North Carolina Central Law Review

Volume 40 | Number 1 Article 2

2017

Educational Gerrymanders: Creating Unequal School Districts in North Carolina

Jeff Lingwall

EDUCATIONAL GERRYMANDERS: CREATING UNEQUAL SCHOOL DISTRICTS IN NORTH CAROLINA

JEFF LINGWALL*

This Article examines racially gerrymandered school districts at the turn of the twentieth century in North Carolina as an ugly yet hopeful apologue for modern districting policy. Before the turn of the twentieth century, educational expenditures for black children in the state were surprisingly close to expenditures for white children, at least in part due to state-constitutional litigation establishing that taxes paid by whites must fund black schools. Yet by 1910, expenditures for black children were half those for whites. This Article first highlights the role that diminished black political power and consenting courts played in allowing localities to use gerrymandering to avoid the state constitution's requirement for racially integrated school funding. Within creatively-drawn school districts, localities could raise tax rates, apply the increased funding to white schools, and avoid allegations of unconstitutional funding of segregation. Gerrymandered districts thus became a turnkey system for discrimination that resulted in explosive growth in educational inequality. This Article then draws lessons for modern gerrymander litigation based on how litigants in North Carolina collected, represented, and persuaded courts to use quantitative data to confront inequality.

* Jeff Lingwall is an Assistant Professor of Business Administration at Truman State University; J.D., Yale Law School; Ph.D., Carnegie Mellon University. I thank Karen Clay, Mel Stephens, and Jack Winstead for helpful comments. Greg Jochems and Ryan Bunselmeyer provided able assistance. Any errors are my own.

INTRODUCTION

Momentum against partisan-based gerrymandering is building, with the Supreme Court's decision to hear *Gill v. Whitford* marking a potential turning point in the use of micro-targeted electoral districts.[1] At the same time, there is increased focus on another type of district dividing the United States—the school district—and some even question whether its existence as an entity is justified.[2] Yet, the confluence of these two strains of litigation and scholarly commentary receive little attention: gerrymandered boundaries of school districts themselves,[3] This is surprising, as school districts permeate the United States and come with unique ties to many of the issues at play in gerrymandering, particularly how gerrymandering entwines politics, political power, and race, often in ugly ways.[4] This Article takes aim at this gap by examining one such ugly instance with particular current applicability.

---

1. Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *appeal docketed*, No. 16-1161 (7th Cir. Mar. 24, 2017). This Article focuses on educational gerrymandering at the community level, but congressional-level districting may also affect education. *See, e.g.*, Andrew J. Rotherham, *No Congressional District Left Behind*, U.S. NEWS, (Mar. 31, 2015, https://www.usnews.com/opinion/knowledge-bank/2015/03/31/the-best-school-reform-idea-fix-gerrymandering. (arguing that districting reform will render congressional districts more competitive, making passage of federal-level education reform more likely).

2. *See* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 950 (2017) (noting legal research on school districts, summarizing the history of school districts within the United States, and ultimately calling for school districts to be abolished in favor of direct control by general local government entities).

3. These have received some attention in the field of education research, but little attention by legal scholars. *See* Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119 (2014) (describing the continued existence of racial gerrymandering at the school-district and attendance-zone level); Genevieve Siegel-Hawley, *Educational Gerrymandering? Race and Attendance in a Demographically Changing Suburb*, 83 HARV. EDUC. REV. 580, 582 (2013) (finding that modern redistricting in response to population growth tends to reinforce racial isolation); Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 961 (2010) (discussing cases in which courts have struck down racially gerrymandered school districts).

4. *E.g.*, Alex J. Whitman, *Comment: Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 248 (2010) ("The most promising and appropriate source to draw from in formulating a district-based political gerrymandering standard is the Supreme Court's racial gerrymandering jurisprudence, which now looks at individual districts rather than statewide plans. Unlike its relatively weak approach to political gerrymandering, the Supreme Court has acted much more aggressively against attempts to pack and crack minority voters through racial gerrymandering."); Douglass Calidas, *Note: Hindsight is 20/20: Revisiting the Reapportionment Cases to Gain Perspective on Partisan Gerrymanders*, 57 DUKE L.J. 1413, 1415 (2008) ("The Court's refusal to correct the breakdown in the democratic process brought on by the advent of egregious partisan gerrymanders has invited the continued use of districting processes with deeply troubling pathologies."); *id.* at 1423 ("Given that the issue of race in

At the end of the nineteenth century, school funding for black and white children in North Carolina was surprisingly equal, with per capita expenditures for black children even exceeding that for whites.[5] This was only temporary—by 1910 black children received less than half the per-capita funding of white children and the inequality that shaped *Brown v Board of Education* was in place.[6] This Article examines the role courts, disenfranchisement, and local control of politics played in creating, and then demolishing, equality in school funding through gerrymandered school districts, particularly as to how courts viewed the data brought to play in litigation.[7] Finally, this article applies this history as a cautionary tale for modern data-driven reform efforts.

---

the United States is 'already explosive,' the Court's willingness to encourage partisan election complaints to be recast in the divisive terms of racial identity is an unfortunate consequence of its jurisprudence.") (footnote omitted). For a contrasting view, see Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 4-5, 8 (2008) ("Gerrymandering is older than the republic ... the Supreme Court has long regarded certain racial gerrymanders to be unconstitutional ... all current Justices seem to agree that certain partisan gerrymanders may be unconstitutional.... The fatal flaw running through all such complaints is that the Constitution neither envisions nor mandates any such ideals. The Constitution never sets out criteria for the proper composition of the legislature, the suitable amount of electoral competitiveness, or the correct ideological balance of legislators within a legislature."); Nelson Elbaugh, *Note: Refining the Racial Gerrymandering Claim:* Bush v. Vera, 33 TULSA L.J. 613, 640 (1997) (noting that "[r]ace-conscious electoral districting advances the worthy objective of protecting and promoting the minority voting franchise").

5. While the reported numbers may be biased, the historical record supports that black and white funding was dramatically more equal before the turn of the century. *See, e.g.*, William J. Collins & Robert A. Margo, *Historical Perspectives on Racial Differences in Schooling in the United States*, *in* 1 HANDBOOK OF THE ECON. OF EDUC. 107 (Eric A. Hanushek & Finis Welch eds., 2006) (finding black educational spending per capita slightly exceeding that for whites in 1890); Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 379 (1998) ("In North Carolina and Alabama, per capita spending on black education actually exceeded that on white until around 1880"). While this Article focuses on North Carolina, the problem of race-based educational gerrymandering existed across the South. JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935, at 154 (1988) ("[I]n the early twentieth century whites all over the South seized the school funds belonging to the disfranchised black citizens, gerrymandering school districts so as to exclude blacks from certain local benefits, and expounding a racist ideology to provide a moral justification for unequal treatment.").

6. Brown v. Bd. of Educ., 347 U.S. 483 (1954). The conventional story that might be told about black education before *Brown* is that hope of equality ended alongside Reconstruction, that *Plessy* and *Cumming* constitutionalized an unequal status quo, and this remained until the NAACP created pressure for reform. *See, e.g.*, JOHN R. HOWARD, THE SHIFTING WIND: THE COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN 25 (1999) ("The kind of demoralization occasioned by the Court's systematic destruction of reconstruction ... did not begin to lift until a new generation of blacks came on the political stage around the turn of the century."); ARNOLD H. TAYLOR, TRAVAIL AND TRIUMPH: BLACK LIFE AND CULTURE IN THE SOUTH SINCE THE CIVIL WAR 121-23 (1977) (discussing how Reconstruction was followed by large growth in inequality in public schooling in South Carolina, which lasted until reform came "largely as a result of pressure from the NAACP and other civil rights forces").

7. Southern states also gerrymandered political districts to preserve majorities in state legislatures, but this Article focuses on gerrymandering at the school district level. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877-1913, at 54 (1951, 2009 printing) (describing gerrymandering by both parties following the Civil War). The legal calculus for racial-based political gerrymandering changed with passage of the Voting Rights Act of 1965, which allowed majority-minority districts. *See* Thornburg v. Gingles, 478 U.S. 30, 79 (1986). The creation of majority-minority districts came with side effects, however. Gerrymandering majority-minority districts might help elect minority representatives, but at the cost of a

First, this article examines how local political power and supportive court decisions created an environment that fostered equality in education, starting with a surprising decision by the North Carolina Supreme Court. In 1886, relying on state constitutional law a century before it became a popular litigation strategy for education reform,[8] the court in *Puitt v. Commissioners of Gaston County* held that racial division of school taxes violated the state constitution.[9] Specifically, *Puitt* mandated integrated taxation for education: white taxes were constitutionally required to go toward schools of both races.[10] Together with a political situation in which blacks partnered with rural whites and achieved some degree of local power through North Carolina's "Fusion" movement, the court thus enabled a surprisingly equal education system that lasted until the turn of the century.[11]

However, *Puitt* was eroded after disenfranchisement as courts turned a blind eye to creative use of local districting policy that skirted (literally) *Puitt*'s requirements.[12] With blacks removed from local power, localities began to establish school districts gerrymandered to avoid black schools, geographically uniting white taxpayers with white schools and letting whites raise school tax rates without increasing support to black schools.[13] The North Carolina Supreme Court supported this and other unequal divisions of school funds, specifically citing the lack of data supporting discrimination claims and the court's deference to the state in interpreting the existing data.[14] By allowing localities to use geography as a proxy for race, courts avoided the restriction in *Puitt*, and the gap between reported measures of education quality for black and white children widened.

The United States is currently undergoing a dramatic moment of education reform and potential changes to districting law.[15] The role of the state in local

---

smaller likelihood of electing other representatives favoring minority rights. *See* Damion Waymer & Robert L. Heath, *Black Voter Dilution, American Exceptionalism, and Racial Gerrymandering*, 47 J. BLACK STUD. 635, 637-38 (2016).

8. *See* Jim Hilbert, *Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation*, 46 J. L. & EDUC. 1, 22 (2017) ("Unlike the federal constitution, every state constitution contains specific language imposing a duty on states to provide at least some level of public education to schoolchildren. Using these 'education clauses' and state constitutional principles, the initial focus of school finance claims was on unequal spending between districts: This 'second wave' of school finance litigation argued that state constitutional provisions required equal resources for all school districts.") (footnotes omitted).

9. Puitt v. Commissioners of Gaston County, 94 N.C. 709, 714-15 (1886).

10. *Id.*

11. *See* HELEN G. EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA (1951) (describing the Fusion movement).

12. *See infra* Section III.

13. *See infra* Section 0(0).

14. *See infra* Section 0(B) (discussing Smith v. Board of Trustees, 141 NC 143, 53 S.E. 524 (1906) and Howell v. Howell, 151 NC 575, 66 S.E. 571 (1909)).

15. *E.g.*, Whitford v. Gill, 218 F. Supp. 3d 837. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 4-5 (2017) (describing education reform

education policy is being re-examined, such as through the creation of state accountability systems and efforts to equalize school funding.[16] This account of North Carolina offers the chance to observe the cause, implementation, and effect of a period of education reform with some hindsight.[17] The road from Reconstruction to *Brown* was not uniform—North Carolina managed to defy the norms of the South with regards to black education, and it was only until the events discussed here that inequality in the state climbed.[18] Combined attention to voting rights, districting, and education policy highlights how political boundaries are deeply tied to constitutional protections. Further, such protections may be meaningless without data to support discrimination claims.[19] In North Carolina, even strong constitutional precedent was undermined by the power of localities to manipulate districting.[20] Studying the lessons of history may help prevent similar results today.

---

efforts); Hilbert, *supra* note 8, at 30-31 (describing contemporary educational adequacy litigation efforts); Noelle Quam, *Note: Big Philanthropy's Unrestrained Influence on Public Education: A Call for Change*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 601, 602-03 (2015) (discussing the role of "big philanthropy" on education reform for the last two decades); Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?*, 1998 BYU EDUC. & L. J. 103, 103 (1998) ("[R]econstitution as an educational reform measure is sweeping the country.").

16. *See e.g.*, CHRIS DOMALESKI & MARIANNE PERIE, NATIONAL CENTER FOR THE IMPROVEMENT OF EDUCATIONAL ASSESSMENT, PROMOTING EQUITY IN STATE EDUCATION ACCOUNTABILITY SYSTEMS (2012), *available at* http://www.nciea.org/publication_PDFs/Promoting%20Equity%20CSDMP110712.pdf.

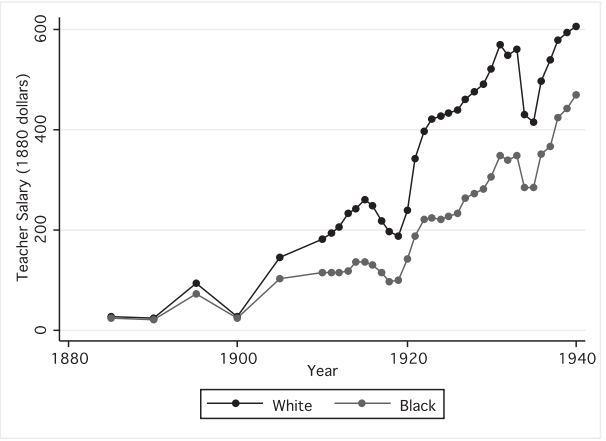
17. While North Carolina is only one state, it provides significant insight into broader historical processes. While inequality in North Carolina was growing, the state was at the "forefront of educational changes," George Lange & R. Craig Wood, *Education Finance Litigation in North Carolina: Distinguishing* Leandro, 32 J. EDUC. FIN. 36, 40 (2006), "a bellwether state," Bruce Beezer, *North Carolina's Rationale for Mandating Separate Schools: A Legal History*, 52 J. NEGRO EDUC. 213, 213 (1983), and boasted the South's leading educational reformists. H. LEON PRATHER, RESURGENT POLITICS AND EDUCATIONAL PROGRESSIVISM IN THE NEW SOUTH: NORTH CAROLINA, 1890-1913, at 11 (1979). This reform left blacks behind. As such, a close look at how reform efforts played out is instructive for a broader discussion of education reform, school district creation, and potential consequences of micro-targeted political districts. Another question that may be asked is why statistical outcomes matter when the holding of *Brown* was that *de jure* segregation itself was unconstitutional. The answer suggested by Morgan Kousser and Bob Margo is that if the "failure to enforce the equal part" of separate-but-equal amounted to a great loss in the economic lives of blacks, then the failure of courts to enforce equality was immoral in the same sense as segregation itself. ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 72 (1990). In addition, although statistical inequality in education was declining when *Brown* was decided, decades of unequal education blessed by the courts had helped create chasms in economic wellbeing between blacks and whites.

18. *E.g.*, J. Morgan Kousser, *Progressivism – for Middle Class Whites Only*, 46 J. S. HIST. 169, 185 (1980) ("[C]ontrary to the claims of some historians, black political power was real and effective long after Reconstruction ended and that the crucial turning point came only after the passage of the suffrage amendment.") (footnote omitted).

19. *See infra* Section III(B) (discussing Smith v. Board of Trustees of Robersonville Graded School, 141 NC 143, 53 S.E. 524 (1906)).

20. *See infra* Section III.

Figure 1: Average Teacher Salary in North Carolina, 1880-1940



Notes: Author's calculations using county-level data from J. Morgan Kousser (1885-1910), and Wanamaker & Carruthers (1911-1940).

I. *PUITT* AND POLITICS: ALL INEQUALITY IS LOCAL INEQUALITY

Segregated schools in North Carolina were among the most equal in the South at the turn of the century, and black schools in the state received comparatively more funding than black schools in other states in the South.[21] Unfortunately, this did not last. For example, Figure 1 compares the salaries of black and white public school teachers.[22] The salaries of black and white school teachers over time are roughly equal from 1880 to 1900 before diverging rapidly after 1900 and remaining divergent through 1940.[23] This second section aims to answer why equality emerged prior to 1900. In brief, a

21. Collins & Margo, *supra* note 5 at 135. In 1890, for example, the ratio between white and black school funding was 1.01.

22. Increased school funding does not, as a rule, mean better student outcomes, but differences in funding in the South provide at least an indication of the inter-racial disparities in educational quality. *See* Eric A. Hanushek, *The Failure of Input-based Schooling Policies*, 113 ECON J. F64 (2003).

23. This characterized the South generally, although in North Carolina the pre- and post-1900 contrast is particularly strong. Klarman, *supra* note 5, at 308 ("While public schools [across the South] re-

favorable political climate fostered black participation in local power structures, and a novel state Supreme Court decision constitutionalized integrated taxing for public schools. The third Section addresses what changed around the turn of the century, namely, disenfranchisement. The fourth section examines the consequences of those changes as inequality expanded, particularly as to how clever districting and acquiescent courts rendered state constitutional law irrelevant. The fifth section offers some parallels for today.

A. *PUITT* REQUIRES INTEGRATED TAXATION FOR SCHOOLS

North Carolina's tale starts as Reconstruction ends in the 1870s.[24] The state constitution was amended in 1876 to require separate and non-discriminatory schools.[25] The non-discrimination provision was attacked as early as the next year, when Democrats passed the County Government Act of 1877 which removed local election of most county officials in favor of appointment from the state legislature.[26] When Democrats controlled the legislature they controlled the counties, including the schools.[27] They followed this in 1883 with a statute allowing school districts to vote on an extra tax, divided by race, so

---

mained completely segregated, the enormous racial disparities that would later characterize public spending on education had not yet begun to develop by the early 1880s."). There is extensive literature discussing when race relations in the South deteriorated post-Reconstruction. *See id.* at 308 n.11.

24. The date typically cited for the end of Reconstruction is 1877, with the "Compromise of 1877" in which Rutherford B. Hayes was given the White House in exchange for removing federal troops in Southern states.

25. N.C. CONST. art. 9 § 2 (1876) ("[T]he children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination made in favor of, or to the prejudice of, either race.").

26. *See* HELEN G. EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA 118 (1951) ("The Democratic legislature of 1877, partly inspired by the removal of federal troops from the South, enacted a Democratic system of county government . . . . Popular election of all county officers, except register of deeds and surveyor, was abolished. . . . [T]he Democrats had resorted to centralized control through legislative appointment thereby guaranteeing perpetuation of Democratic control over 'black counties' and white Republicans.").

27. *See* RONALD MANZER, EDUCATIONAL REGIMES AND ANGLO-AMERICAN DEMOCRACY 411 (2003) ("After the Democrats regained power, elections for county commissioners were abolished in favour of appointment by local justices of the peace, who were appointed in turn by the state legislature. County commissioners governed public schools until the school act of 1885 restored separately appointed county boards of education . . . . In 1895 a coalition of Republicans and Populists abolished the county boards of education and restored popular election of county commissioners, who appointed local school committees."). Louisiana and Florida had similar provisions. "The corresponding device in Louisiana was even simpler. In the hands of the governor, instead of the legislature, was placed 'an inordinate appointive power.' He appointed the police jury of every parish, which levied local taxes and enacted local laws, as well as all rural school boards . . . . [I]n Florida . . . [t]he constitution placed in the hands of the governor the power to appoint . . . in each county the tax collector and assessor, treasurer, surveyor, superintendent of schools, county commissioner, sheriff, clerk of court, county judge, and justices of the peace—thus leaving to the uninhibited franchise of free Floridians the choice of constables." C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877-1913, at 54-55 (1951, 2009 printing).

that property taxes collected from whites would fund white schools only and (much lower) taxes from blacks would go toward black schools.[28]

The all-white state supreme court responded to this with a surprising decision in 1886. *Puitt v. Commissioners of Gaston County* found the tax law unconstitutional.[29] The court reasoned that such a tax was not a uniform tax as required by the state constitution and "marks a color line among the qualified voters of the same territorial district.... Those derived from one class are devoted to the education of the children of that class only, and denied to the children of the other, a distinction which finds no countenance in the Constitution ...."[30]

The court specifically referenced the racial nature of the law, that it "admit[ed] only the votes of white men in the white district, and colored men in the colored district.... [so that the] discrimination rest[ed] wholly upon race."[31] The court made two policy arguments bolstering the constitutional holding. First, the law would be "subversive of the equality and uniformity recognized in the system of public schools, which looks to a fair participation of all its citizens in the advantages of free education."[32] Then, the court reasoned that if this tax were upheld, further lines might possibly be drawn.[33]

---

28. 1883 N.C. ACTS 152; *see also* Beezer, *supra* note 17, at 217 (discussing the legal challenge to the 1883 law).

29. *Puitt*, 94 N.C. 709 (1886). The court continued to show egalitarianism with respect to public schools, holding in *City of Greensboro v. Hodgin* that "the constitution intends and requires that the state and county school funds shall be distributed to the several school-districts in the county in such way as to extend to all the children thereof, as nearly as practicable, equal school opportunities and advantages, and as to make the school term or terms in each district in every year, as nearly as may be, equal with the same of every other district in the county." 106 N.C. 182, 189, 11 S.E. 586, 588 (1890). Democrats had also anticipated trouble with the 1883 tax law. In 1885, the year prior to *Puitt*, the school law gave white "county officials broad discretion over one-third of their school funds" so that discrimination could still occur. JAMES L. LELOUDIS, SCHOOLING IN THE NEW SOUTH: PEDAGOGY, SELF, AND SOCIETY IN NORTH CAROLINA, 1880-1920, at 122 (1996); Kousser, *supra* note 18, at 183 n.27 ("Until 1885 local boards were legally required to distribute all county school funds to subcounty districts strictly in proportion to the school-age population. The 1885 act allowed one-third of the county funds to be distributed so as to equalize the average length of school terms between races. Since black teachers were generally paid somewhat less than the whites per month, black school terms before 1885 had sometimes exceeded those for whites. With the passage of the bill, one-third of the funds were discretionary, and could be used to increase white teachers' annual salaries at the expense of the black teachers."). Most Southern states passed similar laws. HENRY ALLEN BULLOCK, A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT, at 86 (1967). *See generally* State v. Wolf, 145 NC 440, 59 S.E. 40 (1907) (Connor, J., dissenting) ("We have sustained every act of the General Assembly enacted for the purpose of making the public school system elastic and adjustable to local conditions and needs."). After two-thirds was distributed on a per-capita basis, county officials (appointed by white leaders) could spend the remaining third "in such manner as to equalize school facilities to all districts of the country, as far as may be practicable and just to all concerned." This meant that school boards were practically free to distribute a substantial portion of school funds as they pleased.

30. *Puitt*, 94 N.C. at 714-15.

31. *Id.*

32. *Id.* at 715.

33. *Id.*

"[W]hy may it not be between children of different sexes, or between natives and naturalized persons of foreign birth, or even between the former and citizens of other States, removing and settling in this State?"[34]

The motivations of the supreme court are difficult to parse. The chief justice and author of the opinion, William Nathan Harrel Smith, was a Whig before the Civil War and had proposed tolerant legislation during Reconstruction.[35] When questioned about his avoidance of the Republican party, his reply was "that is the natural place of the southern Whigs, but you Republicans render it impossible."[36] He was joined on the court by Thomas Ashe, a reliable conservative vote,[37] and Augustus Merrimon, a favorite of conservative Democrats,[38] who as a quorum somehow became "relatively liberal on racial matters."[39] This liberality showed in two other cases in the 1880s, but it was not universal. In *Britton v. Atlanta & Charlotte Air-Line Railway Co.*, the court held a railway liable for ejecting a previously-seated black passenger from a car.[40] The court also reiterated the holding of *Puitt* in *Riggsbee v. Town of Durham*, where the court invalidated a statute dividing taxes by race for the construction of schools in a town.[41] Despite these decisions, the North Carolina Supreme Court was hardly "an island of racial enlightenment in the late nineteenth century South. *Puitt* did not guarantee, and was not intended to guarantee, equal funding for black and white schools, and the *Britton* court did not challenge the legality of segregation in any way."[42]

Reaction to *Puitt* was negative but short lived. Some localities simply ignored the ruling and continued with racially divided tax schemes.[43] Others closed their public schools, and some newspapers thought the judges would lose their chances to be reelected.[44] These were temporary retorts, though, as

34. *Id.*

35. *Hon. W. N. H. Smith, Chief Justice of the Supreme Court of North Carolina*, 8 N.C. UNIV. MAG. 95, at 96–97 (1889).

36. BIOGRAPHICAL HISTORY OF NORTH CAROLINA: FROM COLONIAL TIMES TO THE PRESENT 432 (Samuel A. Ashe, Stephen B. Weeks, & Charles L. Van Noppen eds., 1908).

37. Buck Yearns, DICTIONARY OF NORTH CAROLINA BIOGRAPHY 56 (William S. Powell ed., 2d ed. 1979).

38. Jerome Dowd, SKETCHES OF PROMINENT LIVING NORTH CAROLINIANS 90-91 (1888).

39. Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 23 (2002).

40. Britton v. Atlanta & C.A.L. Railway Co., 88 N.C. 536 (1883).

41. Riggsbee v. Town of Durham, 94 N.C. 800 (1886).

42. Ranney, *supra* note 39, at 23. Other examples of the court working against black interests are its enforcement of a promissory note for a slave and miscegenation laws. *Id.* at 23.

43. DAVISON M. DOUGLAS, READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS 11 (1995).

44. *Id.* (noting that "[w]ithin a short period of time, however, public schools in these towns were reestablished when it became apparent that school closures were counterproductive to white interests").

the public schools reopened and all three justices won reelection.[45] Apparently, had *Puitt* been decided otherwise, whites would have faced higher taxes, and lower tax rates were sufficient consolation to preserve the tenure of the justices.[46]

B. FUSION POLITICS GIVE BLACKS LOCAL POLITICAL POWER

While Democrats retained control of state government through the 1880s, the 1890s brought a changed political landscape, which helped shore up black schools. The Populist movement was in full swing, and in North Carolina populist rural whites allied themselves with Republicans, including black Republicans.[47] The result in 1894 was that North Carolina became the only Southern state to vote Redeemer Democrats out of the state legislature.[48] With this "Fusion" movement in power, the County Government Act of 1877 was repealed, restoring local election of many county officials in 1895.[49] As blacks had not yet been disenfranchised and election laws were liberalized, this meant local black political power could provide for black schooling.[50] With the constitutional requirement of integrated taxation from *Puitt* and the potential for blacks to exercise political power, black schools approached the

45. *Id.*

46. *Id.*

47. Eventually, the Populist party merged with the Democrats, making the North Carolina alliance all the more remarkable. *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877-1917, at 148 (1999) ("It is a widely accepted view that 1896 marked the end of agrarian-led reform. With the Populist dissenters vanquished, the two major parties are said to have become sectional vehicles of elite dominance.… Within the southern Populist heartland, the restoration of elite hegemony began with the passage, in state after state, of new constitutions and electoral laws that made it all but impossible for African Americans to vote.").

48. *See* PRATHER, *supra* note 17, at 10; DEBORAH BECKEL, RADICAL REFORM: INTERRACIAL POLITICS IN POST-EMANCIPATION NORTH CAROLINA 176 (2011); ROBERT F. DURDEN, THE CLIMAX OF POPULISM: THE ELECTION OF 1896, at 9-10 (1965) ("In order to gain [election law and local government] reforms in these and other state matters, and simply for the satisfaction of beating the Democrats, the Populist-Republican 'fusionists,' as their enemies called them, joined together in the state elections of the non-presidential year and swept to an astonishing victory that gave them safe majorities in both houses of the legislature.").

49. *See* EDMONDS, *supra* note 11, at 118-19 ("Fusion victory brought forth Fusion county government.… Three commissioners were elected biennially for each county by popular vote. Other county officers … were likewise popularly elected.").

50. JENNIFER RITTERHOUSE, DISCOVERING THE SOUTH: ONE MAN'S TRAVELS THROUGH A CHANGING AMERICA IN THE 1930S, 34 (2017) ("Fusionist electoral reforms, including simplified ballots and fairer registration procedures, ensured that eligible black men would be able to vote in the next election in 1896, as a startling 85% of the state's black electorate did . . . ."); Allen W. Trelease, *A Roll-Call Analysis of the Fusion Legislatures of 1895 and 1897*, 57 N.C. HIST. REV. 280, 282 (1980) (noting "Fusionists, especially Republicans, attached high priority to the questions of electoral reform and local self-government. Unbroken Democratic control since the 1870s had rested on an assortment of political devices" such as disfranchisement).

end of the century on an optimistic note relative to white schools.[51] The election of 1898 would end this educational upswing.

II. DISENFRANCHISEMENT BIRTHS EDUCATION REFORM (FOR WHITES)

The shift towards inequality began with disenfranchisement. After Reconstruction, blacks were steadily disenfranchised across the South, with predictable results for local school policy.[52] Disenfranchisement was accomplished through a combination of informal pressure, violence, and a host of policies such as poll taxes, increased registrar discretion, and constitutional amendments.[53] North Carolina followed this pattern. Democrats were determined to fix their failure at the ballot box, and they created a potent campaign of militant white supremacy preceding the 1898 election.[54] This was violent

51. *See, e.g.*, *supra* note 22 (Figure 1).

52. This is shown in econometric studies of education in North Carolina, which focus on the effects of disenfranchisement and Northern philanthropy. Carruthers and Wanamaker found positive effects of the Rosenwald schools across the South, including North Carolina, starting in the 1920s. Celeste K. Carruthers & Marianne H. Wanamaker, *Closing the Gap? The Effect of Private Philanthropy on the Provision of African-American Schooling in the U.S. South.* 101 J. PUB. ECON. 53 (2013). Ng and Halcoussis used North Carolina counties as part of a larger panel of seven Southern states taken at five-year intervals between 1885 and 1930. They found evidence of discrimination in funding, with greater differentials in counties with a higher black population and with discrimination generally increasing with disenfranchisement. Kenneth Ng & Dennis Halcoussis, *Determinants of the Level of Public School Discrimination, 1885-1930*, 29 J. EDUC. FIN. 49 (2003). Walters, James and McCammon performed a similar study across the South and concluded that disenfranchisement increased inequality in school enrollment between 1890 and 1910. P.B. Walters, D.R. James, & H.J. McCammon, *Citizenship and Public Schools: Accounting for Racial Inequality in Education in the Pre- and Post-Disfranchisement South*, 62 AM. SOC. REV. 34 (1997). Kousser studied North Carolina specifically, using a county-level dataset of education variables between 1880 and 1910. He found that discrimination in expenditures on education increased after disenfranchisement, especially in areas with higher concentrations of blacks. Poor whites also suffered relative to middle class whites, so that "'progressivism' was, as a consequence of disfranchisement, for middle-class whites only." Kousser, *supra* note 18, at 169. Outside of disenfranchisement, Card and Krueger performed a comparison of North and South Carolina in a study on the effect of school quality, finding that school quality differences between the races accounted for a significant fraction of the gap in black and white earnings. David Card & Alan B. Krueger, *School Resources and Student Outcomes: An Overview of the Literature and New Evidence from North and South Carolina*, 10 J. ECON. PERSP. 31 (1996). Margo studied teacher salaries in Florida, Louisiana, and North Carolina in 1910 and found severe discrimination in teacher quality. Robert Margo, *Teacher Salaries in Black and White: The South in 1910*, 21 EXPLORATIONS IN ECON. HIST. 306 (1984). Collins and Margo provide statistics on educational inequality across the South, including North Carolina, and summarize many of the economic perspectives on racially unequal schooling. Collins & Margo, *supra* note 5, at 107.

53. For a discussion of the passage and effect of disenfranchisement laws across the South, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

54. Richard Barry Westin, The State and Segregated Schools: Negro Public Education in North Carolina, at iv (May 25, 1966) (unpublished Ph.D. dissertation, Duke University). ("[M]istakes in the Fusionist educational program helped to drive many whites back to the Democratic party. To regain power, the Democrats allied themselves with the advocates of public education and became committed to a policy of school support."). The Fusion education reforms "either were mechanically faulty or were effective only in the long run; hence they created little but antagonism." *Id.* at viii-ix. *See also* LAWRENCE GOODWYN,

and effective. The Red Shirts terrorized voters, and notorious Ben Tillman came from South Carolina to campaign for the Democrats.[55] The resulting racial tension became violent. For example, the infamous Wilmington massacre resulted in the death of at least 60 black people as a white coup overthrew the Wilmington city government, and the statewide campaign succeeded.[56]

Once the Democrats regained control of state politics, they resolved not to lose control. The mechanism to keeping control was disenfranchisement of black people. The 1899 legislature reversed the Fusionist election reforms and enacted a voter registration requirement that gave broad power to registrars to disenfranchise.[57] In addition, Democrats sought to amend the state constitution with a provision patterned after Louisiana's 1898 constitution, which introduced the infamous "grandfather clause."[58] Under this clause, education requirements to vote were introduced, but would not remove suffrage from those whose fathers or grandfathers could vote in 1867.[59] North Carolina's amendment took this as inspiration but differed in two ways. First, North Carolina did not limit the grandfather clause to grandchildren: any "lineal descendent" would qualify for the exemption.[60] Second, the grandfather clause was qualified by setting a specific date after which the exemption would sunset.[61] After December 1, 1908, men who came of age, white and black, would be required to pass a literacy test to vote.[62]

THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA 285 (1978) ("In North Carolina, the election reforms passed by the Populist-Republican legislature led to the election of [a] number of black Republicans in 1896, setting the stage for a violent Democratic campaign of white supremacy in 1898. Almost total black disfranchisement resulted as the Democratic party swept triumphantly back into power.").

55. PRATHER, *supra* note 17, at 133.

56. After the city of Wilmington elected a Fusion city council, whites staged a coup, overturning the city government and driving blacks from the city. H. Leon Prather, *We Have Taken a City*, *in* DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (David S. Cecelski & Timothy B. Tyson, eds. 1998). As a related aside, the North Carolina legislature had enabled white power in Wilmington through racially gerrymandering the city council seats. *Id.*

57. *See* JOHN W. WERTHEIMER, LAW & SOCIETY IN THE SOUTH: A HISTORY OF NORTH CAROLINA COURT CASES 131 (2009) (noting "the literacy test . . . granted almost limitless discretion to local registrars"); PHILLIP J. WOOD, SOUTHERN CAPITALISM: THE POLITICAL ECONOMY OF NORTH CAROLINA, 1880-1980, at 117 (1986).

58. MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH 1888-1908, at 163-65 (2001) (discussing passage of grandfather clauses in the South).

59. WOOD, *supra* note 57, at 117.

60. WERTHEIMER, *supra* note 57, at 131.

61. N.C. CONST. amend. VI, § 5 (1900).

62. The amendment provided, "But no male person, who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908." *Id.*

Since the constitutional amendment would at least facially disenfranchise illiterate whites beginning in 1908, Republicans made white disenfranchisement a part of their political message, appealing to fears among poor whites with low literacy rates.[63] Democrats soon responded with a message of educational reform, with gubernatorial candidate Charles Aycock promising to eliminate illiteracy and aiming "for every child in the state to get an education."[64] The Democrat platform was to "pledge ourselves to increase the school fund so as to make at least a four month school term in each year in every school district in the state."[65] Aycock's convention speech promised that education was the "foundation of white supremacy"[66] and that "universal education of the white children of North Carolina will send us forward with a bound in the race with the world."[67]

The "embryonic" issue of education, in a state with poor public education even by Southern standards, had now become a major political concern.[68] At the same time, it was *white* education with which politicians concerned themselves—even the white Republicans and Populists who opposed the amendment did so out of concern it would disenfranchise whites rather than blacks,[69] fearing the amendment would enable urban, literate blacks to vote while disenfranchising poor, rural whites after 1908.[70]

After such encouragement as "if you find the Negro out voting, tell him to leave the polls and if he refuses, kill him," Aycock and the amendment won the election, and the constitution was then amended in 1900.[71] As education

63. BECKEL, *supra* note 48, at 203. A parallel debate on the relationship between the poll tax, school finance, and disenfranchising both whites and blacks occurred in South Carolina during this same period. STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY 214-15 (2000).

64. Aycock, quoted in JAMES M. BEEBY, REVOLT OF THE TAR HEELS: THE NORTH CAROLINA POPULIST MOVEMENT, 1890-1901, at 205 (2008).

65. Quoted in PRATHER, *supra* note 17, at 184; s*ee also* BEEBY, *supra* note 64, at 199.

66. PRATHER, *supra* note 17, at 184.

67. Aycock, quoted in PRATHER, *supra* note 17, at 184. Previously, the Democrats' approach to solving public education problems was the provision of $100,000 from the state treasury, ostensibly to lengthen the school term to the constitutionally mandated four months. 1899 N.C. ACTS 836. A short school term compounded other problems: "With short school terms . . . we cannot hope to command and retain first-class talent in this business of teaching the rural schools, however good or however accessible the opportunities for improving teachers may be made." 1900-1901 & 1901-1902 SUPERINTENDENT PUB. INSTRUCTION OF N.C. BIENNIAL REP., at 57 ("BIENNIAL REPORT"). A longer school term would also increase attendance. 1902-1903 & 1903-1904 SUPERINTENDENT PUB. INSTRUCTION OF N.C. BIENNIAL REP., at XLVII. The funding was introduced with "fanfare," but reformers knew it would "add only a few hours to the school term." PRATHER, *supra* note 17, at 175.

68. PRATHER, *supra* note 17, at 10.

69. *Id.* at 181.

70. *Id.*

71. LELOUDIS, *supra* note 29, at 138. Some school reformers favored the disenfranchisement amendment due to the literacy requirement, since requiring a literacy test before allowing a person to vote was a mild form of compulsory attendance. *Id.* at 136-37.

reformers had feared,[72] the newly elected Democrats found it difficult to fulfill their promises made during the 1900 campaign.[73] Aycock had trouble convincing wealthy residents to pay new taxes for schools, and funding for even a small measure to increase the school term was objected to by the railroads, a needed Democrat booster.[74] They managed to allocate a further $100,000 from the state treasury towards the schools, but this did not satisfy education reformers.[75] To fill the void, a conference was held in Raleigh in 1902, where representatives from state educators, Northern philanthropists, and the governor met with "the purpose of organizing a thoroughgoing educational campaign and of uniting all the educational forces of the State."[76] This exalted body established the "Central Campaign Committee for the Promotion of Public Education" and resolved on a "Declaration against Illiteracy."[77] This began a long period of education reform in the state, with extended repercussions for children of both races.

While education reform mainly benefited white children, it did not entirely ignore black education, a situation known as "Myrdal's Paradox" (the question of why whites continued to fund black schools after they had been disenfranchised).[78] On one hand, education was a tool to control unrest from both races, a way to keep white supremacy within bounds and to teach blacks their proper place. Schools were a place to "renegotiate the black place in a

72. *Id.* at 143.

73. PRATHER, *supra* note 17, at 207. In 1903, Democrats attempted to overturn *Puitt* through a constitutional amendment, but Governor Aycock opposed it. One newspaper editor wrote that "[i]t would be blessing to the state if our Educational Governor would be stricken with lockjaw." *Id.* at 222. As a renowned white supremacist, Aycock's stance was surprising, but it may have been a way to please Northern philanthropists, whose support he desired for education reform. Aycock promised that "the schools of the disfranchised Negroes would have protection from hostile state legislation through the power and prestige of his high office" in exchange for the philanthropists acceptance of Jim Crow. Louis R. Harlan, *The Southern Education Board and the Race Issue in Public Education*, 23 J. S. HIST. 189, 192 (1957). Or, Aycock may have realized that white supremacy could only be taken so far before blacks left the state en masse. In his departing remarks as governor, Aycock said "[A]part from our sense of obligation to this weaker race, I am impressed with the necessity of causing all agitation which leads to the embitterment and estrangement of the negro, for the reason that as this estrangement and this embitterment increase large amounts of them will go out from among us. The greatest need of North Carolina to-day is more labor." *Governor's Message*, CHARLOTTE DAILY OBSERVER, Jan. 6, 1905, at 7. Or, if the law were pushed too far, intervention might have come from Washington. LELOUDIS, *supra* note 29, at 179. "To the governor's way of thinking, the state's real need was for a more flexible and adroit racial policy—one that joined the active subordination of blacks with an effort to cultivate among them some measure of collaboration and consent." *Id.* What was needed was "[s]tatesmanship," not "passion and prejudice." *Id.* If Northern attention was drawn to North Carolina over the smaller issue of school funding, attention might be drawn to the disenfranchisement that formed the basis of Democratic politics. *See* Kousser, *supra* note 18, at 185-86.

74. LELOUDIS, *supra* note 29, at 144.

75. The funding was introduced with "fanfare," but reformers knew it would "add only a few hours to the school term." PRATHER, *supra* note 17, at 175.

76. EDGAR WALLACE KNIGHT, PUBLIC SCHOOL EDUCATION IN NORTH CAROLINA 331 (1916).

77. LELOUDIS, *supra* note 29, at 151.

78. Collins & Margo, *supra* note 5, at 146.

white South....” and “the classroom stood as a last refuge for claims to common citizenship ....”[79] State Superintendent of Schools James Joyner wrote:

> Ignorance in chains is dangerous enough, but it is safer than ignorance in liberty. It is my deliberate conviction that in a few generations, without education, the great mass of the negro race would sink to a state of animal brutality.... without the power to restrain them that comes alone from proper education ... our only safety will lie in extermination.[80]

At the same time, education for blacks meant a certain kind of education. Blacks were to be given an industrial education to establish an “open-hearted, sympathetic negro, contented in his place, full of gossip and comradeship, the companion ... standing in kindly dependence that is the habit of his blood ....” [81] White industrialists saw black education as a way to produce a useful workforce, and as in the rest of the South, shifting blacks towards industrial education, instead of eliminating black education entirely, became the standard.[82]

North Carolina’s state policies were reinforced with support from Northern philanthropy. The justification seemed to be that the educated white man would turn and provide brotherly protection for blacks. “[W]e cannot do anything for the Negro until his white friend is convinced of his responsibility to him.”[83] In 1901, Governor Aycock wrote to Northern educators that “[i]f the negro is ever to be educated, it will be by the aid of Southern white men ... Education of the white will precede the education of negroes. Philanthropists in the North may think they can educate the negro without the help of Southern whites, but they are mistaken.”[84] Northern reformers “decided ... that the best way to assure the sale [of black education reform] was to emphasize its value to the purchaser [by focusing on education for whites].”[85]

Whether by choice or necessity, Northern philanthropy also focused its efforts during this period on white education. The executive secretary of Rockefeller’s General Education Board noted “if equal philanthropy for the Negro was advocated ... we shall err and invite defeat.”[86] The traditional story is that the reform movement’s lobbyists at the Southern Education Board similarly capitulated: since campaigning for black education would negate their ability to aid white education, the board chose “a middle path between

79. LELOUDIS, *supra* note 29, at xiv.

80. 1900-1901 & 1901-1902 BIENNIAL REP., *supra* note 67, at IX.

81. Grady, quoted in James Douglas Anderson, Education for Servitude: The Social Purposes of Schooling in the Black South, 1870-1930, at 114 (Jan. 1973) (unpublished Ph.D. dissertation, University of Illinois).

82. See *id.* at 27-31.

83. Walter Hines Page of the Southern Education Board, cited in PRATHER, *supra* note 17, at 222.

84. Cited in PRATHER, *supra* note 17, at 223.

85. BULLOCK, *supra* note 29, at 93.

86. Cited in PRATHER, *supra* note 17, at 224.

equalitarianism and racialism, and resigned itself by default to the growth of separate and unequal schools."[87] As a result, the efforts did little to help black schools.[88]

What impact Northern philanthropy did have on black education was focused on industrial training,[89] in line with Joyner's view that education for blacks was essential, but education of a different quality.[90] The small Slater fund concerned itself only with black industrial training at the college level until 1910, while the larger General Education Board and Peabody fund focused on whites.[91] The Southern Education Board had little effect on black education and the Peabody Fund dissolved without allocating blacks their full share of principle.[92] It was only after the momentum for white education declined that Northern philanthropy began to focus on blacks. Even then, the combined resources of the Slater Fund, the Jeanes Fund, and the Rosenwald Fund at the time were small, and these were hardly organizations with a strong advocacy program for blacks: the notably racist Jabez Curry sat on the boards of all three.[93] This is not surprising—white philanthropy, in general, agreed with white supremacists that blacks should hold an inferior role in the South.[94]

III. EDUCATIONAL GERRYMANDERS CIRCUMVENT *PUITT*

A. THE LEGISLATURE THROWS DOWN THE CHALLENGE

The previous section showed how disfranchisement turned would-be Democratic state officials into education reformers, and how Northern philanthropic efforts tied into the Democrat's vision of black education.[95] This

87. Harlan, *supra* note 73, at 198.

88. *Id.* at 201.

89. Joan Majouiski, *"The Schools Lost Their Isolation": Interest Groups and Institutions in Educational Policy Development in the Jim Crow South*, 23 J. POL'Y HIST. 323, 325 (2011); see also BULLOCK, *supra* note 29, at 75.

90. Northern philanthropy allowed "Joyner to hire officials to work in the field of Negro education. These officials became well acquainted with the problems and desired to see improvements made. In the second decade the Department, through these new officials, would begin to seriously consider the problems faced by Negro schools." Westin, *supra* note 54, at 168.

91. PRATHER, *supra* note 17, at 258.

92. Harlan, *supra* note 73, at 200-01.

93. PRATHER, *supra* note 17, at 281. Booker T. Washington was the only black to serve on all three boards, and the Jeannes Fund was the only one to have other blacks on the board. *Id.*

94. JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935, at 92 (1988) ("White supremacists themselves, northern reformers were not perturbed by southern racism per se. They also viewed black Americans as an inferior and childlike people").

95. Whether whites would have been disenfranchised in actuality in 1908 is an open question, as whites would have administered the literacy tests. At the least, the opposition movement was able to use the fear of white disenfranchisement to their advantage.

vision was crystallized in 1901, when the state passed an act outlining a new structure for the public education system, including a provision allowing cities and towns to create "special tax [school] districts" which could cross township lines.[96] Since blacks had been disenfranchised and pushed out of white-majority areas through racially restrictive covenants,[97] special taxes could be passed in white majority districts, which could be gerrymandered to include and support white schools only.[98] In this way the legislature created a way to effectively overrule the court's decision in *Puitt* and provided "especially fertile fields for discriminatory practice."[99] Taxes could not be directly raised from whites to pay for white schools, but special tax districts could accomplish much of this without technically violating *Puitt* and the 1876 anti-discrimination constitutional provision.[100] One contemporary noted "[t]he law which made provision for the levying of special school taxes permits any degree of gerrymandering the ingenuity of the whites can devise…. [I]t looks as if they … exercised the privilege rather freely."[101]

---

96. The state constitution limited the amount of county taxes that could be raised for schools. *See* Barksdale v. Commissioners of Sampson County, 93 N.C. 472, 475 (1885). However, this did not apply to municipalities, the level at which special tax districts were constructed, which motivated passage of special local tax districts as localities reached the *Barksdale* limits. *See* Jones v. Commissioners of Person, 107 N.C. 248, 261-62 (1890) (reasoning that the constitutional language referenced state and county taxes only). The ability of counties to tax increased with a decision of the North Carolina Supreme Court in 1907. By around 1907, most counties in the state had reached the *Barksdale* limit on taxation for school purposes. *Collie v. Commissioners of Franklin County*, 145 N.C. 170 (1907), was a test case prepared to challenge *Barksdale*'s limitation. In *Collie*, the court reasoned that the limit on taxation written into the 1868 constitution did not apply to holding a four-month term, since a four-month term was part of the constitutional text. The constitutional limitation "applied to legislative creations" not to "those expenses especially directed by the Constitution itself." *Id.* at 174.

97. Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 932 (2010).

98. Existing school districts could pass local taxation, and new school districts could be created for the express purpose of passing local taxation. *See* Atwell Campbell McIntosh, *Special Tax School Districts in North Carolina*, 1 N.C. L. REV. 88, 89-90 (1922) (noting an existing district "becomes a special tax district simply by voting for the tax" while new special-tax school districts may be created by "[t]he county board of education . . . under the general law [with] a petition of one-fourth of the freeholders in the proposed district," and that "[s]ince the only purpose in establishing the new district is to have the benefit of a special tax, voting for the tax is voting for the district"). *See generally* LOUIS R. HARLAN, SEPARATE AND UNEQUAL: PUBLIC SCHOOL CAMPAIGNS AND RACISM IN THE SOUTHERN SEABOARD STATES, 1901-1915, at 123 (1958) ("The eastern counties were the dark and bloody ground of educational campaigns. By discrimination against its Negroes and gerrymandering of districts, New Hanover led the state in the length of term of its white schools without a local tax.").

99. Westin, *supra* note 54 at 182. Local taxation "was used to do away with the last criterion of equality left the Negro—the equal term." *Id.* at 182.

100. *See* Jonathon B. Pritchett, *North Carolina's Public Schools: Growth and Local Taxation*, 9 SOCIAL SCI. HIST. 277, 282 (1985) for further discussion of the 1901 law.

101. W. Scott Boyce, Economic and Social History of Chowan County, North Carolina, 1880-1915, at 168 (1917) (PhD Dissertation, Columbia University). *See also* Patricia Randolph Leigh, *Segregation by Gerrymander: The Creation of the Lincoln Heights (Ohio) School District*, 55 J. NEGRO EDUC. 121, 134 (1997) ("Perhaps the adult citizens of Lincoln Heights could have been more diligent and vigilant in determining and protecting their rights and preventing the gerrymandering of their community and school district. However, the history of oppression in this urban area, ... strongly suggests that Lincoln Heights'

If any black schoolchildren *did* reside within such a district, they could still be deprived benefit from increased school taxes. Superintendent Joyner outlined how this "privilege" was to be exercised:

> The [school] committee could not ... apportion to the white schools the money paid by the white race and to the colored schools the money paid by the colored race, but, considering the fact that the colored schools would not require as well qualified teachers and their teachers would not and ought not to be paid as large salaries because they are not as well qualified as a rule and because their expenses are not as great ... the committee could so apportion the money as to do substantial justice to the colored race and satisfy them by giving them about as many months of school without having to apportion to them anything like their per capita part of the special tax money.[102]

Schools for blacks could be furnished "with very little expense," and blacks would "give not trouble about it" if discrimination were "quietly managed."[103]

Local taxation then became a favorite cause of progressive education reform.[104] In 1904, Joyner wrote that existing districts would be "a standing object lesson" for others.[105] The Southern Education Board provided funds for speakers to visit localities and campaign for local taxation.[106] The percentage of school revenues from local taxes for rural schools grew from 0.3% in 1900 to 31% in 1915.[107] The result was unequal schools. Pritchett compared the term length of districts in 1914 and concluded that local taxing

---

Black residents were not privy to the boardroom decisions that would have allowed them to act in a timely or appropriate manner to resist these outside interventions.").

102. Letter from James Yadkins Joyner to county superintendents, Biennial Report 1902-1903 & 1903-1904 BIENNIAL REPORT , *supra* note 67, at 238-39.

103. Westin, *supra* note 54, at 198 (quoting James Yadkins Joyner).

104. Because blacks were removed from political power, progressive educational reformers may have felt more free to extend funding to Southern schools. Klarman, *supra* note 5, at 383-84 ("Black disfranchisement essentially extinguished any political constraints on racially discriminatory administration of the public school fund. Soon thereafter (and not unrelatedly), the Progressive educational campaigns that swept the South from 1900 to 1915 poured much larger sums of money into public education, which administrative officials were now largely free to divert to white schools."). With the backing of the state government, "New South boosters crushed their opponents and cleared the way for the new education to take possession of the countryside. . . . Fortified by the wealth of northern philanthropists, they set out to win the hearts and minds of rural children . . . ." LELOUDIS, *supra* note 29, at xiv. The result was a flood of money for rural education in the state which could be diverted away from black schools because of disfranchisement and white local school funding control.

105. 1902-1903 & 1903-1904 BIENNIAL REPORT, *supra* note 67, at 7.

106. 1904-1905 & 1905-1906 SUPERINTENDENT PUB. INSTRUCTION OF N.C. BIENNIAL REP., at 10. "The campaign for education [including local tax districts] by bulletin, through the press and by public addresses has been carried on without cessation." *Progress of Education in North Carolina*, WINSTON-SALEM J., Mar. 17, 1907, at 2.

107. Louis R. Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States 1901-1915* 119 (The University of North Carolina Press, 1st ed. 1958); Pritchett, *supra* note 100, at 284. In his 1908 report, Joyner trumpeted that the "school terms in the newly established

could explain about 74% of the difference between black and white term length.[108] In essence, white expenditures and school terms increased dramatically under the aegis of education reform while black expenditures and school terms lagged.[109]

B. THE COURT TAKES IT UP

The North Carolina Supreme Court was initially unsympathetic to these efforts. In keeping with the spirit of *Puitt*, in 1902 the court in *Hooker v. Town of Greensville* was skeptical of an obviously gerrymandered school district. Figure 2 shows the outline of this district, as the court "had a map of the town of Greenville, including the school district, furnished … for the purpose of enabling [it] to understand the [boundaries] …"[110] The court noted that the district had "50 corners and 50 lines, in its boundary, which seem[ed]…remarkable …,"[111] and therefore the court would not turn a blind eye to the reality of its discriminatory purpose.[112] Furthermore, "[i]f this bill discriminates against either race to the prejudice of the other race, it is unconstitutional; and the law will not allow that to be done by indirection that cannot be done directly."[113] The gerrymander would have resulted in unequal per capita funding among children of different races, and so violated the state constitution which stated, "one white child of the school age shall have the same amount of money per capita as a colored child, and no more; and the colored child shall have the same amount per capita as any white child, and no more …."[114]

---

local-tax districts have been greatly lengthened, in many instances doubled." 1906-1907 & 1907-1908 SUPERINTENDENT PUB. INSTRUCTION OF N.C. BIENNIAL REP., at 7.

108. Pritchett, *supra* note 100, at 288.

109. *Id.*; *see also* Jonathan B. Pritchett, *The Burden of Negro Schooling: Tax Incidence and Racial Redistribution in Postbellum North Carolina*, 49 J. ECON. HIST. 966, 973 (1989) (analyzing whether white taxes subsidized black schools).

110. *Hooker v. Town of Greensville*, 130 N.C. 472, 474, 42 S.E. 141, 141-42 (1902) (noting the boundaries of the school district).

111. *Id.* at 141, 42 S.E. at 141.

112. *Id.*

113. *Id.* (citations omitted).

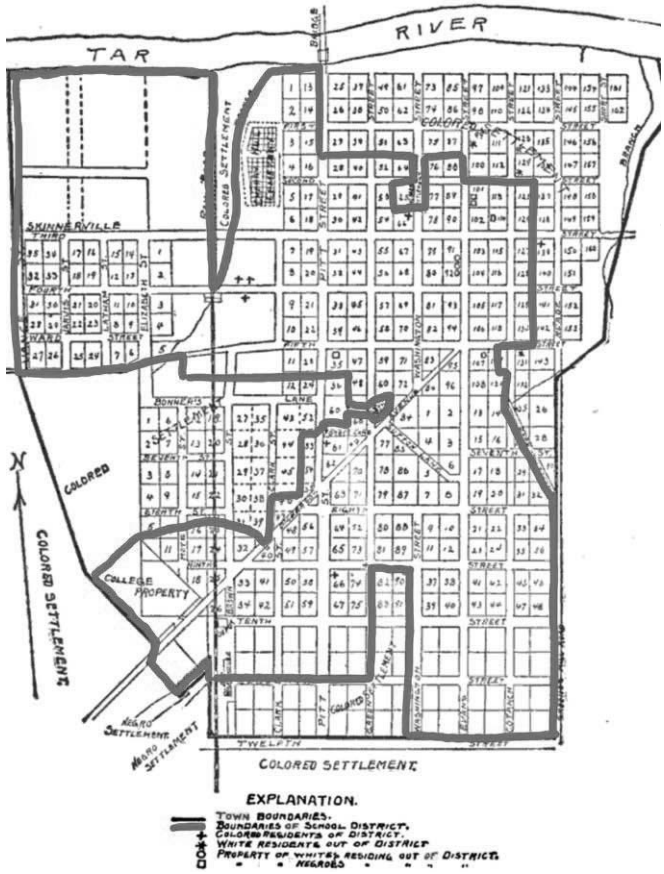
114. *Id.*

The court's tune soon changed as Fusion-era justices were replaced by Democrats.[115] In 1905, the *Lowery v. Town of Kernersville* court turned *Hooker*'s per capita requirement into dicta.[116] The court found that the term

Figure 2: District at Issue in *Hooker v. Town of Greensville*

115. *See* DAVISON, *supra* note 43, at 15 ("The remarkable *Hooker* decision was clearly an aberration in the context of contemporary southern jurisprudence and reflected the explosive politics of the day. Four of the five justices who rendered the decision were Republicans who had joined the court during the tumultuous 'fusion' years of the mid-1890s. The Democrat-controlled House had impeached two of the justices the previous year in part because of their suspected liberal views on racial matters.") (footnote omitted).

116. Lowery v. Town of Kernersville, 140 N.C. 33, 47, 52 S.E. 267, 272 (1905) ("In this connection we wish to say that the language used in the opinion in *Hooker v. Greenville*, which seems to hold that in no other way than by a per capita distribution of all taxes collected for public schools can the Constitution be observed, does not meet our approval.") (citation omitted).



Notes: The dark outline shows the district subjected to litigation.

"equal" did not require "that the taxes are to be apportioned between the races per capita," but rather that "the school term shall be of the same length during the school year, and that a sufficient number of teachers … be employed at such prices as the board may deem proper."[117] The court reasoned that

> [m]uch must be left to the good faith, integrity, and judgment of local boards in working out the difficult problem of providing equal facilities for each

117. *Id.*

> race in the education of all the children of the state. Local conditions, relative numbers, and other well-recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the state. In no sphere of our system of local self-government, under the guidance of a general superintendence and constitutional limitations, is the capacity of the people to govern themselves more strongly illustrated.[118]

The court confirmed this a year later in *Smith v. Board of Trustees of Robersonville Graded School*.[119] In considering a local tax school district, the court left the legality of the allocation of school funds to the good faith of the defendants, writing that the "defendants in their sworn answer aver that they have no desire or intent but to administer their trust in accordance with the law of the land ..." and that there were "no facts or data given by which the court may determine whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds."[120]

The post-Fusion court finally addressed gerrymandering head on in *Howell v. Howell*.[121] The court refused to issue an injunction against a gerrymandered district, reasoning that (1) the citizens had voted for it—though by this time, blacks were disenfranchised—and (2) the proper decision-maker in such a case was the county board of education, not the court.[122] The issue of district boundaries was a political question, since "[w]hen the citizens voted, they voted not only for the tax, but for the district. Hence the question presented is in its analysis a political one, to be fought out on the hustings."[123] If questions arose, the county board had all the facts—as is worth quoting at some length:

---

118. *Id.*

119. Smith v. Board of Trustees of Robersonville Graded School, 141 N.C. 143, 53 S.E. 524 (1906).

120. *Id*. at 160, 53 S.E. at 530. The court may have been questioning the timing of the litigation, suggesting that data could be collected on discriminatory effects in the future—this Article takes the point of lack of data more broadly. The court further noted that "[i]f defendants, contrary to their avowed purpose, shall endeavor to exercise the authority conferred upon them with an 'evil eye and unequal hand,' so as to practically make unjust discrimination between the races in the school facilities afforded, it is open to the parties who may be interested in the question by proper action to correct the abuse and enforce compliance with the law." *Id.*

121. Howell v. Howell, 151 N.C. 575, 66 S.E. 571 (1909).

122. *Id.* at 578, 66 S.E. at 573.

123. *Id.* at 581, 66 S.E. at 574. The court here weakly echoed the Supreme Court's analysis from a few years earlier in *Giles v. Harris*, 189 U.S. 475, 488 (1903) ("The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, *relief from a great political wrong, if done, as alleged*, by the people of a state and the Stat itself, must be given by them or by the legislative and political department of the Government of the United States.") (emphasis added).

> Necessarily the questions of compactness and convenience must be addressed to somebody's judgment and discretion. The statutes unequivocally delegate this duty to the county board of education. The only absolute standard of compactness would be a circle with the schoolhouse in the center. Such would be a physical impossibility. All other opinions of compactness would be relative and not capable of exact definition. The only absolute standard of convenience would be a schoolhouse at every man's door, which, of course, is out of the question. These things are of necessity relative to and dependent upon many other circumstances and conditions, all of which have fluctuating values in the determination of what is best. The lay of the land, streams, roads, mountains, and many other things, must all be considered and given their proper influence.… There are 7,707 districts in the state, and it is highly probable that in each of these there are one or more persons who, with some degree of reason, think that, from the standpoint of convenience and compactness, the district is not correctly laid off. For the courts to undertake to pass upon such matters would be manifestly unwise. The county board of education is supposed to have acquired by observation, study, and experience a knowledge of the varying needs of the county, which no court could hope to obtain by a mere examination of witnesses. There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion.[124]

Who was the court to consider issues such as compactness, when a wise (all-white) county board was at hand—especially as complaint was inevitable no matter the boundaries.

IV. LESSONS FOR CONTEMPORARY POLICY AND LITIGATION

A. A TURNKEY PATH TO DISCRIMINATION

North Carolina's history demonstrates that districting is an all-purpose path to discrimination. For whites not inclined toward equal rights or racial tolerance in North Carolina, keeping school tax funds segregated was challenging. Repeated measures to segregate school taxes by race (so that white taxes would only support white schools) were either struck down in violation of North Carolina law or failed to pass the legislature for fear of being struck

124. *Howell,* 151 N.C. at 578, 66 S.E. at 573.

down for violating federal law.[125] Overt discrimination in distribution of discretionary funds also risked court challenges.[126] Clever districting overcame these problems—once ex-ante discriminatory boundaries were established, ex-post discriminatory funding could proceed without as great a risk of legal challenge.[127]

Today, educational gerrymandering is alive and well.[128] While the overtly discriminatory tax scheme tied to districting in North Carolina would face legal challenge today, segregated districting itself brings a host of concerns, such as lack of access to beneficial social networks and the inherent educational benefits of diversity.[129] In North Carolina, segregated districting provides the same turnkey path to discrimination. Behavior that would constitute actionable discrimination *within* a district is more difficult to challenge when occurring *between* districts.

---

125. In this way, white supremacy in North Carolina faced the same hurdle as white supremacists nationally—how to disempower black voters while still playing lip service to the Fourteenth and Fifteenth Amendments. *See* Klarman, *supra* note 5 at 305 ("[T]he Fifteenth Amendment expressly forbids disfranchisement based on race. Southern states understood this and thus almost universally refrained from adopting explicit racial qualifications on the suffrage, for fear that courts would invalidate them.").

126. In modern day parlance, "addressing any problem of spatial inequality—be it racial segregation, disparities in neighborhood services, or discriminatory annexation, to name a few—through a civil rights lawsuit faces formidable, well-known doctrinal barriers. Such cases must surmount, among other obstacles, the constitutional requirement of proving racially discriminatory intent and the increasingly extensive statistical proof required to establish a disparate impact claim under statutory protections like the Fair Housing Act." Anderson, *supra* note 81*,* at 959-60.

127. Of course, if the boundaries are ex-ante blatantly racially discriminatory, courts might respond. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."); Haney v. County Bd. of Educ.*,* 410 F.2d 920, 923 (8th Cir. 1969) (finding a blatant racial gerrymander violated the Equal Protection Clause); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 566-67 (1999) (discussing *Gomillion*).

128. *See* Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119 (2014) (describing the continued existence of racial gerrymandering at the school-district and attendance-zone level); Siegel-Hawley, *supra* note 3, at 582 (finding that modern redistricting in response to population growth tends to reinforce racial isolation); Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post*-Parents Involved, 29 L. & INEQ. 149, 150 (2011) (critiquing state rules that allowed "school districts to make attendance boundary or school closing decisions that exacerbate racial isolation") (footnote omitted).

129. *See* Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 334 (2002) ("It is important to note that, across these different approaches and different samples of students and faculty, researchers have found similar results showing that a wide variety of individual, institutional, and societal benefits are linked with diversity experiences."). *Cf.* Siegel-Hawley, *supra* note 3, at 585 ("Racially and economically segregated neighborhoods are linked to radically different opportunity structures. . . . On average, few residents living in high-poverty, minority segregated neighborhoods have contact with people connected to advantaged social networks, which tend to be associated with the acquisition of mainstream social, economic, and cultural capital.").

For example, data scientist David Mosenkis studied data on 500 school districts in Pennsylvania.[130] He found inter-district funding gaps based on race at each level of poverty in the state, and that "[j]ust the increased presence of minority students actually deflated a district's funding level."[131] These kind of state-level results are hard to challenge absent successful adequacy litigation under state constitutional principles.[132] In contrast, within-district differences, such as de-facto segregated schools or marked disparity in funding, are more difficult to blame on geographical differences and hence easier to litigate.[133] Creating discriminatory boundaries thus functions as a kind of insulation, shielding discriminatory decisions from legal action.

B. DISTRICTING INHERENTLY RAISES CONSTITUTIONAL CONCERNS

Next, the North Carolina Supreme Court responded to gerrymandering in *Howell v. Howell* by essentially calling the problem a political question: "When the citizens voted, they voted not only for the tax, but for the district. Hence the question presented is in its analysis a political one, to be fought out on the hustings."[134] In a similar way, the political question doctrine is often raised during contemporary gerrymandering cases. Although the Su-

130. Gillian B. White, *The Data are Damning: How Race Influences School Funding*, THE ATLANTIC (Sept. 30, 2015), https://www.theatlantic.com/business/archive/2015/09/public-school-funding-and-the-role-of-race/408085/.

131. *Id.*; *see also* Lincoln Caplan, *Two Connecticut School Systems, For the Rich and Poor*, THE NEW YORKER (Sept. 14, 2016), http://www.newyorker.com/news/news-desk/two-connecticut-school-districts-for-the-rich-and-poor *and* Elizabeth A. Harris & Kristin Hussey, *In Connecticut, a Wealth Gap Divides Neighboring Schools*, N.Y. TIMES, Sept. 11, 2016, https://www.nytimes.com/2016/09/12/nyregion/in-connecticut-a-wealth-gap-divides-neighboring-schools.html (contrasting the neighboring Fairfield and Bridgeport school districts, one of which boasts a 94% graduation rate, while the other suffers a 63% graduation rate).

132. *See* Hilbert, *supra* note 8, at 50 (discussing educational adequacy litigation).

133. *E.g.*, People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 532-33 (7th Cir. 1997) (summarizing lengthy litigation over disparities in white and minority education within the Rockford school district).

134. *Howell*, 151 N.C. 575, 581, 66 S.E. 571, 574.

preme Court has indicated racial-based gerrymandering claims are justiciable,[135] and partisan-based gerrymandering claims are at least potentially justiciable,[136] state-law-based decisions may hold differently,[137] and some scholars have argued there simply is no constitutional basis for courts to confront districting.[138]

However, the events in North Carolina caution against this view. When the court encouraged this question to be settled "on the hustings," it quietly ignored the disenfranchisement of blacks. As a result, blacks had little political influence towards school funding decisions or local government power to decide district boundaries.[139] The political question doctrine relies on the background assumption that politics is functioning in a non-discriminatory manner, and so cannot be used to address claims whose backdrop relies on suppression of voting rights.[140] In addition, arguing that the Constitution does not speak to districting issues ignores that districting stands as a proxy for what the Constitution *does* speak to, such as equal protection and the right to vote.[141]

---

135. Vieth v. Jubelirer, 541 U.S. 267, 286 (2004) (plurality opinion) ("[T]he purpose of segregating voters on the basis of race is not a lawful one . . . ."); *Gomillion*, 364 U.S. at 341-42 (finding race-based gerrymandering unconstitutional); Kirksey v. Bd. of Supervisors, 468 F. Supp. 285, 299 (S.D. Miss. 1979) ("If there is one concrete principal in this area, it's that blatant racial gerrymanders are unconstitutional . . . .").

136. *E.g.*, *Vieth*, 541 U.S. at 281 (plurality opinion) (finding Davis v. Bandemer, 478 U.S. 109 (1986), not judicially manageable); *id.* at 306 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *Bandemer*, 478 U.S. at 123 (finding an Equal Protection claim from partisan-based gerrymandering was not a political question); Common Cause v. Rucho, 240 F. Supp. 3d 376, 382-87 (M.D.N.C. 2017) (discussing the Supreme Court's history of judiciability decisions related to gerrymandering).

137. Cruz-Guzman v. State, 892 N.W.2d 533, 540 (Minn. Ct. App. 2017) (finding educational adequacy stemming from school segregation by race a non-judiciable political question).

138. *See, e.g.*, Alexander & Prakash, *supra* note 4, at 4, 8 ("Gerrymandering is older than the republic. . . . [T]he Constitution neither envisions nor mandates any such ideals. The Constitution never sets out criteria for the proper composition of the legislature, the suitable amount of electoral competitiveness, or the correct ideological balance of legislators within a legislature."). *But see Haney*, 410 F.2d at 923 (finding gerrymandered district unconstitutional); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997) (discussing greater court hostility to minority school districts than other minority political districts); *cf.* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 267-68 (1994) (discussing the creation of a religious-based school district as violating the Establishment Clause).

139. *See supra* Section II.

140. *Cf. Judicial Attitude Toward Political Question Doctrine: The Gerrymander and Civil Rights*, 1960 WASH. U. L. Q. 292, 300 (1960) ("If . . . this is a problem for the people to solve by exercising their political rights, is it not possible that the courts should provide for judicial redress in those situations where the exercise of political rights has been abrogated by maldistricting? And, of course, expecting the legislators to redistrict themselves out of office is political naïveté.").

141. *Cf.* ANTHONY J. MCGANN, CHARLES ANTHONY SMITH, MICHAEL LATNER, & ALEX KEENA, GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE

C. WEAKNESS IN DATA IS WEAKNESS IN COURT

Finally, perhaps the timeliest point of this parable from North Carolina is that weakness in data means weakness in court. This has three aspects: failing to gather data, failing to present data in a useful manner, and failing to convince the court to take responsibility to adjudicate based on the data.[142] In *Smith v. Board of Trustees*, the court considered the legality of discriminatory distribution of school funds and noted "no facts or data given" by which it could adjudicate "whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds."[143] While the court may have ruled this way regardless of any data presented, the absence of data provided the court a convenient excuse not to rule against discriminatory behavior.[144]

Next, even if data exist, they might not be presented to the court in a useful manner. In *Hooker v. Town of Greenville*, the boundaries of a gerrymandered district were known, but the court had to go out of its way to ask for a pictorial representation.[145] The picture conveyed, dramatically, the efforts spent to exclude black schoolchildren from the new district in a way that a wall of text could not convey.[146] Modern litigation over gerrymandering is aided by com-

---

FUTURE OF POPULAR SOVEREIGNTY 3-6 (2016) (noting the Constitution requires the House of Representatives to be elected by the people rather than state legislatures, and that gerrymandering has the prospect of reversing this requirement).

142. Of course, these points require a court be at least willing to consider the cause the data is intended to further. If the courts considering these cases in North Carolina were determined to rule against the plaintiffs no matter the facts, these ideas would not have led to victory. At the least, they would have required the court to reject the evidence in front of its eyes.

143. Smith v. Board of Trustees, 141 N.C. 143, 160, 53 S.E. 524, 530 (1906).

144. The response to this is, of course, that the plaintiffs in *Smith* may not have had the resources to collect data on discrimination once the defendant implemented its scheme, or the legal resources to force the custodians of the data to share it in the litigation.

145. Hooker v. Town of Greenville, 130 N.C. 472, 472-77, 42 S.E. 141, 141-42 (1902); *see supra* note 110 and accompanying text.

146. *Hooker*, 130 N.C. at 475-77, 42 S.E. at 142 (describing the school district as written below. Compare this with *supra* Figure 2:

Section 1. That all the territory embraced within the following limits in the town of Greenville, Pitt county, to-wit, beginning on Tar River at the river bridge, foot of Pitt street, thence up said river to the first branch, commonly called Skinner's Ravine, thence with said ravine or branch to the eastern boundary line of the W. and W. Railroad where it crosses said branch, thence with said eastern boundary of right-of-way of said railroad to Tar River, thence up Tar River to the present corporate limits of said town, thence with said corporate limits of said town to the river road, at a point where Fifth street extended would cross said line, thence with said river road for Fifth street to J. L. Sugg's northwest corner on said street, thence his line so as to include his lot to the western line of the right-of-way of the W. and W. Railroad, thence across said railroad to John Flanagan's southwestern corner on said right-of-way, thence his back line and N. H. Bagwell's, Miss Martha O'Hagan's and Dr. C. O. H. Laughinghouse's back line to Pitt street, thence across Pitt street an air-line to S. T. Hooker's back line, thence his line, Miss McKenny Perkins' and J. A. Andrews' back lines to C. D. Rountree's corner on his back line, thence C. D. Rountree's line to Greene street, thence down Greene street to the Methodist parsonage's southern corner on said street, thence with

puter-generated graphics which quickly convey the unusual shape of gerrymandered districts. This allows for quick comparisons of how voting outcomes could change under simulated non-gerrymandered districting.[147] Just as persuasive writing might help sway an undecided court, persuasive representations of data can convey what raw statistics themselves cannot.[148]

Today, one reason combatting partisan-based gerrymandering has gained traction is because data has become available to detail the effect of gerrymandering. For example, through computer modeling researchers can calculate the "efficiency gap" showing the wasted votes caused by non-compact districts.[149] This "represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to

---

said parsonage line to R. N. King's line, thence his line to Frank Tyson's, thence with B. F. Tyson's back line, including said Tyson lot, to Dickeson avenue, thence with northern side of Dickeson avenue to R. A. Tyson's first corner on said street, thence his back line, including said lot, to Greene street, thence across Greene street to C. D. Rountree's northeast corner, thence his line so as to include his lot and R. A. Tyson's line to Pitt street, thence up said Pitt street to B. C. Shepperd's northeast corner, thence his line to a point one-half distance between Pitt and Clark streets, thence from this point a line parallel with Pitt street an air-line to Zeno Moore's line, thence his line to Clark street, thence with Clark street to Dickeson avenue, thence with Dickeson avenue in a westerly direction to the first ditch crossing said street, thence up said ditch to the W. and W. Railroad trestle over said ditch, thence an air-line from said trestle to the northeast corner of old college lot, thence with old college line in a westerly direction and southerly direction, including said college lot, to old plank road, thence along and across in a southwesterly direction old plank-road to E. A. Moye's northeast corner, thence his line to a point 60 feet north of Broad street, thence a line parallel with Broad street and 60 feet north of said street to the western boundary of the right-of-way of the W. and W. Railroad, thence along said right-of-way to a point where Eleventh street extended would cross said railroad, thence with the line of Eleventh street to a point where an air-line drawn from the eastern side of Liberty Warehouse would cross said street, thence a line made by extension of eastern side of Liberty Warehouse to Ninth street, thence Ninth street 200 feet in an easterly direction, thence a line parallel with the eastern side of Liberty Warehouse to Twelfth street, thence with Twelfth street to the road leading from Greenville to Greene's Mill Run, thence with said road in a northerly direction to Alfred Forbe's northeast corner of the lot on which he now lives, thence his line to the livery stable lot of G. M. Tucker and Rickey Moore, thence this eastern line to Fifth street, thence with Fifth street in an easterly direction to a point midway between Cotanch and Read streets, thence a line from this point parallel with Cotanch street to Second street, thence with Second street to Evans street, thence with Evans street to a point midway between First and Second streets, thence a line midway between First and Second streets to eastern line of Washington street. thence with Washington street to a point midway between Second and Third streets, thence this line parallel with Third street 165 feet, thence an air-line parallel with Washington street to Second street, thence with Second street to Washington street, thence with Washington street to a point midway between First and Second streets, thence an air-line parallel with Second street to Pitt street, thence with Pitt street to the beginning.)

147. *See* Nicholas Stephanopoulos, *The Research that Convinced SCOTUS to Take the Wisconsin Gerrymandering Case, Explained*, VOX (July 11, 2017), https://www.vox.com/the-big-idea/2017/7/11/15949750/research-gerrymandering-wisconsin-supreme-court-partisanship (describing the graphics which convinced a court that extreme partisan gerrymandering was taking place).

148. *See generally* Herbert M Kritzer, *The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom*, 72 L. & CONTEMP. PROBS. 41, 42 (2009) (discussing norms of persuasion in scientific journals versus the courtroom).

149. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

prevail."[150] This "tidy" measure is intuitive, lends itself to persuasive graphics, and enables quick comparisons and counterfactuals.[151] When used effectively, such a rigorous measure may explain the Supreme Court's willingness to newly consider the constitutional implications of partisan gerrymandering.[152]

Finally, even if data are collected and presented persuasively, a court must be convinced the data are actionable. The *Howell* court's second justification for not reviewing a gerrymandered school district was the complexity of the task: "The county board of education is supposed to have acquired by observation, study, and experience a knowledge of the varying needs of the county, which no court could hope to obtain by a mere examination of witnesses."[153]

A court, in this view, was simply the wrong kind of entity to review these kinds of data. For litigants in North Carolina fighting the effects of discriminatory districting, this may have been the greatest challenge. Even if data were collected, and presented persuasively (an expensive endeavor), a court might still ignore the data and refer the plaintiffs back for adjudication to the same entity that supervised creation of the district.

This historical debate echoes what often occurs today in educational adequacy litigation. Courts routinely find they are not in a situation to implement solutions for inadequate distribution of school funds across a state.[154] However, when complex systems of state funding are at issue, courts routinely address complex technical questions in modern jurisprudence. Litigation shows that even if issues are beyond the scope of courts, consideration by courts may result in changes at the legislative level.[155]

---

150. *Id.*

151. *Id.* ("The efficiency gap essentially aggregates all of a district plan's cracking [votes cast for losing candidates] and packing [excessive votes cast for winning candidates] choices into a single, tidy number.").

152. Stephanopoulos, *supra* note 147 ("Another of the plaintiffs' experts, Stanford professor Simon Jackman, prepared [a] chart. It displays the average efficiency gap produced over its lifetime by almost every state house plan in America from 1972 to 2014. . . . The Wisconsin plan . . . lies at the very bottom of the historical distribution, at the extreme pro-Republican edge. In fact, its average efficiency gap is bigger than that of any map used prior to the current cycle. This data is what led the trial court to the conclusion that 'the [efficiency gaps] for the 2012 and 2014 races in Wisconsin … were particularly high by historical levels.'" (quoting Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016))).

153. *Howell,* 151 N.C. at 578, 66 S.E. at 573.

154. *See* Hilbert*, supra* note 8, at 35 (discussing educational adequacy litigation).

155. *See id.* at 55 ("Ultimately, state court solutions may be insufficient, but they can trigger much greater change and lead to important, if modest, reforms. The road to more effective state constitutional remedies may need many building blocks, much as the efforts of the NAACP to eventually bring and win *Brown* took years to complete. This is not a reason to wait; on the contrary, the longer the wait, the further away the solution lies. Perfection may be the enemy of the good, particularly in securing education reform. Furthermore, even though courts basically just hand it back to legislatures, such deference has, with court involvement, led to important results. . . . State courts may not provide all of what is needed, but they can generate reform across the entire political system. . . . Future state court rulings can do the same for school segregation." (footnotes omitted)).

In sum, while anecdotes are powerful, data is the lifeblood of civil rights litigation.[156] While gathering data is expensive, and statistical experts are not cheap, mounting an effective challenge to districting is more likely to be successful when this investment is made. For government entities, proper creation and attention to data, such as through quantitative accountability systems, can help ensure that care is given to minority schoolchildren and these issues are solved before litigation.[157]

CONCLUSION

Confronting the challenges facing education in the United States, particularly minority education, is overwhelming. A host of teachers, policymakers, economists, activists, and litigators have made it their lives' work, in this century and before. While litigation at the end of the nineteenth century left black education in North Carolina on a relatively high note, over the next decades disenfranchisement, education reform, and changes to districting law became vehicles for white supremacists to recreate schools in their image. When this was challenged in court, the failure to collect and present persuasive data on the effects of gerrymandered districts provided acquiescent courts a convenient excuse to reject claims of inequality. As the United States undergoes another period of reform to both education and districting, North Carolina's history suggests detailed quantitative attention is necessary to show how minority rights are affected by districting policy.

156. *See, e.g.*, *People Who Care*, 111 F.3d at 537 (describing admissible and inadmissible use of statistics to show the size of the achievement gap between white and minority students that could be attributed to the actions of the school district).

157. *See State Accountability Information*, AMERICAN FEDERATION OF TEACHERS, https://www.aft.org/position/student-success/state-accountability-information (last visited July 31, 2017) (describing state accountability systems, including those that track statistics for minorities).

Appendix: Timeline of Events in North Carolina

1868: Reconstruction-era constitution forbids racial discrimination

1877: Reconstruction ends

1883: Legislature allows localities to raise school taxes divided along racial lines

1886: *Puitt* holds discriminatory school tax law of 1883 violates the state constitution

1894: Fusion political movement controls state legislature

1898: White supremacist campaign returns Redeemer Democrats to power

1900: Blacks disenfranchised through constitutional amendment, literacy made a condition of voting as of 1908

1901: Education act allows creation of special local tax districts

1902: Raleigh conference kicks off campaign for education reform

1905: *Lowery* allows racial division of school funds based on "good faith"

1906: *Smith* upholds discriminatory school funding based on lack of data

1909: *Howell* upholds gerrymandered local tax districting