

**When African-Americans Were Republicans in North Carolina, The Target
of Suppressive Laws Was Black Republicans. Now That They Are
Democrats, The Target Is Black Democrats. The Constant Is Race.**

A Report for *League of Women Voters v. North Carolina*

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I. Aims and Materials

I was asked by the plaintiffs in this case to gather and analyze evidence to determine whether three provisions of the 2013 North Carolina election law, known as H.B. 589, were adopted with a discriminatory intent and whether those provisions would deny minority voters “an equal opportunity to participate in the political processes and to elect candidates of their choice,” in the phrase of the 1982 Senate Report on the Voting Rights Act.¹ The three provisions are those eliminating a week of early voting, ending same-day registration during the “early voting” period, and prohibiting “out-of-precinct” voting.

The following report is based on transcripts of the legislative hearings and floor debates, bill histories and other legislative documents available on the state legislature’s website and from printed sources, newspaper articles, reports from various public and private groups and agencies, public opinion polls, scholarly studies, and materials that I have used in previous published and unpublished work. These documents notably do not include depositions or internal records of the legislature, which have been of considerable use to me in analyzing similar events in other states. If any other documents become available subsequent to my completion of this report, I will examine them and either produce additional reports or supplement this one. I may also look at expert reports produced by witnesses from parties to the lawsuit. As is the scholarly custom, I have footnoted this document extensively so that the reader can assess the credibility of my arguments and evidence.

II. Abstract of Findings

After introducing my credentials, I begin with a short history of racial discrimination in North Carolina politics not merely to document the fact of that history, but also to point out parallels between earlier periods and today’s discrimination. Politicians who were elected overwhelmingly by white votes faced threats from black voters in the past, and their restructuring and manipulation of election laws to put down those threats throws an important light on the actions of the sponsors of H.B. 589. From 1867 through at least the 1930s, the Democrats were the “white party” in North Carolina, and their partisan and racial interests coincided: they successfully disfranchised the core constituency of the “black party,” then the Republicans. Although partisan and racial motives for the passage of election laws in North Carolina before 1965 were inextricably intertwined, historians have not hesitated to attribute racial motives to the framers of such laws. Disavowals of racial intent during the debates over H.B. 589 and the possible defense of the law as inspired by partisan, rather than racial, goals²

¹S. Rep. 97-417, 28-29 contains the language and sets out the seven “Senate Factors” that I will address.

²The state of Texas has made such an argument in its brief in the current redistricting

should be interpreted in the context of the state's specific history of framing election laws primarily to enforce racial discrimination.

“Free men of color,” like other freemen, could vote from the time when North Carolina entered the union until the state constitutional convention of 1835, when the word “white” was inserted into the suffrage article. After slavery ended, the period from the enfranchisement of southern blacks by the Reconstruction Act of 1867 through 1900 witnessed the highest participation by African-American voters in the state's history, and they were as central to the 19th century Republican coalition as they are to the 21st century Democratic coalition. In 1894, North Carolina Republicans swept the legislature, in coalition with Populists and the Populist-Republican “Fusionists” won the governorship in 1896. One of their first acts on taking power was to replace the Democrats' anti-democratic election laws with the most liberal election law in the South at the time. When Democrats violently wrested power from the Republicans in the “white supremacy campaign” of 1898, one of their first acts was to make drastic changes in the Fusion election law. These changes allowed Democratic election officials – not individual voters – to stuff enough ballot boxes to carry the 1900 disfranchisement amendment, instituting a poll tax and a literacy or property test that almost completely eliminated blacks from the state's politics for two generations. The greatest and most blatant electoral fraud in the state's history, facilitated by election laws that gave one party total control of the election machinery, was necessary to establish a new racially discriminatory political order.

I then bring the story up to 2011 in three steps. First, I show that North Carolina was tardy, compared to many other “Rim South” and even some Deep South states in beginning to emerge from the Jim Crow/Disfranchisement Era. After 1900, it was not usually necessary for the Democratic party or even individual Democratic politicians to profess their devotion to white supremacy and black suppression shrilly. Everyone understood that the political order in the state rested on keeping African-Americans largely powerless. A smaller percentage of African-Americans were registered to vote in North Carolina in 1948 than in Georgia. When a Democratic candidate for the U.S. Senate, Frank Graham, appeared to threaten that consensus in 1950, he was race-baited and soundly thrashed in the Democratic primary.

A second phase followed the passage of the Voting Rights Act in 1965. As more blacks registered to vote and as legislative districts were required to be equal in population, other electoral rules – racial gerrymandering and at-large elections – intentionally kept them from attaining power proportionate to their numbers in the electorate. By the mid-1980s and the 1990s, these rules began to be successfully attacked by Voting Rights Act lawsuits and, at the same time, the Republican party, a party now based almost entirely on white votes, became competitive in the state for the first time since 1900, reemerging on the strength, among other things, of Jesse Helms's strongly racist campaign appeals.

case. See <<http://txredistricting.org/post/58112466646/greg-abbotts-curious-brief>>. So did the state of North Carolina in its latest redistricting case. See Anne Blythe, “NAACP, others appeal GOP-created districts - Voter-rights groups take their fight to state Supreme Court,” *Charlotte Observer* (hereinafter *CO*), July 23, 2013.

As the Democratic base darkened and the Republican threat increased, Democrats reversed the state's historical stance of black voter suppression to pass a series of expansionary laws from 1999 through 2009 which dramatically expanded turnout, especially black turnout. Through a series of measures – pre-election day voting (hereinafter called “early voting”), same-day registration during the early voting period, counting votes that happened to be cast in the wrong precinct on election day, and encouraging the participation of young people in voting – the state managed to climb from 48th to 11th in the percentage of voting-age citizens who actually voted. The process of passing those measures, which became very popular with the state's newspapers and voters, was deliberate and allowed opponents plenty of time and space to object. There were no credible charges of more than minuscule fraud even levied against the expansive voting rules, and when in 2007 State Auditor Les Merritt found some anomalies in state registration rolls, he quickly retreated when State Elections Board Executive Director Gary Bartlett explained to him how to interpret state registration records correctly.

Nonetheless, when a Republican landslide swept them into control of the statehouse and both houses of the state legislature in 2010, for the first time since 1898, Republicans charged that either vote fraud was rife or that the electors were discomfited because they imagined that it might be rife, and that therefore a photo identification law was needed. Although some Republicans want to repeal all of the expansive laws that had been passed since 1999, one of which many Republicans had supported, a bill to accomplish this was shelved after passing the House. The prospects that such a law would survive the preclearance process of the Department of Justice, even if it avoided a veto by Democratic Governor Bev Perdue, and the fear that its obviously retrogressive effect on African-Americans would further taint a photo ID law apparently kept it bottled up in committee.

An even larger Republican majority in the legislature, greatly assisted by a redistricting that further packed blacks into districts that they had shown they were capable of carrying with white crossover votes, plus the election of the first Republican governor in 18 years emboldened Republicans, who pushed a photo ID bill through the 2013 House. They left in committee a more comprehensive bill that repealed the previous expansive measures, neither holding hearings on it nor bringing a bill to the floor and to public discussion. But on June 25, 2013, the U.S. Supreme Court struck down Section 4 of the Voting Rights Act in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), relieving North Carolina of the necessity of preclearing changes in election laws with the Department of Justice or the District Court of the District of Columbia. At that point, Republicans framed a new, much larger bill, containing all of their anti-participation wish list items, which they sprang on the public and the legislature in late July and passed in two days without hearings and with absolutely minimal Republican participation in debate.

Republicans passed the new, more comprehensive H.B. 589 with the full knowledge, in well-documented public sources, that: 1) there had been virtually no provable voter fraud in the recent history of the state; 2) each of the four major measures – photo ID, cutting down early voting, particularly Sunday voting, and ending same-day registration during the early voting period, and refusing to count votes cast outside of the voter's precinct – would disproportionately

burden African-American voters. Democrats, public policy groups, activists, and newspapers loudly repeated the same charges. Republicans made no compromises with their critics after June 25; indeed, they greatly strengthened the suppressive effect of the bill's provisions. There was no scandal or crisis – an incident of ballot box irregularity or a Bush-Gore controversy, for example – that provoked such a radical response as H.B. 589. The only validated reason for its passage was the threat to the Republican Party that too many minority and college student voters posed. It must be concluded that the majority of the legislature and the governor pushed the bill precipitately through the legislature because of, and not just in spite of – and certainly not unaware of – its racially discriminatory effects.

After presenting the pre-history and history of H.B. 589, I extract from that analytical narrative information relevant to the “Senate Factors” necessary for proof of a violation of Section 2 of the Voting Rights Act and to ten “intent factors” drawn largely from federal court opinions in voting rights cases. I conclude that there is strong evidence both for many of the “Senate Factors” of a Section 2 effect test and for a discriminatory intent under Section 2 or the Reconstruction amendments.

III. Credentials

I am the William R. Kenan, Jr. Professor of History and Social Science at the California Institute of Technology. I received my A.B. *summa cum laude* from Princeton University in 1965 and my Ph.D. from Yale University in 1971. Except for sabbatical years, I have taught at Caltech since 1969. I have also been a visiting professor at Michigan, Harvard, Oxford, and Claremont Graduate University.

I have published three books and edited another, in addition to 44 scholarly articles, 80 book reviews, and 24 entries in reference works. My work has focused on minority voting rights, educational discrimination, race relations, political history, and quantitative methods. I was executive editor of the journal *Historical Methods*, which specializes in interdisciplinary and quantitative history, from 2001 to 2013. One of my most recent articles, “The Strange, Ironic Career of Section Five of the Voting Rights Act, 1965-2007,” published in the *Texas Law Review*, was the first comprehensive history of the crucial provision's first 42 years.

My dissertation and first book, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (Yale University Press, 1974), which was termed “the definitive monograph on the establishment of the one-party system in the postwar South” by the late David Donald of Harvard, concerned the connection between party politics and the disfranchisement of African-Americans and poor whites in the late 19th and early 20th century South.³ A substantial part of one chapter of that book, a section titled “North Carolina:

³More recently, it has been referred to as “still magisterial.” Richard H. Pildes, “Foreword: The Constitutionalization of Democratic Politics - The Supreme Court 2003 Term,” 118 *Harvard*

Disfranchising ‘Low-Born Scum and Quondam Slaves,’” analyzed the threat that the 1890s Populist-Republican fusion movement in North Carolina posed to white supremacist Democrats and the crucial role of changes in election laws in putting down that threat. An article in *The Journal of Southern History* specified the racial and class consequences of disfranchisement for the state’s public policy by showing how educational expenditures were dramatically shifted away from black and poor white children after their fathers lost the right to vote.⁴

I returned to the topic of racial discrimination in North Carolina politics in a law review article⁵ that was the basis for a chapter titled “A Century of Electoral Discrimination in North Carolina” in my later book, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (University of North Carolina Press, 1999), which was the co-winner of the Lillian Smith Award of the Southern Regional Council and the Ralph J. Bunche Award of the American Political Science Association. That article and chapter derived from an expert witness report that I had written as part of the case for the NAACP Legal Defense Fund in *Shaw v. Hunt* 517 U.S. 899 (1996), the second round of the decade-long litigation about the 1991-92 congressional redistricting in North Carolina.

I have previously testified or consulted in 25 federal voting rights or redistricting cases and seven state cases (in Alaska and California), as well as before Congress on revisions of the Voting Rights Act in 1981. In seven federal cases, such as the 2002 California state redistricting case, *Cano v. Davis*, 191 F.Supp. 2d 1135 (C.D. Cal. 2002), and in six cases brought under the 2002 California Voting Rights Act, the sources of my testimony have been primarily quantitative. Among the most significant of those cases were the two 2012 Texas redistricting cases, *Perez v. Perry*, 835 F.Supp. 2d 209 (W.D. Tx., San Antonio Div. 2012) and *Texas v. U.S.* (C.A. No. 1:11-cv-01303, D.D.C. 2012).

Other cases in which I have appeared as an expert, such as the case of *City of Mobile v. Bolden*, 542 F. Supp. 1050 (S.D. Ala. 1982), concerned whether at-large systems of voting were adopted or maintained with a racially discriminatory intent or whether they had discriminatory effects. Cases such as *Garza v. Los Angeles County Board of Supervisors*, 756 F. Supp. 1298 (C.D. Cal., 1990), *aff’d*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681(1991), involved questions of “racial gerrymandering.” My testimony on the racial intent of those who redistricted the Los Angeles County Board served as the basis for the district and appeals court decisions on that issue in *Garza*, and their opinions on intent provided the framework for the Justice Department’s standard objection letter on the grounds of discriminatory intent under Section 5 of the Voting Rights Act during the 1990s. The *Garza* decision led directly to the election of Gloria

LR 28 (2004), 60, n. 139.

⁴“Progressivism for Middle-Class Whites Only: The Distribution of Taxation and Expenditures for Education in North Carolina, 1880-1910,” *Journal of Southern History*, 46 (1980), 169-94.

⁵“*Shaw v. Reno* and the Real World of Redistricting and Representation,” in *Rutgers Law Journal* 26 (1995), 625-710.

Molina, the first Latino to be elected to the Los Angeles County Board of Supervisors since 1875. My *Garza* report was expanded into a 141-page law review paper, “How to Determine Intent: Lessons from L.A.”⁶

IV. A Short History of Racial Discrimination in North Carolina Politics

A. The First Disfranchisement

From the state’s first constitution in 1776 until its second in 1835, “free men of color” who met the state’s general property qualifications for voting had the right to vote in North Carolina, because there was no explicit racial restriction. Even though the black vote was small, a petition from New Bern claimed that during “the heat of party contests,” free blacks “are courted and caressed by both parties and treated apparently with respect and attention.” In Cumberland County in the early 1830s, a legislative election was allegedly determined by African-American votes.⁷ During the state’s 1835 constitutional convention, some delegates expressed the fear that there might eventually be black majorities of voters in some towns and counties unless the word “white” was explicitly inserted as a qualification. Despite the fact that several prominent leaders, including former Governor, Senator, and Secretary of the Navy John Branch, favored allowing black freemen who owned \$250 worth of property (a substantial sum at the time) to continue to vote, in the hopes that they would ally themselves with whites, instead of slaves, the convention banned black suffrage entirely by the close vote of 64 to 61. James Bryan of Carteret County introduced the issue of fraud, claiming that the free African-American was “the tool of the ambitious and designing demagogue,” thereby increasing the “sources of corruption” in the electorate.⁸ Future state attorney general Hugh McQueen apparently expressed the sense of the majority of the (all-white) convention delegates, saying of the African-American that “he came here debased, he is yet debased, and there is no sort of polish which education or circumstance can give him, which ever will reconcile the whites to an extension of the right of suffrage” to blacks.⁹

B. Election Laws and White Supremacy in the Post-Civil War South

It was not so easy to disfranchise African-Americans after the passage of the Fifteenth Amendment in 1870. Since explicitly racial disfranchisement was thenceforth illegal, more subtle election laws became the favorite weapons of white supremacists.

⁶*Journal of Law & Politics*, 7 (1991), 591-732.

⁷Lacy K. Ford, *Deliver Us from Evil: The Slavery Question in the Old South* (New York: Oxford University Press, 2009), 421.

⁸Quoted in Ford, *Deliver Us From Evil*, 430.

⁹Harold J. Counihan, “The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy,” *North Carolina Historical Review*, 46 (1969), 335-64, quote at 347.

In an event with close recent parallels, less than two years after the ratification of the Fifteenth Amendment, the Democrats, who had attained a majority in the North Carolina legislature through extensive violence and intimidation against black and white Republicans, packed African-Americans into the “Black Second,” the only congressional district in the South during the era to have its own published biography.¹⁰ The compact southeastern Second District drawn by the Republicans in 1867 had contained a small white majority, a total population that was eight percent below that of the ideal in the state, and had only twenty percent more black citizens than could be expected if the state's black population had been divided equally in the nine congressional districts.¹¹ From the Democratic reapportionment of 1872 until disfranchisement in 1900, the district contained substantial black majorities, from ten to eighteen percent more total population than the average district in the state and, most important, it had approximately twice the number of blacks as an equal division would have dictated. Since the other districts were “stacked” to insure that there was no black majority, the apportionment effectively confined black control in a state that was approximately a third African-American to a maximum of one district in eight or nine (depending on the total population in the decade), and minimized black influence and Republican representation in all the other congressional districts. Republican Governor Tod Caldwell described its shape as “extraordinary, inconvenient and most grotesque.”¹² Nineteenth century transportation and communication made the district much less accessible than any district in North Carolina today. Democrats also extensively gerrymandered state legislative and city districts to undermine black political power in the state during this period.¹³ The 2011 packing of African-Americans into the state’s legislative districts to minimize black and Democratic influence faithfully followed the state’s “traditional districting principles” of the late 19th century.¹⁴

¹⁰Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (Baton Rouge, LA: Louisiana State Univ. Press, 1981). Other notorious discriminatory racial gerrymanders of congressional districts in the South after Reconstruction included the “shoestring district” in Mississippi, the Black Belt Fourth District in Alabama, and the “boa constrictor” Seventh District in South Carolina. On these districts, see Kousser, “How to Determine Intent,” 598-606.

¹¹Data from Stanley Parsons *et al.*, *United States Congressional Districts and Data, 1843-1883* (1986); Parsons *et al.*, *United States Congressional Districts, 1883-1913* (1990). Congress enfranchised southern blacks in 1867 in the Reconstruction Act. Eric Foner, *Reconstruction* (New York: Harper and Row, 1988), 276.

¹²Quoted in Anderson, *Black Second*, 3.

¹³Frenise A. Logan, *The Negro in North Carolina, 1876-1894* (Chapel Hill, N.C.: Univ. Of North Carolina Press, 1964), 49-63; William A. Mabry, *The Negro in North Carolina Politics Since Reconstruction* (Durham, N.C.: Duke University Press, 1940), 16-22.

¹⁴Editorial, *CO*, July 9, 2013: “That's what Republicans did in 2011 by packing minorities into a handful of districts - including Rep. Mel Watt's 12th District - and making surrounding districts more white and friendly to GOP candidates. Republicans also split voting districts - and even split single counties into multiple voting districts - in order to give themselves an electoral advantage.” See also Anne Blythe, “NAACP, others appeal GOP-created districts - Voter-rights

Racial gerrymandering notwithstanding, post-Civil War Republicans kept the state competitive long after the so-called “end of Reconstruction” in 1877. In the five gubernatorial elections from 1880 through 1896, Democrats never won more than 53.8% of the vote, and Republican Daniel L. Russell took the governorship in 1896, following up an off-year legislative landslide for the Populist-Republican Fusion ticket. Turnout was very high, averaging over 80% of the total adult males in those five elections. In the 1896 gubernatorial election, approximately 87% of the adult male African-Americans and a similar percentage of whites are estimated to have turned out to vote – the highest level of any election in the post-Reconstruction South and a turnout that would be considered amazing today.¹⁵

The Populist-Republican Fusion movement that controlled the North Carolina legislature from 1894 until 1898 was the most successful biracial political movement in the post-Reconstruction South. Despite the fact that African-Americans comprised only 28 percent of the state’s adult males, they accounted for an estimated 43 percent of Gov. Russell’s votes in 1896. That only five of the state legislators were black may not seem very impressive until one realizes that this was half of the total number of black legislators in the eleven states of the ex-Confederate South combined in 1896 and 1898.

Responsive to their black and poor white core, the Fusionists in the legislature put through a remarkably (small-d) democratic program. To keep Republicans from electing local officials, Democrats had made all county offices appointive by the state legislature.¹⁶ The Fusion legislature restored local elections. Democrats had leased the state-owned railroad to J.P. Morgan’s Southern Railway for 99 years. Republican Governor Russell attacked the lease. Democrats had starved public services. Fusionists substantially increased appropriations for education from the elementary to the college level and increased taxes on businesses and railroads to pay for better schools and charitable institutions. In response, businessmen and denominational colleges strongly backed the Democrats’ “white supremacy” campaign of 1898.¹⁷

groups take their fight to the state Supreme Court,” *CO*, July 23, 2013.

¹⁵*Shaping of Southern Politics*, 183.

¹⁶Unhappy with the county election districts drawn by local citizens and governing bodies in four counties, apparently because they were insufficiently favorable to Republicans, the 2011 North Carolina legislature intervened in what was usually the local task of redistricting county commissions and redrew districts by state legislative act in Mecklenburg, Guilford, Buncombe, and Lenoir counties. See “Lawmakers leave town after new maps, overrides,” *Rocky Mount Telegram*, July 28, 2011. The Mecklenburg County-based *CO* declared editorially that the legislature’s last-minute move “violated every principle of good government” by rejecting a proposed map that a bipartisan citizens’ commission “had spent months crafting.” “Disrespecting voters, in name of politics - Legislature erases Mecklenburg residents’ say on redistricting,” *CO*, July 29, 2011.

¹⁷*Shaping of Southern Politics*, 184-87.

Most strikingly, the Fusionists replaced an 1889 Democratic law that increased barriers to voter registration with what was probably the fairest, most democratic election law in the post-Reconstruction South. Recognizing that election officials were the principal sources of election fraud, the Fusionist statute required each county clerk to appoint one election judge from each party and to allow all of the judges to be present during the counting of ballots. To prevent the clerk from appointing incompetents from parties other than his own, each local party chairman actually nominated his own party's representative. To end disfranchisement by deliberate delays in large precincts, the clerk had to set up a voting place for every 350 voters. To debar registrars from illegally and capriciously disqualifying voters, the Fusionists strictly limited the registrars' powers. To eliminate repeated partisan challenges against voters, the legislature put the burden of proof on the challenger, rather than the voter. Finally, to make voting easier for illiterates, the 1895 law allowed colored ballots and party emblems on the ballots.¹⁸

The election law did not save the Fusionists from an onslaught of racist oratory, violence, and openly-admitted ballot box fraud that was barely sufficient to carry a Democratic majority of the statewide vote, as recorded, in 1898. As the *Raleigh News & Observer*, edited by future Woodrow Wilson cabinet member Josephus Daniels, expressed the Democratic view of what it called the "White Supremacy Campaign":

Shall low-born scum and quondam slaves
Give laws to those who own the soil?
No! By our gransires' bloody graves,
No! By our homesteads bought with toil.¹⁹

Realizing that they were not safe yet, Democrats planned to submit a constitutional amendment that would have the effect of disfranchising Republicans, particularly African-Americans, in 1900.²⁰ But to insure passage of the amendment, they had first to repeal and replace the Fusionist election law. The 1899 law that passed the legislature with every Populist and Republican in vehement opposition and all but two Democratic members in favor stripped appointment of election officers from local officials and placed it in the hands of a state election board selected by the Democratic General Assembly.²¹ To negate the liberal registration provisions of the Fusionist law, the new Democratic law required every voter to re-register and gave registrars leeway to disfranchise anyone they wished to. Finally, at a time when election

¹⁸*Shaping of Southern Politics*, 187. The parallels between this law and the 2013 North Carolina election law have also been noted by Richard L. Hasen, "Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere," *Harvard Law Review Forum*, 127 (2014), 58-75, drawing extensively on *Shaping*.

¹⁹*Raleigh News and Observer* (hereinafter *N&O*), Nov. 6, 1898.

²⁰*Shaping of Southern Politics*, 190.

²¹For a call, which proved successful, for Gov. Pat McCrory to replace the entire State Board of Elections in 2013, see Susan Myrick, "Time to Reboot NC's Flawed Election Laws," *Civitas Capitol Connection*, January, 2013, Vol 5, No. 1, p. 6.

ballots were printed by the parties and brought to the polls, instead of being provided at the polls by the state, the law provided that any ballot placed in the wrong box – there were six – whether by election officers or the voter himself, would be void.²²

The constitutional amendment, which contained a poll tax and required registrants to pass a literacy test or to own a certain amount of property, with a very temporary grandfather clause inserted in order to attract votes from lower-class whites, passed the General Assembly with all but five Democratic members in favor, and every Republican and three of the six Populists opposed. Its partisan and racial purposes were broadcast. As the *News and Observer* put it in an editorial:

The victory won last November will be short-lived and almost barren unless it is garnered. To leave on the registration books every ignorant Negro in the State, who is merely a tool of selfish and designing men, would be to invite a repetition of the disgraceful rule of 1895-1899 whenever there is any considerable division among the white voters.²³

The subsequent campaign was brutal. Future “progressive” governor Charles Brantley Aycock branded his opponents “public enemies” who deserved “the contempt of all mankind.” Democratic “Red Shirts” broke up opposition meetings, intimidated voters, and prevented such opposition orators as Populist U.S. Senator Marion Butler from speaking to public meetings. The leader of the “Wilmington Riot,” which had killed approximately twenty African-Americans in an 1898 post-election frenzy, Alfred Moore Waddell, told an election-eve crowd in 1900 to “go to the polls tomorrow and if you find the Negro out voting, tell him to leave the polls and if he refuses, kill him, shoot him down in his tracks.”²⁴

Democratic control of the registration and counting of ballots carried the suffrage amendment by a 59-41% margin, but the fraud necessary to sustain that result was as obvious as it was impossible to stop. As a North Carolina Republican congressman put it at the time, African-Americans, “according to the election returns, actually voted to disfranchise themselves.” The overwhelming vote counted for the amendment in heavily-black counties produces a statistical estimate that no blacks at all opposed the poll tax and literacy test aimed primarily at them, while nearly three-fourths of all adult black males favored it.²⁵ This was not fraud by individuals, but by election officials, always the most serious and prevalent variety of fraud. In the next gubernatorial election, turnout shrank by 50%, Republicans abandoned their African-American core and began to claim that they were the real “lily-white” party, and the state entered a political slumber from

²²Part 49 of the 2013 election law repealed a 2005 law that allowed for the votes for offices above the precinct level to be counted on a ballot cast in the wrong precinct. The 2013 statute instead threw out all votes recorded on a ballot cast in the wrong precinct – for instance, votes for statewide or national officers. See Transcript of Senate Rules Committee Meeting, July 23, 2013, pp. 12-13.

²³*N&O*, Feb. 3, 1899.

²⁴*Shaping of Southern Politics*, 193.

²⁵*Shaping of Southern Politics*, 193-95.

which it did not fully recover until the passage of the Voting Rights Act in 1965.

C. The Legacy of White Political Supremacy Hung On Longer in North Carolina than in Other States of the “Rim South”

For a state in the “Rim” or “Border” South with a cherished progressive self-image, North Carolina suppressed black political activity thoroughly during the period of the “nadir” of race relations in the first half of the twentieth century and only slowly, grudgingly, and partially liberalized thereafter. Only 15 percent of the state's blacks -- less than the percentage in Georgia -- were registered to vote in 1948, and only 36 percent in 1962.²⁶

For nearly fifty years after the revolution of 1900, North Carolina enjoyed conservative, but less tumultuous rule. Then, in 1948, North Carolinians elected insurgent moderate W. Kerr Scott as governor, and he, in turn, appointed the University of North Carolina’s distinguished and widely-known Chancellor, Frank Porter Graham, to a vacant seat in the U.S. Senate in 1949. Graham’s candidacy set up an election that brought once more into the open North Carolina’s fervently racist political history. When support from virtually the entire establishment of the state’s politics carried Graham dangerously close to an outright majority in the first primary, his chief opponent, Willis Smith, redoubled the openly racist appeals that he had initiated in the earlier part of the campaign.²⁷ In nearly every speech, Smith charged that Graham’s election would foster school integration and an end to racial discrimination in employment, charges Graham vehemently denied. Smith’s campaign employed blacks to parade around white sections of Eastern North Carolina towns in cars festooned with Graham banners and reprinted endorsements of Graham from black newspapers.

Stressing the continuity of North Carolina politics, Smith backers distributed photographs of black legislators from the 1868 state legislature, suggesting that Graham’s election would automatically bring about the horror of having blacks in elective offices, superior in position to at least some whites. Another flyer featured more recent World War II photos of black soldiers dancing with white Englishwomen, doctored to superimpose the face of Graham’s well-known wife on the head of one of the women. The week before election day, a circular blanketed the state:

²⁶*Colorblind Injustice*, 245.

²⁷On the contest, see generally Julian M. Pleasants and Augustus M. Burns III, *Frank Porter Graham and the 1950 Senate Race in North Carolina* (Chapel Hill, N.C.: University of North Carolina Press, 1990). One of the gems was a fake postcard from “W. Wite, Executive Secretary, National Society for the Advancement of Colored People,” an obvious distortion of Walter White of the NAACP, which encouraged a vote for Graham because he “has done much to advance the place of the Negro in North Carolina.” It was sent to large numbers of white voters in the state. *Ibid.*, 176.

DO YOU WANT Negroes working beside you, your wife and daughters in your mills and factories? Negroes eating beside you in all public eating places? Negroes riding beside you, your wife and your daughters in buses, cabs and trains? Negroes sleeping in the same hotels and rooming houses? Negroes teaching and disciplining your children in school? . . . Negroes going to white schools and white children going to Negro schools? Negroes to occupy the same hospital rooms with you and your wife and daughters? Negroes as your foremen and overseers in the mills? Negroes using your toilet facilities?

If you did, the circular concluded, "Vote for Frank Graham. But if you don't, vote for and help elect WILLIS SMITH FOR SENATOR. He will uphold the traditions of the South." When Smith overtook Graham to win the primary by a comfortable margin, the favorite song at his campaign celebration was "Dixie."²⁸

Because of low overall voter registration and its continued use of a literacy test, 40 of the state's counties were subjected to Section 5 preclearance under the Voting Rights Act in 1965. A year later, black registration in the state finally surpassed 50% for the first time since 1900. While Tennessee elected its first black of the century to the General Assembly in 1964 and abolished multimember districts in urban counties in 1965 on the grounds that they discriminated against blacks, North Carolina did not elect a black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature, even though it was advised that the districts might be challenged in court on the grounds of racial discrimination. The state simultaneously passed a numbered post system with an anti-"single shot" provision over the protests of blacks and white Republicans, who charged that it would have a discriminatory impact. A federal court subsequently struck down that law as racially discriminatory.²⁹ The same legislature that adopted the multimember district/numbered post system also refused to add black activist Durham County to the Second Congressional District, reportedly to prevent a rise in black influence in that district.³⁰

1968 was not only the year when Henry Frye of Greensboro became the first African-American elected to the General Assembly, but also the year when Dr. Reginald Hawkins, a black Charlotte dentist, received 129,808 votes for the Democratic nomination for governor and when Eva Clayton became the first black since 1898 to run a serious campaign for Congress. When Clayton, who had never previously held public office, began her campaign, blacks made up approximately 40 percent of the population of the Second District, but only 11 percent of the voters. Although her poorly financed campaign lost 70-30 to eight-term incumbent L.H. Fountain, the most conservative Democrat in the state's congressional delegation, Clayton and her cadre of

²⁸Pleasants and Burns, *Graham*, 216-21, 244, quote at 221.

²⁹*Dunston v. Scott*, 336 F.Supp. 206 (E.D.N.C. 1972)

³⁰Harry Watson Trial Testimony, 242, 255, 300-07, in *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984); Plaintiff-Intervenor's Exhibit 25 in *Shaw v. Hunt*, 517 U.S. 899 (1994).

black activists managed to raise black registration to 26 percent of the district's voters.³¹

Four years later, in 1972, Howard Lee became Fountain's second and much more serious black challenger. The son of a Georgia sharecropper, Lee had come to Chapel Hill to attend graduate school in social work at the University of North Carolina in 1961 and stayed on in a job at Duke University. He had been narrowly elected to the largely ceremonial office of mayor of the majority-white town of Chapel Hill in 1969 and reelected in 1971, and as the first black mayor in the state during the twentieth century, had been named vice-chairman of the state Democratic party in 1970. Lee's intensive efforts to appeal to whites fell short, as he lost the primary by a 59-41 margin. According to Daniel C. Hoover of the *News and Observer*, "Although [Lee] got some white votes, especially in his own traditionally liberal Chapel Hill area, the balloting generally was along racial lines." Being "a highly skilled campaigner with strong appeal not only to blacks but to liberal urbanites as well" was not enough to win an overwhelmingly rural Second District in which voting was widely understood to be markedly racially polarized. Lee's failure apparently discouraged other potential African-American candidates, as there was no serious black candidacy for Congress in the state for the rest of the decade.³²

In an attempt to avoid a black recapture of the Second Congressional District 81 years after George Henry White became the last southern black member of Congress for three generations, Rep. Fountain and his allies held up redistricting in the North Carolina legislature for six months in 1981. Ultimately, they drew a district that bore a striking resemblance to an upside-down version of the original 1812 Massachusetts district that led to the coining of the term "gerrymander." Before an NAACP-LDF lawsuit in the name of Ralph Gingles, charging that the district was drawn with a racial purpose and had a racially discriminatory effect, could be heard, the Ronald Reagan-era Department of Justice refused preclearance of the redistricting under Section 5 of the Voting Rights Act.³³ Fountain retired rather than face a challenge from Mickey Michaux, now as then a prominent black state legislator. But Michaux lost a racially polarized runoff for the Democratic nomination for Congress when his white opponent, Tim Valentine, mailed appeals to whites warning that Michaux would "again be busing his supporters to the polling places," where they would cast a "bloc vote" for him. The reference to busing and the familiar racial code phrase "bloc vote" were more subtle than Willis Smith's 1950 entreaties, but they had the same effect. Michaux's defeat and that of another African-American candidate, state representative Kenneth Spaulding, in 1984, discouraged blacks from contesting the Second for the rest of the decade.³⁴

But by 1990, civil rights pioneer and Charlotte mayor Harvey Gantt cast off caution, launching a nationally-prominent and well-funded campaign against the symbol of the new southern Republicanism, Sen. Jesse Helms. Threatened with defeat, Helms echoed Willis Smith's anti-Fair Employment Practices Commission campaign against Frank Graham in the most

³¹ *Raleigh Times*, Sept. 4, 1970, 4; *N&O*, Mar. 13, 1972, 5.

³² *Colorblind Injustice*, 246-47.

³³ *Colorblind Injustice*, 247-53.

³⁴ *Colorblind Injustice*, 254-57.

infamous southern political television commercial of the century. A pair of white hands was shown crumbling a job application, while a voice-over announced

“You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?”

Less well known in the fact that the Helms campaign and the state Republican party mailed 125,000 post cards into black neighborhoods charging that there was a plot to commit voter fraud and warning recipients of the penalties for such actions and providing misleading information about registration. The George H.W. Bush Justice Department sued, securing from the state GOP a promise to abjure such “ballot security” campaigns in the future.³⁵

Before Sen. Helms defeated Gantt in another racially-charged election in 1996, Republicans in the state reflected the regional trend by winning control of the state’s House of Representatives, its congressional delegation, and nearly its State Senate in 1994. With popular moderate Democrat Jim Hunt serving as governor for the eight years after 1992 and Democrats almost retaking the State House in 1996, however, neither party could impose changes in election laws. There was a widespread understanding that as more and more whites left the Democratic party, racial and partisan identification increasingly overlapped, and the Democratic party necessarily became more responsive to its black members. For example, former GOP state chairman Jack Hawke told a reporter in 1996 that “as the Democratic party shrinks in size and numbers, percentage-wise it becomes more black-dominated . . . the Democratic party is becoming the party of minorities and the Republican party is becoming the party of the white folks.”³⁶ The large swings in the numbers of members of each party elected on the basis of small changes in the share of votes in this most competitive southern state during the 1990s³⁷ invited each party to make changes in election laws in an effort to gain even the smallest advantage, which might tip the divided state one way or the other.

V. Democratizing North Carolina Election Law and Increasing Turnout, 1995-2009

³⁵Rob Christensen and Jack D. Fler, “North Carolina: Between Helms and Hunt No Majority Emerges,” in Alexander P. Lamis, *Southern Politics in the 1990s* (Baton Rouge, La.: Louisiana State University Press, 1999), 81-85. The newspaper report that Christensen and Fler cite on the “white hands” commercial makes the same parallel to the Smith-Graham campaign: Ferrel Guillory, “N.C.’s 1950 Senate Race Echoed Again in 1990,” *N&O*, Nov. 30, 1990.

³⁶Quoted in Christensen and Fler, “Helms and Hunt,” 88-89.

³⁷Christensen and Fler, “Helms and Hunt,” 102.

A. What Provoked H.B. 589? The Effects of Changes in Election Laws Before 2010

During the 1990s and in the 21st century up to the election of 2010, North Carolina attempted to escape its history of electoral lassitude and racial discrimination by adopting a series of changes in election laws that would increase voting participation and civic involvement. Foremost among them were the adoption of voting in the weeks before election day without the necessity of having an excuse (hereinafter referred to as “early voting”); registration that extended up to the close of the early-voting period, with the ability to cast an absentee ballot at the same time as registration that would be counted unless there was positive evidence that the voter was not eligible to vote (hereinafter called “same-day registration” or “SDR”); the counting of votes for some offices on a ballot, even if the voter had not cast her ballot in the correct precinct (hereinafter called “out-of-precinct voting”);³⁸ and various changes to encourage high-school students to pre-register to vote and college students to be able to register at their college domiciles.

The best way to see the effects and infer the intent of these changes and the likely effects and intent of their reversal by H.B. 589 is to consider tables of turnout statistics. Table 1 shows the dramatic rise in turnout in presidential elections in North Carolina after the establishment of early voting, which went into effect in time for the 2000 election, and the second burst after the 2007 adoption of same-day registration. As often noted during the debates over H.B. 589 in 2013, North Carolina went from near the bottom of the states in its participation level in 1988 to close to the top twenty percent of the states in 2012.³⁹ These were not national or regional trends, and since there were no economic or demographic trends in North Carolina during this period large enough to explain a 45% increase in turnout, that increase must be attributed to changes in the election laws.

Table 2, based on statistics from the North Carolina State Board of Elections, shows that the turnout increase was particularly marked among African-American voters. Although there are other influences that no doubt partially account for the increased black turnout, notably the nomination of the first major-party African-American nominee for president in American history, a great deal of the African-American turnout increase preceded 2008. There was a 47% rise in black turnout in North Carolina from 1996 to 2004 – a date at which Barack Obama was merely running for his first term in the U.S. Senate. By 2008, African-American North Carolinians were voting at higher rates than whites as a percentage of potential voters, not just of registrants.⁴⁰ As in the

³⁸ If a person voted a provisional ballot at the wrong precinct, then if out-of-precinct voting were allowed, the votes for those offices on both the ballot at the “wrong” precinct and on the voter’s correct precinct would be counted. Votes for the offices not shared on both precincts would not be counted. Disallowing out-of-precinct votes invalidates the votes for every office on the mistaken voter’s ballot.

³⁹ For instance George Gilbert, “Turnout rises with early voting,” *Greensboro News & Record*, June 9, 2013; Mebane Rash, “Ominous omnibus,” *Durham Herald-Sun*, July 28, 2013.

⁴⁰ Note that these percentages are based on actual vote counts by the state, not survey

nineteenth century, when the Populist-Republican Fusion of the 1890s in North Carolina revived hopes (for blacks) and fears (for white Democrats) of a renewal of Reconstruction—the first decade of the twenty-first century in the state seemed to renew the promise of a renewal of the Civil Rights Movement, an ominous prospect to the representatives of the tradition of Willis Smith and Jesse Helms.

As Table 3 makes dramatically clear, once they got used to early voting, white and especially black North Carolinians took advantage of the opportunity to avoid very long lines, possibly getting their pay docked or failing to pick up their children from day care or school on time. By 2008, over half of whites and nearly three-quarters of African-Americans who voted did so in person before “election day.” Any compression of the time for early voting would have a disproportionate effect on black turnout, and since the statistics were available and widely discussed,⁴¹ legislators whose careers depended on knowing the facts of electoral life must have anticipated the effect of slicing the early voting period.

Not only were African-Americans more likely to vote early than whites in North Carolina, they were also more than twice as likely to take advantage of same-day registration when they voted early. In 2008, 6.9% of blacks who registered did so initially or changed their place of registration using SDR, compared to only 3.2% of whites. In 2012, the figures were 4.6% for blacks and 1.5% for whites. To put the figures another way, African-Americans made up only 21.7% of all registered voters in 2008 and 22.4% in 2012, but they comprised 35.8% of the same-day registrants and registration changers in 2008 and 40.7% in 2012.⁴² Any measure that eliminated same-day registration would have approximately twice as large an impact on African-Americans as on whites, and any legislator who voted for such a measure must have anticipated this consequence.

responses of remembered activity, which tend to overstate turnout. Previous studies have shown that blacks are more likely to over-report turning out to vote than whites. See Jan E. Leighley and Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* (Princeton, N.J.: Princeton University Press, 2014), 19-21.

⁴¹See, for example, “Group Hopes Data Boosts Youth Votes - Report: Turnout Lower Than Number of binge Drinkers, Gun Owners,” *CO*, April 3, 2007; Bob Hall, “Sounding a retreat on voting,” *N&O*, July 1, 2011; Justin Guillory, “Cutting early voting a mistake,” *Greenville Daily Reflector*, July 29, 2013; House Elections Committee Hearing, March 12, 2013, Transcript, statement of William Barber, at 18; House Elections Committee Hearing, March 13, 2013, Transcript, statement of Bob Hall, at 24-26; House Elections Committee Meeting, April 10, 2013, Transcript, statement of William Barber, at 13-14; House Debate, April 24, 2013, Transcript, remarks of Rep. Garland E. Pierce, at 129-30.

⁴²Sources of data:

ftp://www.app.sboe.state.nc.us/Requests/20081104_Changed_OneStop_registrations.xls>
ftp://www.app.sboe.state.nc.us/Requests/20081104_New_OneStop_registrations.xls>
ftp://www.app.sboe.state.nc.us/Requests/20121106_Changed_OneStop_registrations.xlsx>
ftp://www.app.sboe.state.nc.us/Requests/20121106_New_OneStop_registrations.xlsx>

And they were much more likely than whites to cast ballots outside their legal precincts on election day. In 2004, the first election in which the legislature tried to guarantee that ballots would be counted, even if the voters went to or were directed to the wrong precinct, 36% of the out-of-precinct votes were cast by African-Americans, although they cast only 19% of overall votes in that election. In 2008, blacks cast 27% of the out-of-precinct votes; in 2010, 46%; in 2012, 32%.⁴³

⁴³Sources of data:

2004: <<http://www.democracy-nc.org/reports/researchreports/OOPChart.pdf>>

2008: <ftp://www.app.sboe.state.nc.us/ENRS/provisionals_2000_11_04.txt>

2010: <ftp://www.app.sboe.state.nc.us/ENRS/provisionals_2010_11_02.txt>

2012: <ftp://www.app.sboe.state.nc.us/ENRS/provisionals_2012_11_06.txt>

**Table 1: A 45% Rise in Turnout
Accompanied the Democratization of Election Laws⁴⁴**

Election Year	% Turnout of Voting-Eligible Population	National Rank
1988	44.5%	48
1992	51.4%	46
1996	46.3%	43
2000	50.7%*	37
2004	57.8%	38
2008	65.5%**	22
2012	64.6%	11

* Early Voting Introduced

** Same-day Registration Introduced

Source: Michael P. McDonald, United States Elections Project,
<https://docs.google.com/file/d/0B0bHdAFS4MgqWmdKdEdWTHRzbUE/edit?usp=sharing&pli=1>

⁴⁴The 20.1% increase in turnout divided by the initial 44.5% turnout rate = 45.2%.

Table 2: The Black Vote Rising – Most of the Post-1996 Turnout Increase Represented Increased African-American Participation

Election Year	% of Citizen-Age Population Voting	
	White	African-American
1996 ¹	48.3	36.9
2000 ²	52.9	41.9
2002 ³	45.1	34.4
2004 ³	63.8	54.1
2006 ³	35.9	24.7
2008 ³	64.6	71.5
2010 ³	42.0	36.9
2012 ³	64.4	68.5

Sources:

1: North Carolina State Board of Elections, data provided through discovery in this case.

2: Democracy North Carolina: 2000: <<http://www.democracy-nc.org/downloads/archive/2000turnoutchart.pdf>>

3: North Carolina State Board of Elections: <<ftp://www.app.sboe.state.nc.us/ENRS/>> and U.S. Census Population Data

Table 3: African-Americans Took Disproportionate Advantage of Early Voting

Election Year	% Voting Early of Those Who Voted	
	White	African-American
2004	19.5	16.3
2006	20.5	13.1
2008	51.1	71.5
2010	33.3	36.2
2012	51.8	70.4

Source: North Carolina State Board of Elections

2004 Data: < ftp://www.app.sboe.state.nc.us/ENRS/absentee11xx02xx2004.zip>

2006-2012 Data: SEIMS Data from BOE Discovery Request compiled by Paul Gronke.

B. The Intent and Effect of Election Laws Must Be Judged by their Context

Defenders of the current spate of suffrage restrictions tell an abstract, fact-free, time-and-space-independent story to justify their actions. They suspect that election fraud occurs, and if they produce little or no evidence of that contention, the mere suspicion is enough, they claim, to provide a rational basis for the laws.⁴⁵ Conditions in all places at all times are essentially the same, and details about the provisions of laws are irrelevant – if a restriction was legal in Indiana or Georgia in 2005, then a somewhat similar law must be legal in Texas or North Carolina in 2014 or 2015.

But the story of the changes in the election laws before 2011 and of the proposals that failed, the sometimes unintended consequences of those laws, and the changes that those laws made in the political context that faced the North Carolina legislature in 2013 undercuts the ahistorical version of H.B. 589. As I have argued at length elsewhere about English and American election laws from before the founding of this country through the present, one can only judge the intent and effects of such laws by viewing them in their very specific historical and spatial contexts.⁴⁶

1. The First Early Voting Bill, 1993

On May 6, 1993, Senate Elections Committee Chair Linda Gunter of Wake County introduced S.B. 1066, which provided for the pre-registration of 16- and 17-year-olds. Reported favorably out of committee a week later, it passed the senate by 36-2, with no apparent controversy. In the House, it passed on June 17 by 71-27, but it was then withdrawn, referred to the House Judiciary Committee on June 29, and a substitute bill that expanded the original bill to include no-excuse absentee voting at “early voting” sites passed second and third readings in the House on July 23 by a vote of 78-11. At that point, the Senate refused rather loudly to concur in the House amendments, a conference committee was appointed, and even carrying the bill over to the “short session” of the legislature in 1994 did not produce agreement. Finally, the legislature dropped both the 16- and 17-year-old-preregistration and early voting features and simply authorized registration at driver's license, unemployment, and social services offices statewide, in order to conform state law to the National Voter Registration Act.⁴⁷

⁴⁵ “North Carolina Dems: Thom Tillis: Wrong Priorities for North Carolina,” *Targeted News Service*, March 19, 2013.

⁴⁶ “Suffrage,” in Jack P. Greene, ed., *Encyclopedia of American Political History* (New York: Charles Scribner's Sons, 1984), III, 1236-58.

⁴⁷ Here and at other points in the next few pages, I draw on the legislative histories of each bill available on the General Assembly's website, which can be accessed by searching for the bill numbers and years. To reduce the length of this report, I will simply refer the reader to that website for details. In this instance, I draw also on Foon Rhee, “LEGISLATORS SAY END OF SESSION IN SIGHT - “WE'VE GOT A HANDSHAKE,” SENATE LEADER SAYS LAWMAKERS HOPE

This was not a partisan battle. Democrats were firmly in control of both houses of the legislature and, for the first time in eight years, of the governor's office, and Republicans did not then oppose the early voting provision. Nor was it pushed because of an effort by Democrats to facilitate voting by their partisans, minority or white. It does not seem to have occurred to anyone at the time that African-Americans would be particularly likely to take advantage of early voting. According to the recollections of a state senator from that session, a voting rights lawyer who would have been sensitive to any mentions of racial considerations or consequences, there was no discussion of such matters in connection with S.B. 1066. Rather, there was a concern that having too many people vote at different times would complicate campaigning, because of the necessity of contacting voters earlier in the election cycle, and that it would therefore increase the expense of elections.⁴⁸

2. No-Excuse Absentee Voting, 1995-97

Seven House members in 1995, led by the longtime African-American legislative leader Mickey Michaux, introduced a bill to allow no-excuse absentee votes to be cast by mail or, at the option of each county, at not only the county board of elections, but also at additional sites. The 39-page H.B. 27 does not seem to have been acted upon in the House, where Republicans enjoyed a majority for the first time in a century.

Two years later, a somewhat simpler 19-page bill, H.B. 1014, titled "Shorter Lines at Polls," allowed "one-stop" voting (the ability to apply for, receive, and vote a ballot in a single trip) at the county board of election and perhaps additional sites. It attracted 75 sponsors, mostly Democrats, but also about a dozen Republicans. Chiefly sponsored by Martin Nesbitt, an Asheville Democrat, as well as Michaux and Democrat Martha Alexander of Charlotte, the bill was, according to Nesbitt, a response to voting lines of over an hour in 1996 in Buncombe County.⁴⁹ In Mecklenburg County, said Alexander, some voters had to wait two and a half hours in the rain to vote in November, 1996.⁵⁰ Other supporters noted the differential burden of long lines on working people and discounted the likelihood of fraud, stressing that voters would still have to go through the process of applying for an absentee ballot. As the *Durham Herald-Sun* put it:

. . . voting at the polls is not always convenient when both parents work. People also run out of time standing in long lines and leave without voting.

Any means of making voting easier, of course, always raises questions about the

TO FINISH SEVERAL ISSUES AND GO HOME," *CO*, July 16, 1994.

⁴⁸Personal communication from Leslie J. Winner, March 21, 2014.

⁴⁹Dennis Patterson, "Legislators are full of ideas on reforming elections process," *Durham Herald-Sun*, April 22, 1997.

⁵⁰Stephanie Gibbs, "Bill Eases Absentee Voting Rules - Aponsors Hope to Shorten Lines at Polls," *CO*, April 18, 1997.

potential for vote fraud. As Rep. [Jim] Black [the House Minority Leader] noted, absentee voting leaves a substantial paper trail. Moreover, the state Board of Elections would be the first to pounce on a potentially fraudulent method of voting that an estimated 35 percent of North Carolina's voters will use. The board has endorsed most of the provisions of the no-excuses bill, which would become effective with the 1998 elections.⁵¹

Nonetheless, the House Elections Committee tabled the bill, and the legislature never got a chance to vote on it. The chair of the committee, Rep. Connie Wilson, R-Mecklenburg, “cited concerns about fraudulent voting as one of the reasons she and others were concerned about the bill,” according to the *Charlotte Observer*, which did not specify whether it was mail-in or on-site voting that bothered Wilson. The newspaper was skeptical of the fraud suggestion. “Some politicians,” the *Observer* asserted editorially, “seem to have an instinctive negative reaction to making voting too easy, as if that somehow cheapens the democratic process or devalues the responsibilities of citizenship.”⁵²

3. Early Voting Launched, 1999-2001

When Democrats returned to control of the lower house of the legislature in 1999, Republican support for early voting collapsed in the House, though it partially persisted in the Senate. Democratic control, however, meant that a bill authorizing no-excuse absentee voting and authorizing satellite sites where early voting could take place could emerge from the committee and actually be considered on the floor.

S.B. 568 was introduced on March 29, 1999 and passed the Senate by 36-10, including four Republicans in the majority, on April 21, and the House, on July 13, by 60-53, with one Democrat joining all of the Republicans in opposition. The bill was entirely concerned with authorizing no-excuse absentee voting, including authorizing county boards of elections to establish additional sites for one-stop voting. On the way to passage, the Senate rejected an amendment from Republican Senator Robert Rucho to require voters to display some form of photo identification before voting. Since the form was not specified, it presumably could have included business or student or local government IDs, or identification documents used to obtain various welfare benefits or to buy prescription drugs. The Senate rejected the amendment, 35-15, on a party-line vote. In the House, Republican J. Russell Capps introduced a voter ID amendment, which failed, 54-57, with two Democrats crossing over to vote for the amendment. Republican Larry Justus also proposed a voter identification restriction, but this one was loose enough that a voter could qualify if she presented a social security card and any type of ID showing the name and picture of the voter. If a voter did not have that or any other identification card, she could cast a provisional ballot, and the county board of elections could count it if the board determined, under rules which the State Board of Elections was tasked with writing, that the voter was legally qualified.⁵³ Justus, who,

⁵¹Editorial, *Durham Herald-Sun*, “Absentee Voting - How to make it easier,” May 1, 1997.

⁵²Editorial, “No Voter Relief,” *CO*, July 18, 1997.

⁵³All of this information comes from official documents on the legislature’s website or from

according to a Winston-Salem newspaper, “has long opposed efforts to make voting more convenient,” charged that the early voting bill would lead to “massive fraud.”⁵⁴ The newspaper was skeptical: “If anything, most observers feel that the absentee voting changes will help Republicans turn out a larger share of their suburban vote. Harried parents will have the choice, for example, to vote at any time in the three weeks leading up to Election Day.”⁵⁵

Initially less controversial was S.B. 767, which directed the State Board of Elections to study and report on the process of setting up satellite early voting sites for early voting. The bill first passed the House by 102-6. But it was amended by a conference committee to include a grant-in-aid program by the State Board of Elections to help counties set up more early voting sites, as well as authorization for the State Board to step in and set up more sites if county boards (which were split, 2-1 between the political parties) failed to agree on site selection. This had been a divisive issue since at least 1992, when the Mecklenburg County Board of Elections had moved seven voting machines from black to white precincts in the county, prompting a successful Democratic bill to require county boards of election to allocate voting machines based strictly on registration totals in each precinct.⁵⁶ In Union County in 2000, there was a partisan controversy over how many satellite early voting sites to establish and where to put them – on the Republican western side of the county or on the Democratic eastern side.⁵⁷ At least four counties had refused to authorize any satellite sites at all in 2000.⁵⁸ Republicans in the 1999-2000 legislative session, smelling a threat by Democrats to allocate early voting sites disproportionately to Democratic areas, angrily filibustered for four hours on the short 2000 session’s last day before the bill finally passed.⁵⁹

Nonetheless, 2000 session-end wrap-ups by newspapers noted the “uncharacteristic harmony” of the “short and sweet” legislative session, which “avoided much partisan sniping,”⁶⁰ an indication that early voting itself was not seen as terribly controversial. Drawing on the long experience of Texas with early voting, some observers expected early voting not to lead to increased turnout in North Carolina.⁶¹ In fact, about 400,000 people, 13% of those who voted, cast

printed state documents.

⁵⁴Editorial, “Making Voting Convenient,” *Winston-Salem Journal*, April 2, 1999.

⁵⁵Editorial, “Voting Becomes Easier”, *Winston-Salem Journal*, July 23, 1999.

⁵⁶Foon Rhee, “Voting Bill Aimed at County - Election Board’s ‘92 Move of Machines Targeted,” *CO*, May 7, 1993.

⁵⁷Michelle Crouch, “Satellite Question Spurs Partisan Wrangling,” *CO*, June 23, 2000.

⁵⁸Editorial, “Early Voting Promises Convenience, Little Else,” *Greensboro News & Record*, July 23, 2000.

⁵⁹Lynn Bonner, “Discord keeps legislature another day,” *N&O*, July 13, 2000; “Partisanship Begets Partisanship Yet Again,” *Greensboro News & Record*, July 15, 2000.

⁶⁰“Partisanship Begets Partisanship Yet Again,” *Greensboro News & Record*, July 15, 2000; Eric Dyer, “Session Was Short and Sweet This Year - Most Controversial Issues Have Yet to Be Resolved as Lawmakers Look to the Fall Election,” *Greensboro News & Record*, July 15, 2000.

⁶¹Editorial, “Early Voting Promises Convenience, Little Else,” *Greensboro News & Record*,

ballots early in 2000, and early voting was a “big success with the voters.”⁶² There was no evidence that Democratic election boards had slighted Republican areas in establishing early polling sites, and Republican opposition diminished, as “by Election Day many Republicans were conceding that early suburban voting probably helped their party.”⁶³ By 2001, H.B. 977, to extend early voting to party primaries, sailed through the legislature by votes of 106-4 in the House and 47-0 in the Senate, and neither charges that there was any fraud in the 2000 election nor predictions of fraud in the future graced the debate.

4. An Instructive Incident and Out-of-Precinct Voting, 2005

The controversy that provoked the passage of a law that unequivocally protected the right to have votes counted, even though they were cast outside a voter’s home precinct, is instructive in two regards: First, despite the fact that it was a very close and hotly contested election that turned on a few thousand votes of over three million cast, the contest over the election of the Superintendent of Public Instruction in 2004 did not produce any allegations of in-person voting fraud.⁶⁴ With a major statewide office at stake and both parties boiling about it, one would expect any plausible example of fraud to be exposed. The fact that no such exposure occurred provides strong evidence that the state’s elections were quite clean and that a desire to eliminate fraud cannot be a plausible motive for the passage of H.B. 589. Second, the connection of an election controversy to the passage of an electoral reform law fits the paradigm of incremental electoral change in America, for example the passage of the Help America Vote Act (HAVA) in 2002 after the Bush-Gore imbroglio of 2000. That paradigm contrasts starkly with the passage of H.B. 589 in 2013, a “reform” completely unconnected to any particular election incident.

In 2003, the legislature had almost unanimously (109-1 in the House and 46-0 in the Senate on second reading) passed H.B. 842 to bring the state’s laws in compliance with the HAVA. Among the provisions of the national act was one that sought to guarantee the counting of ballots that for one reason or other were cast in the wrong precinct. If someone mistakenly showed up at the wrong precinct because she was confused or was trying to vote at a precinct in which she no longer resided, or because she was mistakenly directed to the wrong precinct by an election official or notice, then she would be given a provisional ballot and at least the non-precinct-specific parts of her ballot would be counted. According to the Democratic leaders of the 2003 legislature, the intention of H.B. 842 was to mandate the same procedures for state as for federal elections.⁶⁵ Yet a

July 23, 2000.

⁶²Editorial, “Making Voting Easy,” *Winston-Salem Journal*, July 31, 2001. See also “State,” *Durham Herald-Sun*, July 26, 2001; “Plans would extend voting changes,” *N&O*, April 20, 2001.

⁶³Editorial, “Making Voting Easy,” *Winston-Salem Journal*, July 31, 2001.

⁶⁴As the *Rocky Mount Telegram*, “Provisional votes should count,” Feb. 8, 2005, explicitly noted: “No one has presented any evidence to suggest voter fraud. “

⁶⁵“House Speaker Jim Black, D-Matthews, said Saturday that the ruling misread legislators

five-man majority of the North Carolina Supreme Court tentatively threw out 11,310 provisional ballots that had been cast in the wrong precincts, many on bad advice from election officials. The decision in *James v. Bartlett*, 359 N.C. 260 (2005) endangered Democrat June Atkinson's 8535-vote lead over Republican Bill Fletcher when the Supreme Court remanded the election contest to the Wake County Superior Court with instructions to settle the winner without counting the 11,310 ballots, which no one doubted were cast by legitimate voters.⁶⁶ Democrats charged that a "judicial activist" Supreme Court was protecting its party's "political cronies."⁶⁷

Democrats responded very quickly, introducing S.B. 133, which had the short title "Reconfirming Provisional Voting," within a week of the Supreme Court's decision in *James v. Bartlett*. What was controversial about the bill was not counting votes cast in the wrong precinct, but applying the law to elections that had already taken place⁶⁸ – not only the State Superintendent's race, but county commission contests in Mecklenburg and Guilford counties.⁶⁹

intent, which was to have those ballots count." Carrie Levine, "GOP: RETALLY COUNTY VOTES - DISCARDED BALLOTS COULD CHANGE RESULTS," *CO*, Feb. 8, 2005. "[State E]lections board director Gary Bartlett said he was at the Legislature when lawmakers crafted these statutes and knows their intent was to allow out-of-precinct voters to cast ballots on Election Day." William L. Holmes, "Out-of-precinct votes rejected. N.C. Supreme Court says provisional ballots cannot be counted," *Durham Herald-Sun*, Feb. 5, 2005.

⁶⁶Lynn Bonner, "Supremely speedy court makes a decision," *N&O*, Feb. 10, 2005; "COURT DISCARDS VOTES - LAST WEEK'S RULING GIVES TRUDY WADE AND BILL FLETCHER A CHANCE TO WIN WITH FEWER VOTES. THE DECISION MAY BE CORRECT LEGALLY, BUT IT'S HARDLY FAIR," *Greensboro News & Record*, Feb. 10, 2005.

⁶⁷Mark Binker, "DECISION ON ELECTION FAVORS WADE - JUSTICES SAY VOTERS CAN'T CAST BALLOTS OUTSIDE THEIR PRECINCTS ON ELECTION DAY," *Greensboro News & Record*, Feb. 5, 2005; AP, "BILL WOULD UNDERCUT COURT'S BALLOT RULING," *Greensboro News & Record*, Feb. 10, 2005; Sharif Durhams and Mark Johnson, "ASSEMBLY RAPS N.C. COURT ON BALLOTS - LEGISLATORS SAY THEY MADE LAW TO INCLUDE PROVISIONAL VOTING - DEMOCRATS IN HOUSE AND SENATE WORK TO RESTORE BALLOTS JUSTICES THREW OUT LAST WEEK", *CO*, Feb. 10, 2005. The latter article noted that "Republicans took control [of the State Supreme Court] in 2000." All five of the judges who decided the case were identified in the newspapers as Republicans.

⁶⁸Sharif Durhams and Mark Johnson, "ASSEMBLY RAPS N.C. COURT ON BALLOTS - LEGISLATORS SAY THEY MADE LAW TO INCLUDE PROVISIONAL VOTING - DEMOCRATS IN HOUSE AND SENATE WORK TO RESTORE BALLOTS JUSTICES THREW OUT LAST WEEK", *CO*, Feb. 10, 2005; Gary D. Robertson, "ELECTION BATTLE BACK IN COURT - SCHOOL SUPERINTENDENT POST COULD BE AFFECTED BY GOP COMPLAINT" *CO*, March 16, 2005.

⁶⁹Carrie Levine, "GOP: RETALLY COUNTY VOTES - DISCARDED BALLOTS COULD CHANGE RESULTS," *CO*, Feb. 8, 2005; "COURT DISCARDS VOTES - LAST WEEK'S RULING GIVES TRUDY WADE AND BILL FLETCHER A CHANCE TO WIN WITH FEWER VOTES. THE DECISION MAY BE CORRECT LEGALLY, BUT IT'S HARDLY FAIR,"

As often noted during the debate and even in the text of the bill,⁷⁰ since early voting was not organized by precinct and generally had fewer polling sites than election-day voting, a great many early votes were necessarily cast outside of their precincts, but the Supreme Court ignored the point,⁷¹ and Republicans in and out of the legislature did not cast doubt on the legitimacy of out-of-precinct early votes or use the supposed centrality of precinct voting in order to attack early voting.

One thing that neither activists nor bill sponsors ignored was the racial implications of refusing to count provisional ballots that were cast in the wrong precincts. The State Board of Elections released the names of the 11,310 people whose provisional ballots had been rejected by the Supreme Court because they were cast in the wrong precincts, and Democracy North Carolina checked their racial identities on the voter rolls. Thirty-six percent of the out-of-precinct ballots were cast by African-Americans, even though blacks cast only nineteen percent of all ballots in 2004.⁷² As the organization's Adam Sotak noted, "The out-of-precinct provision is especially helpful to people who can't take off several hours from work, who recently registered or moved within the county or who don't have easy access to transportation."⁷³ Apparently drawing on Democracy North Carolina's analysis, Section 9 of the bill stated that:

Greensboro News & Record, Feb. 10, 2005.

⁷⁰Mark Johnson, "11,310 BALLOTS CAST OUT - COURT RULES VOTING OUTSIDE HOME PRECINCT IS ILLEGAL - RACES IN LIMBO," *CO*, Feb. 5, 2005; Jack Betts, "N.C. VOTERS NOW PUNISHED FOR OTHERS' ERRORS - EVEN THOUGH COURT SAYS FAULT LIES WITH BOARD OF ELECTIONS, VOTES TOSSED OUT," *CO*, Feb. 13, 2005. Section 8 of the bill noted that "Several hundred thousand registered North Carolina voters cast ballots outside their resident precincts during the one-stop absentee balloting ("early voting") period pursuant to G.S. 163-227.2 prior to the General Election in November 2004, during the two primaries in 2004, and then on the date of the General Election in November 2004. There is no statutory basis upon which to distinguish out-of-precinct voting that occurred on the date of the General Election in November 2004 from out-of-precinct voting that occurred during the First and Second Primaries in 2004 or that occurred during the period of one-stop absentee ("early") voting prior to the General Election of 2004."

⁷¹ See *James v. Bartlett*, at note 5 ("Absentee voting (*N.C.G.S.* §§ 163-227.2, -231,-248 (2003)) and election day voting at specially created "out-of-precinct" voting places (*N.C.G.S.* § 163-130.1 (2003)) are not at issue in the present case.")

⁷²David Ingram, "BILL THAT CLARIFIES VOTE COUNT GETS PUSH - COURT'S TOSsing OUT PROVISIONAL BALLOTS IS CENTER OF DEBATE," *Winston-Salem Journal*, Feb. 18, 2005 broadcast the results of the report, which is available at <<http://www.democracy-nc.org/reports/researchreports/OOPChart.pdf>>.

⁷³Adam Sotak, "MAKE DEMOCRACY A REALITY - SUPREME COURT DISENFRANCHISES 11,310 VOTERS WHO FOLLOWED RULES," *CO*, Feb. 11, 2005. See, similarly, Mark Binker, "DECISION ON ELECTION FAVORS WADE - JUSTICES SAY VOTERS CAN'T CAST BALLOTS OUTSIDE THEIR PRECINCTS ON ELECTION DAY," *Greensboro News & Record*, Feb. 5, 2005.

The General Assembly takes note of the fact that of those registered voters who happened to vote provisional ballots outside their resident precincts on the day of the November 2004 General Election, a disproportionately high percentage were African-American.

After a Republican amendment to apply the out-of-precinct bill only to future elections lost in the Senate, the bill rapidly passed both houses on party-line votes.⁷⁴ As extra insurance, the Democratic majority also passed another law reinstating a 19th-century law that had apparently been inadvertently omitted from a 1971 codification. The law provided a procedure to put into effect a state constitutional provision mandating that the legislature, and not the courts, would decide contested election cases for statewide offices.⁷⁵ It was that law, not the out-of-precinct law, that Wake County Superior Court Judge Henry Hight eventually used to decide the Superintendent of Public Instruction race.⁷⁶

5. A Fair and Open Process: Same-Day Registration, 2007

The adoption of same-day registration during the early voting period by the Democratic-majority 2007 legislature provides two sharp contrasts with the adoption of H.B. 589 and exposes two very instructive facts: The first contrast is that essentially the same bill was considered for five months, discussed in committee and on the floor, amended, passed from house to house, conferenced, and finally passed. Nothing in the bill was dumped in at the last minute without time or process that allowed for explanation and public debate. The second contrast is that when the Republican State Auditor Les Merritt raised questions about previous registration rolls -- not about SDR itself -- and requested, 26 minutes before Senate debate was scheduled to begin, that the bill be postponed, the legislature agreed. In 2013, after the Supreme Court decision in *Shelby County v. Holder*, nothing was allowed to delay the steamroller of H.B. 589. The facts are, first, that when questioned by the legislature and refuted by State Elections Director Gary Bartlett, Auditor Merritt quickly backtracked from his sensational charges of dead people voting and lists of drivers' licenses and Social Security numbers not matching all of those on the voter registration lists. So evidence of fraud, which would have been useful to Republicans in the 2011 and 2013 debates, dissolved under examination and was discarded. The second fact is that what Republicans objected to during the debates over SDR was the lack of photo identification required for new registrants, not SDR *per se*. This implies that once H.B. 589 required photo ID of voters, there should have been no need to include a repeal of SDR in the bill.

⁷⁴Lynn Bonner, "Senate: Count ballots," *N&O*, Feb. 23, 2005; David Ingram, "STATE HOUSE GIVES 1ST OK TO LAW ON PROVISIONAL VOTES - DEMOCRATS ARE UPSET OVER SUPREME COURT RULING," *Winston-Salem Journal*, March 1, 2005.

⁷⁵Jack Betts, "Legislators and Judges Fight Over Election Process - Democrats Need to Keep in Mind the Squabble's Potential Consequences," *CO*, Feb. 27, 2005.

⁷⁶Gary D. Robertson, "RULING APPEARS TO FAVOR WADE FOR COMMISSIONER - IT DOESN'T GUARANTEE HER WIN BUT ORDERS CERTAIN PROVISIONAL BALLOTS TO BE THROWN OUT," *Greensboro News & Record*, Mar 18, 2005.

H.B. 91, “Registration and Voting at One-Stop Sites,” was introduced with 57 House sponsors on Feb. 7, 2007. It finally passed the Senate, with 4 Republicans joining 30 Democrats in favor, on July 11. On the same day, it passed the House with 3 Republicans joining 66 Democrats in favor. All the opponents, 15 in the Senate and 47 in the House, were members of the GOP. Many amendments were considered and some adopted during the session. As finally passed, the law allowed initial registration or changes in registration (connected with an address change, for instance) during the early voting period. The identification required included a drivers’ license, a photo ID from any government agency, any of the documents specified for registration under HAVA, or other documents that the State Board of Elections might designate. Each registrant had to include either her drivers’ license number or the last four digits of her Social Security number on the registration form. Ballots cast by new registrants were to be identifiable and retrievable so that they could be excluded from the count if the county board of elections determined that the registrant was not qualified. Within two days of registration, the State Board of Elections had to verify the drivers’ license or Social Security number, update the statewide registration database and search for possible duplicate registrations, and send postal mail to the registrant to check the mailing address on each form.⁷⁷ If the postal mail, which was not forwardable, was returned, the county board of elections sent out a second piece of mail to that address. If this was returned, most counties apparently invalidated the ballot. Anyone who registered fraudulently, under this or older methods, of course, was guilty of a felony, punishable by a jail term.

The debate and amendments offered were instructive. In the House in March, according to a newspaper report,

The measure faced stiff opposition from Republicans, who tried to amend the measure to require those registering and voting on the same day to show photo identification.

Same-day registration and voting would open the polls to fraud *without additional safeguards*, they argued.⁷⁸

In the Senate in June, Republican Minority Leader Phil Berger stated that “If that bill did not include allowing someone to register and vote by showing a utility bill as identification or showing a bank statement as identification, I could support the bill.”⁷⁹ Democrats who supported the bill believed that the necessity to show various types of identification and the checks on registrants that the elections boards had to complete quickly before the same-day registrants’ ballots were counted were sufficient guarantees against fraud. Sen. Larry Shaw, D-Cumberland, the leading Senate proponent of the measure, expected the prime enrollees under SDR to be young people. “They need to be enfranchised and we need to empower these young men and women so that they can be

⁷⁷As above, all of this information is derived from the bill history on the legislative website.

⁷⁸Mark Binker, “Voting bill gets House backing,” *Greensboro News & Record*, March 29, 2007. My italics.

⁷⁹James Romoser, “Senate Oks Early Vote – Backers of Legislation Say It Will Help Increase Voter Registration,” *Winston-Salem Journal*, June 21, 2007.

... active citizens”⁸⁰ Other observers pointed to “minorities and poor voters” as those most likely to take advantage of SDR.⁸¹

The House approved H.B. 91 on March 29. After consideration by a Senate committee, the Senate was set to vote on the bill at 3 p.m. on June 5. At 2:34 p.m. that day, State Auditor Les Merritt, who had already announced for reelection to the post in 2008, sent an email to the co-chairman of the Senate Committee on Election Laws and Government Reform, Dan Clodfelter, a Charlotte Democrat, asking Clodfelter to pull the bill from the Senate calendar. Merritt claimed that his department had begun a study of voter registration in January and had now turned up unspecified “sensitive information” about the voting registration rolls. In response, Clodfelter and Senate Majority Leader Tony Rand replied to Merritt. “We are sure you appreciate how unusual it is for us to receive a specific request that we not take action on a pending bill,” they wrote, “and we therefore trust that you have substantial, credible, and specific evidence to back up the general inferences in your letter.” Merritt’s spokesman, Chris Mears, who had been the political director for the state Republican party, where he had been involved in voter registration issues, before he took the government job, acknowledged that Merritt’s request represented an effort to delay the bill. “We know that this was a very unusual situation,” Mears said, “but we thought it was necessary because of the information we discovered and also the timing. The bill was within hours of passing both houses of the General Assembly.”⁸² Merritt’s investigation paralleled one by the U.S. Department of Justice, which sent a letter to the State Board of Elections in April inquiring about inadequately pruned registration rolls, one of a series of inquiries across the country in 2007 that eventually exploded when several U.S. attorneys who refused to file charges of fraud were summarily fired.⁸³

When Clodfelter invited Merritt and State Elections Board Executive Director Gary Bartlett to testify before his committee, hundreds of people came to listen – a very large total for a mere committee meeting scheduled to hear technically complicated testimony from two bureaucrats. Merritt charged that the voter registration database contained 24,821 invalid driver’s license numbers, 380 people who appear to have voted after their dates of death, and others who had voted before they were 18 years old. Bartlett responded in testimony and a 10-page letter that the Auditor did not understand the data that the Election Board compiled, did not realize that many of the 380 “dead” people cast absentee ballots, in the two months before election day in which absentee ballots

⁸⁰Gary D. Robertson, “N.C. Senate approves same-day voter registration bill, NC,” AP, June 20, 2007; James Romoser, “Senate Oks Early Vote – Backers of Legislation Say It Will Help Increase Voter Registration,” *Winston-Salem Journal*, June 21, 2007 .

⁸¹David Ingram, “Senate Oks later cutoff to register,” *N&O*, June 21, 2007.

⁸²David Ingram, “Review of voter bill puzzles,” *CO*, June 16, 2007; James Romoser, “AUDITOR, ELECTIONS DIRECTOR CLASH OVER VOTER ROLLS - CONFLICT OVER ACCURACY OF VOTER ELIGIBILITY ALSO BRINGS ALLEGATIONS OF PARTISANSHIP” , *Winston-Salem Journal*, June 20, 2007.

⁸³See Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (New Haven, Conn.: Yale University Press, 2012), 52-59.

could be returned, but died before election day (meaning that the voter had been alive and legally entitled to vote when they sent in their ballots). Merritt had also apparently failed to understand that 17-year-olds who would turn 18 before a general election were authorized to vote in primaries to nominate candidates for that general election, even if they were still 17 at the time of the primary.⁸⁴ After hearing Bartlett's response, Merritt, in a reporter's words, "backed away . . . from the early findings of a review of North Carolina's voter rolls, telling lawmakers his office might find no irregularities at all. 'We'll eventually get to a correct, final report,' Merritt said, "and that final report, it could very well say there isn't anything here, that everything's fine, we're doing a super job.'"⁸⁵ Convinced that there was nothing to the Auditor's charges, the Committee sent the bill to the floor, and the next day, the Senate passed SDR by a party-line vote.⁸⁶ But it had held the bill up for two weeks to give the Auditor a chance to present evidence of registration problems.

6. Bipartisan Consensus on 16-17-Year-Old-Preregistration, 2009

Although a bill to allow 16- and 17-year-olds to preregister had been introduced and passed by both houses of the legislature in 1993, as explained above, it died when it was amended to include early voting. The issue at long last reemerged 16 years later, when the legislature in a burst of bipartisanship passed H.B. 908, by votes of 107-6 in the House and 32-3 in the Senate. The bill not only allowed the pre-18-year-olds to preregister at county election offices, early voting sites, and public high schools but it also mandated that public high schools had to mount annual voter registration drives, even in non-election years. There were no reports of fraud in this classic civic consciousness program.

⁸⁴David Ingram, "Inquiries checking rolls of voters," *N&O*, June 15, 2007.

⁸⁵David Ingram, "Voter roll probe raises hackles," *N&O*, June 20, 2007. Similar considerations might well explain a more recent sensationalized story about voter matches of interstate registration files and death records. Despite screaming headlines and exaggerated claims by Republican politicians that massive fraud had been discovered, State Board of Elections Executive Director Kim Westbrook Strach cautioned that some of the apparent matches may have been the result of "data error," such as a poll or precinct worker marking the wrong person's name as having voted. None of the cases that had been sent to local law enforcement officials had been prosecuted. See Laura Leslie, "State elections officials seek tighter security," *WRAL*, April 2, 2014, available at <<http://www.wral.com/state-elections-officials-look-tighter-security/13533579/>>. It is perhaps not surprising that a racist, anti-semitic website immediately jumped to the conclusion, based on no evidence whatsoever, that the apparently matched voters were African-American. See "Massive Nonwhite Voter Fraud Revealed in North Carolina," *The New Observer*, April 4, 2014, available at <<http://newobserveronline.com/massive-nonwhite-voter-fraud-revealed-in-north-carolina/>>.

⁸⁶Gary D. Robertson, "N.C. Senate approves same-day voter registration bill, NC," *AP*, June 20, 2007.

VI. Voter ID and the Restriction of Early Voting: The Preview, 2011

A. Constraints

With their tea party-led triumph at the polls in the 2010 election, Republicans sought in the succeeding legislative session to pass a voter identification bill and to repeal or constrain the major Democratic laws that had led to such a marked increase in turnout, particularly African-American turnout. But in the 2011 session, they faced two constraints, which frustrated their efforts. First, Democratic Governor Beverly Perdue held the veto power and might at least force Republicans to compromise. Having served in the legislature from 1987 through 2001 and as Lt. Gov. from 2002 to 2009, Purdue was quite familiar with voting rights issues and had supported the voting expansion laws. Second, and even more important, any changes in voting laws had to be precleared by the Obama Administration's Department of Justice under Section 5 of the Voting Rights Act, and there was scant reason to believe that the Attorney General would allow a voter ID bill, much less a clearly retrogressive bill cutting down early voting or eliminating SDR, to go into effect.

B. In the Wings

In both the 2011 and 2013 legislatures, voter ID legislation held center stage, attracting most of the media attention, legislative debate, and, in 2013, hearings and protests. Restrictions on early voting and other measures divided the Republican party, particularly in 2011, and the 2011 bill, H.B. 658, never made it to the Senate floor. Introduced on April 5, H.B. 658 was referred to the Committee on Elections, reported favorably on May 11, and passed its second reading in the House by 61-53 on May. 12. On May 18, one of the primary sponsors, Rep. Bert Jones, proposed an amendment allowing one-stop voting to take place from 10 to 4 or 11 to 5 on both Saturdays of the early voting period, instead of stopping it at 1 p.m., as in the original bill. The amendment passed, 107-10, with support from both parties. At this point, in other words, there was a bipartisan consensus that holding early voting sites open on Saturday afternoons facilitated voting by working people and that that was a good thing – a consensus that strikingly broke down when H.B. 589 was considered in 2013.

Later on May 18, 2011, H.B. 658 passed third reading by only 60-58, with 6 Republicans joining 52 Democrats in opposition and only Republicans in support. The bill, which reduced the number of days of early voting from 12.5 days to 7.5 days, including banning Sunday voting, and also ended SDR,⁸⁷ was sent over to the Senate, but died in committee. A companion Senate bill, S.B. 657, with the short title "Voting Integrity," cut down early voting by 7 days, including eliminating Sunday voting, and it ended SDR.⁸⁸ It, too, failed to emerge from committee.

⁸⁷"GOP legislators continue push for photo ID of voters," *Rocky Mount Telegram*, June 15, 2011; Jim Morrill and Michael Biesecker, "Voter ID requirement passes Senate - The House approves changes that would cut down time for voting and limit registration," *N&O*, June 16, 2011.

⁸⁸Editorial, "Shorter early voting costlier? Just say no! - N.C. lawmakers should reject these vote-restricting bills," *CO*, May 23, 2011.

A more comprehensive bill, S.B. 47, reduced the early voting period by a week, banned Sunday voting, eliminated SDR and straight-ticket voting, restored partisan judicial elections, made it a crime to compensate workers in voter registration drives, and allowed unlimited corporate donations to political parties.⁸⁹ It does not appear ever to have emerged from committee, but many of its provisions would later be added to H.B. 589, after the Supreme Court's decision in *Shelby County*.

One possible reason for the close votes and even Republican defections on H.B. 658 was that the Executive Director of the State Elections Board, Gary Bartlett, made public a memo to the legislature on early voting on the same day that H.B. 658 passed its third reading. The memo explained that a restriction on early voting would actually cost more, because county elections officials would have to buy more equipment and open more early voting sites to satisfy the growing demand for early voting, and that such a restriction would decrease the flexibility that officials had to deploy personnel and resources. The memo also contained statistics on who had taken advantage of early voting in 2008 and 2010, which showed the disproportionate use of early voting by African-Americans.⁹⁰ Public debate emphasized the partisan and racial implications of the bill. As a *News and Observer* story summarized it: "During the 2008 presidential election, early voters helped propel both President Barack Obama and Gov. Bev Perdue to narrow victories. Many of those were minority voters, who voted on Sunday after leaving church."⁹¹

C. Center Stage: Voter ID

The only election bill of 2011 to be considered on the floors of both houses was the photo ID bill, H.B. 351, titled "Restore Confidence in Government." Introduced on March 15, it was referred to two committees, and the Appropriations Committee reported out a substitute on June 7. The bill passed second reading in the House on June 8 by 67-50 and third reading, the next day, by 66-48. It was acted upon much more quickly in the Senate, being slightly amended and then passing second and third reading, 31-19 on June 15. The House concurred with the Senate amendments on June 16 by a vote of 62-51. When Gov. Perdue vetoed the bill, the House took four votes on July 26 in an attempt to override it. The overrides got 66-68 votes, while the opponents' 51-52 were enough to prevent the bill from obtaining the necessary three-fifths vote.⁹² All of the votes were almost pure partisan splits.⁹³

⁸⁹ "Legislators Deal With Voting Bills," *Southern Pines Pilot*, June 18, 2011.

⁹⁰ Editorial, "Shorter early voting costlier? Just say no! - N.C. lawmakers should reject these vote-restricting bills," *CO*, May 23, 2011.

⁹¹ Jim Morrill and Michael Biesecker, "Voter ID requirement passes Senate - The House approves changes that would cut down time for voting and limit registration," *N&O*, June 16, 2011.

⁹² "House to test Perdue on vetoes, repeatedly," *Rocky Mount Telegram*, July 24, 2011.

⁹³ Jim Morrill, "Voter ID bill passes House - Requires voters show photo," *N&O*, June 10, 2012; "GOP legislators continue push for photo ID of voters," *Rocky Mount Telegram*, June 15,

The discussion on H.B. 351 was instructive and filled with racial overtones. A State Board of Elections summary of prosecutions found only 2 in the state for in-person fraud from 2000 through 2010. There were 40 for absentee voter fraud, which was untouched by H.B. 351. Altogether, in 2008, there were 50 cases referred to District Attorney offices in 2008, of about 4.3 million votes cast.⁹⁴ As will be discussed at greater length in the section on the 2013 bill, Republicans contended that the very absence of evidence of fraud proved how much the law was needed: Without a strict photo ID law, one could not discover fraud, so the present lack of convictions did not mean that fraud was not occurring.⁹⁵ Seeking invisible conspiracies to organize voters or potential voters to engage in systematic fraud, proponents of voter ID apparently played upon the growth in the state's Latino population to suggest that "illegal immigrants" might be culpable. The *News and Observer* editorially denounced such unproved charges:

In making their case for voter ID, Republicans conjured visions of people (including illegal immigrants) sneaking into the polls to cast illegitimate ballots. In fact, the problem in North Carolina is virtually non-existent, and GOP leaders know it. . . .

The party now in control of the General Assembly was the one doing the pandering here. In trying to convince people there was a problem where there wasn't one, they were appealing to anti-immigrant sentiment, to suspicion in the minds of some that there is a conspiracy to rig elections with crooked voting.⁹⁶

Summarizing criticisms of the bill, the *Charlotte Observer* declared that opponents "said it would suppress voter turnout, particularly among students, African-Americans and elderly people, calling it a modern-day poll tax."⁹⁷ Democracy North Carolina publicized a study that found that "one in eight senior citizen voters have no photo ID; one in nine African-American voters and one in 10 women voters have no photo ID."⁹⁸

Realizing that Gov. Perdue would likely veto their bill, Republicans in June had floated a compromise, allowing a provisional vote to be cast if voters presented their current voter registration cards, a utility bill, or a pay stub. Perdue's office felt an agreement was within reach, but enough Democrats, worried that the provisional ballots would not be counted, rejected the bill to scuttle the potential deal. One of the bill's sponsors, Rep. Tim Moore, called the measure that

2011.

⁹⁴Editorial, "Shameless," *Fayetteville Observer*, July 28, 2011. Undated handout from State Board of Elections, "Types of Voter Fraud."

⁹⁵Gunther Peck, "Big voter turnouts and perceptions of fraud," *N&O*, June 9, 2011.

⁹⁶Editorial, "The governor's veto of a voter ID bill makes sense, whether it is popular with the public or not," *N&O*, June 25, 2011.

⁹⁷Jim Morrill, "Perdue vetoes photo ID voter bill - Measure's critics say it cut [sic] reduce turnout. GOP says it would help prevent fraud." *CO*, June 24, 2011.

⁹⁸Editorial, "Perdue rightly vetoed Voter ID, abortion bills," *Elizabeth City Daily Advance*, July 5, 2011.

passed as H.B. 351 “more of a purist bill.”⁹⁹ In her veto message, Gov. Perdue asserted that the bill would “unfairly disenfranchise” voters.¹⁰⁰ Suggesting that she would have been willing to accept a compromise, Perdue stated that ““The legislature should pass a less extreme bill that allows for other forms of identification, such as those permitted under federal law.””¹⁰¹

Instead of compromising, proponents of voter ID began a campaign to have the legislature pass local voter ID laws for three dozen localities, laws which the governor could not constitutionally veto.¹⁰² But state Attorney General Roy Cooper issued an opinion stating that such local voter ID laws would violate the state constitution’s provision that laws be uniformly applicable across the state.¹⁰³

VII. H.B. 589 Before and After *Shelby County*

A. Process Reveals Intention

At the beginning of the legislative process on H.B. 589, House Speaker Thom Tillis promised a “deliberative, responsible and interactive approach” to the bill, which, he claimed at a news conference, had not yet been written. Appearing with Tillis, House Elections Committee Chairman David Lewis invited opponents of voter ID to “help us . . . come to the table and seriously talk about an issue” that was important to its sponsors. Lewis, a member of the Republican National Committee, promised that opponents would have a chance to influence the final product. Asked whether the measure would be a “stand-alone voter ID bill” or an omnibus bill containing other

⁹⁹“Republican lawmakers return to stronger voter ID bill,” *Rocky Mount Telegram*, June 7, 2011; Jim Morrill, “Bill backs partisan judicial races -GOP-led House vote among several that will change elections. Senate passes bill to end straight-ticket voting,” *CO*, June 8, 2011; Reggie Ponder, “County asked to back voter IDs,” *Elizabeth City Daily Advance*,” Dec. 20, 2011 .

¹⁰⁰Jim Morrill, “Perdue vetoes photo ID voter bill - Measure’s critics say it cut [sic] reduce turnout. GOP says it would help prevent fraud.” *CO*, June 24, 2011.

¹⁰¹Nathan Tabor, guest columnist, “Perdue’s selfish veto of a sensible voter ID bill,” *Winston-Salem Journal*, June 30, 2011. The HAVA documents to which the governor was apparently referring include any government-issued photo ID or a current utility bill, bank statement, government check, paycheck, or other government document showing their name and address. See <<http://moritzlaw.osu.edu/electionlaw/ebook/part5/hava.html>>.

¹⁰²Craig Jarvis and Lynn Bonner, “Legislature saw drama, big shifts - GOP leader touts a ‘successful bipartisan effort,’ but Democrats differ,” *N&O*, July 31, 2011; Editorial, “Stop the shenanigans over the voter ID bill - Some Republicans seem to be drunk on power; sober up,” *CO*, Aug 1, 2011; .

¹⁰³Editorial, “Republicans should give up voter photo ID effort,” *Elizabeth City Daily Advance*, Dec. 24, 2011; Roy Cooper to Mark A. Davis, General Counsel to the Governor, Nov. 23, 2011, quoting Art. XIV, Sec. 3 of the North Carolina Constitution and various treatises.

provisions, Lewis said he planned to address only voter ID and absentee voting requirements.¹⁰⁴

Reporters attending the news conference characterized Tillis's statement as a promise to "slow walk the bill through the House."¹⁰⁵ Opponents were skeptical, one declaring that "this is all window dressing - a kind of political theater of the absurd in which the outcome is foreordained and most of the elected officials in the drama are merely playing roles assigned to them."¹⁰⁶ But the House did hold two public hearings and five committee meetings between March 12 and April 23, 2013 on the original H.B. 589, a stand-alone voter ID bill, hearing experts and citizens and allowing votes on 10 amendments. Three of the amendments were non-controversial and passed overwhelmingly, with from 109 to 116 votes in favor and from 0 to 9 votes opposed. The other seven amendments failed by almost straight party-line votes. The bill passed the House on April 24, garnering 4 Democratic votes, but otherwise revealing polarized parties.

A much different process was followed for H.B. 451, an omnibus elections bill slicing the early voting period, eliminating Sunday voting, ending SDR and straight-ticket voting, loosening restrictions on absentee ballots to let anyone deliver other voters' absentee ballot request forms, and fulfilling other dreams of the conservative Civitas Foundation think tank.¹⁰⁷ Although sponsored by House Majority Leader Edgar Starnes, H.B. 451 was introduced on March 27, referred to committee on March 28, and received neither hearing, nor committee report, nor floor action, at least in its initial guise. A similar lack of progress impeded the unfortunately-numbered S.B. 666, which proposed to shrink early voting by a week and end Sunday voting and SDR.¹⁰⁸

H.B. 589 was passed over to the Senate on April 25. There it sat in committee for two months until the Supreme Court's June 25 decision in *Shelby County v. Holder* because, as the chair of the Senate Elections Committee, Tom Apodaca said, "the state Senate . . . held up the bill pending the court ruling."¹⁰⁹ Operating with no publicity until July 23, the Senate sprang upon the legislature in

¹⁰⁴Press Conference, March 5, 2013, WRAL (video); Gary D. Robertson, "NC House Republicans lay out voter ID bill process," AP, March 5, 2013.

¹⁰⁵Rob Christensen and John Frank, "Confident GOP preps for voter ID bill - Democrats say it's more of the same; poll shows bill has support," *N&O*, March 6, 2013.

¹⁰⁶Rob Schofield, "Theatre of the absurd on voter ID laws," *Durham Herald-Sun*, March 18, 2013.

¹⁰⁷Editorial, "Another GOP effort to limit the N.C. vote - House bill targets several items that might favor Democrats," *CO*, March 30, 2013; Clark Riemer "Long Session, Big Battle," *Civitas Capitol Connection*, Jan. 2013, Vol 5, No. 1, p. 1; Susan Myrick, "Time to Reboot NC's Flawed Election Laws," *ibid.*, p. 6.

¹⁰⁸"Early voting could shrink," *Greensboro News & Record*, April 5, 2013; <<http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S666&submitButton=Go>>.

¹⁰⁹Wesley Young, "Impact of ruling to be felt in N.C.," *Winston-Salem Journal*, June 26, 2013. As one of the House sponsors of H.B. 589 said of the photo id section of the bill the day after the decision, "I guess the bottom line is we were very concerned about pre-clearance, so our range of

the session's last week a much different bill, 57 pages long, instead of the original 14.¹¹⁰ Within a period of 48 hours, the new bill was reported out of committee, passed by both houses, and ordered enrolled. An omnibus containing provisions from H.B. 451 from 2013, H.B. 658 from 2011, and six other bills, none of which had been the subjects of hearings or committee or floor debate,¹¹¹ the new H.B. 589 was considered in a flurry that mocked the promises of "a very deliberative, responsible manner" that Tillis had made in March. The obvious and admitted reason for throwing off the pretense of deliberation was the Supreme Court's *Shelby County* decision, which meant that laws that had a discriminatory intent or a retrogressive effect no longer faced rejection by the Department of Justice or the District Court of the District of Columbia. The reticence that the overwhelmingly Republican legislature had to passing an omnibus election bill in 2011 and before June 25, 2013 and the fervor with which the majority waded the bloated H.B. 589 through the legislature after *Shelby* by itself goes a long way toward establishing the bill's discriminatory intent. As Congressman G.K. Butterfield remarked about the legislature on June 26, "undoubtedly, there will be more efforts to suppress minority voting strength."¹¹²

B. Facts

Beneath often emotional and ideological debate on the two versions of H.B. 589, which I will hereafter refer to as H.B. 589 (1) and H.B. 589 (2), lay certain facts, which are important to keep in mind in judging the intent of the framers of the bill and its supporters, as well as the likely effects of the bill. It will be useful to review the facts that were in the public sphere before examining the debate *per se*.

1. The Extent of Fraud

Conveniently for the discussion, the State Board of Elections in 2011 and again in 2013 made public summaries of its investigations of voter fraud and those it had referred to local district attorneys for potential action. From 2000 through 2012, there were 1032 cases sent on to district attorneys. Only 2 of them charged a voter with impersonating another, the only kind of fraud that a photo voter ID measure would expose. Seventy-two related to absentee voting. Thirty-two concerned voter registration, though there was no breakdown between registration that took place 25 or more days before the election and SDR registrations. Fifty-eight had to do with non-citizens

acceptable IDs was broader than it may have needed to be . . ." Margaret Banks, "Ruling removes review of Guilford election laws," *Greensboro News & Record*, June 26, 2013.

¹¹⁰ Although rumors abounded, the *Charlotte Observer* commented the day before H.B. 589 was unveiled that "It's still unclear whether the legislature will move to enact restrictions on early voting and Sunday voting. Proposals have been floated but aren't in the bill being considered Tuesday by the Senate." Ely Portillo and Fred Clasen-Kelly, "Voter ID bill draws protesters - House, Senate versions differ on forms of acceptable identification," *CO*, July 23, 2013.

¹¹¹ Mebane Rash, "Ominous omnibus," *Durham Herald-Sun*, July 28, 2013.

¹¹² "Swift impact of voting decision," *Durham Herald-Sun*, June 27, 2013.

registering or voting. There were approximately 21 million votes cast during the period.¹¹³ Provable fraud was much less than round-off error.

2. The Disproportionate Use of Same-Day Registration, Out-of-Precinct Voting, and Early Voting, Particularly Sunday Voting, by African-Americans

Table 3 above sets out the basic figures on disproportionate early voting by blacks, but other studies show that “Souls to the Polls” campaigns by the NAACP, the General Baptist State Convention, AME Zion Church, Prince Hall Masons, Eastern Stars, and other groups especially energized black urban voters. In 2008, according to a Democracy North Carolina study, more people voted per hour on Sunday in the seven urban counties – Cumberland, Durham, Forsyth, Guilford, Mecklenburg, Pitt, and Wake – than on any other day during the early voting period.¹¹⁴ (On Sunday, early voting sites were open only in the afternoons; on weekdays, they were also open in the mornings.) In 2012, according to figures from the State Board of Elections, African-Americans were more likely to vote on Saturday than whites and much more likely to vote on Sunday. On Friday, Oct. 19, 2012 in the first week of early voting, 32% of the voters were black; on Saturday, Oct. 20, 36%; on Sunday, Oct. 21, 43%. The next week’s Friday-Sunday percentages for black voting were 26%, 30%, and 36%. 61,498 people voted on Sunday in 2012.¹¹⁵

Statistics on voting by race using SDR and out-of-precinct voting are given above, in Section V-A. In addition, State Board of Elections numbers show that blacks were much more likely than whites to favor in-person early voting to absentee voting by mail. Whereas African-Americans made up 29% of in-person early voters, they comprised only 9% of absentee voters by mail.¹¹⁶

Even politicians who did not pay close attention to reports by public policy groups, listen to their opponents’ speeches, or read newspapers would probably have been aware of events like one that took place on the first day of early voting in Durham, where students at predominantly black North Carolina Central University held a rally addressed by the president of the state NAACP, William Barber, and then marched to an early voting site at the student union to vote.¹¹⁷

3. The Disproportionate Lack of Identification Documents Among Minorities

Although the League of Women Voters plaintiffs are not challenging the photo ID sections of H.B. 589 in this court, facts about the probable disproportionate impact of that voting restriction are relevant to questions about the intent of the legislation. An April 2013 report by the State Board of

¹¹³“Under the Dome, *N&O*, March 11, 2013.

¹¹⁴“North Carolina Dems: Dems Tell Berger: You’re Not Entitled to Your Own Facts on Sunday Vote,” Targeted News Service, April 3, 2013..

¹¹⁵ See <ftp://www.app.sboe.state.nc.us/ENRS/absentee11xx06xx2012.zip>.

¹¹⁶ See <ftp://www.app.sboe.sate.nc.us/ENRS/historystats11xx06xx2012.zip>.

¹¹⁷ Neil Offen, “It’s opening day for voting,” *Durham Herald-Sun*, Oct. 18, 2012.

Elections matched voter registration lists with lists of current holders of North Carolina driver’s licenses or state identity cards. It found non-matches for 318,643 of the 6.4 million voters at the time. The information, which was available to the legislature at the time it considered H.B. 589 (1), is most easily presented in tabular form. Table 4 shows that disproportionate numbers of African-American registrants, and even more disproportionate numbers of African-American actual 2012 voters, did not appear on the Department of Motor Vehicles lists. That is, the legislature was certainly aware that substantially more African-Americans would have to acquire some form of state-issued identification card if a photo id law were passed.¹¹⁸

Table 4: Percentages of Voters Without Driver’s Licenses or State Identity Cards, 2013

Group	All Registered Voters	% Without State Photo IDs	
		Registered Voters	Voters Who Voted in 2012
Whites	71	54	54
Blacks	23	34	36

Source: <<http://www.democracy-nc.org/downloads/SBOEDataNoIDApril2013PR.pdf>>

C. Justifications for and Criticisms of H.B. 589

The quality of the debate in the two days between the time when the Senate Elections Committee reported out H.B. 589 (2) and when both houses passed it, sent it to the governor, and triumphantly adjourned the legislative session, was not high. Brent Laurenz, executive director of the nonpartisan North Carolina Center for Voter Education testified before a brief Senate hearing, saying “Voting is among the most fundamental and sacred rights that we have as North Carolinians and as Americans. Any effort to limit the free exercise of that right should be examined cautiously, fairly and with full public involvement.” As he spoke, the Associated Press reported, “Republican lawmakers rolled their eyes, talked among themselves or checked their smart phones for messages.”¹¹⁹ In the House, the only Republican to speak was Elections Committee Chair David Lewis, who did not bother to answer charges that the measure would lead to long lines at the polls and disfranchise minorities and college students. Democrats, according to a news report, “used most of the 2-1/2 hours of debate to recall the fight for voting rights in the 1960s.” As the House majority

¹¹⁸ Part or all of the statistics in Table 4 were repeated, e.g., in the testimony of Sarah Preston, Policy Director of the North Carolina ACLU, House Hearing, March 12, 2013, at 13-14; Jennifer Frye of Democracy North Carolina, *ibid.*, at 49-50; Keesha Gaskins of the Brennan Center, in March 13, 2013 House Hearing, at 9; Allison Riggs in *ibid.*, at 32-33.

¹¹⁹ Michael Biesecker, AP, “NC bill would place new restrictions on voting,” July 24, 2013.

voted in the law, Democrats stood, held hands, and bowed their heads.¹²⁰

1. Fraud

To charges that there was almost no in-person voting fraud, usually backed up by statistics from the State Board of Elections or the Brennan Center,¹²¹ the typical response was a variation on Secretary of Defense Donald Rumsfeld's famous statement about the failure to find evidence of weapons of mass destruction in Iraq: "The absence of evidence is not evidence of absence." Typical was that given during the Senate hearing on H.B. 589 by Sen. Bob Rucho: Fraudulent votes "never seem to get recorded or reported."¹²² Or as Sen. Jerry Tillman phrased it, "If you don't check it, you ain't going to detect it. . . . We don't know how many there are."¹²³ As a reporter summarized the debate, "Despite the lack of evidence showing widespread voter fraud in the state, Republicans repeatedly insisted that cheating at the polls is rampant and that the perpetrators are not caught."¹²⁴

The chief group charging that there was actual voter fraud in North Carolina was the Voter Integrity Project (VIP), a group "inspired by"¹²⁵ the national organization "True the Vote," which targeted black and Latino voters for challenges in Houston in 2010. Jay DeLancy, the founder of the VIP, told the *New York Times* that he split off from True the Vote "partly because the group raised concerns about focusing on immigrants," which Mr. DeLancy did not mind doing.¹²⁶ The evidence it cited was very circumstantial and mostly amounted to inadequate purging of registration rolls – counties in which the registration lists were nearly as large as the number of voting age citizens; 30,000 dead people who had not yet been removed from the rolls;¹²⁷ 150 people in Wake County who

¹²⁰Lynn Bonner, David Perlmutter, and Anne Blythe, "Election changes move ahead - House and Senate approve the package, which could invite a Department of Justice lawsuit," *CO*, July 26, 2013.

¹²¹ E.g., Sarah Preston, Policy Director of the ACLU of North Carolina, in House Hearing March 12, 2013, at 13-14; Diana D. Hatch, in *ibid.*, at 19; Bill Rowe, in *ibid.*, at 45; Sonya Gressel, in *ibid.*, at 101-02; Keesha Gaskins, in March 13, 2013 House Hearing at 8;

¹²²Editorial, "Election 'Reform' Stacks the Deck", *Southern Pines Pilot*, July 26, 2013.

¹²³ Craig Jarvis, "Senate gives voter ID law initial OK - Final approval today would send measure to the N.C. House," *CO*, July 25, 2013.

¹²⁴Michael Biesecker, "NC Senate approves GOP-backed election changes," AP, July 25, 2013.

¹²⁵ See <http://voterintegrityproject.com/faqs/>.

¹²⁶Stephanie Saul, "Looking, Very Closely, for Voter Fraud," *New York Times*, Sept. 16, 2012 (reporter's summary of DeLancy comments); Ryan J. Reiley, "In Texas' Biggest County, A Minority Registration Drive Is Crippled by Fraud Allegations," *TPM Muckraker*, Oct. 5, 2010, <<http://talkingpointsmemo.com/muckraker/in-texas-biggest-county-a-minority-registration-drive-is-crippled-by-fraud-allegations>>.

¹²⁷ In the normal course of purging in a 19-month period in 2006-07, the State Board of Elections removed 725,999 names from the voter rolls, most because of death or inactivity, so 30,000

had voted, but who had claimed at some point in response to jury summonses not to be voters; 7000 Wake County voters from 2012 to whom letters were sent and returned as undeliverable; and 63 people in Buncombe County who registered and whose driver's licenses and social security numbers matched state records, but whom the post office did not find at the addresses they had given. VIP Director Jay DeLancy's testimony on the subject before the House was quickly disavowed by the organization itself,¹²⁸ meticulously debunked by critics,¹²⁹ as well as undermined by his charge that critics of the VIP were "all part of a vast left-wing conspiracy, if you will pardon the term, working to pad the voter rolls with as many non-citizens as possible."¹³⁰

There were some charges during the debates that there was not time to validate SDR votes by sending out mail and seeing if it was returned (the post office was not supposed to forward it).¹³¹ Not

remaining on the rolls at any one time was unsurprising. David Ingram, "Inquiries checking rolls of voters," *N&O*, June 15, 2007.

¹²⁸ Two days later, the VIP website posted a "Statement on possible errors," which read, in part "Late this afternoon, we learned that some of our findings, revealed at the April 10 public Legislative hearing, may be inaccurate; so we plan to issue a full report after completing an audit." See http://voterintegrityproject.com/poss_errors/. The VIP did not indicate which of its findings were inaccurate, and if it did conduct an audit, it apparently never posted or published a "full report."

¹²⁹ The VIP presented a list of 528 registered voters who were allegedly not citizens to the Wake County Board of Elections in 2012. The Board quickly found evidence that at least 510 of them were citizens and called the remaining 18 before a hearing. "Advocacy group appeals dismissal of voter fraud," "Under the Dome," *N&O*, July 9, 2012, available at http://projects.newsobserver.com/under_the_dome/advocacy_group_appeals_dismissal_of_voter_fraud.

¹³⁰ Bill Bryson in House Elections Committee Hearing, April 10, 2013, at 70-71; Jay DeLancy, in House Hearing, March 12, 2013, at 34. There were over 700,000 voters registered in Wake County in 2012.

¹³¹ E.g., Francis DeLuca, President of the John W. Pope Civitas Institute, in March 13, 2013 House Hearing, at 17. See also Meghann Evans, "Republicans take control of county elections board," *Winston-Salem Journal*, July 17, 2013; testimony of John Pizzo, research director of the Voter Integrity Project, at House Elections Committee Public Hearing, April 10, 2013, at 22; and testimony by numerous individuals, announcing individual names, provided by VIP on slips of paper, of voters in Buncombe County who used SDR, but whose mailed confirmation letters were returned, in April 10, 2013 public hearing. As Gerry Sovak remarked at the April 10, 2013 Public Hearing of the House Elections Committee, at 141, "I have, of course, another one of these things here from the Voter Integrity people, who have done a magnificent job in their research. And I don't have to bore you any more with more from Buncombe County. We have a guy, Keith Miles Avery (phonetic), and he did the same thing that all the rest of them from that county did." The State Board of Elections investigated a county commission contest from Buncombe County, referred to in complaints about SDR at this hearing, and found that almost all of the challenged ballots, which were from Warren Wilson College students, were valid. Johnnie F. McLean, Deputy Director of the State Board of Elections, to Robert J. Deutsch *et al.*, Jan. 2, 2013.

only did this ignore the other checks on such registration, which required HAVA identification and either a drivers' license number or the last four digits of a Social Security number, but they also ignored the tagging of the SDR ballots, as explained above, so that they could be excluded for the count if found later to be invalid.¹³² Again, proponents of H.B. 589 (2) presented no evidence of actual fraud, just what Gov. Pat McCrory called the "potential for abuse."¹³³ Asked at a post-passage news conference how ending SDR, cutting a week off of early voting, and eliminating teenage pre-registration would prevent voter fraud, Gov. McCrory seemed not to know the details of either existing North Carolina law by suggesting that people could register online, which was not legal, he ignored the question about early voting, and he confessed he did not know about pre-registration. "I don't know enough, I'm sorry, I haven't seen that part of the bill," McCrory replied."¹³⁴

It was very telling that no one in the 2013 debates referred to the 2007 Auditor's study by Les Merritt or the investigation of the same year by the U.S. Department of Justice as providing any evidence of fraud. Nor did anyone counter the contention made, for example, by Lee Mortimer, a former member of the Legislative Study Commission for Election Law Review in 1996, that if there had been appreciable fraud, some candidate in a close election would have successfully challenged his defeat.¹³⁵ It does not take Sherlock Holmes to appreciate the significance of non-barking dogs.¹³⁶

2. Lack of Confidence

Lacking credible evidence of fraud, proponents of voter ID retreated to the notion that people believed there was fraud, whether or not it was true, and that therefore, they needed voter ID to assuage their fears and restore confidence in the electoral process.¹³⁷ Speaking of the voter identification bill about to be introduced in the North Carolina House, Speaker Thom Tillis told MSNBC on March 16, 2013 that

There is some voter fraud, but that's not the primary reason for doing this. There's a lot of people who are just concerned with the potential risk of fraud. And in our state it could be significant. This is just a measure that we think makes three-

¹³² The confirmation-by-mail rate of SDR and earlier registrations was approximately equal. Bob Hall, "Sounding a retreat on voting," *N&O*, July 1, 2011.

¹³³ Chris Berendt, "Voter ID bill draws praise from Jackson, disdain from Bell," *Sampson Independent*, July 31, 2013.

¹³⁴ Michael Biesecker, "McCrory not familiar with all of bill he's to sign," AP, July 28, 2013.

¹³⁵ Mortimer testimony in April 10, 2013 Public Hearing before House Elections Committee, at 94-95.

¹³⁶ Arthur Conan Doyle, "Silver Blaze."

¹³⁷ The most amusing response to this argument came from Dr. Walter Salinger, a psychologist, who told the House Elections Committee in its March 12, 2013 hearing that "I can assure you that individuals who find themselves unsettled enough by imaginary danger that they require a new law against it will not find relief from that new law. It is surely safe to say that therapy for that kind of affliction is not found in the North Carolina General Assembly." At 152.

fourths, nearly three-fourths of the population, more comfortable and more confident when they go to the polls.¹³⁸

Likewise, David Lewis, chairman of the House Elections Committee, said of the purpose of H.B. 589 (2) that “It’s all about continuing to improve the confidence in elections.”¹³⁹ Introducing H.B. 589 (1) on the House floor, Lewis remarked that “I will not stand before you today and list name by name or example after example, but I can tell you that the perception is that there needs to be an improvement in the integrity of the election system.”¹⁴⁰ They offered even less evidence for the incidence of such fears than they did for the incidence of fraud.¹⁴¹ In any event, no one had any occasion to say during hearings on H.B. 589 (1) that slicing early voting or SDR or out-of-precinct voting or teenage pre-registration would somehow restore the electorate’s confidence, and they never made such assertions. Democrats responded with an equal lack of specific information, Sen. Malcolm Graham, for example, asserting that H.B. 589 (2) was “not about providing confidence, honesty, integrity, and trust in government. Trust is being lost as we speak.”¹⁴² The disagreement about what the public thought and the lack of evidence on both sides suggests that the whole issue was merely rhetorical and not a possible motive for acting.

3. Expense

Sen. Bill Cook declared that in his rural district, there was no need to open early voting sites for more than two weeks. “I don’t think we need (the extra days),” he said. “The first week, you get lots of folks. The second week, nothing. It’s almost a desert.” Urban election administrators, such as George Gilbert of Guilford County, disagreed, saying, in the words of a newspaper reporter, that

shrinking the early voting period would mean “extremely long voter lines” or millions of dollars to buy enough voting machines to keep voters moving on the remaining days.

He scoffed at the idea the state could save money by cutting back on voting days, saying he did that math for elections going back to 2000.

“On a cost basis, early voting is much more efficient,” Gilbert said.¹⁴³

On a perhaps similar note, Senate President Pro Tem Phil Berger declared that early voting “put stress

¹³⁸ “North Carolina Dems: Thom Tillis: Wrong Priorities for North Carolina,” *Targeted News Service*, March 19, 2013.

¹³⁹ Gary D. Robertson, “NC Senate rolls out voter ID proposal,” AP, July 18, 2013.

¹⁴⁰ House Floor Debate, April 24, 2013, 43, my underlining.

¹⁴¹ The one study of the correlation between the public perception of fraud and turnout, by Steve Ansolobehere and Nate Persily, cited by Allison Riggs in her testimony before the House Elections Committee, March 13, 2013, at 38, found no correlation at all.

¹⁴² Senate Debate, July 24, 2013, at 25-26.

¹⁴³ “Early voting could shrink,” *Greensboro News & Record*, April 5, 2013. During the Senate debate on the bill, African-American Senator Dan Blue made the same point as Gilbert. Senate Debate, July 24, 2013, at 19-20.

on election workers and campaign coffers.”¹⁴⁴ Gilbert responded that

Early voting enabled us to use fewer polling places and place more experienced and better-trained poll workers in the early voting sites. We were also able to place better technology in these sites and, as a result, execute elections much more accurately.¹⁴⁵

To the extent that there was any discussion of expenses with respect to other provisions of the bill, Democrats pointed out that providing free identity cards and advertising about the new election provisions would cost the state a fair amount. The largest expense as a result of the bill, certainly larger than any possible cost savings from restricting early voting, was in moving the presidential primaries up to coincide with the South Carolina primary. Sen. Rucho blithely predicted that the extra spending on presidential campaigns coming into the state would offset the \$12 million that he predicted it would cost the counties to run another election.¹⁴⁶ Despite the importance of cutting spending in normal Republican rhetoric, no proponent touted any provision of the bill as a cost-saving measure.

4. Efficiency and Uniformity

Introducing H.B. 589 (2) in the Senate Rules Committee, Sen. Bob Rucho touted “early voting changes, which help streamline and make the system work smoothly as it was intended . . .”¹⁴⁷ It would provide for more uniformity across the state.¹⁴⁸ On the Senate floor, however, Rucho was inconsistent about consistency. On the one hand, he declared that H.B. 589 “sets standards as to the voting hours, uh, across the one hundred counties. Everyone will be treated the same way. Lack of consistency has been a problem.”¹⁴⁹ On the other hand, Rucho criticized a compromise amendment by African-American Senator Floyd McKissick, Jr. to restore the full 17 days of early voting in presidential years, when turnout was especially high. Counties could provide more days or more sites if they desired, said Sen. Rucho, who praised the bill for providing county-level “flexibility.”¹⁵⁰ And Rucho was not alone. Other Republicans, such as Sen. Brent Jackson, touted the non-uniformity of the bill. As Jackson told his hometown newspaper, “While it does shorten the period for early voting, it gives counties flexibility to set their own early voting hours during this, provided that they are the same throughout the county.”¹⁵¹ In fact, the bill allowed counties to petition for exemptions to

¹⁴⁴“Early voting could shrink,” *Greensboro News & Record*, April 5, 2013.

¹⁴⁵George Gilbert, “Turnout rises with early voting,” *Greensboro News & Record*, June 9, 2013.

¹⁴⁶ Senate Debate, July 24, 2013, at 8-9.

¹⁴⁷ Senate Rules Committee Meeting, July 23, 2013, at 3-4.

¹⁴⁸ Sen. Rucho, in Senate Rules Committee Meeting, July 23, 2013, at 22.

¹⁴⁹ Senate Debate, July 24, 2013, at 4.

¹⁵⁰ Senate Debate, July 24, 2013, at 12. McKissack’s amendment was defeated on a party-line vote. *Id.*, at 21.

¹⁵¹Chris Berendt, “Voter ID bill draws praise from Jackson, disdain from Bell,” *Sampson*

decrease early voting more than the standard for the state, and by February, 2014, more than a third of the state's counties had petitioned to provide fewer days or shorter hours.¹⁵² It is a curious argument if a relatively simple provision of the bill can be interpreted in opposite ways, even by its chief sponsor, and a loophole can guarantee the failure of an asserted goal.

Sen. Rucho also argued that SDR should be ended because it strained election boards. H.B. 589, he declared, “allows time for, um, to verify voters' information, uh, by repealing same-day registration, and which will ensure accuracy. Uh, it's been a challenge for the Board of Elections, uh, to be able to identify and validate everyone that has come there on the basis of one-day registration.”¹⁵³ This was, of course, a problem that might have been attacked by relatively small increases in spending to hire more people to work at county election boards. Instead, the legislature cut appropriations for the boards of election.¹⁵⁴

VIII. H.B. 589 and the “Senate Factors”

Having laid out the evidence extensively in narrative/analytical form, I now more briefly summarize it, organizing it under the rubrics of the nine “Senate Factors” of the 1982 Senate Report on the renewal of the Voting Rights Act. I then reorganize the evidence, summarizing it under the rubrics of ten “intent factors” drawn primarily from federal court opinions dealing with intent.

A. Modifications in the Senate Factors for this Case

Senate Report 97-417 sets out seven “typical factors” and two “additional factors” that might be used to prove a violation of Section 2 of the Voting Rights Act. As the Report notes at p. 28, n. 113, “These factors are derived from the analytical framework used by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973)], as articulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)].” Because *White v. Regester* concerned at-large elections in Dallas and San Antonio, these factors are not entirely congruent with the particulars of state-wide election laws. Moreover, political conditions have changed a great deal since 1973 – the Latino population has grown markedly in many states, more minorities have been elected to office, and the Republican party has replaced the Democratic party as the dominant one in the South. As a consequence, some of the “Senate Factors,” such as factor #4 on slating processes, may be ignored in this case, while others, such as factor #1, must be slightly reinterpreted.

Independent, July 31, 2013.

¹⁵² Doug Chapin, “Many North Carolina Counties Seek Further Cutbacks on Early Voting,” *Electionline*, Feb. 27, 2014, available at <http://blog.lib.umn.edu/cspg/electionacademy/2014/02/many_north_carolina_counties_s.php>.

¹⁵³ Senate Debate, July 24, 2013, at 4-5.

¹⁵⁴ Statement of Joanne Clayton, Wake County Board of Elections Trustee, in House Elections Committee Hearing, March 12, 2013, at 161

B. The Evidence Arrayed Under the Rubrics of Relevant Factors

What follows is largely a very abbreviated rearrangement of the evidence presented in sections IV-VI, augmented by evidence from outside the narrative where appropriate.

1. History of Official Discrimination

The first Senate factor is “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.”¹⁵⁵ Part IV of my report is largely devoted to this factor.

The 1835 constitutional convention’s closing of the loophole that allowed black freemen to vote by inserting the word “white” because of the threat that free men of color might influence or even dominate a local election represents the purest form of black disfranchisement (Section IV.A.) But efforts to diminish black voting power did not cease when the Fifteenth Amendment made disfranchisement explicitly on racial grounds unconstitutional. There was significant Ku Klux Klan violence against African-Americans and their white allies in North Carolina, captured memorably in the phrase of the famous North Carolina Republican and later lawyer for Homer Plessy, Albion W. Tourgee: “It is no crime for a white man to cut a colored man open in Alamance.”¹⁵⁶

But really lasting discrimination in the political process in the South in the late nineteenth and early twentieth centuries was accomplished by changes in election laws that brief frenzies of violence and fraud made possible. After Democrats took over the legislature, at least partly through Klan violence, in 1870, they redistricted both legislative and congressional seats to pack blacks into as few districts as possible in order to minimize the influence of blacks and the Republican party to which they overwhelmingly adhered. Although the state remained politically competitive until 1894 and African-Americans retained the ability to vote, their effective participation in the politics of the state was considerably diminished. Then, largely as a result of the worldwide depression of the 1890s, a Republican-Populist Fusion movement swept into control of the legislature in 1894 and the governorship in 1896. In an event paralleling the liberalization of election laws in the state from 1999 through 2007, the Fusion movement passed the most expansive election law in the post-Reconstruction South, and turnout of both blacks and whites reached the highest levels of any southern state after 1876, including recent elections. This experiment in competitive democratic elections was brought to an abrupt end by the violent 1898 “white supremacy campaign,” which enabled Democrats to pass a severely restrictive election law and gave Democratic election officials

¹⁵⁵S.R. 97-417, p. 28. The rest of the Senate factors appear on p. 29. I will quote them without further citation.

¹⁵⁶Quoted in a convenient reference on the Klan in North Carolina, Rachel Hampton, “The Ku Klux Klan in Reconstruction North Carolina: Methods of Madness in the Struggle for Southern Dominance,” available at <<http://history.ncsu.edu/projects/cwnc/exhibits/show/kkk-methods>>.

the unrestrained ability to fabricate election returns. They used this ability in the 1900 referendum that fastened upon the state a poll tax and literacy test, enforced by Democratic election officials who moved electoral discrimination from the ballot box to the registration list.

It took African-Americans in the state a long time to recover politically. Even after the repeal of the poll tax in the state in 1920 and the Supreme Court's outlawing of the white primary in 1944, few blacks managed to register – only 15% in 1948 and 36% in 1962. When after the 1965 passage of the Voting Rights Act, black registration in North Carolina finally approached levels that might have allowed them to elect candidates of their choice, the state retained at-large elections for urban legislative and city council seats, a form of elections only gradually overthrown by judicial action in such notable cases as *Thornburg v. Gingles*. Intentional discrimination in the drawing of congressional districts in 1971 and 1981 kept blacks from winning even a single seat, although they comprised over 20% of the state's population. Only pressure from Sections 2 and 5 of the Voting Rights Act in 1991-92 caused the state to adopt congressional districts where, for the first time since 1898, blacks in North Carolina enjoyed the opportunity to elect candidates of their first choice.

Also relevant for evaluating H.B. 589 is the history of anti-discrimination in North Carolina politics - the passage of election laws that encouraged African-Americans and the small, but growing Latino population to participate in politics. Early voting, same-day registration, the counting of votes cast outside of the voter's precincts, in addition to civic education and the pre-registration of 16- and 17-year-olds while they were still in high school, spurred turnout in the state from 48th among the states in 1988 to 11th in 2012,¹⁵⁷ and most of this increase can be attributed to increased black participation. (See Section V above.) It is the repeal of these laws by H.B. 589 that directly threatens the participation of African-Americans in North Carolina politics that makes the analysis of the 1999-2007 laws central to the history of minority political participation in the state.

2. Racially Polarized Voting

Factor 2 is “the extent to which voting in the elections of the state or political subdivision is racially polarized.” The extent of racial bloc voting is relevant to the intent prong of Section 2.¹⁵⁸ If Republicans crafted changes in election laws to do the maximum damage to Democrats, then they necessarily must have aimed them at that party's most loyal supporters. If a majority of African-Americans in 1900 had been Democrats, Democrats would have had no interest in disfranchising them. If a majority of African-Americans in 2013 had been Republicans, Republicans would have had no interest in restricting the opportunities to vote that blacks differentially exercised.

Voting in North Carolina is racially polarized, as I understand the state has conceded in the

¹⁵⁷For a convenient source of turnout data by state, 1980-2012, see <https://docs.google.com/file/d/0B0bHdAFS4MgqWmdKdEdWTHRzbUE/edit?pli=1>.

¹⁵⁸For example, in *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), the Court declared that “bloc voting along racial lines” and the failure to elect blacks “bear heavily on the issue of purposeful discrimination.”

current redistricting litigation. The CNN exit poll for the 2012 Governor's race found 29% of whites and 85% of African-Americans voting for Democrat Walter Dalton, while 70% of whites and only 13% of blacks favored Republican Pat McCrory.¹⁵⁹ The polarization by race was much more pronounced than those by education or income. Thirty-nine percent of high school graduates voted Democratic, compared to 46% of college graduates and 45% with postgraduate degrees. Forty-nine percent of those with incomes under \$50,000/year favored Dalton, but only 38% with incomes over \$100,000. The presidential contest (Romney carried the state, 50-48) was even more polarized. Thirty-one percent of whites, but 96% of African-Americans voted for Barack Obama. There was almost no correlation between education and 2012 presidential vote choice, and that between income and the vote was tempered. Fifty-five percent of those with incomes of less than \$50,000/year voted for Obama, while only 44% of those with incomes above \$100,000 did so.

Outcomes from earlier polls are similar. In 2004, the CNN exit poll showed that 43% of whites and 87% of blacks voted for the successful Democratic gubernatorial candidate, Michael Easley, which was again, much more polarized than votes by income or education. Even though John Kerry ran considerably behind Easley among whites, garnering only 27% of their votes, he polled nearly as well, 85%, as Easley did among African-Americans.

In the state as a whole, there are sometimes enough crossover white voters to elect the choice of black voters, as in the gubernatorial elections from 1992 through 2006, and sometimes not enough white crossover voters, as in 2010. Nor do legislative or congressional seats necessarily have to contain majorities of minority voters to elect the minority candidates of choice, as shown by the repeated reelection of Mel Watt to Congress, after his first two elections, in a minority-minority congressional district. Racial polarization has never been defined legally as 100% of whites opposing and 100% of minorities favoring particular candidates, and indeed, Justice Brennan in *Gingles* singled out "legally significant white bloc voting" as that subset of all bloc or racially polarized voting in which white voters "normally will defeat the combined strength of minority support plus white 'crossover' votes . . ."¹⁶⁰

3. Enhancing Provisions

Factor 3 is "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." These types of laws pertain largely to local elections or to an era in which winning the Democratic primary virtually guaranteed a candidate the election. The implicit lawsuit to which they pertain is one attempting to overturn an at-large election in a system containing other provisions that add to the difficulty of electing minority candidates of choice.

¹⁵⁹ Also relevant to the provisions of H.B. 589, the vote was polarized by age, as well. 56% of voters aged 18-29 voted Democratic, compared to 34% of those over 65.

¹⁶⁰ *Gingles*, at 56.

The best analogy in this case is simply the number of provisions being put into effect simultaneously, each of which by itself has a disproportionately large effect on African-American participation. Added together, they have a multiplier or interactive effect: the constriction of early voting, especially the ending of Sunday voting and the confining of Saturday voting to a half-day, the end of SDR and counting out-of-precinct votes, cutting off preregistration and civic outreach for 16-17-year olds, plus voter ID legislation with a very limited range of ID cards accepted. As was pointed out during the Senate debate, the end of straight-ticket voting also disproportionately affected African-Americans, 80% of whom voted straight tickets in 2012, compared to 45% of whites. It would take much longer for people to vote in predominantly black than in predominantly white precincts, compared to the times in 2012, which would make for longer lines and more people leaving without voting.¹⁶¹ Putting all of these into effect at the same time will depress turnout for two reasons: First, political organizations will have to insure that every voter overcomes more than one new obstacle – that they register at least 25 days before the election AND that they vote on a weekday or Saturday morning in an 11-day, rather than in an 18-day period (ten days plus the normal election day), AND that they remember to bring a valid ID with them to the polls. Second, because minority voters will expect fewer of their group to vote, and that therefore, there will be a smaller chance for a minority-preferred candidate to win, they will have less incentive to vote, and those who contribute funds to campaigns will have less incentive to contribute to such candidates.

In 2008, the Obama campaign keyed its strategy in North Carolina to the newly expansive election laws, targeted potential black and college student voters, and invested more resources in the state than any Democratic presidential campaign since 1964. The combination of laws that encouraged more people to vote and a campaign that grasped that opportunity produced the greatest increase in turnout of any state in the country between 2004 and 2008.¹⁶² H.B. 589 can be expected to produce the opposite effect – a law designed to make voting more difficult, coupled with decreased campaign efforts because the outcome seems predetermined, will lead to a decline in turnout, especially among minorities. The 1999-2009 laws enhance minority participation; the many provisions of H.B. 589, added together, enhance discrimination.

4. Candidate Slating Processes

This factor relates only to local elections and is not relevant to this case.

¹⁶¹ See Senate Debate, July 24, 2013, Track 3, at 6. The estimate of straight-ticket voting by race was made by regressing the percentage of straight-ticket votes on the percent of black voters in each precinct.

¹⁶² Tova Andrea Wang, *The Politics of Voter Suppression: Defending and Expanding Americans' Right to Vote* (Ithaca, N.Y.: Cornell University Press, 2012), 91-92.

5. The Current Effects of Discrimination

The fifth factor is “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” Congress assumed in its statement of this factor a fact long recognized by social scientists -- that in the post-World War II U.S., political participation is strongly correlated with education and income. As Raymond E. Wolfinger and Steven J. Rosenstone put it in *Who Votes* in 1980, “Probably the best-known finding about turnout is that ‘citizens of higher social and economic status participate more in politics.’”¹⁶³ Poorer people are less likely to own cars or have internet connections. Less educated people may make more errors following complicated bureaucratic instructions. Any legal change that shortens voting periods, penalizes mistakes in going to the wrong polling place, or sets the registration deadline at a time before some people are paying much attention to an election will have a disproportionate effect on those who bear the effects of hundreds of years of discrimination.

But there are also two particular legacies of past discrimination that are relevant to the particular provisions under review are, first, the geographic mobility of African-Americans, compared to whites, which would affect a voter’s need to re-register because she moved within or between counties. The repeal of SDR would disproportionately affect a more geographically mobile group, and the contraction of the early voting period would disproportionately affect even those who moved within a county, because they would have less time to change their registration to reflect their new residences. A second trait is the extent to which members of a group held blue collar or low-skilled service jobs, because people holding these jobs might have more difficulty than professionals or those in high-skilled service jobs or homemakers to get off from work for long periods during the day. They would therefore be disproportionately damaged by a constriction of early voting, particularly on weekends. Both conditions – geographic mobility and low-skilled jobs – can be seen as resulting from generations of past discrimination.

As in the country as a whole, African-Americans are more geographically mobile than non-Hispanic whites in North Carolina. The 2006-1010 American Community Survey (ACS) data indicates that an average of 17.1% of blacks moved within the state each year during that 5-year period, compared to 10.9% of whites. Although most of that movement took place within each county, blacks were still more likely than whites to move from county to county – 4.2% to 3.3% – per year.¹⁶⁴

¹⁶³ (New Haven: Yale University Press, 1980), 13, quoting Sidney Verba and Norman H. Nie, *Participation in America: Political Democracy and Social Equality* (New York: Harper and Row, 1972), 125. The most recent treatment of the subject, which reaches the same conclusion about differential turnout by education and income as the earlier works did, is Jan E. Leighley and Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* (Princeton, New Jersey: Princeton University Press, 2014).

¹⁶⁴See

<<http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?ft=table>>.

Furthermore, in North Carolina, African-Americans are still disproportionately concentrated on the lower end of the employment spectrum, presumably enjoying less ability to take long periods of time off of work, in the case lines at the polls are long. The 2006-2010 ACS data show that non-Hispanic blacks hold only 16.2% of the management, professional, technical, or sales jobs in the state, while they fill 25.0% of the administrative support, construction, operative, laborer, and service worker jobs.¹⁶⁵

So two specific legacies of slavery and Jim Crow connect directly with two specific provisions of H.B. 589, in both cases hindering minority group participation in politics as a direct result of that law. Lengthening lines at polling places, a certain result of eliminating a week of early voting, especially voting on the weekends, will disproportionately affect African-Americans because of their geographic mobility and less flexible employment conditions.

6. Racial Appeals

The sixth factor is “whether political campaigns have been characterized by overt or subtle racial appeals.”

The unsubtle racial appeals in the 1950 Willis Smith and 1990 Jesse Helms campaigns are sufficiently notorious as to have been the principal subject of several books and articles. There have been fewer such blatant uses of race by political candidates in the state since that time, but there have not needed to be. The racial demagoguery of the 1898 white supremacy campaign fastened the black collar around the Republican party’s neck in North Carolina for fifty years or more. Every effort that the party made – and there were many, particularly in the 1920 gubernatorial campaign of John J. Parker – to claim that it, not the Democrats, was “the party of the white man” failed. A sufficiently strong racial appeal, in the earlier case, imprinted itself on one party for a very long time. The continued racial polarization in voting in the state suggests that Helms’s racial appeal has had a similar effect in the more recent period.

7. The Election of Minority Group Members

The seventh factor is “the extent to which members of the minority group have been elected to public office in the jurisdiction.” With the *Gingles* case in 1986, it became much more difficult to retain at-large systems of electing candidates to local and legislative offices, and the resulting district elections sent many more African-Americans to city halls and state legislative chambers. The redistricting of the 1990s, as a direct result nationally of *Gingles*, greatly increased the number of districts where blacks could elect candidates of their choice. The growth of black officeholding, in other words, was the result of the enforcement of the Voting Rights Act.

¹⁶⁵See

<http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?_afpt=table>.

In 2011, Republican redistricting plans for congress and the state legislature in North Carolina insured the election of a certain number of black candidates – no more, no less – by packing more African-Americans into districts where blacks could already elect black candidates with white crossover votes.¹⁶⁶ *Slate* magazine rated the two black-dominated North Carolina congressional as among the 20 “most gerrymandered” in the country.¹⁶⁷

Whether black officeholding in North Carolina will ever equal the percentage of black voters, which might be one interpretation of the aim of the seventh factor, is difficult to say because of the Supreme Court’s invalidation of Section 4 of the Voting Rights Act in *Shelby County v. Holder*. Whether the Republican party’s interest in redistricting will continue to be maximized by packing African-Americans into the smallest number of districts, or whether the North Carolina party, like the Texas party, will attempt to decrease the number of minorities elected by cracking the existing minority opportunity districts, also remains to be seen. If districts that currently elect black members are “cracked,” instead of packed in the future, then the number of candidates of choice of the black community elected will probably decline.

8. Unresponsiveness

The eighth factor, which the Senate Report calls “not an essential part of plaintiff’s case,” is particularly relevant in this one because it is unusually easy to measure. The Report defines the factor as “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.” Three laws passed by the 2013 North Carolina legislature demonstrate unresponsiveness: slicing the length of time that people can receive unemployment benefits, refusing to expand Medicaid under the Affordable Care Act, even though the first few years were 100% paid for by the federal government, and repealing the Racial Justice Act.

The Great Recession drove up long-term unemployment generally, but particularly black long-term unemployment. Nationally, 1.9% of African-Americans were unemployed for 27 weeks or more in 2007, compared to just 0.7% of whites. By 2010, the totals were 7.7% and 3.7%, respectively. By 2012, black long-term unemployment had fallen to 6.5%, and white long-term unemployment had dropped to 2.8%. A larger proportion of blacks than of whites had been unemployed for a year or more – in 2012, fully 4.8% of blacks and 2.0% of whites. In March, 2013, not long before the legislature passed a bill limiting unemployment benefits to 12-20 weeks,¹⁶⁸ North

¹⁶⁶“NAACP threatens suit over Congressional redistricting plan,” WRAL, July 7, 2011; “Miller, Shuler, and Kissell Biggest Losers in New Congressional Maps,” *Carolina Journal*, July 01, 2011; “N.C.’s Redistricting Maps Could ‘Off’ Four Dems,” *The American Spectator*, July 5, 2011; “Cracked, stacked and packed: Initial redistricting maps met with skepticism and dismay,” *Indyweek.com*, June 29, 2011; “Legal challenge for redrawn 12th District anticipated,” *Salisbury Post*, July 31, 2011.

¹⁶⁷See <http://ballotpedia.org/Redistricting_in_North_Carolina>.

¹⁶⁸ Emery P. Dalesio, “North Carolina Dropped From Federal Unemployment Program,” AP,

Carolina had the third highest long-term unemployment rate of any state.¹⁶⁹ The general unemployment rate of African-Americans in North Carolina during the fourth quarter of 2012 was 17.3% -- nearly three times as high as that of whites, which was 6.7%.¹⁷⁰ Cutting the length of time for which someone actively seeking work (a requirement of the program) could receive benefits would obviously hurt blacks more than whites, and cutting benefit levels, as the law also did, would damage even those left on the rolls. A government that was responsive to the particular needs of African-Americans would not sever a lifeline that was disproportionately important to that group.

More African-Americans and Latinos than whites lack health insurance in North Carolina. In 2011-12, 21% of blacks, 44% of Latinos, but only 15% of whites in the state lacked health insurance.¹⁷¹ Whites in the state were very much more likely to obtain their health insurance from their employers – 71% of whites did, but only 18% of blacks and 4% of Latinos.¹⁷² Blacks and Latinos were much more dependent on Medicaid than whites. Although some people received both Medicaid and employment-based insurance during a single year, so that coverage figures can exceed 100%, 36% of blacks, 16% of Latinos, and 38% of whites received at least some coverage from Medicaid in 2011-12. Because minorities were more likely to lack health insurance, particularly private insurance, any cuts in Medicaid or a refusal to expand it to cover people with incomes between 100% and 138% of poverty (the level at which subsidies under the Affordable Care Act begin) would disproportionately hurt members of minority groups. That is what the state did. North Carolina's actions were estimated to eliminate 40,000 North Carolinians from health insurance coverage provided by Medicaid and cause from 455 to 1145 extra deaths in the state per year. Because minorities disproportionately lacked insurance, a disproportionate number of those deaths would likely be to minorities.¹⁷³ Certainly, those who suffered additional pain, suffering, or death because of the legislature's refusal to accept a federal grant to expand Medicaid in the state would believe the state unresponsive to their interests, and they would be disproportionately minority.

Finally, the 2013 legislature repealed the Racial Justice Act, passed in 2009, which provided

June 28, 2013, available at < http://www.huffingtonpost.com/2013/06/28/north-carolina-unemployment_n_3515448.html>.

¹⁶⁹ Joint Economic Committee, "Long-Term Unemployment in the United States," (April 2013), Appendix, Tables 1 and 2, available at <http://www.jec.senate.gov/public/?a=Files.Serve&File_id=ee31ad2d-5eb0-4f60-a852-87a27d559457>. I could not find figures for long-term unemployment by race for the state.

¹⁷⁰ Mary Gable and Douglas Hall, "Ongoing Joblessness in North Carolina Unemployment rate for African Americans fourth in nation, more than double the state's white rate" Economic Policy Institute, May 16, 2013, available at <http://www.epi.org/publication/ongoing-joblessness-north-carolina-unemployment/>.

¹⁷¹ See < <http://kff.org/uninsured/state-indicator/rate-by-raceethnicity/?state=NC>>.

¹⁷² See < <http://kff.org/other/state-indicator/distribution-by-raceethnicity-3/?state=NC>>.

¹⁷³ Laura Leslie, Mark Binker, and Cullen Browder, "New studies: Medicaid opt-out costly for NC," @NCCapitol, WRAL, Jan. 31, 2013, available at < <http://www.wral.com/new-studies-medicaid-opt-out-costly-for-nc/13349683/>>.

that those convicted of murder, who were disproportionately minority in North Carolina, could escape the death penalty if they could prove that racial bias tainted their cases.¹⁷⁴ Eight-one of the 153 convicts awaiting execution when the law was passed were black – 53%, compared to the 22% black proportion of the total population of the state.¹⁷⁵ Only 61 were white. Blacks and other minorities who believed the justice system of the state infected with racism, as some reversals of death penalties under the Racial Justice Act had already shown, had reason to doubt the responsiveness of the legislature to their particularized needs.

9. Tenuous Policy

The ninth factor is “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous,” and the sentence has a footnote which begins “If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact.” While the factor was obviously framed primarily to apply to sub-jurisdictions of a state, it does have an application here, especially because H.B. 589 represents such a radical departure from the previous practices.

H.B. 589 reversed all of the policies that had been adopted since 1999, all of which except 16- and 17-year-old preregistration had been shown to have a disproportionately expansive effect on African-American voting participation, and it added a photo ID requirement, when it had been shown that blacks were considerably less likely to hold state-issued photo IDs than whites were. There is simply no evidentiary basis to doubt the conclusion that this abrupt departure from previous legal requirements will have a discriminatory impact on minority voters.

VIII. The Intent of H.B. 589

A. Reasons, Scrutinized Reasons, and Motives

Courts sometimes seem to accept almost any reasons for actions by a government proffered by an attorney in a lawsuit, even if it cannot be shown that the government actors articulated those reasons before or at the time that they acted.¹⁷⁶ In other cases, courts require governments not only

¹⁷⁴ Kim Severson, “North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges,” *New York Times*, June 5, 2013, available at <<http://www.nytimes.com/2013/06/06/us/racial-justice-act-repealed-in-north-carolina.html>>.

¹⁷⁵ Matt Smith, “‘Racial Justice Act’ repealed in North Carolina,” CNN, June 21, 2013, available at <<http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/>>.

¹⁷⁶ See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986), where the majority of the Supreme Court accepted the state’s defense of a ban on imports of bait fish on the grounds that non-native species or parasites might otherwise invade, prompting Justice Stevens’s skeptical rejoinder: “There is

to come up with reasons for their actions, but to have considered sufficient evidence, in the court's view, to have arrived at the decision to pass the various provisions of the law.¹⁷⁷ In a third class of cases, those that turn on the government's intent, courts have felt compelled to weigh the evidence for and against competing explanations of that intent.¹⁷⁸ Intent is often a complicated inquiry, one turning on facts and not simply on assertions of motives, and therefore, like historians' inquiries in general, the inquiry must be initially skeptical of all explanations and desirous of testing each potential explanation against other plausible ones. I have examined these issues at much greater length in chapter 7, "Intent and Effect in Law and History," in *Colorblind Injustice*.

B. H.B. 589 and Ten "Intent Factors"

Drawing largely on federal court opinions, particularly the U.S. Supreme Court's opinion in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), I set out ten "intent factors" in *Colorblind Injustice*, 347-58, discussing their rationales at greater length than courts have often done. I have very briefly indicated their rationales at the beginning of the discussion of each factor. For a more extensive discussion, the reader is referred to *Colorblind Injustice*. As in the "Senate Factors" section above, I compress the evidence presented in earlier sections of my report and array it under each of the ten rubrics.

1. Models of Human Behavior

Every explanation rests implicitly or explicitly on some model of human behavior. The models that each observer or analyst has in her mind influences what explanations seem plausible, whether she uses the model self-consciously or not. If we think that politicians who frame election laws are typically public-spirited citizens who only want the best for all people, then we will be more likely to accept the inevitable rhetoric of reform. If we believe all politicians are only narrowly self-interested in every endeavor, we will look for self-interested motives.

What should the history of election laws in North Carolina suggest about the proper model of human behavior to adopt in analyzing H.B. 589? Since this history has been reviewed above, it is easy to be brief. North Carolina's election laws until very recently have been biased against African-Americans, with the exception of the Fusion election law of 1895, and laws and redistricting schemes

something fishy about this case." *Id.*, at 152.

¹⁷⁷ See, e.g., *University of Alabama v. Garrett*, 531 U.S. 356 (2001), in which a majority of the U.S. Supreme Court held that Congress had not found a sufficient pattern of discrimination against disabled persons by state governmental entities to justify applying the Americans With Disabilities Act to such entities. *Id.*, at 370-71.

¹⁷⁸ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976), in which a majority of the U.S. Supreme Court weighed the evidence for and against the proposition that a written test for police officers in the District of Columbia was instituted for a discriminatory purpose, finding that the District's minority outreach and pattern of hiring, and the connection of the test to communication skills outweighed the disparate impact of the test. *Id.*, at 246.

have repeatedly been used to disadvantage both blacks and minority parties. Major changes in those laws have usually taken place at times of major challenge to a ruling party, and they have represented attempts to entrench that party – always the party least dependent upon African-American votes.

We should approach such a major change in the rules of elections as H.B. 589 with this history in mind.

2. Historical Context

The sequence of historical events, which often reveals a great deal about the general attitudes and interests of decisionmakers, is particularly telling in this instance in three respects: First, although Democrats had managed to control the governorship and at least one house of the legislature from 1992 through 2010, the party had not won a presidential election in North Carolina since 1976. Obama's breakthrough in 2008, fueled by huge turnouts of African-Americans and college students, posed the threat that Democrats would extend the power of a younger, growing coalition into a dominant position in state politics. Second, Republicans reversed that surge in the nationwide tea party landslide of 2010 and partially solidified its control through heavily partisan and racial gerrymandering of legislative and congressional lines in 2011. But demographic trends were against the GOP, and Obama nearly carried the state in 2012. Third, and most important, was the Supreme Court's decision in *Shelby County*, which freed the state from preclearance. Many of the segments of H.B. 589 that were added to the bare-bones photo ID bill that had passed the House would surely have been deemed retrogressive by the Department of Justice, because it could be easily shown, by the evidence presented above, that African-Americans were more likely to vote early, more likely to register using SDR, and more likely to vote out of their precincts. The timing of the addition of the sections of the bill under attack in this case should be decisive in determining its intent.

3. Text of Law or Lines of Districts

The text of the law – for example late or anomalous additions or deletions or amendments not accepted – may be indicators of its intent. First, consider some of the amendments that were NOT adopted as the process proceeded. Ms. Pricey Harrison moved to include high school photo IDs and then, when objections to those from private high schools were raised, removed them. The amendment still failed. Harrison also wanted to add private college IDs as, she noted, were valid in several other states. That failed, too. Elmer Floyd moved to allow someone without a photo ID to agree to have a photo taken of her at the polls, along with her signature. That proposal was also defeated.¹⁷⁹ Rick Glazier proposed an amendment allowing someone who did not bring a photo ID to the polls to vote if a polling place official knew them. The defeat of this amendment weakened the case for those who contend that the law was about stopping fraud.¹⁸⁰ Glazier also proposed an amendment similar to the one that the Department of Justice forced on South Carolina, allowing someone who had a “reasonable impediment” to obtaining a photo ID to vote without him. Photo ID

¹⁷⁹ House Elections Committee Meeting, April 17, 2013, 48-110.

¹⁸⁰ House Appropriations Committee Hearing, April 23, 2013, 31-34.

purists prevented this amendment from passing.¹⁸¹ All of these amendments would have made it easier to vote without increasing the possibility of fraud.

It is also instructive to compare the voter ID section of H.B. 589 with the laws of three states with well-known voter ID laws, as well as with H.B. 658 from 2011 and H.B. 589 (1). Table 5 does so. It shows that H.B. 589 (2) is vastly more restrictive than the Georgia and Indiana laws, which were declared constitutional, and considerably more restrictive than the Texas voter ID law, which did not survive a Section 5 challenge in the District Court of the District of Columbia and is now under a Section 2 challenge in Texas. It was more restrictive than the 2011 photo ID bill, as well.¹⁸² Georgia allowed county, municipal, state public and private college, gun license, pilot's license, and government assistance cards to be used as IDs. H.B. 589 (2) allowed none of these. Indiana also allowed college student IDs, as well as expired state drivers' licenses. Both Georgia and Indiana scheduled 21 days of early voting, instead of H.B. 589 (2)'s 10. Texas allowed gun licenses and U.S. citizenship certificates as IDs. The 2011 bill that Gov. Perdue vetoes allowed federal, state government, county, municipal, and public college IDs and those issued by a county Board of Election, and it did not change the number of days of early voting.

The changes between H.B. 589 (1) and H.B. 589 (2) were also dramatic. When introducing the House version in the Elections Committee, one of the chief sponsors, Harry Warren, touted the VIVA (Voter Information Verification Act) Board in grandiose terms:

VIVA provides for increased participation of eligible voters through an aggressive, bipartisan program of voter education and voter registration initiatives at the grassroots level across the state over a two-year period. VIVA aggressively addresses allegations of voter suppression and dispels predictions of disenfranchisement.¹⁸³

After *Shelby County*, the sponsors dropped the VIVA Board and the information campaign, along with the use of public college, local government IDs, and IDs used for government assistance programs, which they had added when the House Elections Committee agreed to an amendment by longtime African-American legislator Mickey Michaux.¹⁸⁴ The sponsors added a section to allow people who resided anywhere in the county, not just in a voter's precinct, to challenge her right to vote, and they authorized political parties to appoint bands of wandering observers to supplement the normal two observers at each polling place, in case there were fewer than two partisan observers at a polling site at any time. The prospect of large-scale challenging at minority precincts, which True the

¹⁸¹ House Appropriations Committee Hearing, April 23, 2013, 50-51.

¹⁸² Activists paid very close attention to the exact provisions of each bill, and the politicians who passed them must be assumed to have, too. For example, in the April 10 public hearing before the House Elections Committee at 15, Maria Gaither, a representative of the Voter Integrity Project, declared that H.B. 589 (1) "has been watered down from the bill passed in the previous session. Now is . . . not the time to go wobbly."

¹⁸³ House Elections Committee Meeting, April 10, at 36-37.

¹⁸⁴ See House Elections Committee Meeting, April 17, 2013, at 44.

Vote had threatened to do nationally in 2012,¹⁸⁵ filled civil rights forces with trepidation.¹⁸⁶

Most important for this case, H.B. 589(2) reduced early voting from 17 to 10 days, eliminated voting on one of the two Sundays preceding the election, which was particularly important to African-Americans, and ended Saturday voting at 1 p.m., not 5 p.m. It also ended SDR during the early voting period and disallowed counting ballots for any offices at all that were cast out of precinct on election day.

The simplest way to gauge the impact of *Shelby County* on the bill is to compare the last two columns of Table 5. A bill that was already more restrictive than those in other states became much more restrictive, and those provisions disproportionately affected minorities. Clearly, the majority party in the legislature chose the more restrictive option in every case, and they did so with full knowledge of their discriminatory impact.

¹⁸⁵ Stephanie Saul, “Looking, Very Closely, for Voter Fraud,” *New York Times*, Sept. 16, 2012; Suevon Lee, “A Reading Guide to True the Vote, the Controversial Voter Fraud Watchdog,” *ProPublica*, Sept. 27, 2012, available at < <http://www.propublica.org/article/a-reading-guide-to-true-the-vote-the-controversial-voter-fraud-watchdog>>.

¹⁸⁶ Rob Schofield, “Voter suppression proposal a fitting conclusion to the 2013 legislature,” *Elkin Tribune*, July 31, 2013. The *News and Observer* predicted that the provision “it will give muscle to those who want to make trouble at polling places by challenging the rights of others.” Editorial, “Unhappy ending - Republican legislators produced a session to forget . . . if only we could.” *N&O*, July 27, 2013.

Table 5: Comparison of Voter ID Laws in Four States

Acceptable IDs	ID Law					
	GA	IN	TX	NC 2011	NC 2013 (1)	NC 2013 (2)
In-state drivers' license	x	x	x	x	x	x
In-state drivers' license, expired	x	x			x	
State ID Card	x	x	x	x	x	x
Federal ID Card	x	x		x	x	
U.S. Passport	x	x	x	x	x	x
County ID	x			x	x	
Municipal ID	x			x	x	
Tribal ID	x			x	x	x
Employee Photo ID	x					
Student ID, State Public College	x	if expiry date		x	x	
Student ID, State Private College	x					
Student ID, State Technical School	x			x	x	
State Gun License	x		x			
FAA Pilots' License	x					
Military ID Card	x	x	x	x	x	x
U.S. Citizenship Certificate with Photo			x			
State Government photo id, other state	x			x		
County BOE ID card				x		
Veterans ID card	x	x			x	x
Out-of-State Drivers' License or Non-Operator Id, if Voter Reg. Within 90 Days						x
Government Assistance Card	x				x	
Out-of-State ID card no more than 10 years old					x	
Publicity Board					x	
Early Voting	21 days	21 days	10 days	(17 days)*	(17 days)*	10 days

Sunday voting			County option	x	x	
Saturday voting	Until 6	County option	County option	Until 5	Until 5	Until 1
Same-day registration				x	x	

Sources:

Georgia: <http://sos.ga.gov/index.php/elections/georgia_voter_identification_requirements2>

Indiana: <<http://www.in.gov/sos/elections/2401.htm>>

Texas: <<http://www.sos.state.tx.us/elections/pamphlets/largepamp.shtml>>

North Carolina 2011: H.B. 351, as ratified

North Carolina 2013 (1): House Appropriations Committee Meeting Transcript, April 23, 2013, at 6-7.

North Carolina 2013 (2): <<http://www.ncleg.net/enactedlegislation/sessionlaws/pdf/2013-2014/sl2013-381.pdf>>

*left status quo untouched

4. Basic Demographic Facts

A fast-growing minority population or populations whose depressed educational and economic levels reflect the vestiges of past and present racial and ethnic discrimination are facts that politicians can be expected to observe and that, therefore, should be assumed to affect their design of electoral rules and structures. Although the black population percentage in the state was virtually constant from 2000 to 2010, the Latino population more than doubled, and the white percentage dropped by almost four percent.¹⁸⁷ A party almost wholly dependent on white voters, especially where younger white voters had preferred Obama in 2008 and 2012,¹⁸⁸ faced a daunting long-range prospect.

5. Climate of Racial Politics

The climate of racial politics must be assumed to condition the expectations of officials who frame or maintain electoral structures. To the traditional antagonism between whites and African-Americans in the state, intensified by the election of the nation's first African-American president, the marked growth of a Latino population in the state, for the first time, added another element to the racial stew, and there is evidence that it partly motivated H.B. 589. According to an editorial in the *Raleigh News & Observer*, "In making their case for voter ID, Republicans conjured visions of people (including illegal immigrants) sneaking into the polls to cast illegitimate ballots."¹⁸⁹

6. Background of Key Decisionmakers

In some election law changes, as in the adoption of a majority-vote requirement in Georgia in 1964, one or a small group of legislators were clearly the prime movers, and their histories and biographies become key to understanding the motives of the legislature in passing the law. The prime mover of the Georgia majority-vote law in 1964, Denmark Groover, whose political career had been almost brought to an end by what he called a black "bloc vote" in 1958, was the leader of the extreme segregationist/county unit forces in the legislature. His leadership and background cast strong light on the intentions of the legislature that passed the majority-vote law.¹⁹⁰ There is as yet insufficient evidence to connect H.B. 589 strongly to a particular legislator or small group of legislators. Instead, it seems on current evidence that a 2010 landslide and the continuation of that geological shift in 2012 brought a cadre of new legislators to join veterans who had opposed extensive early voting, same-day registration, and out-of-precinct voting since they were adopted. Although internal documents that may emerge later in discovery may spotlight some particular

¹⁸⁷ See <http://censusviewer.com/state/NC>.

¹⁸⁸ In 2012, according to the CNN exit poll, voters aged 18-24 in North Carolina favored Obama by 67-31; those from 25-29, by 66-33; those in their thirties, by 58-41. In contrast, only 35% of voters over 65 preferred the African-American Democrat.

¹⁸⁹ Editorial, "The governor's veto of a voter ID bill makes sense, whether it is popular with the public or not," *N&O*, June 25, 2011, discussing Gov. Perdue's veto.

¹⁹⁰ See *Colorblind Injustice*, chapter 4, "The Bloc Vote in Georgia."

legislators, currently it appears that these extensive changes should be attributed to the whole Republican leadership that came to power in 2010 and 2012.

7. Other Actions of Key Decisionmakers

Like their backgrounds, other actions of key decisionmakers may be indirect indicators of their general attitudes toward different minority groups. According to John Hood, a conservative writer at the John Locke Foundation, the 2013 legislative session in North Carolina was “phenomenal.” As the *News and Observer* summarized its accomplishments, not so enthusiastically:

The Republican supermajority, backed by Gov. Pat McCrory, dramatically reshaped the North Carolina landscape, upending decades of settled law, cutting once-sacred institutions and redefining the state's political vision. The moves represent a test of how a moderate, evenly divided state reacts to a deep-red governing class. . . .

Once the new laws take effect, the new North Carolina will require photo identification at the polls, levy a flat income tax that reduces rates for many, make it harder to get an abortion, offer less generous unemployment benefits, require cursive education in schools, give low-income families vouchers for private schools, require fewer government regulations on businesses, resume executions for capital crimes and allow concealed handguns in bars and restaurants. . . .

It's a similar story on the Racial Justice Act, which allowed convicted killers to be spared the death penalty if they could prove racial bias in their cases. Republican lawmakers weakened it last year but repealed it completely this session with McCrory's approval.¹⁹¹

Repealing a law called the “Racial Justice Act” might serve as the symbol of the legislative session. But others had wider effects.

An omnibus deregulation bill weakened restrictions on siting landfills. Democrats and some Republicans opposed the bill in the House, saying sponsors kept a provision on landfills in the dark and they weren't able to properly vet it in committee. . . .

But it does restrict consideration of the impact of multiple landfills on minority or low-income communities to only what's required under federal law. . . .

Landfills' impact on low-income and minority towns was an important consideration in 2007, when the legislature approved tougher landfill regulations.¹⁹²

And as Rep. Garland Pierce, chairman of the Legislative Black Caucus, remarked, the legislature repealed the Earned Income Tax Credit, a benefit to lower-income working families with children,

¹⁹¹John Frank, “GOP changes ‘breathhtaking’ - With a friendly governor, agenda became more ambitious in second session,” *N&O*, July 28, 2013.

¹⁹²Annalise Frank, Lynn Bonner, and Daniel Blustein, “Regs bill wraps up Assembly session - McCrory mum on whether he'll veto it,” *N&O*, July 27, 2013.

and decided to reject the 100% federally funded expansion of Medicaid in Obamacare.¹⁹³

8. Statements by Important Participants

It is rare nowadays to find “smoking gun” statements about voting rights cases littering the legislative hallways, and one is forced to rely more on objective evidence. Careful to avoid statements that might undermine their case in the inevitable Section 2 and constitutional challenge to H.B. 589, backers of the legislation said as little as possible, especially about H.B. 589 (2). Dismissing their critics’ continual charges that the bills were aimed at bolstering the Republican party by suppressing the votes of minorities, college students, and seniors, proponents of H.B. 589 contented themselves with chanting their concern for minorities¹⁹⁴ and their nonpartisanship.

9. State Policies and Institutional Rules

Departures from settled or widespread state policies or well-established institutional norms may be indicators of a discriminatory intent. Although there were no telltale abrogations of rules when the wholesale ripping up of the state election code that H.B. 589 represented took place, there were abrogations of norms. In 2007, when the Republican State Auditor requested a sudden halt to the planned debate on the SDR bill, Democrats jammed on the brakes, invited him to a public session, and considered the evidence he presented. By contrast, Republicans in 2013 sprung H.B. 589 (2) on the Democrats and the state just before legislative adjournment. There were no hearings or, in the House, even one committee meeting to let the Democrats debate, offer compromises, and vote on amendments. In *Larios v. Cox*, 300 F.Supp. 2d 1320 (2004), a federal district court examining the intent of the 2001 Georgia legislature in passing a redistricting plan for itself began by discussing the plan’s partisan origin and the majority Democrats’ defeat of all Republican amendments. A similar analysis of the 2:1 ratios of Republicans to Democrats on legislative committees in North Carolina in 2013, the generation of the bills wholly by the Republicans, the rejection of most Democratic amendments to H.B. 589 (1) and the renegeing after *Shelby County* on the few compromises the Republicans had made should lead to a judgment similar to that in *Larios*. Every Democratic amendment to either bill considered on the House or Senate floors was rejected by a party-line vote.

10. Impact

Effect is very often taken as an indicator of intent because the framers of electoral laws may be assumed to be aware of and to calculate the consequences of their actions carefully and to be quite good at making such calculations. The likely impact of the voter identification provision of H.B. 589 and of the additional provisions at issue here is very clear, very discriminatory, and very

¹⁹³John Frank, “GOP changes ‘breathhtaking’ = With a friendly governor, agenda became more ambitious in second session,” *N&O*, July 28, 2013.

¹⁹⁴Larry G. Pittman in House Floor Debate, April 24, 2013, at 148: “It deeply distresses me that some of the opponents of this bill have brought the issue of race into this discussion.”

easily anticipated because of all of the publicity given to the statistics while the law was being considered. African-Americans, a matching study by the State Board of Elections showed, were much more likely than whites not to have a driver's license or state identity card, and they were much more likely to vote early, to use SDR, and to vote outside their precincts. Republicans showed no reluctance to adopt these suppressive provisions; they did not accept them "in spite of" their racially discriminatory effects, in the words of *Feeney*.¹⁹⁵ Rather, they did so triumphantly, gleefully, because of the discriminatory effects.

C. Alternative Explanations Tested

1. A Response to Fraud

If H.B. 589 were really a response to fraud, one would expect a large incident – a contested or disputed election, the discovery of a conspiracy to alter election returns, the report of obviously spurious returns, as in the 1900 suffrage amendment referendum in North Carolina – would precede and focus the election law debate. But there was no scandal, small or large, that precipitated the passage of H.B. 589 and, indeed, no credible evidence of in-person voting fraud or illegal registrations. What little fraud there was concerned mail-in absentee balloting,¹⁹⁶ and the legislature rejected proposals to require a copy of a photo ID to be included with mail-in ballots or that they be notarized.¹⁹⁷ There was no evidence presented that the strictly-regulated SDR allowed fraudulent ballots and not even any conceivable rationale for a connection of fraud and the first week of early voting or for counting out-of-precinct votes.

2. Restoration of Confidence

It was odd that since "restore confidence" appears in the title of H.B. 589 (2), as it had in H.B. 589 (1), there was never any testimony in the hearings or attempt to demonstrate in the debates that there was any lack of confidence in elections among the populace, or that any of the provisions of the bill would increase confidence.¹⁹⁸ Nor were there any polling results on the issue of whether there was any crisis of confidence among the voters, even though there were plenty of polling results discussed in the legislature and the media on generic photo ID bills, early voting, and same-day registration. Nor was there any recent event that would have destroyed the confidence of voters in

¹⁹⁵ *Personnel Administration of Mass. v. Feeney*, 442 U.S. 256 (1979).

¹⁹⁶ State Board of Elections, "Documented Cases of Voter Fraud in North Carolina" showed that 47 cases of absentee voter fraud and 2 cases of in-person voter fraud were prosecuted in the state from 2000 to 2012.

¹⁹⁷ Amendment offered by Darren G. Jackson, House Floor Debates, April 23, 2013, 62-75.

¹⁹⁸ Speaking during House debate on H.B. 589 (1), at 152-53, of the perception of fraud, Democratic Leader Larry Hall asked "What does this bill do to address that perception? What did the hearings do to address that perception?"

North Carolina government in general or the election process in particular. In fact, as Democratic Senate Leader Martin Nesbitt, Jr. pointed out during the Senate debate, it was the earlier, expansive laws that responded to problems with the electoral system:

We haven't had hanging chads, we haven't had problems, and we have been proactive in trying to solve the problems we have had--long lines at the polls. Uh, back in the early '90s, we were having three and four hour lines at our polls, and we were proactive about that, and we created early voting. It was bipartisan when we created it, it was a good thing, it solved the problem, and voters were better off for it.¹⁹⁹

Calling H.B. 589 an attempt to restore confidence was an empty rhetorical gesture, like calling a self-interested change a “reform,” to which politicians in America have been addicted since at least the late nineteenth century. It is entirely implausible as a motive.²⁰⁰

3. Economy, Efficiency, and Uniformity

Given the place of such words in business-oriented rhetoric and ideology, one would have expected to see such claims play a larger role in the debates than they did. But in fact, they barely made an appearance, and there was never any effort to provide any evidence that the bill would have any such effects or to explain why it would.

4. Partisanship and Racial Discrimination

Civil rights leaders and Democrats continually drummed into the debate in public and in the legislative halls that the bill was intended to have partisan and racially discriminatory effects. Jamie Phillips of the NAACP was exemplary:

I want to point out as every single person before me has, that these changes to voting laws are impacting specific groups of people. The fewer young people and minorities who vote, the better it seems in your minds. We get it. No one is being fooled. . . . Of registered North Carolina voters who lack ID, nearly 25 percent are seniors over the age of sixty-five even though they make up only 13 percent of the state's population. Seniors are also hard hit by provisions making it more difficult to add satellite voting sites to accommodate seniors and voters with disabilities. The youth; in a sad move to restrict youth participation in our democracy, this bill specifically bans college student ID's from being used for voting, eliminates pre-registration for sixteen and seventeen years olds and eliminates the requirement for high school voter registration drives. We should be

¹⁹⁹ Senate Debate, July 24, 2013, at Track 3 , 36-37.

²⁰⁰ Stephen Ansolabehere and Nathaniel Persily, “Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements,” *Harvard Law Review*, 121 (2008), 1737-74 find that perceptions of fraud have no relationship to a survey participants’ likelihood of turning out to vote.

encouraging the civic participation of young people, not blocking it. And finally, the most blatant and harmful impact of these changes are in voters of color. 31 percent of registered North Carolinian voters who don't have photo ID are African-American despite comprising just 22 percent of the state's population. . . . This bill also bans out [of] precinct provisional ballots, striking the votes of people who move, making it much easier to challenge voters' eligibility and create an intimidating presence at the polls.²⁰¹

Or as Sen. Josh Stein put it, referring to statistics that had been frequently cited in the Senate debate on H.B. 589 (2):

It will disproportionately affect minorities. Minorities take advantage of early vote, and in particular the first week of early vote, more than the general population. They take advantage of same-day registration, like college students do, more than the general population. They disproportionately don't have driver's licenses. And the biggest instance where they do things disproportionately, as Senator [Angela R.] Bryant talked about yesterday, was straight party voting. You wrap all these election changes into one, in fact it was in today's Washington Post, the Department of Justice is readying their complaint to file against North Carolina when this gets enacted because of its impact on the participation of minorities in North Carolina and the electoral process. . . . Why are you making it harder for seniors, young people, and minorities to vote? Might it be because these folks disproportionately vote Democratic?²⁰²

The obvious strategy of H.B. 589 (2) was to put into effect provisions that would have disproportionate suppressive effects on constituencies that tended to vote Democratic. Since the core constituency of the North Carolina Democratic party at this time, the one that is most overwhelmingly Democratic in its vote and the one whose participation has risen the most as a result of the expansive changes in election laws since 1999 is African-Americans, they were of necessity the principal targets of any election law that would assist Republicans by decreasing Democratic turnout. When blacks were Republicans in North Carolina, the target of suppressive laws was black Republicans; now that they are Democrats, the target is black Democrats. The constant is race.

Since African-Americans' disproportionate use of the targeted expansive provisions that were cut back was well known, and since none of the other possible hypotheses about the motives for the passage of the law in general or those provisions in particular can be logically or factually sustained, it is safe to conclude that the law was passed with a discriminatory intent. As the earlier discussion of the factors underlying a judgment of a violation of Section 2 makes clear, it will very likely have a discriminatory effect, as well.

²⁰¹ Philips in Senate Rules Committee Hearing, July 23, 2013, at 53-54.

²⁰² Senate Debate, July 24, 2013, Track 3, at 27-28.