *Id.*

[283] *Id.* at 452.

Gingles preconditions and the totality of the circumstances, or based on a valid court order, creation of such a majority-minority district would not be justified.[284]

To determine how many and where any majority-minority districts would need to be created to comply with § 5, the dissent proposed that the trial court look to § 5 and assess on a district-by-district basis which actions were needed "to ensure non-retrogression in any district created pursuant to § 5," while also looking to the districts as they existed under the prior redistricting plan to discern the TBVAP of each district and whether the minority group had the ability to elect its candidate of choice in that district. If the trial determined there was no present ability to elect, then the court would need to determine the TBVAP needed to permit the election of the minority group's candidate of choice. If the trial court determined that there was a present ability to elect, then the trial court would have to assess if the TBVAP in that district was impermissibly increased.[285]

The Supreme Court in *Alabama Legislative Black Caucus* clearly held that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates,'" but was a given part of the redistricting background when determining whether race or other factors predominate in a legislator's determination about how equal population objectives will be met.[286] The dissent in *Dickson* also argued that the three-judge court on remand had erroneously found the principles articulated in *Alabama Legislative Black Caucus* inapplicable, on the basis that North Carolina's Whole County Provision, of which equal population is a component, established a framework to address the neutral redistricting principle that political subdivisions be respected. In essence, the three-judge court concluded that equal population was a traditional redistricting principle in North Carolina, thereby ignoring the Supreme Court's explicit holding that equal population was "not a traditional

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[284] *Id.*

[285] *Id.*

[286] *Id.* at 452 (quoting Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1270 (2015)).

redistricting principle to be weighed among other such principles."[287]

In conclusion, the dissent found that there was record evidence showing that the North Carolina General Assembly had "used numerical targets formulated by racial considerations" in order to avoid liability under Section 2 and ensure Section 5 preclearance without thoroughly considering whether the districts thereby created were necessary "to enable minority voters to elect [their] preferred candidate of choice in compliance with the VRA."[288] This resulted in an unconstitutional redistricting scheme.[289] As a consequence, "[a]ny impermissibly racially gerrymandered districts affect[ed] the entire state under the Whole County Provisions of the North Carolina Constitution," requiring such a defective districting plan to be vacated and remanded for more adequate findings of fact.[290]

E. Harris v. McCrory

In *Harris v. McCrory*, Plaintiffs challenged the constitutionality of the North Carolina General Assembly's 2011 Congressional Redistricting Plan, alleging that North Carolina's Congressional District 1 and Congressional District 12 were racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment.[291] On February 5, 2016, following a three-day bench trial, a three-judge court convened in the Middle District of North Carolina held that the plaintiffs had carried their burden of proving that race predominated in both districts and that the defendants had failed to establish how such race-based redistricting satisfied strict scrutiny.[292]

In holding that the two districts created under the North Carolina General Assembly's 2011 Congressional Redistricting Plan violated the Equal Protection Clause, the court found that "race was the predominant consideration with respect to both

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[287] *Id.* at 434-35.
[288] *Id.* at 458.
[289] *Id.*
[290] *Id.*
[291] Harris v. McCrory, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016).
[292] *Id.*

districts, and the General Assembly did not narrowly tailor the districts to serve a compelling interest." [293]

Turning to the history of this litigation, the court noted: "For decades, African-Americans enjoyed tremendous success in electing their preferred candidates in former versions of CD 1 and CD 12 regardless of whether those districts contained a majority black voting age population ("BVAP")—that is the percentage of persons of voting age who identify as African-American."[294]"No lawsuit was ever filed to challenge the benchmark 2001 version of CD 1 or CD 12 on VRA grounds."[295]

The three-judge court in *Harris* rejected the State of North Carolina's claim that it had used race in drawing CD 1 in order to comply with the VRA, reasoning that even if compliance with the VRA was a compelling governmental interest, the state had failed to demonstrate that it used race in a narrowly tailored manner.[296] As to both districts, moreover, it should be noted that neither CD 1 nor CD 12 was a majority-minority district. Therefore, neither contained a majority BVAP under the 2000 Census, but "African-American preferred candidates easily and repeatedly won reelection under those plans."[297]

After the results under the 2010 Census were made available, the North Carolina legislators employed a redistricting consultant who had served as the Republican National Committee's redistricting coordinator for the 1990, 2000, and 2010 redistricting cycles. They specifically sought his services to design and draw the 2011 Congressional Redistricting Plan. [298] The legislators instructed their redistricting consultant to increase the BVAP in two districts, 1 and 12, so that they became majority-minority districts, and the 2011 plan was submitted to and precleared by the DOJ under Section 5, which was in effect and fully applicable at this time before the Supreme Court had decided *Shelby County v. Holder*.[299]

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[293] *Id.*
[294] *Id.* at 606.
[295] *Id.* at 607.
[296] *Id.* at 610-11.
[297] *Id.* at 606.
[298] *Id.* at 633 & n.2.
[299] *Id.* at 608-09.

Prior to this time, the North Carolina Supreme Court had held that race was the predominant factor in drawing of Congressional District 1, but that the State of North Carolina had a compelling governmental interest in using race to draw this district in order to comply with the VRA. The North Carolina Supreme Court also held that race was not a factor in drawing Congressional District 12. Hence, it found no violation of the Equal Protection Clause. With this case in this posture, the plaintiffs in *Harris v. McCrory* argued that the State of North Carolina had used compliance with Section 5 as a pretext for packing blacks into CD 1 and CD 12 in order to reduce those black voters' influence in other districts. The three-judge court ruled that "plaintiffs have presented dispositive direct and circumstantial evidence that the legislature assigned race a priority over all other districting factors in both CD 1 and CD 12."[300]

Further, according to the court, even if compliance with the VRA is a compelling governmental interest for CD 1, the legislature's use of race in drawing the districts was not narrowly tailored to satisfy that interest, noting "[e]vidence of narrow tailoring in this case is practically nonexistent."[301]

1. Expedited Remedial Phase and Imminent Elections

In the remedial phase of *Harris v. McCrory*, although the North Carolina General Assembly was currently not in session, the three-judge court gave the State of North Carolina two weeks to redraw new maps for the two districts in light of the approaching elections for members of Congress in Congressional Districts 1 and 12, and denied the state's request for a delay.[302]

The state's application for a stay of the lower court's ruling was filed with Chief Justice John Roberts, who handled emergency motions for the Fourth Circuit, which includes North Carolina. Chief Justice Roberts followed the usual practice of sharing the issue with his colleagues, rather than acting on his own. He asked for a response to the state's application by February 16. The North Carolina General Assembly then convened in a special session in Raleigh and approved a new redistricting plan for Congressional

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[300] *Id.* at 610.
[301] *Id.* at 611.
[302] *Id.* at 627.

Districts 1 and 12, replacing the two districts that had been declared unconstitutional based on racially gerrymandering.

In conjunction with the state's pending request for the United States Supreme Court to grant a stay pending appeal, the State of North Carolina forecasted election chaos if the Supreme Court did not act promptly to halt the rescheduling of the primary election that was set for March 15, 2016. The time was short, and according to North Carolina officials, a primary election held on March 15 "would be disrupted so much that state officials could decide to delay balloting until another date."[303] To add to the pressure, "the primary election day for hundreds of offices and thousands of candidates is less than forty days away," and early voting in North Carolina was "less than thirty days away."[304]

The state's application for stay was presented to the Chief Justice, and after he referred it to the entire Court, it was denied in a brief order without explanation on Friday, February 19, 2016.[305] The denial of the application for stay came just hours after the Supreme Court had been told that the North Carolina General Assembly in a special session in Raleigh, N.C., had approved a new plan for the Congressional Districts 1 and 12.

As noted by Lyle Denniston, the Court acted with dispatch:

> Without an explanation, the Supreme Court on Friday night left intact a lower court decision that had forced the North Carolina legislature to draw up a new election district map for congressional seats, to cure "racial gerrymandering" in two of its districts. There were no noted dissents from the order.
>
> The Court acted within hours after it had been told that the legislature in a special session in Raleigh had approved a new plan for the two districts—1 and 12—that a three-judge district court had ruled unconstitutional as a result of "packing" more minority voters into those areas.

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[303] Lyle Denniston, *New Test on Racial Issue in Redistricting (UPDATED)*, SCOTUSBLOG (Feb. 10, 2016, 1:49 PM), http://www.scotusblog.com/2016/02/new-test-on-racial-issue-in-redistricting/ [https://perma.cc/V24C-K5A8].

[304] *Id.* (quoting Emergency Application for Stay from the Middle District of North Carolina, *McCrory v. Harris*, 2016 WL 686480 (U.S. 2016) (No. 15A809)).

[305] *See McCrory*, 2016 WL 686480.

> The Justices' order was one of the first significant actions the Court had taken since the death of Justice Antonin Scalia. An eight-member Court can deal effectively with such matters, at least when the Justices are not split four to four.
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> The new North Carolina districting plan enacted Friday specified that it would not go into effect if the Supreme Court had granted the request of the governor and state board of elections to postpone the district court's order mandating a new map. With the Justices' denial of the state's challenge, the new map will be in effect for the primary election in the state—now set for June 7 under a separate law, also passed by the legislature Friday, setting aside an earlier plan for the primary on March 15.
>
> The approaching date of the March primary was one factor that had led state officials to ask the Supreme Court to delay the district court ruling. The panel had given the lawmakers just two weeks—that is, until Friday—to come up with a remedy for the constitutional violation in the two districts.[306]

2. A New Test for Racial Predominance?

The core issue now before the United States Supreme Court in *Harris* is whether compliance with the VRA, specifically avoidance of liability under Section 2 and avoidance of non-retrogression under Section 5 in previously covered jurisdictions, can constitute a compelling governmental interest that can justify race-based redistricting.

Depending on how the Supreme Court answers these issues, we may finally have some clarity regarding the extent to which redistricting plans can and should limit racial considerations in drawing voting districts. This may include clarity regarding the extent to which race may be used by a state, consistent with *Alabama Legislative Black Caucus*, to pack black voters into districts in a way that arguably dilutes the influence of those black voters in other districts.

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[306] Lyle Denniston, *North Carolina Redistricting Delay Denied*, SCOTUSblog (Feb. 20, 2016, 12:09 AM), http://www.scotusblog.com/2016/02/north-carolina-redistricting-delay-denied/ [https://perma.cc/865F-CDRX].

In *Alabama Legislative Black Caucus*, the Supreme Court set forth four principles for the lower courts to use in evaluating such claims, and its remand for further proceedings was presumably for the purpose of enabling the three-judge court in Alabama to conduct such an evaluation. The Supreme Court did not specifically, clearly or categorically answer this key question: Whether and when might a state permissibly use race to comply with the VRA? *Harris* may provide that answer.

CONCLUSION

Alabama Legislative Black Caucus v. Alabama breathed new life into the constitutional tort of racial gerrymandering.

The sharply divergent results in the application of the racial predominance standard in Virginia's *Page* and *Bethune-Hill* decisions and in North Carolina's *Dickson* and *Harris* decisions illustrate quite graphically that courts are struggling to find a coherent, uniformly applicable set of constitutional standards for measuring the propriety of racial classifications during the redistricting process.

Bethune-Hill and *Harris* were both calendared for oral argument before the Supreme Court on December 5, 2016. Moving this debate to a politically divided eight-member United States Supreme Court may or may not provide a solution and necessary clarity regarding the permissible extent to which a state may consider race in creating voting districts. [307] While the general principles and guiding factors can be identified by each court, the lower courts are not in accord on the ultimate question of when race impermissibly becomes the predominant factor forming the basis of

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[307] *See* Bethune-Hill v. Virginia State Board of Elections, et al., LEGAL INFO. INST.: LII SUPREME COURT BULLETIN, https://www.law.cornell.edu/supct/cert/15-680?utm_source=Cornell+Legal+Information+Institute+%5BLII%5D&utm_campaign=856ed07210-BULLETIN_PREVIEW_2016_12_05&utm_medium=email&utm_term=0_74379d6e9c-856ed07210-133095565 [https://perma.cc/Q3FL-J9VX]; Patrick McCrory and A. Grant Whitney, Jr. v. David Harris and Christine Bowers, LEGAL INFO. INST.: LII SUPREME COURT BULLETIN, https://www.law.cornell.edu/supct/cert/15-1262?utm_source=Cornell +Legal+Information+Institute+%5BLII%5D&utm_campaign=856ed07210-BULLETIN_PREVIEW_2016_12_05&utm_medium=email&utm_term=0_74379d6e9c-856ed07210-133095565 [https://perma.cc/93LX-8XS7].

a redistricting plan. The United States Supreme Court has not provided adequate guidance for those jurisdictions seeking to invoke compliance with Section 2, or prior compliance with Section 5, as a sufficient justification for a race-based redistricting plan, and one can only hope that guidance will come once the Court decides these two pending cases from Virginia and North Carolina.

Finally, it is not enough to stand on the academic sidelines and point out how farcical, shaky or ephemeral racial gerrymandering claims may be. The fact remains that the Supreme Court has most recently recognized and cordoned off racially gerrymandered districts as constitutional kryptonite, and no amount of scholarly criticism will make future claims of unconstitutional racial gerrymandering simply fade away.

In closing, at the distinct risk of second-guessing the Supreme Court months before it decides *Bethune-Hill* and *Harris*, we suggest that the most reasonable and justifiable approach to the racial gerrymandering quandary presented by the courts in Virginia and North Carolina should include (1) a principled analysis of the burden of proof with respect to claims of racial gerrymandering, (2) a consistent application of the presumption of constitutionality of state legislative action in the redistricting arena, (3) an objectively consistent application of existing constitutional precedent (*Shaw I, Shaw II, Miller, Cromartie I, Cromartie II, Alabama*), with respect to racial classifications, and (4) an intensely fact-specific appraisal of the political landscape and litigation history that forms the backdrop for such claims in a particular jurisdiction.