DILEMMAS OF REDISTRICTING IN A PARTIAL-COVERAGE VRA STATE: AN EMPIRICAL RECONSIDERATION OF THE NORTH CAROLINA SUPREME COURT'S *STEPHENSON* OPINION

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In modern legislative redistricting jurisprudence, the State of North Carolina has certainly contributed its share of cases to the United States Supreme Court's development of the law.[1] Perhaps this comes as something of a surprise given that only forty of the state's one hundred counties are covered by the Voting Rights Act[2] ("VRA"), inclusive of its preclearance provisions in section 5.[3] These provisions have been a predominant source of consternation, resentment, and legislative and judicial challenge within many southern states which are totally covered by the Act.[4] Those states' abilities to take autonomous action in changing voting or registration processes have been completely preempted by the federal government; what distinguishes North Carolina in this regard is that the state legislature still retains almost unfettered control over the redistricting process in the sixty non-VRA-covered counties of the state.[5] What has been unique about the North Carolina

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1. *See* Shaw v. Reno, 509 U.S. 630 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); *see also* Pender County v. Bartlett, 649 S.E.2d 364 (N.C. 2007), *aff'd*, Bartlett v. Strickland (*Bartlett*), No. 07-689 (Mar. 9, 2009). *Bartlett* is the latest North Carolina redistricting case, which is discussed *infra* in an addendum.

2. Voting Rights Act of 1965, 42 U.S.C. §§ 1973 – 1973aa-6 (2000).

3. Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377, 385 (N.C. 2002).

4. *See* U.S. Dept. of Justice Civil Rights Division, Introduction to Federal Voting Rights Laws, http://www.usdoj.gov/crt/voting/intro/intro.php (last visited Nov. 4, 2008).

5. This is true, except to the extent that any particular scheme may violate the "one person, one vote" standard of representation and/or reflect an obvious attempt to disfranchise or circumvent the traditional Fourteenth Amendment equal protection or due process provisions of the United States Constitution. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964); *Shaw*, 509 U.S. 630 (1993).

With respect to the issue of increased competition for the control of scant remaining resources in the federalism game, for example, as opposed to the expectation of decreased competition among players in a game where resources have been stably allocated and depleted,

experience of recent years, however, is the locus of potentially discriminatory voting rights action. The historical pattern since the 1960s in many southern states has been state legislative action that has ultimately required the federal appellate courts, applying the VRA, to remedy.[6]

In the "Tarheel State," by contrast, the North Carolina General Assembly ("NCGA") has not been leading the most recent charges. With Democrats in control of both chambers of the body[7] and approximately eighty-four percent of the black registered voter base affiliated with that party,[8] this is no surprise; one might well expect the NCGA to serve as a paradigm of protectionism for black voter registration and voting rights as it undergoes the redistricting routine. The latest major assault has instead come from the North Carolina Supreme Court ("NCSC") in its opinion in *Stephenson v. Bartlett*,[9] and a follow-up to the ongoing redistricting fracas in an identically titled opinion.[10] The eye of the proverbial storm has been the "Whole County Provision" ("WCP") of the North Carolina State Constitution, which provides that "[n]o county shall be divided in the formation of a representative district."[11] In *Stephenson I*, the court ruled in summary that the WCP, despite its absolutist "no county" language which has since been modified by VRA section 5 preemption in forty of the state's counties, is still applicable to the sixty North Carolina counties where the VRA does not apply.[12]

The purpose of this essay is to explore a relatively simple proposition: while attempting to ground its controversial decision in *Stephenson I* on as solid a doctrinal footing as it could under the circumstances, reading precedent selectively to do so, the NCSC erred with its initial decision in at least one important respect. In the majority's rush to find normative and doctrinal grounding for the *ratio* in the *Stephenson I* opinion, it completely overlooked simple and easily accessible empirical voting and voter registration data, more

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see Augustine A. Lado, Nancy G. Boyd & Susan C. Hanlon, *Competition, Cooperation, and the Search for Economic Rents: A Syncretic Model*, 22 ACAD. OF MGMT. REV. 110, 130 (1997).

6. The most famous example of a pre-VRA case is almost certainly *Smith v. Allwright*, 321 U.S. 649 (1944), which held that a white primary system disfranchising black voters in political primaries is unconstitutional and introduced the public function test to resolve parties' status as private organizations performing an important public function and, therefore subject to anti-discrimination laws.

7. *See* North Carolina General Assembly, N.C. House of Representatives Members, http://www.ncga.state.nc.us/gascripts/members/memberList.pl?sChamber=House (last visited Nov. 4, 2008); North Carolina General Assembly, N.C. Senators, http://www.ncga.state.nc.us/gascripts/members/memberList.pl?sChamber=Senate (last visited Nov. 4, 2008).

8. North Carolina State Board of Elections, North Carolina Party Statistics Report 2007, http://www.sboe.state.nc.us/content.aspx?ID=33. Blacks also comprise just over twenty percent of North Carolina's registered voter base. *Id.*

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

10. Stephenson v. Bartlett (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003).

11. N.C. CONST. art. II, § 5, cl. 3. The provision was introduced into and became part of the 1971 State Constitution. The provision was proposed as a constitutional amendment by the General Assembly in 1969, submitted to the voters in 1970 and ratified to take effect July 1, 1971. N.C. GEN. STAT. ANN. art. II, § 5 (Westlaw).

12. *Stephenson I*, 562 S.E.2d at 377.

simply categorized by county VRA status, that could have given the court a snapshot of potential vote dilution issues that should have raised, at the least, a few honorable eyebrows. There are additional issues in the opinion of partisan division, the sufficiency of the court's federal preemption analysis, and others that make for a wonderfully intriguing tale of classic southern politics with overtones of public policy and judicial federalism thrown in for good measure; while entertaining, these concerns nevertheless are ancillary to the primary legal issue in any Monday-morning quarterbacking of *Stephenson I*. Ultimately, the *Stephenson I* court made too many questionable assumptions and too few inquiries of empirical social science in rendering its decision and opinion in the case.

This is not to say that the court made these mistakes on its own; a reading of arguments, exhibits and other relevant records suggest that the plaintiffs and defendants were also focusing so diligently on doctrinal issues that too much tree-seeing in the absence of a forest became a likely end result. Because both principal parties and the NCSC got caught up in the traditional normative and precedent-based biases of legal methodology and because the primary legal questions centered around only two of the three possible grounds for elimination of the WCP (VRA section 5 and the State Constitution itself, but not the VRA section 2 issue), the product of *Stephenson I* is that, like the proverbial stray cat fed at the doorstep in a moment of humane pity, it is now the redistricting case that will not go away.

Stephenson I also raised new issues about the well documented undermining of public perceptions of the elective judiciary as a passive, neutral arbiter and interpreter of the law.[13] The data that are available regarding voter registration and participation suggests that there are statistically significant differences in registration by race and in electoral participation by race between North Carolina's forty VRA-covered counties and its sixty non-VRA covered counties. Perhaps these data would not have changed the *Stephenson I* decision had it been considered by the court; their recognition at a minimum, however, would have made the opinion notably harder to rationalize as a clear and bold strike of judicial activism[14] that significantly changed the course of redistricting precedent[15] in the state.

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13. *See generally* Lawrence Baum, *Information and Party Voting in "Semipartisan" Judicial Elections*, 9 POL. BEHAV. 62 (1987); Nicholas Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?* 36 W. POL. Q. 241 (1983). *See also* Seth Warren Whitaker, *State Redistricting Law:* Stephenson v. Bartlett *and the Judicial Promotion of Electoral Competition*, 91 VA. L. REV. 203, 229 (2005) (one possible "pessimistic" interpretation of the decision is that the NCSC "has let partisan political considerations affect its decision-making.").

14. Whitaker, *supra* note 13, at 207 (noting that "no other state has been as aggressive as North Carolina"). *See also* John Patrick Hagan, *Patterns of Activism on State Supreme Courts*, 18 PUBLIUS: J. FEDERALISM 97, 97 (1988) (shifts to stronger judicial activism occur after changes to court composition with the introduction of "maverick" justices).

15. Whitaker, *supra* note 13, at 217-20 (discussing at length North Carolina's history of problems with redistricting).

A BRIEF HISTORY: STEPHENSON AND REDISTRICTING IN NORTH CAROLINA

North Carolina had a long history of redistricting legislative boundaries in compliance with some form of the "whole county/compactness" standard of line-drawing even before the insertion of the WCP into the 1971 State Constitution.[16] Because of the preclearance requirements of section 5 of the Voting Rights Act enacted by Congress in 1965,[17] this guideline for redistricting became a preemptive federal requirement for at least part of the state, given that forty of North Carolina's counties were covered by the VRA.[18] The North Carolina Attorney General sought preclearance of the 1971 Constitution with the Civil Rights Division of the United States Department of Justice ("USDOJ"); after an objectionable literacy test was removed, USDOJ precleared the document with respect to its election procedures, leaving a mixture of single-member and multi-member districts across the state—as well as the WCP—intact.[19]

In 1981, the State of North Carolina sought preclearance from the USDOJ for the application of some older amendments[20] in the Election Code related to the creation of federal and state House and Senate districts. USDOJ, however, promptly refused preclearance.[21] The primary basis of the federal objection was that the use of whole counties to form legislative districts in the forty counties covered by [section 5 of the VRA] had the effect of "submerge[ing] cognizable minority population concentrations into larger white electorates" which had the effect of canceling minority vote strength because of racial bloc voting.[22]

Subsequently, in 1982, the NCGA enacted a redistricting plan which divided county lines throughout the state.[23] The plan met USDOJ preclearance, but a group of plaintiffs filed suit against the NCGA the same

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16. *Stephenson I*, 562 S.E.2d at 386.

17. 42 U.S.C. § 1973(c) (2000) states that any "standard, practice, or procedure with respect to voting different from that in force or effect [in any covered jurisdiction] on November 1, 1964" must be submitted to the United States Attorney General ("USAG") for his approval; the jurisdiction may also seek a declaratory judgment from the United States District Court for the District of Columbia. In order to pre-clear the standard, practice, or procedure, the USAG or the court must conclude that the procedure does not have a racially discriminatory purpose or effect. *See* Beer v. United States, 425 U.S. 130, 141-42 (1976). Such purpose or effect would result in what is termed a retrogressive effect—a change in law or policy that reduces the ability of minority voters to participate effectively in the electoral process. Nonretrogression, however, has its limits; it 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." Bush v. Vera, 517 U.S. 952, 955 (1996).

18. *Stephenson I*, 562 S.E.2d at 385.

19. *Id.* at 387.

20. The amendments dated back to 1968.

21. *Stephenson I*, 562 S.E.2d at 387.

22. Plaintiff-Appellees' Brief at 21, Stephenson v. Bartlett, 562 S.E.2d 377 (N.C. 2002) (No. 01 CV 02885).

23. *Stephenson I*, 562 S.E.2d at 387.

year in *Cavanaugh v. Brock* claiming violation of the WCP to the extent that some of the sixty non-VRA covered counties were split in the drawing of the new lines.[24] Defendants successfully removed the case to federal court on federal question grounds; although ultimately the court found that while an original jurisdiction federal question was not involved in the case (it was instead a state constitutional matter), it could nevertheless retain jurisdiction.[25] The court reaffirmed the inapplicability of the WCP in those forty North Carolina counties covered by the Voting Rights Act.[26] The VRA federally preempted the WCP in those jurisdictions and they could be—in fact under the standard announced by the United States Supreme Court in *Beer v. United States*,[27] they *had* to be—divided in order to provide protection from the retrogression of black voting rights.[28]

After conducting a severability analysis, the *Cavanagh* court concluded that "when one portion of a statute is declared unconstitutional or is otherwise stricken, the surviving portion will be given effect only if it is severable. . . . [W]hen a portion of a statute is stricken, the whole must fall absent a clear legislative intent to the contrary."[29] Only where it is clear the legislature "would have enacted the remainder alone" had it known of the invalidity of the stricken portion shall portions of an Act be considered severable and survivable.[30] The two-part test of severability in North Carolina applies to constitutional provisions, as well as to laws passed by the General Assembly.[31] As such, the WCP of the 1971 Constitution was declared preempted across the entire state of North Carolina.[32] The court concluded:

> the amendments' effect thus territorially circumscribed by federal authority, under North Carolina law they would be effective in the sixty non-covered counties only if there were manifest a legislative, and popular, intent that the amendments should be applied differentially across the state if for any reason—including a failure of section 5 preclearance—they should be held of no effect in respect of some portions of the state. We find no evidence of such an intent in any legislative source. The illogic, indeed the questionable legality, of such a consequence is manifest. [33]

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24. Cavanagh v. Brock, 577 F. Supp. 176, 178 (E.D.N.C. 1983).

25. The court did this on "refusal clause" grounds*, to wit* pursuant to 28 U.S.C. §1443 (2), "state officers can remove [a case] to federal court if sued or prosecuted 'for refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]." *Id.* at 180 (internal citation omitted).

26. *Cavanaugh*, 577 F. Supp. at 178.

27. Beer v. U.S., 425 U.S. 130 (1976).

28. *Id.* at 141.

29. *Cavanagh*, 577 F. Supp. at 181.

30. *Id.* (quoting Jackson v. Guilford County Bd. of Adjustment, 166 S.E.2d 78, 87 (N.C. 1969).

31. *Id.*

32. *Id.* at 181-82.

33. *Id.* Plaintiff-Appellees' brief in *Stephenson* makes a great deal out of one other successive case dealing with whole counties, State *ex rel.* Martin v. Preston, 385 S.E.2d 473 (N.C.

In 1992, the General Assembly once again redistricted the state abiding by the provisions of *Cavanagh*, and seeking both to equalize district populations to the extent possible and to maximize black populations by district in the more heavily populated black areas of the state.[34] A serious challenge did not emerge until November 2001 when plaintiffs, including Ashley Stephenson,[35] filed suit in state Superior Court against, among others, Gary Bartlett,[36] claiming that the WCP had been violated by the NCGA's redistricting plan.[37] Later that same month, the defendants successfully removed the case to federal court, but in December of 2001, the court adjudged the removal improper due to a lack of a "substantial" federal question, and ruled that there was no ground under the Refusal Clause on which to base hearing the case.[38] The federal court subsequently remanded the matter to state court.[39]

In April 2002, the NCSC rendered its decision on state constitutional grounds in *Stephenson I*, finding that the WCP was in fact severable where it involved those sixty North Carolina counties not covered under the VRA.[40] Section 2 of the Act, which prohibits denial or abridgement of voting rights by *any* jurisdiction—including those not covered by the preclearance provision of VRA section 5—was the only limiting federal principle and it was not applicable to non-VRA covered counties.[41] As such, the WCP was to be

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1989). The brief claims that *Martin* reaffirms the point that the state "requires that county boundaries be followed in creating legislative districts," and that it is a decision by the North Carolina Supreme Court interpreting the relevant provisions of Article II, Sections 3 and 5. Plaintiff-Appellees' Brief, *supra* note 22, at 49, n.25. In fact, *Martin* did not address the Article II question—it dealt specifically and limitedly with the issue of judicial elections under the state constitution, and the *Martin* court concluded by noting that the decision resolved *solely* an issue of election of judges under Art. IV of the state constitution— "we do not reach, consider or decide any federal question whatsoever." *Martin*, 385 S.E.2d at 487.

34. *See* DEWEY M. CLAYTON, AFRICAN AMERICANS AND THE POLITICS OF CONGRESSIONAL REDISTRICTING 144-45 (2000) (discussing the 1991 North Carolina redistricting plan and the General Assembly's attempt to create strong black-majority districts despite creating some of the most unusually-shaped geographical regions in the history of modern redistricting). *See generally* TINSLEY E. YARBROUGH, RACE AND REDISTRICTING: THE SHAW-CROMARTIE CASES (Peter Charles Hoffer & N. E. H. Hull eds., 2002) (discussing the political background of the 1991 redistricting plan).

35. Stephenson was a registered Republican voter in Beaufort County; the other plaintiffs were Leo Daughtry, Patrick Ballantine and Art Pope (Republican members of the North Carolina General Assembly) and Bill Cobey (Chairman, North Carolina Republican Party).

36. Bartlett was the Executive Director of the North Carolina Board of Elections; other members of the Board were also named in the suit, as were NCGA House Speaker James B. Black, NCGA Senate President *Pro Tempore* Mark Basnight, Governor Michael Easley and Attorney General Roy Cooper.

37. Stephenson v. Bartlett, 562 S.E.2d 377, 383-84 (N.C. 2002).

38. Stephenson v. Bartlett, 180 F. Supp. 2d 779 (E.D.N.C. 2001).

39. *Id.*

40. *Stephenson I*, 562 S.E.2d at 389-90.

41. This was largely the extent of the court's VRA section 2 analysis which, I will demonstrate *infra*, was an unacceptably dismissive analytical approach to the issues raised by Defendant's counsel.

construed as an enforceable provision of the state's constitutional compacts on redistricting.[42] A subsequent appeal to the United States Supreme Court for a stay of the court's ruling in *Stephenson I* was denied by Chief Justice Rehnquist.[43]

THE *STEPHENSON* RATIO AND THE IMPACT OF THE WCP

The primary question in *Stephenson I*, according to the opinion ultimately issued by the NCSC, was "whether the General Assembly, in enacting the 2001 legislative redistricting plans, violated the WCP of the State Constitution."[44] The defendants contended "that the constitutional provisions [of the WCP] . . . are wholly unenforceable because of the requirements of the Voting Rights Act," while "Plaintiffs, on the other hand, assert[ed] that the State Constitution requires that counties not be divided when creating state legislative apportionment plans except to the extent required by federal law."[45]

The court's decided discomfort with the specter of federal preemption is noticeably present in the early part of the decision, as if Chief Justice I. Beverly Lake is warming up to tackle *Cavanagh*—which he in fact is forced to do at a later point in the decision.[46] Beginning the legal analysis by noting that legislative apportionment is reserved primarily to the states,[47] however, the decision then quickly plays a "state preeminence" card to neutralize the lingering federalism and preemption issues by citing the fact that "issues concerning the proper construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court."[48]

According to *Stephenson I*, what were the federal *bona fides* in the state legislative redistricting process? They apparently did not matter because it had been determined that the question was primarily one of state constitutional law. Therefore, "[i]nterpretation of the federal limitations upon the redistricting process [was] unnecessary to the resolution of the instant case."[49] A brief discussion of the "one-person, one-vote" principle from *Baker v. Carr*[50]

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42. *Stephenson I*, 562 S.E.2d at 390.

43. Bartlett v. Stephenson, 535 U.S. 1301 (2002).

44. *Stephenson I*, 562 S.E.2d at 383.

45. *Id.* at 383-84.

46. *Id.* at 390-92.

47. *Id.* at 384 (citing Growe v. Emison, 507 U.S. 25, 34 (1993)).

48. *Id.* (citing State *ex rel.* Martin v. Preston, 385 S.E.2d 473, 479 (1989)). It is worth noting that in *Stephenson I*, the Court cited—and misquoted—this provision from *Martin*, which is actually a quote from *State v. Arrington*, 319 S.E.2d 254, 260 (N.C. 1984). *Arrington* in turn dealt with a criminal defendant who claimed that federal *stare decisis* was binding upon the state court's interpretation of his rights under the North Carolina Constitution; it did not directly address any issues of federal preemption, nor of federal rights under the United States Constitution which rendered provisions of the state constitution null or void. *Martin* itself did not, in turn, deal with the *Stephenson* I issue either, but rather with a completely different part of the North Carolina General Statutes which addressed judicial election procedures exclusively.

49. *Stephenson I*, 562 S.E.2d at 384.

50. Baker v. Carr, 369 U.S. 186 (1962).

and *Reynolds v. Sims*[51] ensues this passage, followed by a slightly lengthier discussion of the provisions of section 2 and section 5 of the VRA.[52] What is strikingly curious about this part of the opinion, however, is that, for as important as section 2 clearly is to the degree of deference the state court must afford to federal law, the *Stephenson I* opinion mentions it but then swiftly and awkwardly shifts gears to the substantially more elementary point that counties not covered by VRA are not subject to section 5 preclearance. The court never again addresses the former issue as if it were a pariah, merely stating:

> Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice. The primary purpose underlying section 5 of the VRA is to avoid retrogression, i.e., 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. . . . The State of North Carolina is not a covered jurisdiction for section 5 purposes. . . . [but the forty VRA-covered counties] are subject to section 5 requirements.[53]

What the *Stephenson I* court is willing to emphasize, in lieu of a more compelling discussion of the intricacies of state compliance with section 2 of VRA, however, is the point that all of the state's counties play a vital role in many areas touching the everyday lives of North Carolinians. "There is a long-standing tradition of respecting county lines during the redistricting process in this State. Indeed, this custom and practice arose hundreds of years before federal limitations were placed upon state redistricting and reapportionment procedures during the 1960s."[54]

Because the court took this particular route in addressing the constitutionality of the WCP, the "expanded question . . . in light of the VRA, [was] whether the WCP [was] now entirely unenforceable, as defendants contend[ed], or, alternatively, whether the WCP remain[ed] enforceable throughout the State to the extent not preempted or otherwise superseded by federal law."[55] Recognizing the validity of the general principle of federal preemption of state law under the Supremacy Clause,[56] the court framed the primary inquiry within the preemption analysis as being "to ascertain the intent of Congress," noting that this intent may be express or implied.[57] Implied preemption exists where the "federal scheme is imposed on an area

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51. Reynolds v. Sims, 377 U.S. 533 (1964).
52. *Stephenson I*, 562 S.E.2d at 385.
53. *Id.* at 385 (internal citations omitted).
54. *Id.* at 386.
55. *Id.* at 388.
56. U.S. CONST. art. VI, cl. 2.
57. *Stephenson I*, 562 S.E.2d at 388.

occupied by state law, leaving state law 'no room' in which to continue operating. . . . [Alternatively,] 'where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law *to the extent* it actually conflicts with federal law.'"[58] Borrowing an important passage from the United States Supreme Court's 1963 *Florida Lime*[59] case, the court noted that "[t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field."[60] Because it was not Congress' intent to preempt the *entire* field of state legislative redistricting with the VRA, the court concluded that state redistricting provisions, including the WCP, "must be accorded full force and effect."[61]

This is a highly pragmatic argument for the purpose of getting around the danger of federal preemption of North Carolina's WCP, but it is of dubious analytical depth given the United States Supreme Court's decision in *Crosby v. National Foreign Trade Council*[62] which came only a year prior to *Stephenson I*. While the *Crosby* decision made ample use of basic preemption principles from *Florida Lime*, it provided at least some useful clarification of the principle of implied preemption by reiterating that state law is "naturally preempted to the extent of any conflict with a federal statute" and that the Court "will find preemption where it is impossible for a private party to comply with both state and federal law, . . . and where 'under [particular circumstances], the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[63] The Court's understanding of "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[64] As to the VRA and its preclearance procedures, the Court had long ago established that Congress reasonably determined that case-by-case litigation to fight discriminatory voting practices was "inadequate to . . . overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[65]

None of this was considered by the *Stephenson I* court in its brief section of the opinion dedicated to the federal role in legislative redistricting, which made it remarkably convenient in terms of preemption thicket-avoidance. The section did, however, admit that the VRA acts to "prevent[] the enforcement

58. *Id.* (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987).

59. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

60. *Stephenson I*, 562 S.E.2d at 388 (quoting *id.* at 142).

61. *Id.* at 388.

62. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

63. *Id.* at 372-73 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

64. *Id.* at 373.

65. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

of redistricting plans having the purpose or effect of diluting the voting strength of legally protected minority groups,"[66] which makes it all the more curious as to how the court justified its treatment of the anomaly of North Carolina's partial VRA coverage in *Stephenson I*.[67] With the opinion notably oblivious to critical issues of unitary statehood as it proceeds to spend additional space on a careful analysis of the status of the Tarheel State's one hundred counties, it is as if covered and non-covered counties exist in something of a dual-chamber vacuum apart from each other. The dual-redistricting-rule schema was apparently not considered by the court to be even so much as a *potential* threat with respect to diluting the strength of legally protected minority groups, and therefore, there was no need to explore its empirical impact upon the voters of the state whatsoever. This is to some degree the state application of United States Supreme Court Justice Robert Jackson's observation regarding the utility of being a court of last resort four decades ago: "We are not final because we are infallible, but we are infallible only because we are final."[68]

Having conveniently established this intellectual platform free of the obstacle of federal preemption, however, the *Stephenson I* opinion goes on to emphasize the importance of proper and conservative state constitutional analysis; reconciliation of seemingly conflicting statutes or constitutional provisions is a fundamental goal of such analysis and "[m]ore importance is to be placed upon the intent and purpose of a provision than upon the actual language used."[69] The court will consider history, the conditions which brought forth the challenged law, and the purposes for which it was promulgated "when interpreting the State Constitution in light of federal requirements."[70] Recognizing that a statewide "inflexible application of the WCP" is no longer possible because of the VRA and the one-person, one-vote standard, the court nevertheless concludes that the WCP is not "rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees."[71] As such, while the court gave Defendants some leeway by ruling that the use of multimember legislative districts in North Carolina violated at least the *state* Equal Protection

66. *Stephenson I*, 562 S.E.2d at 385.

67. Only six other states share this artifact with North Carolina: California, Florida, Michigan, New Hampshire, New York and South Dakota. *See* Lopez v. Monterey County, 525 U.S. 266, 280 (1999).

68. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

69. *Stephenson I*, 562 S.E.2d at 389.

70. *Id.*

71. *Id.* It should be noted that, except for the largely aesthetic argument about the historical value of counties in North Carolina earlier in the decision, the court makes no effort to identify or describe the "beneficial purposes" of which they speak about WCP. The rule's value is treated as *res ipsa loquitur*, as is, and apparently, the sacrosanct nature of artificial boundaries called "counties," abolishable or alterable at the will of the legislature over which no further artificial boundaries called "district lines" may now be drawn.

Clause,[72] if not the federal one, it nevertheless established a series of important guidelines for Tarheel State redistricting that comported with the requirements of both the VRA *and* the state constitution's WCP:

> (1) [L]egislative districts required by the VRA shall be formed prior to the creation of non-VRA districts;
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> (2) To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP;
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> (3) In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one person, one-vote" requirements;
>
> (4) [In multi-district non-VRA counties, the districts created] shall be compact and shall not traverse the exterior geographic boundary of any such county;
>
> (5) In counties having a non-VRA population pool which cannot support at least one legislative district … the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary … whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping;[73]
>
> (6) [M]ulti-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest;
>
> (7) [A]ny new redistricting plans [created by the General Assembly,] including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.[74]

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72. *Id.* at 395. Plaintiffs, consisting primary of Republican legislators looking for a way to crack black Democratic voting strength, appeared to pin some of their litigation strategy on hopes (as the NAACP *amicus curiae* brief forcefully pointed out) that the voting strength of minority voters would be "diluted by application of the WCP in a manner which permits the creation of multi-member legislative districts containing predominantly non-minority voters adjacent to single-member VRA districts." *Id.* at 393.

73. There is a logical problem—probably unnoticed, but certainly unexplained by the court—with this part of the opinion, which I address *infra*.

74. *Stephenson I*, 562 S.E.2d at 396-97.

In *Stephenson II*, the NCSC once again entered the redistricting fracas after the General Assembly submitted revised redistricting plans to the supervisory trial court in Johnston County.[75] The court quickly rejected the revised plans for not abiding by the WCP.[76] The trial court had since substituted its own "interim" plan for use while the General Assembly worked as provided in *Stephenson I*, but in *Stephenson II*, the NCSC rejected the General Assembly's 2002 redistricting plan on grounds that it violated both the WCP and the contiguity requirements of the state constitution.[77] In so doing, the court used the *Stephenson II* opinion to attempt clarification of some of the most important or salient points from *Stephenson I*.

Taken together, *Stephenson I* and *II* probably raise more questions than they answer, which is a strong potential dilemma when an elective court seems to split so cleanly along partisan lines[78] in cases so loaded with divisive partisan potential (and so cleanly split between Democratic and Republican-loaded sides in controversy). While there may or may not have been a palpable partisan strain making its way through the isolated chambers of the NCSC, the political effects of the court's decision caused the NCGA to consider a number of pieces of retaliatory legislation that struck fear into the hearts of many a Justice, including a suggested halving of their clerkship resources[79] and legislative murmuring in select quarters—albeit quickly extinguished—about the possible impeachment of Chief Justice Lake.[80] Understanding those dilemmas becomes the next step in the analysis, prior to introducing an empirical analysis of relevant data that might otherwise have saved the NCSC—and the state—this degree of public policy grief.

DILEMMAS OF THE *STEPHENSON* OPINIONS

In *Stephenson I*, there is a curious passage in which the court attempts both to promulgate a rule about sparsely populated non-VRA counties in North

75. Stephenson v. Bartlett, 582 S.E.2d 247, 248-49 (N.C. 2003).

76. *Id.* at 251.

77. *Id.* The General Assembly's 2002 plan included a district boundary concept labeled by the court as "point contiguity," which meant that some districts were contiguous and/or met other districts only by very small geographic points. *Id.* at 254.

78. As the North Carolina Supreme Court did in both *Stephenson* cases, with the Republican majority siding forcefully with the Republican plaintiffs and the court's senior Democrat, Justice Parker, writing in dissent (with two Justices, Orr and Martin, not participating in either case). North Carolina elects Justices of the Supreme Court in nonpartisan statewide elections, but political scientists in particular have been instrumental in deflating the myth that such elections do anything for public policy besides confuse voters at the polls; they certainly do not reduce partisan pressures or actions within the membership of a sitting court. *See generally* Philip L. Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 LAW & SOC. REV. 757 (1979); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001).

79. Interview with anonymous North Carolina Supreme Court Justice, in Raleigh, N.C. (Feb. 10, 2005).

80. Jack Betts, *Lake in '08?*, THIS OLD STATE, July 11, 2006, http://jackbetts.blogspot.com/2006_07_01_archive.html.

Carolina and to explain the procedure by which such counties may find compliance with the WCP:

> In counties having a non-VRA population pool which cannot support at least one legislative district at or within [the five percent population tolerance], the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the [tolerance]. Within any such contiguous multi-county grouping, compact districts shall be formed . . . whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the [tolerance]. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the [tolerance] shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.[81]

Presumably, by phrasing the rule in this manner, the court is protecting its ruling from legislative cabal; without the "smallest number of counties" edict there is nothing to keep the General Assembly from declaring all sixty of the state's non-VRA counties a large "county grouping" and creating multiple multi-county districts within the exterior line of that group. So too, the passage invoking the protection of "communities of interest" appears intended to provide some additional protections in this regard, as it provides a judicially manageable standard by which to reject any redistricting plan which carves up non-VRA counties in violation of the WCP.

This is one of the places, however, where the court immerses itself in something of a logical quagmire involving population remainders in the redistricting process and the ebb and flow of suburbanization patterns—pushed predominantly by "white flight" from the cities—that urban politics and demography scholars within the social sciences have long recognized.[82] If the necessity for grouping counties in the *first* place was facilitated by the fact that one or two counties by themselves did not have the population to sustain a separate district, one relies on the expectation that an appropriate number of *contiguous non-VRA counties* can be found within the state which can be grouped and then divided into two or more separate districts.[83] This is but one of the dangers of bifurcating the redistricting process with "VRA" and "non-VRA" labels in the unique North Carolina partial-coverage experience. Otherwise,

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81. Stephenson v. Bartlett, 562 S.E.2d 377, 397 (N.C. 2002).

82. *See generally* JOHN J. MACIONIS & VINCENT N. PARRILLO, CITIES AND URBAN LIFE (1998); G. Tomas Murauskas, J. Clark Archer & Fred Shelley, *Metropolitan, Nonmetropolitan, and Sectional Variations in Voting Behavior in Recent Presidential Elections*, 41 W. POL. Q. 63 (1988).

83. Under some circumstances, the ability to find sparsely-populated, contiguous, non-VRA counties, which taken together as a group can comprise *one* district within the acceptable population tolerance, is a slightly more palatable proposition.

under the court's ruling, these counties are grouped in as small a number as possible and the maximum number of "population-tolerance-approved" districts is extracted from them *even if* actual county lines must be transgressed in a seeming violation of the WCP. It is *not* a (legal) violation of the WCP, however, because the court ruled in *Stephenson I* that what was important in *that* case was not the county line itself, but rather the outer county boundaries of the "group" within which the divided county fell.[84] "Whole county" too easily dissolves into "whole county group" under the dictates of this ruling. The terse logic of this edict is that under the WCP county lines are critically important in fulfilling the contiguousness requirement—but some lines may simply have to be eviscerated in order to give credence to how important they actually are.

Of more significance is the curious fate which awaits any collection of individuals within the county group who represent a surplus of the population, which would bring the "county group" district's population outside of the maximum tolerance parameter. These individuals cannot be put in any of the districts within their group because that would violate the one-person, one-vote standard of the federal (and, one would also assume, the state) Equal Protection Clause. Alternatively, they cannot be taken out of the group and put into *another* county group because they represent only a portion of a county's population. Under the *Stephenson I* interpretation of the WCP, counties cannot be divided to form districts except within their own county group.[85] A part of the population of such a geographical county is thus left hanging— until another county is added to the "county group" and a second viable district is formed. If there is a remainder from *this* grouping, presumably the only course of action would be to add another county to the group, *ad nauseam*, until the population of the grouped counties was an even dividend of the number-of-districts divisor to produce an acceptable population tolerance in each district.

In the worst-case scenario, the likelihood of having mega-multi-county groups with repeated fragmentation of county lines within each group is potentially quite high. Because VRA-covered counties cannot be divided or grouped by the same order of preference of laws, boundaries become considerably more difficult to draw, particularly in and around the "border areas" between VRA-covered and non-VRA-covered counties. This leads to a greater likelihood of the paradox that, in applying the *Stephenson* rules as NCSC promulgated them, North Carolina may be put into the position of having to ignore the "constitutional mandate" of the WCP to varying degrees across its sixty non-VRA covered counties in order to give meaningful life to it. Admittedly, such as disaster scenario has not yet occurred and this is doubtless, in no small part, due as much to the acumen of the General Assembly's redistricting officers and high-tech data and computing resources

84. *Stephenson I*, 562 S.E.2d at 397.
85. *Id.* at 396.

as it is to the fact that the next major redistricting of the state will take place after the 2010 United States Census. Murphy's Law as it applies to North Carolina redistricting, however, may simply be in a state of hibernation—awaiting that precipitous change in the state's rapidly-moving-and-growing population that makes the heartiest of computers smoke and explode when fed the modeling data for 2010 or beyond.

In *Stephenson II*, the court reiterated the "smallest number of counties" rule, following it up immediately with a reiteration of the "communities of interest" rule also promulgated in *Stephenson I*.[86] By emphasizing the text in the former, the court appeared to want to make this rule more clear, yet it provided no additional examples, details or praxis for effecting it other than to warn the General Assembly that "smallness counts." By emphasizing the "communities of interest" rule, on the other hand, the court displayed a certain naiveté about the nature of suburbanization in North Carolina (and indeed, across the entire United States),[87] or at the very least a lack of concern for how many non-VRA counties would remain for "grouping" once these communities of interest[88] were protected through the most deliberate and cautious consideration possible.

Figure 1. North Carolina Multi-County "Communities of Interest"

City	***NC Counties With Related Communities of Interest Drawing From the City***
Asheville	Buncombe, Henderson, Haywood, Madison
Charlotte (and Gastonia/Rock Hill)	Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, Union
Greensboro (and Winston-Salem/High Point)	Alamance, Davidson, Davie, Forsyth, Guilford, Randolph, Stokes, Yadkin
Hickory (and Morganton/Lenoir)	Alexander, Burke, Caldwell, Catawba
Raleigh/Durham/Chapel Hill	Alamance, Chatham, Durham, Harnett, Johnston, Nash, Orange, Wake
Wilmington	Brunswick, New Hanover, Pender

Source: created by the author, using metropolitan area data from the Open Directory Resource Project at www.dmoz.org.

A simple and by no means exhaustive consideration of all of the multi-county "communities of interest" in North Carolina underscores this point. (*See* Figure 1). In addition to considering the potentially adversarial goals of whole-county and partial-county districting within county groups, the court added to the General Assembly's burden by ordering that "communities of interest" be considered and their legislative district fractioning minimized; the burden indeed becomes a weightier one. The call to consider "communities

86. Stephenson v. Bartlett, 582 S.E.2d 247, 250 (N.C. 2003).

87. *See* Bartlett v. Stephenson, 535 U.S. 1301, 1302-04 (U.S. 2002).

88. This often represents the vast multi-county areas because of "white flight" from the inner suburban rings of most cities.

of interest . . . in the formation of compact and contiguous electoral districts"[89] adds a new geographic variable to the mix which, far from re-enforcing the "down home" nature of the WCP or its emphasis on the sanctity of county borders, simply calls to mind the fact that in modern North Carolina many urban counties have multiple suburban fringes. These counties find much more of a "community of interest" with other small fringes in an adjoining county or counties than they do with other parts of the county in which they technically reside.[90]

Particularly in the eastern and south central areas of the state where VRA-covered and non-VRA covered counties meet with great frequency, the potential for conflict created by *Stephenson I* is the highest. A predominantly minority, suburban enclave around a major, multi-county metropolitan area may be partially within a VRA-covered county and subject to one redistricting standard that protects against vote dilution, while just across the county line, despite sharing neighbors with the same grocery stores, retail locations, workplaces and churches, minority residents of the non-VRA covered county are unable to join their primary community of interest in a local electoral district. They are instead lumped into one with predominantly white suburbanites twenty to forty miles away in a remote part of the same county—compliments of *Stephenson I*'s interpretation of the WCP.

LIONS AND TIGERS AND RETROGRESSION, OH MY!: THE LAW OF VOTE DILUTION UNDER VRA

The primary question behind *Stephenson I* for minority voting rights-oriented groups[91] after NCSC's opinion is whether there is any more room for federal judicial review and intervention. My point in this essay is that there *is* and the claims a voter may bring under the Voting Rights Act have in fact more clearly crystallized as a result of the case. Of particular note is the unusual dismissal of the VRA section 2 claim and the rapid subject changes halfway through *Stephenson I*'s analysis regarding why the federal government should stay out of what a majority of the NCSC clearly thought was purely North Carolina's business.

What must be demonstrated to a federal court's satisfaction in order to sustain a claim of action against a particular election is that "(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be politically

89. *Stephenson II*, 582 S.E.2d at 250; *See also Stephenson I*, 562 S.E.2d at 397.

90. This belies the point that counties in North Carolina, as in most states, have never been given any substantive protections from the state, and continue to serve as mere functionaries of the General Assembly, alterable or abolishable at will. *See generally* Smith v. Mecklenburg County, 187 S.E.2d 67 (N.C. 1972); High Point Surplus Co. v. Pleasants, 142 S.E.2d 697 (N.C. 1965).

91. This is to say nothing of the state Democratic Party, which is heavily dependent on black bloc voting for the success of its candidates in most elections.

cohesive; and (3) the majority must usually vote sufficiently as a bloc to enable it to defeat the minority's preferred candidate."[92] These elements are known as "*Gingles* factors" or collectively as the "*Gingles* test," having been promulgated in the United States Supreme Court's landmark decision of *Thornburg v. Gingles*.[93] The factors are also generally used against state electoral devices and redistricting plans too, however, with the additional point that, presented as a VRA section 2 claim, there is no longer a need to prove discriminatory *intent* by a government body; discriminatory *effect* will suffice:

> The feature of the [1982 VRA Amendments] which evoked the most debate in Congress is the section 2 amendment which eliminates the requirement of proving a discriminatory purpose for a section 2 violation. The . . . amendment was Congress' response to the United States Supreme Court's 1980 decision in *City of Mobile v. Bolden*. . . . Accordingly, a section 2 violation may now be shown *inter alia* by proof of factors such as: a past history of official racial discrimination affecting the right to vote, racially polarized voting, the use of a majority vote requirement, [etcetera]. . . . Congress has provided that equal access to the political process for minority citizens should not depend upon their ability to prove a discriminatory intent underlying questionable election schemes.[94]

Indeed, "[a]n invidious discriminatory racial purpose need not be express, and 'may often be inferred from the totality of the relevant facts including the fact, if it is true, that the law bears more heavily on one race or another.'"[95] A voting practice is "impermissibly dilutive" within the meaning of section 2 of VRA if,

> based on the totality of the 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 [defined by race or color] 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.[96]

The evidentiary issue in such cases revolves around Federal Rule of Evidence 401 under which the court determines if information or data are relevant if they make "the existence of any fact that is of consequence to the [case] more []or less probable."[97]

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92. 25 AM. JUR. 2D *Elections* § 44 (2004).

93. *See* Thornburg v. Gingles, 478 U.S. 30, 89-90 (1986).

94. Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716-18 (1983) (internal footnotes omitted).

95. Martinez v. Bush, 234 F. Supp. 2d 1275, 1281-82 (S.D. Fla. 2002) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

96. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2000).

97. FED. R. EVID. 401; *See also Thornburg*, 478 U.S. at 52-54.

While not necessarily exclusive of other demonstrations of proof, one standard method "by which members of a disadvantaged political group may establish a dilution of their voting rights is by reliance on . . . statewide statistical analysis."[98] States are not required to prove empirically objective effects of vote dilution under the VRA in order to impose a logically consistent, uniform and statewide redistricting scheme, such as the one struck down in *Stephenson,* because this would impose an unreasonably high burden of proof to uphold the fundamental right to one-person, one-vote representation.[99] Therefore, if the empirically objective effects of vote dilution *were* demonstrable to a federal court through standard statistical testing, the case for overturning *Stephenson I* on section 2 grounds—or at least reviewing the decision with a more careful preemptive federal eye—would be greatly strengthened.

The key grouping variable for such an analysis, because it played a critical part in the *Stephenson* ratio as to the effective coverage of the WCP, would be the VRA coverage status of the state's counties. Discernable differences between black and white voting or registration power in the forty VRA-covered counties vis-à-vis the sixty non-VRA-covered counties would raise a distinctive red flag regarding the discriminatory effect standard of the *Gingles* test if race is demonstrated as a predominant or substantive reason for a noted discrepancy. It is to that purpose that this essay now turns.

METHODOLOGY

For the empirical part of this survey, it was necessary to collect a dataset comprised of discrete voter registration, election, and demographic data operationalized at the ratio/interval level of measurement for all one hundred counties in the State of North Carolina. The survey was not intended to be a time-series design due to the state's lack of experience with post-*Stephenson I* cases (as of this writing), which would have facilitated a more robust observation of changes in voter registration and turnout patterns over time.[100] As such, while current voter registration data can generally be expected to reflect something of a constant, or at least slowly-changing, pattern and thus maintain a high degree of reliability, the decision as to which election(s) to use for specific-point turnout data was more of a subjective judgment call. For these data I used the 2004 General Election turnout statistics provided by the North Carolina State Board of Elections ("SBOE").[101]

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98. Karcher v. Daggett, 462 U.S. 725, 755 (1983).

99. Burson v. Freeman, 504 U.S. 191, 208 (1992).

100. This point does suggest that time-series analysis would be welcome in the future, however, to determine whether the results provided by a single-point analysis, such as the one in this essay, are validated.

101. North Carolina State Board of Elections, North Carolina Voter Turnout 2004 General Election 11/2/2004, ftp://www.app.sboe.state.nc.us/enrs/turnout11xx02xx2004.pdf (last visited Nov. 4, 2008).

These data have several inherent advantages over other turnout statistics. The 2004 election was the only post-*Stephenson I* set of statewide contests North Carolina had undergone at the time of the analysis, and the SBOE provided them in easily-retrievable machine-readable format broken down by county. Additionally, because 2004 was a presidential election year and this election is known to hold much more of a potential to maximize turnout by both party identification and race than simple state or local contests,[102] it was logical to assume that measurable voter mobilization would be at its most robust during such an election. Coded by county, therefore, the 2004 election data provided by SBOE produced two ratio-level variables, named BLTOUT04 and WHTOUT04, which respectively measured the percentage of registered black voters and white voters in a county who cast a vote in this contest.

Unlike the "turnout-by-race" statistics for the 2004 election, SBOE does not provide a count of registered voters by county as a percentage of all the persons of a specific race in that county. It instead only provides the raw number of total registered voters by race in each county. To derive the variables WREGPCT and BREGPCT, which respectively measure white voter registration as a percentage of all whites residing in a county and black voter registration as a percentage of all Blacks residing in a county, therefore, I retrieved aggregate population-by-race statistics for North Carolina counties from the United States Census Bureau. I then calculated these statistics by dividing the raw number of white and black registered voters by the raw number of white and black residents reported as residents by the Census Bureau in the 2004 census update.

Finally, of course, is the proverbial crux of the analysis. A simple dummy variable, VRACOV, was created for the purpose of determining whether a county was one of the forty VRA-covered cases or one of the sixty non-covered cases. Coding was performed so that non-VRA covered counties = 0 and VRA covered counties = 1. A host of other variables, mostly raw numbers of voters at the county level identified by race, gender, and party, were included in the dataset because of the format used by SBOE in its reporting mechanism; these data are not essential to the current analysis, however, and therefore will not be discussed in further detail.

HYPOTHESIS TESTING AND RESULTS

Before approaching the issue of what differences may exist between VRA and non-VRA North Carolina counties in actual voter turnout for the 2004 elections, a more fundamental question deserves attention. Is there any evidence that the VRA coverage status of a county may explain statistically

102. *See generally* Angus Campbell, *Surge and Decline: A Study of Electoral Change*, 24 PUB. OPINION Q. 397 (1960), *reprinted in* ELECTIONS AND THE POLITICAL ORDER 40 (Angus Campbell, Philip E. Converse, Warren E. Miller & Donald E. Stokes eds., 1966).

significant differences in voter registration by race? The formal hypothesis takes the following form:

> H_1: A county's VRA coverage status will affect voter registration by race in that county.

The variance between populations is not constant or specifically known, and the distribution of Blacks and Whites in North Carolina by county falls somewhat outside of the parameters of a normally-shaped distribution curve because of the "black belt" counties in the eastern part of the state. Still, an appropriate test for this hypothesis is the *t*-test, which compares the statistical significance of means between two independent groups and is reliable with even a comparatively small number of cases.[103] Table 1, below, reports the results of this test.

Table 1. White and Black Voter Registration Levels in North Carolina, VRA vs. Non-VRA Counties

Mean black registration, non-VRA-covered—*54.98%*
Mean black registration, VRA-covered—*55.71%*
t= -3.25 df=98 *p= .75 (not significant at .05 level of significance)*

Mean white registration, non-VRA-covered-- *66.42%*
Mean white registration, VRA-covered— *61.56%*
t= 2.086 df= 98 *p= .04 (significant at .05 level of significance)*

While there is no statistically significant difference between black voter registration levels among VRA-covered and non-VRA-covered counties, there is interestingly a difference between *white* voter registration levels in these two groups to at least a 99.5% degree of certainty. Whites living in non-VRA-covered counties are substantially more likely to register to vote in their home counties, and these counties have an almost five percent rise in white registration—and thus eligibility to vote—as a result. Does this necessarily mean that black registration in VRA-covered counties is causing depressed white registration, or is it more a matter of Whites and Blacks in these forty counties of North Carolina sharing a common non-racial predictor, such as poverty, which can be demonstrated to be the primary cause of the difference? Table 2 reports the results of two bivariate linear regression equations in which white registration serves as the dependent variable, black registration is the independent variable and case selection in the first of two models is

103. For WHITEPOP, mean=58046.56, median=32571, skewness=3.44, SE (skewness)=241, kurtosis=14.915 and SE (kurtosis)= .478. For BLACKPOP, mean=17375.45, median=10699, skewness=3.813, SE (skewness)=0.241, kurtosis=16.979 and SE (kurtosis)= .478. As to the acceptable veracity of the *t*-test under these conditions, however, *see generally* GOPAL K. KANJI, 100 STATISTICAL TESTS (2d ed. 1999).

limited only to those counties covered by the VRA. Cases for the second model are only those not covered by VRA.

Table 2. Regression Analyses, White Registration Percentage Dependent Upon Black Registration Percentage in North Carolina Counties

VRA-Covered:	R^2 (adj.) = .575	F= 52.381	p < .001
Non-VRA-Covered:	R^2 (adj.) = .052	F= 4.154	p < .05

While black registration in VRA-covered counties explains over half the variance in white registration within those counties, this result differs starkly from an explanation of variance in non-VRA-covered counties where black registration explains only about five percent of white registration levels.[104] Additionally, the strong *F* statistic for VRA-covered counties suggests that white registration in those counties is attributable to the treatment (independent) variable and not to chance.[105] Blacks in North Carolina, therefore, do not exhibit statistically significant differences in patterns of voter registration on the basis of whether their county of residence is covered by the Voting Rights Act. White Carolinians *do* exhibit differences, however, and it is demonstrable that the majority of variance in white voter registrations in VRA-covered counties is attributable to the level of black registration in those counties.

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104. Furthermore, in the model for VRA-covered counties, the correlation coefficient (slope) for black registration is positive, indicating that in these counties, a greater number of Blacks registered to vote actually *increases* white registration. This lends credence to the "black threat" hypothesis developed elsewhere in the political science literature, which suggests that whites countermobilize in electoral jurisdictions when a perceived threat from increasing black political power is noted. *See* DAVID DUKE AND THE POLITICS OF RACE IN THE SOUTH (John C. Kuzenski, Charles S. Bullock III & Ronald K. Gaddie eds.,1995); Michael W. Giles & Melanie A. Buckner, *David Duke and Black Threat: An Old Hypothesis Revisited*, 55 J. POL. 702 (1993); Micheal W. Giles & Kaenan Hertz, *Racial Threat and Partisan Identification*, 88 AM. POL. SCI. R. 317 (1994). For this particular study, however, the effects of black registration on white countermobilization are not as critical as the fact that a disparate pattern exists between VRA and non-VRA-covered counties, and it is based primarily on a racial criterion in voter registration. This finding is sufficient to sustain a federal claim under Section 2 of the VRA.

105. Levene's test for equality of variances, also known as the *F*-test, produces a statistic designed to allow the researcher to determine if comparison of the mean variance for each of multiple groups is different enough to preclude random chance as a determinant of these values. In other words, if the *F* variable is strong enough, one may safely reject the null hypothesis that the difference between groups is attributable merely to chance and/or measurement error, leaving the conclusion that the treatment variable is responsible for it.

There is therefore at least something of a racial onus[106] faced by whites in such counties that their counterparts in North Carolina's sixty non-VRA counties, where the WCP is applicable, do not face. As a mirrored proposition, white voters in VRA counties do not enjoy the same "impact of registration" that their white counterparts in non-VRA counties enjoy, and black voters in non-VRA counties do not enjoy the same "impact of registration" that their black counterparts in VRA counties possess. The bottom line of what might otherwise be seen from the judicial perspective of so much analytical nonsense is this—there is at least a considerable possibility that the mandates of the WCP and VRA imposed simultaneously upon the same state (or, to conceive of it in more helpful way perhaps, the same "single-locus-controlled redistricting unit") is something akin to the dreaded mixing of matter and anti-matter in one's preferred *Star Trek* episode. Their respective effects create within the voter registration data, at least, a clear ability of whites in non-VRA counties to engage in more efficacious racially polarized voting.

Since passage of the Act, Blacks in VRA counties, of course, have enjoyed a more efficacious racially polarized vote to promote the election of candidates of color in public elections—but because it was part of the federal legislative intent to remedy past voting discrimination, arguments that non-VRA county whites are simply getting their proverbial fair share of a slanted playing field are essentially political and beyond the purposes of this study. The *legal* significance of this finding, on the other hand, is that black voters in these same non-VRA counties are experiencing a vote dilution that their VRA-covered neighbors do not. Because both populations are participating in the same statewide elections, the judicial enforcement of the WCP in North Carolina establishes a double standard that is not protective of one-person, one-vote in at least those elections on voter registration grounds.

To put the registration issue aside for the moment, however, is there evidence that any type of vote dilution by race is actually *occurring* in state elections? This question leads to the next hypothesis:

> H_2: Voter turnout by race at the county level in a North Carolina election will be affected by the VRA coverage status of that county.

Table 3 displays the results of the testing for this hypothesis. In the 2004 General Election, there was a turnout rate of sixty-six percent for registered

106. This is not to say that there is necessarily a racial *animus*, however, even though the literature on "black threat" suggests that this is the case in these counties. Because discriminatory intent no longer needs to be demonstrated under the 1982 Amendments to the VRA following the objective factors announced by the United States Supreme Court in *White v. Regester*, 412 U.S. 755, 766 (1973), a showing of some dilution of the impact of one's voter registration on racial grounds should suffice to promote the standing of a white plaintiff in federal district court.

white voters compared to a turnout rate of fifty-nine percent for registered black voters.[107]

Table 3. Comparison of Means of White and Black Voter Turnout in the 2004 North Carolina General Election, Grouped by VRA Coverage of Home County

Mean black turnout, non-VRA-covered—*54.57%*
Mean black turnout, VRA-covered—*56.25%*
t= -.902 df= 89 *p= .369*

Mean white turnout, non-VRA-covered—*65.90%*
Mean white turnout, VRA-covered— *64.15%*
t= 1.518 df= 98 *p= .132*
Levene's *F*: Black turnout -6.323 (p= .014) White turnout -0.887 (p=0.348)

The suggestion made by analysis of these data, at an initial glimpse, is that black voters in VRA-covered counties turned out to vote more often than their counterparts in non-VRA-covered counties and that, conversely, whites in the latter jurisdictions turned out to vote more heavily than their counterparts in the VRA-covered counties in the 2004 North Carolina elections. The difference in means grouped by race, however, is not great; indeed, the levels of significance reported for both black and white voters indicate that VRA coverage status alone does not appear to be a statistically significant explanation for a county's turnout of voters by race. Interestingly, the *p* value for white turnout is considerably lower than for black turnout, suggesting that there is less possibility for error in rejecting the null hypothesis (H_0) if one were to propose that white turnout in a given county is, at least partially, a function of whether that county is covered by the VRA. Given, in effect, a thirteen percent chance of getting this call wrong, however, it is not a statistically compelling one to make.

This point, however, is one at which further sleuthing is required. Of particular note is the result of the *F*-test for equality of variances between groups, which suggests that for black voters there is a statistically significant difference in the variances of mean turnout between non-VRA counties (54.57%) and VRA counties (56.25%). Something appears to be causing the *rate or magnitude* of variance in turnout in one or both of these groups to change significantly, suggesting the need for a more powerful parametric test

107. These figures may be compared to a sixty-five percent turnout rate for Hispanic voters, seventy-four percent for Asian voters and forty-three percent for American Indian voters. North Carolina State Board of Elections, North Carolina Voter Turnout 2004 General Election 11/2/2004, at 3, 6, ftp://www.app.sboe.state.nc.us/enrs/turnout11xx02xx2004.pdf (last visited Nov. 4, 2008). A cursory glimpse at these statistics suggests other possibilities for exploring the race-and-voting connection in state elections, particularly the disparate turnout rate for American Indians; those questions, however, are outside the scope of this particular study.

which can account for observable effects in a multivariate equation. A linear (OLS) regression model is therefore indicated as the appropriate form of further analysis. Additionally, because there is at least a theoretical justification for including in the analysis a variable which measures the overall percent black of the total population of each county—which did not originally exist in the initial dataset—a new variable was created, named BLPOPPCT and labeled as "percent black population of county." The formula for calculating this variable was:

BLPOPPCT = BLACKPOP / (BLACKPOP + WHITEPOP)

"BLACKPOP" is the total black population of the county and "WHITEPOP" is the total white population of the county.

Admittedly, this method of calculation omits consideration of the population of Hispanic and other discernable ethnic groups in some North Carolina counties; Hispanics, however, comprise only 4.7% of the state's population (compared to a national average of 12.5%), and with the exception of three counties[108] do not have voter registration figures even in the thousands anywhere in the state. Furthermore, there is no known evidence from prior voter registration or election turnout studies to suggest that black registration or turnout is dependent upon other racial minority statuses present within the electoral milieu. "Black threat" and "white countermobilization," in other words, appear to be mutually exclusive of other racial stimuli and exist in something of a closed universe to each other. There is ample reason, therefore, to believe that the white-black connection is the primary racial phenomenon requiring analysis.

Table 4. Regression Results, Effects of Multiple Independent Variables on Black Voter Turnout by County in North Carolina 2004 General Elections

Dependent = black turnout, 2004 General Election

R^2 (adj.) = .658 F= 37.983 p < .001

Coefficients:

Variable	B	t	p
CONSTANT (unstandardized):	-1.802		
VRA Coverage	-.017	-.221	--
White turnout, 2004 General Election	.499	7.920	< .001
White voter registration percentage	-.378	-5.537	< .001
Black voter registration percentage	.646	9.714	< .001
Percent black population in county	.032	.404	--

-- = not significant at .05 level or more

108. Wake, Mecklenburg and Cumberland Counties.

This initial regression model suggests from the adjusted R-square statistic that approximately two-thirds of the variance in black voter turnout by county in North Carolina is attributable in particular to three specific independent variables: (1) white turnout, (2) white voter registration levels, and (3) black voter registration levels. Of these variables, the two measures of voter registration are the most interesting because elections are one-time events for which turnout and candidate selection decisions among potential voters are necessarily prospective. There is no way black voters can evaluate the actual level of white turnout on Election Day before they must decide for themselves whether to participate in the contest. This is not to say, however, that white turnout is a variable which cannot be predicted given the nature of the offices to be elected, the candidates offered for the positions, primary salient issues within the black community and the likelihood of encountering conservative white resistance to their positions on those issues. [109]

Numerous previous studies have confirmed that while black voters continue to turnout in lesser numbers than white voters for any given election on average, and while they are certainly susceptible to the same influences as whites which drive overall interest and participation in an election—socioeconomic status of the voter, state of the economy, candidate spending, the presence of appealing candidates and the like—there is nevertheless a separate calculation for black voters which is driven primarily by the individual's racial status. That calculation causes a black voter to some degree to decide more or less how significant his or her vote is likely to be on election day given, for want of a better way of putting it, the likelihood of "white interests" being advanced with a lack of black turnout in the electoral contest.[110]

Evidence to support this phenomenon in the 2004 North Carolina General Election, at least, is provided by the standardized coefficients for both the white turnout and white registration variables in the multivariate regression equation. For every one percent increase in white voter *turnout* at the county level in this election, black turnout increased .499 or roughly one-half of one percent. For every one percent increase in white voter *registration* in the county, however, black turnout in this election *decreased* .378 or just over one-third of one percent. This lies in stark comparison to the effects of *black voter registration* at the county level where a one percent increase caused a .646 (roughly two-thirds of one percent) *increase* in black turnout in this model.

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109. *See* KUZENSKI, *supra* note 104 (citing numerous examples of black voters using media reports as a cue, among others, that white pro-Duke turnout was likely to be high in the 1991 Louisiana governor's race).

110. *See* Paul R. Abramson & William Claggett, *Racial Differences in Self-Reported and Validated Turnout in the 1988 Presidential Election*, 53 J. POL. 186 (1991); Paul R. Abramson & William Claggett, *Race-Related Differences in Self-Reported and Validated Turnout in 1984*, 48 J. POL. 412 (1986); Franklin D. Gilliam, Jr., *Influences on Voter Turnout for U.S. House Elections in Non-Presidential Years*, 10 LEGIS. STUD. Q. 339 (1985).

DISCUSSION OF RESULTS

The purpose of the preceding analyses was to assess the ability of a plaintiff—either black or white—to regain standing in the *Stephenson I* matter before a federal court. The suggested manner of doing so was to employ current and reliable social science data to make the case that the NCSC's protection of the state constitution's WCP across only selected counties of the state was incompatible with the Fourteenth Amendment's guarantee of equal protection of the laws via section 2 of the VRA. By creating two "substates" for redistricting purposes within the State of North Carolina, one judicially required to abide by the redistricting rules of the VRA by the federal courts and another judicially required by the NCSC to abide by an archaic provision of state constitutional law that did not anticipate the rise of minority voting rights in the 1960s, voters participating in the same statewide contests for state office or the United States Senate do so essentially under one of two discrete sets of electoral rules depending on their county of residence. The disparities between those sets of rules insofar as redistricting is concerned have a considerable effect on the ability of minority-race candidates to win, affecting both white and minority voter registration and minority voter turnout at the polls.

The federal district court which last heard the case in *Cavanagh* based its decision—interestingly, *against* enforcement of the WCP—primarily on grounds of legislative intent, noting the "illogic" and "questionable legality" of raising a dual redistricting standard in North Carolina for VRA and non-VRA-covered counties, respectively.[111] It was not privy, however, to any known empirical findings addressing actual experience with voter registration or election turnout data by race, which would have greatly strengthened the plaintiff's case against the "illogic" that the court appeared to recognize almost *a priori*.

After the NCSC issued its ruling in *Stephenson I*, however, the United States Supreme Court again passed on the opportunity to review the matter any further for federal grounds on which to preempt the decision.[112] In Chief Justice William Rehnquist's order denying the application for stay of the ruling, he summarized the history of *Stephenson I* and noted that his denial of the application was based on the principle that there "is not a reasonable probability that four Members of this Court will vote to grant *certiorari* to resolve what is largely a dispute about the meaning of a single DOJ letter from 1981."[113] Petitioners sought stay of the new redistricting plan of the time on grounds that this letter—which objected to both the state's WCP-faithful redistricting plan and to the WCP itself—was evidence of the federal government's refusal to offer preclearance to anything tainted with the WCP

111. Cavanagh v. Brock, 577 F. Supp. 176, 181-82 (E.D.N.C. 1983).
112. Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002).
113. *Id.*

as a potential violation of section 5 of the Voting Rights Act.[114] In fact, the letter also remarked that:

> [the] determination with respect to jurisdictions covered by Section 5 . . . should in no way be regarded as precluding the State from following a policy of preserving county lines **whenever feasible** in formulating its new districts. Indeed, this is the policy in many states, subject only to the preclearance requirements of Section 5, where applicable.[115]

Even one on the opposite side of the case would find difficulty faulting Rehnquist for his decision that an advisory letter from the USDOJ—particularly one which seemed at least tacitly to Chief Justice William Rehnquist approve the use of the WCP in those counties where it could be used—should not trump the determination of a state court of last resort in an interpretation of the state's own constitution absent any more compelling evidence to raise a federal question under the VRA.

Neither the United States Supreme Court nor the NSCS, however, appears to have conducted or received evidence of empirical analysis of the effects of VRA coverage on registration and voting patterns by race across the state. This study has provided those data and analyses. So where are we left as a result? What conclusions could be drawn that would meet a plaintiff's burden to demonstrate such disparities, which would in turn call anew into question not only the wisdom, but the legality of such a dual standard for redistricting in the Tarheel State?

It has been demonstrated, from the comparison of means test in Table 1,[116] that while there is no significant difference in black registration levels between VRA and non-VRA counties, there is such a difference in white registration levels. Whites are significantly more likely to register to vote in non-VRA counties, and it has been further demonstrated both that (1) white voter turnout levels regularly surpass black voter turnout levels, and (2) this disparity can be attributed to a significant degree to race. Table 2,[117] furthermore, indicates the significance of black voter registration levels on white registration levels in VRA-covered counties, but not in non-VRA counties. A white resident of a VRA-covered county, therefore, is left in an interesting position. These data indicate, that by virtue of depressed white voter registration caused "under color of law" by the VRA, white registration in one of the state's forty counties so situated is diluted with respect to its "racial impact" on the outcome of a statewide election for federal or state office. Conversely, because the VRA is a federal Act which preempts state law *and* it is constitutional, the alternative form of this proposition is that in upholding the constitutionality of the WCP for only sixty of one hundred of its counties, the NCSC, under color

114. Plaintiff-Appellees Brief, *supra* note 22, at 21-23.
115. *Id.* at 21.
116. *See Table 1*, *supra*.
117. *See Table 2*, *supra*.

of law, has unduly *enhanced* a white registrant's racial impact on such elections based solely on the somewhat haphazard criterion of place-of-residence within the state. This begs the question: should white voter *W* enjoy less impact upon the political system with the issuance of his or her new voter registration card in Bladen County,[118] because it is covered by the VRA, than he or she enjoyed as a former resident of Wake County, which is not covered?

Even where one might object to using only registration data and not actual election data to make this argument before a court, there is ample opportunity to build a plaintiff's redoubt using the latter. The analysis in Table 3[119] indicated that there was no statistically significant difference in white turnout between VRA and non-VRA counties, but this belies the fact that in order to vote, one must register to do so. Therefore, because the state Board of Elections' turnout data are reported as a percentage of all eligible voters in the county by race, the Table 3 equation does not adequately account for factors which enhance white registration, primarily among them the absence of VRA-mandated redistricting preclearance and/or electoral dilution criteria. The results of the analysis in Table 3 also provided a justification to explore the variance in black voter turnout statewide, however, and subsequently a full multivariate analysis of black turnout was conducted and reported in Table 4.

What do the results of the equation reported in that table indicate, in turn? The model demonstrates that close to sixty-six percent of the variance in black voter turnout levels in the 2004 North Carolina General Election—variance that is known from the results of the *F* statistic calculated in Table 3 to be affected by the treatment variables is explained with powerful effect by three specific independent variables: white turnout, white registration and black registration. Of these variables, white turnout and black registration both produced positive standardized coefficients suggesting that they enhanced black turnout. White registration, however, produced a negative coefficient that is indicative of depressing black turnout; for every one percent increase in white voter registration in a county, black turnout in the general election decreased by over one-third of one percent.

Given that white registration is higher to a statistically significant degree in non-VRA counties, this leads to the conclusion that black voters in those counties experience a certain "dilution effect" of their actual decision making power at the ballot box vis-à-vis black counterparts in VRA counties where

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118. By "impact upon the political system," I admittedly refer specifically to *racial* impact, or the ability to select or prefer candidates of one race over another in a "mixed-race-candidate" primary or general election. While the concept of racially-conscious voting is fortunately anathema to many people these days, there is still substantial evidence that it exists, permeates both southern and non-southern electoral politics, and in fact continues to provide ample justification for subsequent congressional renewals and/or amendments of the VRA itself. *See generally* Charles S. Bullock III, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238 (1984); Jack Citrin, Donald Philip Green & David O. Sears, *White Reactions to Black Candidates: When Does Race Matter?*, 54 PUB. OPINION Q. 74 (1990); Daron R. Shaw, *Estimating Racially Polarized Voting: A View From the States*, 50 POL. RES. Q. 49 (1997).

119. *See Table 3*, *supra*.

white registration is depressed. At worst, under a single statewide redistricting standard, which would by necessity bring all 100 North Carolina counties under the Voting Rights Act, all of these analyses might be passed off as the discordant ramblings of social scientists who claim that a one-third of one percent dilution effect means something of considerable note when it is applied within the context of a host of unmeasured intervening variables. When all voters regardless of race or other suspect or semi-suspect criteria suffer equally under a law, the remedy to inequity is generally legislative and not judicial. When racial disparities do exist, however, the courts have ground to intervene. Where the decision of the state's highest court results in a cognizable claim under the United States Constitution, the federal courts may claim jurisdiction to resolve the federal question(s) involved in the state court's interpretation of state law.[120] The argument this paper has proposed takes the following quasi-syllogistic form:

1. White registration in VRA counties is significantly lower than white registration in non-VRA counties, and this difference is attributable mainly to black registration in those same counties;

2. White registration in non-VRA counties (where WCP is in effect) is therefore significantly higher than in VRA counties, and it has been demonstrated that higher levels of white voter registration at the county level results in significant depression of black voter turnout levels;

3. Black voters in non-VRA counties therefore suffer vote dilution vis-à-vis black voters otherwise similarly situated in VRA counties, and this double standard is applied to Blacks across the state (as well as to whites, who suffer a reverse effect) under color of state law as a result of the *Stephenson I* decision;

4. Section 2 of the VRA prohibits, *inter alia*, abridgement of the right to vote of any citizen of the United States on account of race or color by any state, and the 1982 Amendments to the same require only the showing of a discriminatory effect in order to nullify such state action;

5. Because the WCP is enforced under color of state law, it fails to provide a similar level of protection against retrogression of minority voting rights as the VRA does in North Carolina's VRA-covered counties, *and* it attempts to preempt the redistricting criteria required by a valid and binding federal law.

120. Martin v. Hunter's Lessee, 1 U.S. 304 (1816).

Conclusion: The use of a dual redistricting scheme required by *Stephenson I*, as a recognition of the alleged "harmony" of WCP with VRA, is in violation section 2 of the Voting Rights Act.

CONCLUSION: A RECONSIDERATION IN ORDER

The federal court in the Eastern District of North Carolina has demonstrated its prior approval of the justiciability of the issue by finding grounds on which to hear *Cavanaugh*,[121] and there is little reason to believe it would hesitate to revisit the redistricting question on the more substantive federal question grounds suggested in this essay. More importantly, however, this line of argumentation with the right plaintiff or group of plaintiffs provides more substance to the propriety of a *certiorari* petition before the United States Supreme Court as well.

There is a distinct difference between section 2 and section 5 of the VRA. The former specifically prohibits a "voting qualification or prerequisite to voting or standard, practice or procedure" designed to "den[y] or abridge[] . . . the right of any citizen of the United States to vote on account of race or color."[122] The latter provides for federal "preclearance" of changes in an electoral process or procedure, including redistricting, in covered jurisdictions by the United States District Court for the District of Columbia or the Attorney General, although contemporary practice has bureaucratized the process into being largely a function of the Civil Rights Division of the USDOJ. Furthmore, while an "intent" element may still form an important part of a general equal protection claim, it has specifically been *removed* from the plaintiff's burden under section 2 by Congress' 1982 amendments to the Act, leaving only the "effects" element for a plaintiff to demonstrate.[123] Section 5 and section 2 claims are not the same thing nor do they necessarily implicate the same set of rights under the VRA; even where a state has received section 5 preclearance, therefore, a plaintiff is not precluded from raising a section 2 claim for relief.[124] The *Stephenson I* court determined that the section 2 claim could be summarily dismissed, however, and given the results of even the simple analyses in this essay, a respectable case can be made that this decision amounted to prejudicial error with proper grounds for federal appellate jurisdiction.

For however compelling a federal appellate forum may ultimately find this new argument, it is clearly superior to using an equivocating memorandum from the USDOJ as the be-all and end-all of a decision to refuse *certiorari*. At the very least, should the case ever have life breathed back into it, it seems incumbent upon a plaintiff to hold the NCSC to account for its failure to treat the VRA section 2 issue with the judicial or intellectual attention it deserved.

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121. Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983).
122. Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2000).
123. Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (2000).
124. *See* Georgia v. Ashcroft, 539 U.S. 461, 463 (2003).

The appropriate forum for this accounting is purely and without exception in the United States District Court. Given North Carolina's recent rocky road with redistricting issues and the continuing "quiet tempest" that characterizes legislative-judicial relations in Raleigh, one might expect the breath of life to come again any day.

Author's Note: Being the Executive Director of the North Carolina State Board of Elections in the modern day is an outstanding way to ensure that one's name goes down in the annals of legal history. Gary Bartlett, from numerous previously-noted incarnations of the *Stephenson* controversy, is a prime example of this fact. In October of 2008, Bartlett's name became once again notorious for its attachment to *Bartlett v. Strickland*, No. 07-689 (March 9, 2009) (*Bartlett*), a case involving the NCGA's latest redistricting plan that reached the United States Supreme Court on cert from the NCSC. The slip opinion in the case was released in early March, 2009, as this article was being finalized for print. As such and because of a few particularly critical points various Justices made in the *Bartlett* opinion, I believed it was necessary to write a brief postscript to the subject matter addressed herein. While this postscript will undoubtedly make this particular article one of the first to appear in law journal literature that addresses the *Bartlett* decision, therefore, I should point out that this was merely a case of fortuitous timing, and both thematic and editorial limitations counsel against attempting to provide a complete and detailed analysis of the case.

On first glance, *Bartlett* is, however, another one of those benchmarks of confusion that is likely to result in, as Justice Ginsburg said in dissent, a plurality decision that "is difficult to fathom" and "returns the ball to Congress' court."[125] *Bartlett* featured a 5-4 vote in favor of appellee Strickland, representing Pender County, NC. Pender County had been divided in redistricting by the NCGA in a way it believed to be compliant with and necessitated by section 2 of the VRA, in apparent violation of the state constitution's WCP.[126] The Court's opinion, authored by Justice Kennedy, was joined only by Chief Justice Roberts and Justice Alito; Justices Thomas and Scalia joined in a separate concurring opinion, while Justices Stevens, Ginsburg and Breyer signed on to a scathing dissent authored by Justice Souter.[127]

The seminal legal question raised by the case, according to Justice Kennedy, was whether section 2 of the VRA "c[ould] be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial

125. Bartlett v. Strickland, No. 07-689, slip op. at 1 (Mar. 9, 2009). (Ginsburg, J., dissenting).

126. Bartlett v. Strickland, No. 07-689, slip op. at 2 (Mar. 9, 2009).

127. Breyer and Ginsburg also offered their own very brief dissents, reaffirming their belief in the ratio expressed by Souter in his primary dissent. *See id.* at 1 (Ginsburg, J., dissenting); *id.* at 1 (Breyer, J., dissenting).

minority is less than 50 percent of the voting-age population in the district to be drawn."[128] Ultimately expressing concern that without a rule attached to a hard-and-fast percentage such as fifty percent, the Court might devolve into some sort of social science research institute or divining body in future redistricting cases,[129] Kennedy writes that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[130] As such, section 2 of the VRA does not require states, as the NCGA had asserted with its most recent redistricting plan, to maximize majority-minority district percentages by the division of a county where the native black population was just over thirty five percent, and the legislative district drawn by the plan would have included only part of said county and resulted in a district that was just over thirty nine percent black.[131]

At this juncture, it is perhaps best to intervene in a discussion of the facts of the case and make the most critical points about it for the purposes of fitting my essay into a broader understanding of the ongoing drama. First, the mere fact that the United States Supreme Court determined this section 2 VRA claim to be a justiciable federal question belies the NCSC's earlier decision, in *Stephenson I*, that section 2 was something of an appendage to the "real" section 5 claim that needed to be decided by the court.[132] Appellant Bartlett sustained a section 2 claim at both the state and federal levels; although strangely, he started off as the winning defendant in the trial court invoking an affirmative defense that is usually a favorite of plaintiffs who are attacking a redistricting plan. He was ultimately the losing appellee in the state supreme court and the losing appellant in the United States Supreme Court by the same reasoning.

Bartlett is also curiously devoid of references to *Cavanagh* and its "dual standard" redistricting concerns, which came of course from the federal district court in the Eastern District of North Carolina, from a judge in the heart of the ongoing redistricting fracas. Earlier in this essay, I noted the geographic dangers of leaving these VRA-versus-WCP dual standards in place in North Carolina. At the heart of *Bartlett* lies the undeveloped story that Pender County is an Atlantic coastal county just to the north of the City of Wilmington and New Hanover County in North Carolina. It is not covered by the VRA, and therefore is subject to the state constitution's WCP rule for redistricting. Two of the seven counties that border Pender—Bladen and Onslow Counties—however, are covered and are exempt from the WCP as a result. Pender County itself sits between North Carolina's two major VRA coverage belts—the largest one just to the north, running up through the east central part of the state to the Virginia state line. The smaller, but still considerably sized, belt in the south central part of the state is to Pender's

128. Bartlett v. Strickland, No. 07-689, slip op. at 1 (Mar. 9, 2009).
129. *Id.* at 12-13.
130. *Id.* at 17.
131. *See* Bartlett v. Strickland, No. 07-689 (Mar. 9, 2009).
132. *See* Stephenson v. Bartlett, 562 S.E.2d 377, 385 (N.C. 2002).

immediate west. While the United States Supreme Court's apparent attempt to remain focused solely on the "central question of law" in *Bartlett*—the question of a percentage threshold in a district that requires VRA section 2 guidance—is procedurally ordinary and expected, therefore, it is practically laced with some degree of willful blindness to the bizarre realities of the task faced by the North Carolina General Assembly in redistricting the state. Justice Ginsburg is perhaps the most practically succinct when she says, noted supra, that this is clearly now a matter which screams for congressional clarification as to the purposes of section 2.[133] Justice Souter in dissent is similarly succinct by noting that if

> districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under §2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation.[134]

In conclusion, *Bartlett* adds one critically important point to contemporary North Carolina redistricting law, and on which the North Carolina Supreme Court unfortunately defaulted in *Stephenson I and II*: section 2 of the Voting Rights Act is indeed still alive, well and justiciable. Albeit in the form in which the United States Supreme Court has now left *Stephenson*, one might be excused for believing that the mechanism of case law that is designed to clarify the answer to weighty questions of modern federalism on which Congress has previously spoken has, in this situation, done something of the opposite. What it does not do, in turn, is to illuminate a constitutional ratio for the peaceful coexistence of North Carolina's dual standards for redistricting. These dual standards perhaps do far more to divide true communities of interest in the state than the artificial geographical boundaries that the state Supreme Court suddenly appeared to be desperate to consider sacrosanct by judicial fiat in *Stephenson I*. *Bartlett* also does not seek to establish a more reliable empirical base for any of the plurality's conclusions about what minority populations may or may not do, or opportunities they may or may not have to advance the cause of electing preferred representation.

Experience has taught us that full coverage of a state suits the VRA quite well, albeit perhaps uncomfortably in the early years of its existence. Its remedial powers have been considerable in that context. At the other extreme, in states where there has been nothing to remedy, the VRA has also posed no blazing contemporary controversy by mere omission. It is in VRA partial-coverage states that the most vexing modern dilemmas of voting rights seem prepared to continue to emerge. North Carolina will probably continue

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133. Bartlett v. Strickland, No. 07-689, slip op. at 1 (Mar. 9, 2009) (Ginsberg, J., dissenting)

134. *Id.*, slip op. at 2 (Mar. 9, 2009) (Souter, J., dissenting).

to serve as ground zero for that trend as the unique variables which gave us the *Stephenson* cases continue to play themselves out—for example, the conflict between the NCGA and NCSC in the state's politics—and as it remains the most covered partial-coverage state on the USDOJ's roll of VRA jurisdictions.

A more social science-sensitive jurisprudence might have obviated the need for Congress to revisit the VRA and engage in a substantial clarification of section 2 in particular; with issuance of the *Bartlett* decision, two different supreme courts have now passed on that opportunity. The ball does indeed appear, in Justice Ginsburg's apt characterization, to have been returned to Congress' court. It may be a serve that, in retrospect, is returned faster and with more power than original plaintiffs, like Stephenson, or Supreme Court appellees, like Strickland, ever contemplated receiving.