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INTRODUCTION

In the political participation and voting rights context, the right to vote is the most important constitutional right that African Americans and other racial minorities possess. The importance of this right was restated by the Fourth Circuit Court of Appeals in the landmark case *North Carolina State Conference of the NAACP v. McCrory* where the Court concluded that the North Carolina General Assembly intentionally engaged in efforts to restrict the rights of and opportunities for African

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Americans to vote.[1] The *McCrory* decision addressed yet another race-based effort by North Carolina lawmakers to curtail the participation of racial minorities in the state's democratic process.[2]

The voting rights efforts engaged in by activists in North Carolina are similar to the struggles that racial minorities face in an array of states across the country. These struggles, seeking full participation in the democratic process, by necessity, focus on efforts by the several states to aggressively resist constitutional protections.[3] Notwithstanding the complimentary prohibition provided through the Fifteenth Amendment to the United States Constitution which outlawed discrimination in voting on the basis of race, the right to vote is uniquely one which is provided

1. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 219, 227, 229 (4th Cir. 2016) (invalidating a post-*Shelby County* omnibus election law that revised a list of acceptable photo identification; reduced the number days for early voting; and eliminated same-day registration, out-of-precinct voting, and preregistration, as enacted with a racially discriminatory intent in violation of the Equal Protection Clause and Section Two of the Voting Rights Act).

2. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 34, 80 (1986) (holding North Carolina's redistricting plan using multimember districts violative of Section Two of the Voting Rights Act because it impaired the opportunity for African American voters to participate in the political process and to elect representatives of their choice); N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 224 (4th Cir. 2016) (finding that from 1980 to 2013, "the Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina[,]" and "private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act[,]" with "[t]en cases end[ing] in judicial decisions finding that electoral schemes in counties and municipalities across the state had the effect of discriminating against minority voters[,]" and "[f]orty-five cases [] settled favorably for plaintiff's out of court or through consent [decrees] that altered the challenged voting laws" (citing Anita S. Earls et al., *Voting Rights in North Carolina: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008))).

3. *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 135 S. Ct. 1257, 1262-63, 1265-67, 1270-71 (2015) (overturning an Alabama redistricting plan as racially gerrymandered because "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white[,]" "the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines[,]" and "race was a factor in the drawing of District 26, and [] the legislature preserved the percentage of the population that was black" (internal quotations omitted)); Crawford v. Marion Cty. Election Bd., 533 U.S. 181, 191-97, 200-03 (2008) (upholding the validity of an Indiana voter identification law because the state's interests in "election modernization," "preventing voter fraud," and "safeguarding voter confidence" outweigh the burden on homeless, elderly, and indigent voters and voters religiously opposed to being photographed in obtaining sufficient identification to allow them to vote); Gaston Cty. v. United States, 395 U.S. 285, 286-87, 291, 295-97 (1969) (upholding the suspension of North Carolina's use of literacy tests as a prerequisite for voting registration, finding that "throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. 'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form.").

by each individual state.[4] As classically interpreted, the Fifteenth Amendment requires that the states provide the right to vote to all their citizens, regardless of a person's race.[5] The historical reality has been that states, particularly the southern states, regularly engaged in conduct designed to suppress the opportunities for racial minorities to register, vote, and fully participate in the political franchise.

The right to vote and the ongoing struggle to ensure it, has engulfed this nation as far back as the "enslavement" era.[6] At the congressional level, this struggle reached a triumphant conclusion with the enactment of the Voting Rights Act of 1965 which represented a sea change in the campaign for African Americans and racial minorities to participate robustly in the political franchise of the United States.[7] This enactment was primarily directed against stringent "Jim Crow" laws which were in place throughout the South, but practically impacted voting rights in

4. U.S. CONST. amend. XV, § 1("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *see, e.g.*, N.C. CONST. art. VI, § 1 ("Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.").

5. U.S. CONST. amend. XV, § 1; *see* United States v. Reese, 92 U.S. 214, 217-18 (1875) ("The Fifteenth Amendment does not confer the right of suffrage upon [anyone]. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude." "It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.").

6. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 17-20 (3d rev. ed. 1974) (tracing the origin of "Jim Crow" laws to the policies governing free Africans living in the North in the decades immediately prior to the Civil War).

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 52 U.S.C. §§ 10301-14 (2018)); *see* WOODWARD, *supra* note 6 at 184-87, 215-16 (identifying Alabama's African American population in early 1964 as "slightly more than half" of state's total population, "yet they accounted for only one [percent] of its registered voters[;]" noting that in the year leading up to the August 1965 enactment of the Voting Rights Act, 450,000 African Americans registered to vote in the Southern states, "nearly as many as they had added in the five preceding years[;]" and documenting the resulting increase in political participation, "Black representatives in Congress increased from five in 1960 to fifteen in 1972 (two from the South, the first since 1901), the number of black mayors from twenty-nine in 1968 to a hundred or more in 1973, the black delegations in state legislatures from 94 in 1964 to 206 in 1972, and the number of elective officeholders increased to 2600 by 1973, half of them in the South[,]" but lamenting, "[n]one of these figures, of course, reflected in offices held the proportion of blacks in the population, but they did reflect a new order of black involvement and acceptance in American politics.").

every state.[8] Since its enactment, the Voting Rights Act's main provisions, Section Two[9] and Section Five,[10] have been successfully used in efforts to advance political participation by African Americans and other racial minorities.[11]

I. SUMMARY OF THE VOTING RIGHTS ACT

Section Two states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[12]

Section Four of the Act,[13] which created the formula for the Section Five[14] preclearance process, was deemed unconstitutional in *Shelby County v. Holder*.[15] During its history, legal challenges pursuant to

8. DAVID S. CECELSKI & TIMOTHY B. TYSON, DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY 6-10, 82 (1998).

9. 52 U.S.C. § 10301 (2018).

10. 52 U.S.C. § 10304 (2018).

11. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (Section Two); Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 135 S. Ct. 1257 (2015) (Section Five).

12. 52 U.S.C. § 10301 (2018).

13. 52 U.S.C. § 10303 (2018), *invalidated by* Shelby Cty. v. Holder, 570 U.S. 529 (2013).

14. 52 U.S.C. § 10304 (2018).

15. Shelby Cty. v. Holder, 570 U.S. 529, 556-57 (2013).

Section Five successfully thwarted thousands of efforts to restrict or dilute the rights of and opportunities for African Americans and other racial minorities to equally participate in the political process within the covered jurisdictions.[16] In North Carolina, Section Five covered the forty counties where, at that time, most African Americans in the state resided,[17] which were the central focus of political repression prior to the passage of the Act.

The continuing success of racial minorities to participate in the political franchise resulted from robust litigation in federal courts which challenged legislative and administrative conduct in the several states that sought to deny the political participation on the basis of race or color. The Voting Rights Act complements the right to vote as it is guaranteed in state constitutions.[18] While the Fifteenth Amendment condemns the denial of the right to vote based on race, that right is centrally focused on the constitutions of the individual states.[19] Nevertheless, the forum in which most often voting rights challenges have occurred has been in the federal courts.[20] In response to each of these challenges, the states have

16. *See generally* Anita S. Earls et al., *Voting Rights in North Carolina: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 577, 583-84 (2008) ("Section 5 arguably has had the greatest impact in the state because numerous objections have prevented the implementation of election changes that would have made it harder for black voters to participate in elections.").

17. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 [https://perma.cc/765C-4WRG] (last updated Aug. 6, 2015).

18. *Ex parte* Yarbrough, 110 U.S. 651, 662-63 (1884) ("[T]he right to vote for a member of congress is not dependent upon the constitution or laws of the United States, but is governed by the law of each state respectively.").

19. *Ex parte* Yarbrough, 110 U.S. 651, 664-65 (1884) ("The [F]ifteenth [A]mendment of the [C]onstitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." "In all cases where the former slave-holding states had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and apart of the state law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons.").

20. *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884) ("The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the

invoked the claims of "states' rights."[21] This narrative has been framed by state legislators who argue that the Voting Rights Act is an unlawful enactment which is designed to undermine the right of the states to design, implement, and regulate the conduct and protections of its

adverse influence of force and fraud practiced on its agents, and that the votes by which its members of congress and its president are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."); *Ex parte* Seibold, 100 U.S. 371, 388 (1879) ("It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the [s]tate government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. . . . Those duties are owed as well to the United States as to the [s]tate. . . . A violation of duty is an offence against the United States, for which the offender is justly amendable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States."); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369-71 (1886) (speaking illustratively on "the political franchise of voting" as secured by the Equal Protection Clause of the Fourteenth Amendment, "Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights." "It has accordingly been held generally in the states that whether the particular provisions of an act of legislation establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question.").

21. *See, e.g.*, Brief of the Plaintiff at 7, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22) ("Sections 4, 5 and 6(b) [of the Voting Rights Act] grant the right to vote to certain of South Carolina's unqualified residents in violation of her laws and deprive her and her citizens of their right to prescribe lawful voter qualifications and regulations for her elections in violation of Article I, §§ 2 and 4 and the Seventeenth Amendment to the Constitution of the United States. There can be no serious doubt that the original architects of the Constitution through its provisions, intended to reserve to the [s]overeign [s]tates exclusive control over all matters pertaining to suffrage and elections, except in certain particulars dealing with national representatives."); *see also* Shelby Cty. v. Holder, 570 U.S. 529, 540 (2013) (using the term "federalism costs"). *But see Ex parte* Yarbrough, 110 U.S. 651, 657-58 (1884) ("If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."); Special Message to the Congress: The American Promise, 1 PUB. PAPERS 283 (Mar. 15, 1965) (Lyndon B. Johnson) ("There is no issue of [s]tates[']s rights or national rights. There is only the struggle for human rights.").

citizens.[22] According to this narrative, the intrusions by federal courts represent an overreach by the federal government into the sovereign authority of the states.[23]

II. HISTORY OF VOTING RIGHTS STRUGGLES IN NORTH CAROLINA

As far back as the conclusion of the Revolutionary War, "Free Africans" in North Carolina could vote.[24] In those early days, "Free Africans" constituted a significant bloc of voters in the state, with populations in eastern North Carolina that ranged from ten to fifteen percent of the total populations of over forty counties.[25] The North Carolina Constitution of 1776 did not prohibit these "Free Africans," who were property owners from voting, since enfranchisement was looked upon as the right of all free men to vote.[26] To be sure, Africans classified as slaves could not vote, but "Free Africans," who owned land and businesses, satisfied the legal and accepted definition as being able to vote.[27] As a result, "Free Africans" could vote and they did vote.[28]

Up until 1835, North Carolina was the only southern state which allowed "Free Africans" to vote.[29] That privilege changed when a majority of the General Assembly, over a vigorous debate and by a narrow margin, voted to disenfranchise this group of voters.[30] Legislators who supported disenfranchisement sought to prevent the

22. *See generally* Brief of the Plaintiff, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22).

23. *See generally* Brief of the Plaintiff, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (No. 22); *see also* Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the state.' Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975) (other internal citations omitted)).

24. JEFFREY J. CROW ET AL., A HISTORY OF AFRICAN AMERICANS IN NORTH CAROLINA 9 (1992).

25. JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 1790–1860, at 14-18, 105-06 (1995).

26. *Id.* at 12-13, 105-06.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 111.

election or appointment of Africans to any political position in the state.[31]

This race-based political exclusion extended from 1835 until 1868 when a new post-Civil War Constitution was adopted in North Carolina.[32] The 1868 North Carolina Constitution resulted from a biracial effort to meet qualifications imposed by the United States Congress on former Confederate states seeking to rejoin the United States.[33] Following a North Carolina Constitutional Convention, in which African Americans were integral contributors,[34] a new Constitution was adopted, and it guaranteed that every person born or naturalized in the United States, eighteen years of age, and otherwise qualified, "shall be entitled to vote at any election by the people of the State . . . ."[35] The quest for the right to vote also secured the right to vote for White men in the state who did not own property and were not entitled to vote.[36]

From the adoption of the 1868 Constitution, African Americans and other People of Color, eagerly engaged in the political process and franchise until 1898. During this thirty-year Reconstruction Period, approximately ninety percent of African Americans were registered to vote and regularly voted at levels which exceeded ninety to ninety-five percent of those who were registered.[37] Hundreds of African Americans were elected and appointed to serve in political positions at the local, county, state, and national levels.[38] Despite this political success, African Americans had to regularly resist efforts by White Republicans and Democrats to undermine their right to vote and to prevent their full participation in the political and economic process.[39] This political

31. *Id.*

32. CROW ET AL., *supra* note 24.

33. *Id.* at 70.

34. Of the 120 delegates involved in the 1868 Constitutional Convention, fifteen were African Americans.

35. N.C. CONST. art.VI, § 1 (1868).

36. Not addressed by this expanded right to vote was the enfranchising of women even though women were robust, strong, and natural allies of the African American men who were now able to vote. For a comprehensive discussion of these constitutional mandates, see Irving Joyner, *North Carolina's Racial Politics:* Dred Scott *Rules from the Grave,* 12 DUKE J. CONST. L. & PUB. POL'Y 141 (2017).

37. CROW ET AL., *supra* note 24, at 113-14.

38. *Id.*

39. *Id.*

participation was regularly challenged through force and physical intimidation by former slave owners, Confederate officers, and other White supremacists who were organized under the banner of the Democratic Party.[40] Following several highly, racially divisive and corrupt political campaigns, the political rights of African Americans were destroyed, the fundamental principles of democracy were undermined, and "Jim Crow" emerged as the new face of politics in North Carolina.[41] This hostility was concurrently instituted by other states across the country, disenfranchising and displacing entire African American communities.[42] This political undermining resulted in canceling the registration of every citizen, the institution of poll taxes, the enactment of literacy tests, with its infamous "grandfather clause," and the requirement that all citizens must re-register pursuant to the new "Jim Crow" requirements made a part of the amended North Carolina Constitution.[43]

As a result of the "Jim Crow" laws, African Americans were deprived of both the right to vote and the ability to participate in every area of society in North Carolina. With political powerlessness and societal exclusion mandated by racial segregation, African Americans were powerless to fend for themselves or to advance their goals within the political process. This resulted in an almost total exclusion of African Americans from polling places. The percentage of African Americans registered to vote dropped below twenty percent from the ninety percent present during the Reconstruction Period.[44] This minimal political participation resulted in a near-absence of African Americans from any elected political position; especially after the 1898 Wilmington Massacre where the Democratic Party successfully conducted a political and military overthrow of the biracial, legally elected city council members

40. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisited 1870–1905 and 2011–2013*, 33 LAW & INEQ. 53, 80-81 (2015).

41. *Id.* at 75-82.

42. CROW ET AL., *supra* note 24, at 83-84.

43. Irving Joyner, *African American Political Participation in North Carolina: An Illusion or Political Progress?*, 6 WAKE FOREST J.L. & POL'Y 85, 111-116 (2016) (describing the statewide campaign to destroy the African American right to vote).

44. CROW ET AL., *supra* note 24, at 83-84.

and political leaders.[45]

From the hundreds of African Americans who were elected in the state before 1898, none were elected to a local political office until 1947 when the Rev. Kenneth Williams was elected to the Winston-Salem City Council in a single member district election that pitted an African American candidate directly against a White candidate.[46] Thereafter, the General Assembly re-drew political districts around the state and created multimember districts in those areas where large African American populations were located.[47] At the state level, no African American was elected until 1968 when attorney Henry Frye became the first African American elected to the North Carolina General Assembly from a single member majority African American district in Greensboro.[48] No African American was elected to a U.S. congressional seat from 1900, after George H. White's congressional district was reconstituted, until 1990 when Representative Eva Clayton of Warrenton was elected to complete an unexpired term.[49] In that same year, Representative Clayton was elected for a full term, and since then that district has been represented by an African American.[50]

III. IMPACT OF 1965 VOTING RIGHTS ACT IN NORTH CAROLINA

When the Voting Rights Act of 1965 was enacted, many believed that avenues now existed to involve the federal government and the courts in protecting the rights of African Americans and other racial minorities to vote. Of particular significance in this fight was the presence of Section Five of the Act which required all changes in voting districts, procedures, process, and other efforts that affected voting to be pre-cleared by the Civil Rights Division of the U.S. Justice

45. For a more detailed account and description of the Wilmington coup d'etat, see generally CECELSKI & TYSON, *supra* note 8.

46. CROW ET AL., *supra* note 24 at 153; see also Testimony of Dr. James L. Leloudis at 18, N.C. Conference of the NAACP v. McCrory, No. 1:13-CV-658 (2015).

47. CROW ET AL., *supra* note 24 at 149.

48. Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N. C. INSIGHT, Dec. 1989, at 40-41.

49. *Id.*

50. For a comprehensive discussion of Reconstruction and the demise of African American political participation in North Carolina, see Joyner, *supra* note 36; *see also Clayton, Eva M.*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/People/Detail?id=11065 [https://perma.cc/RD8U-UZA3].

Department.[51] When the Voting Rights Act was enacted, only twenty-one percent of African Americans in North Carolina were registered to vote.[52] At the time, the vast majority of African Americans lived in the eastern portion of the state. As a result, forty of the one hundred counties were covered under the Section Five preclearance provision.[53] Not included in this protection were the largest cities, Charlotte, Durham, Greensboro, Raleigh, Wilmington, and Winston-Salem, where a substantial African American population resided.

Although voter registration substantially improved across the state, political success did not substantially increase. By 1980, a minimal number of African Americans were elected to local city councils, boards of education, or county commissions; only four African Americans were elected to the General Assembly; only one African American was elected as a Superior Court Judge, but none served on the appellate courts; and no African Americans were elected as a Congressional Representative.

By 1982, the number of African Americans elected in the General Assembly had increased to four out of one hundred and twenty in the House of Representatives and one out of fifty in the Senate.[54] In areas of the state where large numbers of African Americans lived, the state mandated elections in multimembers districts. In multimember districts, several counties were banded together to allow several surrounding White populations to submerge large African American populations such that the African Americans were the minority political grouping in the district.[55] This purposeful discrimination, which started after the Rev. Kenneth Williams was elected to the Winston-Salem City Council, had the effect of minimizing the political power of African Americans in a district where the population of African Americans was sufficiently large enough to create a separate district and to elect the representative of their choice.[56]

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51. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified at 52 U.S.C. § 10304 (2018)).

52. Testimony of Dr. James L. Leloudis at 18, 23, N.C. Conference of the NAACP v. McCrory, No. 1:13-CV-658 (2015).

53. U.S. DEP'T JUST., *supra* note 17.

54. Earls et al., *supra* note 16 at 580.

55. Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

56. Jordan, *supra* note 48, at 42.

A successful challenge to this practice is found in *Thornburg v. Gingles*,[57] which resulted in increases of house members from four to sixteen and in senators from one to four. At the time that the *Gingles* challenge was filed, fifty-two percent of the African American population was registered to vote; when the case was finally decided in 1982, fifty-seven percent were registered to vote.[58]

IV. SHORTCOMINGS OF THE VOTING RIGHTS ACT

The Voting Rights Act is typically applauded for protecting the right to register and vote, but it did nothing to increase the opportunities for African Americans to vote. In 1986, voters had to vote on a lone Election Day, when most worked at hourly jobs and could not take off from work in order to go vote. Many others, who did vote, had the experience of rushing from their jobs after getting off at 5:00 p.m. and locating their polling site by 7:30 p.m. in order to cast their vote in time. Usually, late voting created a host of voting related problems which prevented individuals from being able to cast their ballots, such as encountering super long lines and discouraging many from wanting to vote.

Setting aside only one day on which voters could vote offset the increased percentage of African Americans who were registered to vote. As a result, African American political leadership, in partnership with the Democratic Party, enacted legislation designed to increase opportunities for voters to go vote.[59] These efforts began by authorizing citizens in local communities to serve as registrars rather than requiring citizens to report to a Board of Elections office between 9:00 a.m. and 5:00 p.m. in order to register. Under this legislation, community groups, organizations, voting activists, and others could organize voting registrations drives in communities on any day of the week and at different times. In due time, the General Assembly authorized the pre-registration of sixteen- and seventeen-year-olds who could register early and then be automatically allowed to vote, as long as they were eighteen-years-old by Election Day.[60] This provision also encouraged young citizens to become politically active at an earlier age and allowed high

57. Thornburg v. Gingles, 478 U.S. 30, 75-76 (1986).

58. *Id.*

59. Curtis, *supra* note 40, at 99.

60. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 217 (4th Cir. 2016).

schools and other youth institutions and programs to engage in voter registration and education efforts.[61]

The efforts to expand voting opportunities increased with the authorization for voters to cast "no excuse absentee ballots."[62] As such, people who could not get to a polling site, for *any* reason, could request that a ballot be sent to their home, the voter could then mark the ballot, seal it in a specially prepared envelope, and mail the ballot back or physically return it to the Board of Elections where it would be unsealed and counted on Election Day. Spurred forward by African American legislators, the General Assembly also enacted legislation which provided for seventeen days of early voting at several polling sites which were located around the county in order to allow people to vote at any time that was convenient for them to do so. The early voting process was enhanced when legislation was amended to allow any unregistered person to go to a polling site during these seventeen days and be allowed to register and vote at the same time.[63]

These increased voting opportunities resulted in a surge in voting enthusiasm, particularly in African American and minority communities. As a result, by 2008, African American registration increased substantially to 94.9%, and this level of participation surpassed the turnout rate for Whites for the first time in history. On a national scale, the North Carolina voter participation rate rose from forty-third in the nation to eleventh during the 2008 Presidential election.

Within the North Carolina General Assembly, the African American presence grew from one member out of 120 in the house of representatives in 1968 to twenty-six house members and ten senators in 2019, which is a tremendous increase in political participation and political power.

V. LITIGATING TOWARDS POLITICAL PARTICIPATION

The tremendous growth in African American participation in North Carolina resulted from bruising legal battles. From the onset of this litigation, there were landmark victories achieved through the federal

61. *Id.* at 217-18.

62. N.C.G.S.A. § 163A-1295 (2017).

63. Act of Jul. 20, 2007, ch. 163, 2007 N.C. Sess. Laws, § 163-82.6A (codified at N.C.G.S.A. § 163-82.6A (2007)) (recodified as § 163A-866 (2017)).

courts and often confirmed by the United States Supreme Court. The beginning litigation, *Thornburg v. Gingles*, a legislative redistricting case, resulted in the dismantling of multimember legislative districts.[64] Multimember districts had been used since 1947 to successfully bury large African American populations into a larger assemblage of White voters which consequently submerged their political power.

The second major litigation involved efforts by the U.S. Department of Justice under the Ronald Reagan Administration to impose a "Black Max" scheme throughout the country. The "Black Max" plan was designed to "stack and pack" African Americans into a small number of congressional districts in an attempt to minimize the availability of these voters to vote for Democratic Party candidates in congressional races involving White candidates.[65] Due to an ever-increasing African American population in the state following the 1990 Census, the Reagan Justice Department insisted that the North Carolina General Assembly create two majority African American congressional districts in the state rather than one.[66] The intent behind this action was to ensure that Republican candidates would be able to win a supermajority of the other congressional districts in the state.

This effort resulted in the landmark case, *Shaw v. Hunt*, where the Supreme Court ruled that the explicit use of race to design congressional districts was unconstitutional.[67] In spite of this ruling, for the first time in North Carolina history and since 1900, two African Americans, Representatives Eva Clayton and Melvin Watt, were elected to Congress and were regularly re-elected since that time.

VI. NORTH CAROLINA'S CONSTITUTIONAL PROVISIONS TO PROTECT VOTING RIGHTS

Pertinent constitutional provisions, which impact voting rights and political participation in North Carolina, were at the heart of concerns presented by the fifteen African Americans who were a part of the 1868

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

65. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); United States v. Hays, 515 U.S. 737 (1995); Johnson v. DeGrandy, 512 U.S. 997 (1994).

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

67. Shaw v. Hunt, 517 U.S. 899 (1996).

Constitutional Convention.[68] For these leaders, the key to political power and governmental participation were the guarantees of the right to vote and full participate in the democratic process. As discussed earlier, the fundamental right to vote is guaranteed by the state constitution, not the United States Constitution.[69] In North Carolina, the protection of that right was deemed to be fundamental and mandated by the state constitution as a result of the political influence of African American delegates to the 1868 Constitutional Convention.[70] In that regard, the North Carolina Constitution provides that: "Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided."[71]

African Americans, led by Abraham Galloway and Bishop John Hood, who served as the chairs or co-chairs of many powerful legislative committees, aggressively pushed for the enactment of a number of legislative reforms, which allowed for the education, growth, and development of the interests of their communities.[72] These enactments also greatly benefitted a large number of Whites who were not wealthy landowners, were not able to attend schools, could not vote or participate in the political franchise, or otherwise enjoy the economic success of the state.[73] Although small in number, these African American legislators, in conjunction with White colleagues with similar views, were able to promote progressive legislation that advanced the rights and power of the larger African American community.[74]

Drawing upon the resolutions that were adopted during the 1865 Freedman's Convention, the African American delegates aggressively fought for and won the inclusion of revolutionary provisions into the North Carolina Constitution.[75] In the constitution's preamble, the

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

69. N.C. CONST. art VI, § 1.

70. Orth, *supra* note 68, at 1776-90.

71. N.C. CONST. art VI, § 1.

72. DAVID S. CECELSKI, THE FIRE OF FREEDOM: ABRAHAM GALLOWAY & THE SLAVES' CIVIL WAR 198-201 (2012).

73. *Id.* at 196-99.

74. Orth, *supra* note 68.

75. *Id.* at 1777-79.

drafters articulated a new political reality that people of African descent were included in the phrase "We the people."[76] The preamble also established the authority under which the constitution was established.[77] The preamble conveyed a definite religious tone, but focused on the absolute power of "the people" as the controlling force of the state government.[78]

In Article I, Section One, the drafters declared, "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[79] This provision became a crucial statement in light of the U.S. Supreme Court's infamous decision in *Dred Scott v. Sandford*, which declared that the official definition of the term "We the People" was never intended to refer to or include anyone other than White people.[80]

With the understanding of who was included in the concept of "the people," Article I, Section Two boldly proclaimed that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[81] This constitutional provision was designed to support the proposition that popular sovereignty is the basis of North Carolina's democracy.[82] This provision was followed by Article I, Section Three that reaffirmed the state's right mandate with respect to the internal regulation of state governmental affairs, which must follow the law, but recognizes that this right must be exercised consistent with the federal constitution.[83]

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76. *See* N.C. CONST. Preamble; s*ee also* Orth, *supra* note 68.

77. N.C. CONST. Preamble.

78. *Id.*; *see also* Orth, *supra* note 68, at 1777-78.

79. N.C. CONST. art. I, § 1.

80. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV("In the opinion of the court, . . . neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.").

81. N.C. CONST. art. I, § 2.

82. *Id.*

83. N.C. CONST. art. I, § 3.

In another bold departure from the decision of pre-Civil War state leaders who seceded from the United States in 1861, Article I, Section Four prohibited the state from secession in the future and Section Five provided that "[e]very citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force."[84]

With the intent of keeping the tenure of legislators tied directly to the consent of the people, Article I, Section Nine mandated frequent elections for citizens to allow them to redress their grievances against their legislators and the state and to provide for amending and strengthening the laws.[85] As a final blow to the racially exclusive nature of previous governments, which restricted who could vote and hold office, Article I, Section Eleven prohibited the imposition of property qualifications in order to exercise the right to vote or to hold political office.[86] With this constitution, African Americans had faith that the new North Carolina government would finally recognize and protect their rights and interests.[87] Once the powers and rights of the people were defined, the framers identified the qualifications of those who had a right to vote. Article VI, Section One provided, "Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein provided."[88]

In Article VI, Section Two the Constitution decreed a one-year residency in the State and thirty-day residence within the election district in order for a person to qualify to vote.[89] These are the only constitutional qualifications which must be satisfied before a person can vote.[90] The State, through Article VI, Sections Three and Four is allowed to require qualified voters to register, but registration is not a constitutional qualification to vote.[91] A prior requirement that a person

84. N.C. CONST. art. I, § 5.
85. N.C. CONST. art. I, § 9.
86. N.C. CONST. art. I, § 11.
87. *Id.*
88. N.C. CONST. art. VI, § 1.
89. N.C. CONST. art. VI, § 2, cl. 1.
90. *Id.*
91. N.C. CONST. art. VI, §§ 3-4.

demonstrate that they are able to read and write any section of the constitution before they can vote, the literacy test, has been voided by federal law, although it remains as a provision in the state constitution. Before the enactment of the Fourteenth and Fifteenth Amendments to the U.S. Constitution, North Carolina had already guaranteed the right to vote and provided for equal rights and due process protections in its state constitution.[92]

African Americans were finally in a position to exert political influence and they did. For the first time in history, universal suffrage, which enfranchised former slaves and Whites who did not own real property, was guaranteed.[93] In addition, the new constitution abolished the property qualification for holding political office, provided for the election of judges, mandated a free public education system, and created elected county commissions to govern each county.[94]

The particulars of a state's constitution may differ from the exact wording found in North Carolina's constitution, but most states have similar provisions. Whatever differences may exist, there are certainly more legal options available under state constitutions than presently exist with the Voting Rights Act and the Fifteenth Amendment. The existing favorable federal court decisions can be utilized to support strong and progressive interpretations of state law since the state courts must, at least, provide the same level of protections as are available under federal law.

VII. LITIGATING IN STATE COURT

Voting rights litigation is not exclusively under the jurisdiction of the federal courts.[95] State courts have concurrent jurisdiction to hear and

92. Orth, *supra* note 68, at 1777-80.

93. CROW ET AL., *supra* note 24, at 84.

94. *Id.* at 84-85.

95. *See* Hathorn v. Lovorn, 457 U.S. 255, 268-69 (1982) ("Granting state courts the power to decide, as a collateral matter, whether § 5 [of the Voting Rights Act] applies to contemplated changes in election procedures will help insure compliance with the preclearance scheme. Approval of this limited jurisdiction also avoids placing state courts in the uncomfortable position of ordering voting changes that they suspect, but cannot determine, should be precleared under § 5. Accordingly, we hold that the Mississippi courts had the power to decide whether § 5 applied to the change sought by respondents.").

rule upon voting and civil rights cases.[96] Because of discrimination which has historically infected state courts, the tendency of litigators has been to bring voting rights challenges in federal courts.[97] Particularly in those traditional "Jim Crow" jurisdictions, more meaningful relief has been possible when civil rights claims are presented to federal court judges than with state court judges. Traditionally, federal courts have provided a more favorable forum due to better educated and less partisan judges. That is not necessarily as true today as it was in the past.[98]

Utilizing the protections provided by state constitutions in the right to vote and participate in the political franchise can possibly provide more comprehensive and relevant theories of law which can better advance these rights for African Americans and other racial minorities.[99] Typically, these provisions are untested due to past litigators' decisions to heavily rely upon Sections Two and Five challenges in federal court.[100] The U.S. Supreme Court demolished that preference with its decision in *Shelby County v. Holder*.[101] There, the Court held that Section Four of the Act, used to determine which states and municipalities were covered under the preclearance requirement, was no longer a viable formula to identify political jurisdictions which were regularly violating the voting rights of racial minorities.[102]

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96. *See, e.g.*, Martinez v. California, 444 U.S. 277, 280-81 (1980) (upholding the Supreme Court of California's determination that a statute providing a defense to a state law cause of action did not violate the Due Process Clause of the Fourteenth Amendment).

97. *See generally* Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 502-07 (1982) (quoting legislative history of the Civil Rights Act of 1871).

98. Carrie Johnson, *Trump's Impact on Federal Courts: Judicial Nominees by the Numbers*, NAT'L PUB. RADIO (Aug. 5, 2019, 5:01 AM), https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers [https://perma.cc/2YWA-ULPB] (calculating President Trump's appointments as "nearly 1 in 4 of the nation's federal appeals court judges and 1 in 7 of its district court judges[,]" quoting Kristine Lucius of the Leadership Conference on Civil and Human Rights who notes, "[H]e has not nominated a single African American or a single Latinx to the appellate courts[,]" and also finding that "around 70% of Trump's judicial appointees are white men").

99. *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

100. 52 U.S.C. §§ 10301, 10304 (2018).

101. Shelby Cty. v. Holder, 570 U.S. 529 (2013).

102. *Id.* at 551 ("Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

Clearly, state courts have the primary responsibility to interpret their state's constitution, and they are the only authorities with the power to issue final rulings on purely state law questions.[103] A ruling by a state court regarding the interpretation of a pure state constitutional or statutory issue is immune from review by the U.S. Supreme Court.[104]

VIII. THE IMPACT OF STATE COURT LITIGATION ON VOTING RIGHTS PROTECTIONS

Just last year, the Pennsylvania Supreme Court struck down their legislature's congressional redistricting map as based on partisan gerrymandering which they determined violated their constitution.[105] That groundbreaking decision occurred at the same time that the U.S. Supreme Court "punted" on four similar partisan gerrymandering cases from North Carolina, Texas, Maryland, and Wisconsin.[106] These cases raised challenges to the redistricting based on the First Amendment's protection of free speech and associational rights as well as the Fourteenth Amendment's Equal Protection Clause.[107] The Pennsylvania

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Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity." (internal citations omitted)).

103. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."); *see, e.g.*, State v. Harris, 6 S.E.2d 854 (N.C. 1940) (invalidating discriminatory legislation using the North Carolina Constitution).

104. *See* Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").

105. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa.), *cert. denied*, 139 S. Ct. 445 (2018).

106. North Carolina v. Covington, 585 U.S. ___, 138 S. Ct. 2548 (2018) (per curiam) (affirming the District Court's conclusion to the extent that the North Carolina General Assembly's remedial plan to redistrict racially gerrymandered voting districts was required by federal law or judicial order, but reversing to the extent that the remedial plan relied on the North Carolina Constitution); Abbott v. Perez, 585 U.S. ___, 138 S. Ct. 2305 (2018) (reversing a unanimous three-judge panel District Court finding of racial discrimination in Texas voting maps, but affirming as to the finding in one Texas house district); Benisek v. Lamone, 585 U.S. ___, 138 S. Ct. 1942 (2018) (per curiam) (upholding a District Court's denial of a preliminary injunction to prevent the use of allegedly politically gerrymandered maps due to the plaintiffs' delay in bringing the suit and the inability of the court to provide injunctive relief in the timeframe requested); Gill v. Whitford, 585 U.S. ___, 138 S. Ct. 1916 (2018) (remanding after finding plaintiffs lacked standing to challenge statewide political gerrymandering in Wisconsin).

107. First Amended Complaint (Renewed Request for Three-Judge Panel) at 91, 92, Covington v. North Carolina, No. 1:15-cv-00399, 2017 WL 5992358 (M.D.N.C. July 24, 2015), *aff'd in part, rev'd in part on other grounds, per curiam*, 585 U.S. ___, 138 S. Ct. 2548 (2018)

decision was protected from review and the possibility of being vacated by the current Supreme Court because it was based solidly upon the Pennsylvania Constitution.[108] This was a bold use of a state constitution and could be replicated in other states.

In North Carolina, a unanimous three-judge superior court panel in *Common Cause v. Lewis* recently declared that the partisan gerrymandering which occurred in the state is unconstitutional based on its interpretation of the state constitution.[109] Rather than appealing the decision to the presently constituted state supreme court,[110] the General Assembly chose to comply with the court's order and re-draw the legislative districts in a non-partisan manner.

In 2011, North Carolina's National Association for the Advancement of Colored People (NC NAACP) challenged a redistricting plan immediately after it was enacted in North Carolina.[111] Initially, the Wake County Superior Court[112] and the North Carolina Supreme

(proceeding under the Fourteenth Amendment's Equal Protection Clause); Brief for Appellees (Congressional Districts) at 35, Abbott v. Perez, 585 U.S. ___, 138 S. Ct. 2305 (2018) (No. 17-586) (invoking the Fourteenth Amendment's Equal Protection Clause); Amended Complaint at 3, Benisek v. Mack, No. 1:13-cv-03233-JKB, 2013 WL 10767430 (D. Md. Nov. 20, 2013), *sub nom.* Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018), *aff'd, per curiam*, 585 U.S. ___, 138 S. Ct. 1942 (2018) (seeking relief under the First Amendment and the Fourteenth Amendment); Complaint at 1, Whitford v. Nichol, 151 F. Supp. 3d 918 (W.D. Wis. 2015) (No. 15-cv-421-bbc), 2015 WL 4651084, *sub nom.* Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 15-cv-421-bbc), *vacated and remanded by* 585 U.S. ___, 138 S. Ct. 1916 (2018) (seeking relief under the First Amendment and the Fourteenth Amendment). *But see* Petitioners' Reply Brief (Public Version) at 7, 8, League of Women Voters of Pa. v. Commonwealth, 181 A.3d 1083 (Pa.), *cert. denied*, 139 S. Ct. 445 (2018) (utilizing the "broader" speech protections of the Pennsylvania Constitution).

108. *See* League of Women Voters of Pa. v. Commonwealth, 181 A.3d 1083 (Pa.), *cert. denied*, 139 S. Ct. 445 (2018) ("'Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.' On this record, it is clear that the 2011 Plan violates Article 1, Section 5, since a diluted vote is not an equal vote." (quoting PA. CONST. art. I, § 5)).

109. Judgment, Common Cause v. Lewis, No. 18-CVS-014001 (N.C. Super. Ct. Wake Cty. Sept. 3, 2019).

110. Will Doran, *Democrat Anita Earls Claims Victory in NC Supreme Court Race*, NEWS & OBSERVER, https://www.newsobserver.com/news/politics-government/article221037190.html [https://perma.cc/S3L2-E6CJ] (last updated Nov. 7, 2018, 12:06 AM); *Supreme Court*, N.C. JUD. BRANCH (2019), https://www.nccourts.gov/courts/supreme-court [https://perma.cc/9G93-ZZC6].

111. First Amended Complaint, N.C. State Conference of Branches of the NAACP v. North Carolina, No. 11-CVS-016940 (N.C. Super. Ct. Wake Cty. Dec. 9, 2011).

112. Dickson v. Rucho, Nos. 11-CVS-16896, 11-CVS-16940, 2012 WL 7475609 (N.C. Super. Ct. Wake Cty. Feb. 2012), *aff'd*, 766 S.E.2d 238 (N.C. 2014).

Court[113] ruled against the NC NAACP on the application of Section Two of the Voting Rights Act to the redistricting plan. This litigation required two separate appeals to the U.S. Supreme Court[114] before the North Carolina Supreme Court ultimately ruled in favor of a new redistricting plan.[115] In return, that corrected decision has now established a strong legal foundation for future race-based redistricting litigation in North Carolina.[116] At the same time, the state challenge allowed for the inclusion of state-specific civil rights claims which could not have been litigated in federal court.[117]

In 2017, the North Carolina General Assembly placed a constitutional amendment on the 2018 midterm ballot that would require voters to show photo identification at the polls before voting.[118] The amendment did not specify what type of photo identification would qualify. There are currently two filings challenging the legality of the voter photo identification amendment.

First, in *NC NAACP v. Moore*, the NC NAACP challenged the General Assembly's placement of a constitutional amendment on the 2018 ballot to require a photo identification in order for citizens to vote in future elections.[119] This challenge is premised on the fact that members of the General Assembly were elected under a redistricting plan which was

113. Dickson v. Rucho, 766 S.E.2d 238 (N.C. 2014), *vacated and remanded by* 135 S. Ct. 1843 (2015).

114. Dickson v. Rucho, 135 S. Ct. 1843 (2015) (vacating and remanding in light of Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 135 S. Ct. 1257 (2015)); Dickson v. Rucho, 137 S. Ct. 2186 (2017) (vacating and remanding in light of Cooper v. Harris, 581 U.S. ___, 137 S. Ct. 1455 (2017)).

115. Order and Judgment on Remand from the North Carolina Supreme Court, Dickson v. Rucho, Nos. 11-CVS-16896, 11-CVS-16940 (N.C. Super. Ct. Wake Cty. Feb. 12, 2018).

116. *See, e.g.*, Judgment, Common Cause v. Lewis, No. 18-CVS-014001 (N.C. Super. Ct. Wake Cty. Sept. 3, 2019) (invalidating and enjoing the use of the 2017 voting maps).

117. *See* Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484, 2506-07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. . . . The States, for example, are actively addressing the issue on a number of fronts."). *See, e.g.*, Judgment at 298-331, Common Cause v. Lewis, No. 18-CVS-014001 (N.C. Super. Ct. Wake Cty. Sept. 3, 2019) (finding the 2017 voting maps violative of the North Carolina Constitution's protections of elections, assembly, speech, and equal protection (citing N.C. CONST. art. I, §§ 10, 12, 14, 19)).

118. S. 824, 2017-2018 Reg. Sess. (N.C. 2017).

119. N.C. State Conference of the NAACP v. Moore, No. 18-cvs-9806 (N.C. Super. Ct. Wake Cty. Aug. 13, 2018).

subsequently declared by a federal court to violate Section Two of the Voting Rights Act and the Fifteenth Amendment to the federal Constitution.[120] As such, the General Assembly is illegally constituted and its enactments, including the decision to place constitutional amendments on the ballot, are illegal.[121] This claim is premised on a prior North Carolina legal principle that the General Assembly members are usurpers and have no power to act as a legally constituted body because they are operating without legal authority.[122] In a Decision by a Wake County Superior Court Judge on February 22, 2019, it was determined that the placement of the constitutional amendment on the 2018 ballot was unconstitutional because three separate federal and state decisions had determined that the General Assembly was illegally constituted and had lost its "popular sovereignty" and "did not represent the will of the people."[123]

Second, in *Holmes v. Moore*, six voters challenged the results of the approval of a constitutional amendment which passed in November 2018.[124] The amendment requires that legally registered voters must present a photographic identification in order to vote in future elections. This action differs from the *NC NAACP* litigation described above since its focus is on the completed election results and draws upon several entrenched existing state constitution provisions.

At this time, the composition of the North Carolina Supreme Court has changed, and three African Americans with progressive histories are now a part of a Democratic majority.[125] A similar change in composition may be happening in other states, and it deserves to be recognized and utilized. We look forward to the opportunity to present and argue future voting rights cases in this legal environment, which is more promising than arguing these cases to the new ultra-conservative U.S. Supreme Court.

There are definite pros and cons when resorting to state courts, but this forum should be seriously considered. Among the pros are: (1) state court opinions cannot be overruled by the U.S. Supreme Court or counteracted

120. Cooper v. Harris, 581 U.S. ___, 137 S. Ct. 1455 (2017).

121. *Id.*

122. *Id.* at 1489-90.

123. N.C. State Conference of the NAACP v. Moore, No. 18-cvs-9806 (N.C. Super. Ct. Wake Cty. Feb. 22, 2019).

124. Holmes v. Moore, No. 18-cvs-15292, (N.C. Super. Ct. Wake Cty Dec. 19, 2018).

125. Doran, *supra* note 110; N.C. JUD. BRANCH, *supra* note 110.

by congressional enactments; (2) states may have stronger history of equal protection provisions compared to the Supreme Court; (3) state constitutions may have protections which are not included in the federal Constitution; and (4) state courts may have better appreciation for voting rights of African Americans and other racial minorities. On the other side are the cons which include: (1) good precedent from a state court will only apply to that state; (2) some state courts may be worse than U.S. Supreme Court on voting rights; (3) state court judges may be bullied by their state legislature; and (4) state judges may be less experienced and be reluctant to rule on novel voting rights claims. Of course, there are others, but a serious effort to compare and choose the more favorable venue is one of the tasks that attorneys engage in on a regular basis.

CONCLUSION

The protection of the right to vote is a shared responsibility between activists from local communities and the attorneys who will eventually litigate these cases. One cannot be successful without the other. As such, we must enhance the training and cooperation between the various parts of our community, because together we can win these battles to ensure future generations of African Americans and other racial minorities have the right and the opportunities to vote and participate in the political process.