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Say the Magic Words: Establishing a Historically Informed Standard to Prevent Partisanship from Shielding Racial Gerrymanders from Federal Judicial Review

Emily K. Dalessio

Washington and Lee University School of Law, dalessio.e21@law.wlu.edu

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Say the Magic Words: Establishing a Historically Informed Standard to Prevent Partisanship from Shielding Racial Gerrymanders from Federal Judicial Review

Emily K. Dalessio*

Abstract

In its 2019 decision in Rucho v. Common Cause, the Supreme Court closed the doors of the federal courts to litigants claiming a violation of their constitutional rights based on partisan gerrymandering. In Rucho, the Court held that partisan gerrymandering presents a political question that falls outside the jurisdiction of the federal courts. However, the Supreme Court did not address an insidious consequence of this ruling: namely, that map-drawers may use partisan rationales to obscure what is otherwise an unconstitutional racial gerrymander. This Note uses North Carolina as an example of a state with a long history of gerrymandering—both racial and partisan. Over the course of the last quarter century, the Supreme Court has repeatedly struck down North Carolina’s redistricting efforts as the product of racial gerrymandering. Nonetheless, when the State changed its strategy, arguing that it based its redistricting efforts on partisan goals, the Supreme

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Court in Rucho ultimately declined to review the constitutionality of the map, allowing it to stand. This leaves voters potentially unable to challenge redistricting where, as is the case in North Carolina, race and political behavior are closely aligned and the map-drawers claim that the map was designed to secure partisan advantage, even if racial demographics were central to their considerations. In effect, Rucho creates a “magic words” test that incentivizes map-drawers to sanitize the legislative record of references to race, in favor of references to partisanship, in order to insulate redistricting plans from federal judicial review.

*This Note suggests that the Supreme Court adopt a test to distinguish between racial and partisan gerrymandering using the approach the Court took in *Flowers v. Mississippi*—another 2019 decision. In *Flowers*, the Court placed great emphasis on Mississippi’s history of racial discrimination in jury selection in finding that the State had again violated the Equal Protection Clause in the case before it. Applying that logic to the issue of gerrymandering, this Note proposes a test that would presume that a challenged map from a state with a history of racial gerrymandering was a product of racial gerrymandering. The State would then face a high burden to rebut that presumption before the reviewing court could decide whether the case presents a political question under *Rucho*. The test this Note proposes would safeguard the right to vote, especially for Black and minority voters in states with histories of voter suppression and in so doing, ensure that the fundamentals of the democratic process are not subject to further erosion.*

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I. Introduction

“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”¹ As such, voting rights receive special protections under the Fourteenth² and Fifteenth³ Amendments to the Constitution, as well as under the Voting Rights Act (VRA).⁴ Despite these protections and guarantees, the right to vote currently stands on uneven ground.⁵ This is particularly true in states like North Carolina, where a long history of racial gerrymandering has morphed into a recent history of partisan gerrymandering,⁶ creating a landscape in which legislators

1. See *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

2. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).

3. See *id.* amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

4. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 52 U.S.C.).

5. See John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 505 (2002) (indicating that a “green light for partisan gerrymandering” could undo the accomplishments of the Warren Court with regard to reapportionment).

6. See *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 658 (1993) (holding plaintiff-voters stated a claim under the Equal Protection Clause where they claimed North Carolina’s reapportionment scheme was “so irrational on its face that it [could] be understood only as an effort to segregate voters into

choose their voters rather than voters choosing their representatives.⁷

This Note explores issues of racial and partisan gerrymandering in the United States, using North Carolina⁸ as a case study. In particular, this Note focuses on the actual and potential impacts of the Supreme Court's 2019 decision in *Rucho v. Common Cause*,⁹ in which the Court held that partisan gerrymandering is a non-justiciable political question.¹⁰ This Note seeks to provide an answer to a question left unaddressed in *Rucho*: how can federal courts ensure that states with a long history of racial gerrymandering do not disguise

separate voting districts because of their race"); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 904–18 (1996) (holding that the reapportionment of voters in North Carolina's District 12 violated the Equal Protection Clause and Section 2 of the Voting Rights Act because the State's classification of voters by race was "not narrowly tailored to serve a compelling state interest"); *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 553–54 (1999) (finding insufficient evidence that North Carolina's 1997 redistricting of District 12 was racially gerrymandered); *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 257–58 (2001) (holding that racial considerations did not predominate the 1997 redesign of District 12); *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017) (upholding "the District Court's conclusions that racial considerations predominated in designing both [Congressional] District 1 and District 12"); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (finding that the North Carolina congressional district map was the result of partisan gerrymandering, which is not justiciable under the political question doctrine).

7. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (arguing that the North Carolina partisan gerrymanders "enabled politicians to entrench themselves in office as against voters' preferences").

8. See Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229, 242 (2018) (indicating that North Carolina is an appropriate state to use to study racial gerrymandering because its "congressional districts have seen more racial gerrymandering litigation at the Supreme Court level than any other districts in the country").

9. 139 S. Ct. 2484 (2019).

10. See *id.* at 2506–07 (majority opinion) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

unconstitutional racial gerrymandering¹¹ as partisan gerrymandering in order to escape judicial review?¹²

Justice Kagan’s dissent in *Rucho* speaks directly to what is at stake in instances of racial and partisan gerrymandering—“[gerrymandering] deprive[s] citizens of the most fundamental of their constitutional rights: the right to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives.”¹³ For nearly 150 years, the Supreme Court has recognized the importance of voting “as a fundamental political right, because [it is] preservative of all rights.”¹⁴ In the absence of federal judicial review this essential democratic right is without the protections that it warrants.¹⁵

Rucho’s holding that partisan gerrymandering is a non-justiciable political question¹⁶ creates an incentive for legislatures redrawing congressional district maps to disguise racial gerrymandering as partisan gerrymandering.¹⁷ Legislators can do this by ensuring that there is little to no direct or circumstantial evidence in their records demonstrating

11. See *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (stating that the Equal Protection Clause of the Fourteenth Amendment prohibits a state from “separating its citizens into different voting districts on the basis of race” without a compelling justification (quoting *Bethune-Hills v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017))).

12. See *Rucho*, 139 S. Ct. at 2506–07 (concluding that partisan gerrymandering does not present an issue suitable for federal judicial review under Article III of the Constitution).

13. *Id.* at 2509 (Kagan, J., dissenting).

14. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

15. See *id.* (stating that voting rights are among those rights “secured by those maxims of constitutional law” and are fundamental); *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (referring to “the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives” as “the most fundamental of [citizens’] constitutional rights”).

16. *Rucho*, 139 S. Ct. at 2506–07.

17. See *id.* at 2523 n.5 (Kagan, J., dissenting) (“In districting cases no less than others, officials respond to what this Court determines the law to sanction.”).

that race was the dominant factor motivating redistricting.¹⁸ Thus, federal courts need a standard by which to hold legislatures accountable when partisan motivation becomes a thin veil for racial motivation—particularly in states whose legislatures have historically played a game of trial and error with racial and partisan gerrymanders to gain an entrenched political advantage.¹⁹ This Note provides that standard.

Specifically, this Note argues that the Court should utilize the same equal protection intervention it applied in another 2019 decision: *Flowers v. Mississippi*.²⁰ In *Flowers*, the Court placed great emphasis on the defendant’s historical evidence of racial discrimination in the context of juror selection, both with regard to recent patterns and long-term practice.²¹ Similar considerations of history and practice are justified with respect to voting rights, which have historically been the subject of deep racial discrimination in states like North Carolina.²² This Note posits that where a plaintiff bringing a gerrymandering claim can show a recent and long-standing history of a state-defendant’s impermissible use of race in drawing district lines, an evaluating federal court should presume that the gerrymandering is based on race rather than partisanship.²³

18. See *Cromartie II*, 532 U.S. 234, 257 (2001) (indicating that even where some evidence of racial consideration in redistricting is present, the overall scheme may be constitutional); David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NEW YORKER (Sept. 6, 2019) <https://perma.cc/57MU-W6VE> (“[Dr. Thomas Hofeller,] known as the master of the modern gerrymander, trained . . . G.O.P. operatives and legislators nationwide to secure their computer networks, guard access to their maps, and never send e-mails that they didn’t want to see published by the news media.”).

19. See cases cited *supra* note 6 (evidencing North Carolina’s history of gerrymandering, beginning with unconstitutional racial gerrymanders, followed by the same districts being redrawn and upheld as seeking partisan advantage).

20. 139 S. Ct. 2228 (2019). For further discussion of *Flowers v. Mississippi*, see *infra* Part V.

21. *Flowers*, 139 S. Ct. at 2245 (indicating that a judge may consider a “wide net” of historical evidence of racial discrimination in the context of allegations of discriminatory peremptory strikes).

22. See *Shaw I*, 509 U.S. 630, 656 (1993) (noting the “long history of official racial discrimination in North Carolina’s political system”); see also *infra* Part III.

23. See *infra* Part V.

The state-defendant would then have an opportunity to rebut the presumption of racial gerrymandering before it could move to dismiss based on the *Rucho* political question holding.²⁴ This test would prevent *Rucho* from shielding racial gerrymanders from judicial review merely because a state used partisanship as “magic words” to avoid scrutiny from the federal judiciary.²⁵

This Note proceeds as follows. Part II provides background information on redistricting law and the VRA,²⁶ which aids in understanding the issues of racial and partisan gerrymandering addressed by the rest of this Note. Part III presents a case study of a quarter century of gerrymandering jurisprudence in North Carolina. This section explores important issues and themes presented in each case, which inform the analysis in Parts IV and V.²⁷ Part IV discusses the Supreme Court’s majority and dissenting opinions in *Rucho v. Common Cause* and identifies the problem *Rucho* creates in instances where partisan gerrymandering clearly has a strong racial component. Finally, Part V examines the Supreme Court’s decision and reasoning in *Flowers v. Mississippi*. Part V goes on to propose a solution that would allow the federal courts to have a continued role in ensuring that voting rights, which are so fundamental to our system of democracy, are not subject to further degradation.

II. Redistricting Law and the Voting Rights Act

This section explores the constitutional and statutory framework underlying the claims of racial and partisan gerrymandering presented in Parts III and IV of this Note.²⁸ An understanding of this background material further supports the workability of the solution presented in Part V.²⁹

24. See *infra* Part V.

25. See *infra* Part V; see also *Dickson v. Rucho*, 766 S.E.2d 238, 269 (N.C. 2014) (Beasley, J., dissenting) (cautioning against a “magic words” test to determine whether gerrymandering was based on race or partisanship).

26. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 52 U.S.C.).

27. See *infra* Part III.

28. See *infra* Parts III, IV.

29. See *infra* Part V.

The Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment provide the constitutional basis for claims of vote dilution,³⁰ including racial gerrymandering.³¹ “[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.”³² This understanding of equal protection with regard to voting rights is drawn from the Court’s decision in *Gray v. Sanders*,³³ in which the Court laid down the concept of “one person, one vote” (OPOV).³⁴ When states afford individual votes different weights based on the geographic location of that voter, the state generally violates the OPOV doctrine.³⁵

Supplementing the Constitution’s protections, the Voting Rights Act, “statutorily prohibits redistricting legislation that results in racial vote dilution (regardless of intent) or, in some jurisdictions, redistricting legislation that causes a retrogression in minority voters’ ability to elect their candidate

30. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting) (defining vote dilution as “the devaluation of one citizen’s vote as compared to others”).

31. See U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1113 (2016) (“The Fourteenth Amendment prohibits legislatures from engaging in two forms of racial gerrymandering: intentional racial vote dilution . . . and racial sorting.”).

32. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

33. 372 U.S. 368 (1963).

34. *Id.* at 381.

35. See *Wesbury v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that Article I, § 2 of the Constitution “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”); *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (interpreting *Reynolds v. Sims* as meaning that in states with a bicameral legislature both houses must be “apportioned substantially on a population basis”); Parsons, *supra* note 31, at 1109 (referring to state violations of OPOV as “quantitative vote dilution”).

of choice.”³⁶ Section 2 of the VRA, as amended in 1982,³⁷ prohibits vote dilution.³⁸ Vote dilution occurs where minority voters “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³⁹

In *Thornburg v. Gingles*⁴⁰ the Court construed Section 2 of the VRA for the first time after the 1982 amendments.⁴¹ *Gingles* primarily concerned the North Carolina General Assembly’s 1982 redistricting plan for state legislative elections.⁴² Black voters challenged one single-member and six multi-member districts,⁴³ claiming that the districting frustrated their ability to elect representatives of their choosing under Section 2 of the VRA.⁴⁴

The crux of a claim under Section 2, according to the Supreme Court, is “that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and

36. Parsons, *supra* note 31, at 1113; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at scattered sections of 52 U.S.C.); *see infra* notes 59–65 and accompanying text.

37. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C. § 10301).

38. *See Shaw I*, 509 U.S. 630, 641 (1993) (“[Congress] amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group’s voting strength, regardless of the legislature’s intent.”); Parsons, *supra* note 31, at 1119 (explaining that the VRA prohibits “two different redistricting offenses: dilution and retrogression”).

39. 52 U.S.C. § 10301(b); Parsons, *supra* note 31, at 1119 (describing the prohibitions of the VRA).

40. 478 U.S. 30 (1986).

41. *Id.* at 34.

42. *See id.* at 34–35, 46 (noting the plaintiffs’ allegations that “the legislative decision to employ multimember, rather than single-member, districts . . . dilutes their votes by submerging them in a white majority”).

43. *See Rogers v. Lodge*, 458 U.S. 613, 616–17 (1982) (defining multi-member districts as those that “tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district”). “[In these districts a] distinct [racial] minority . . . may be unable to elect any representative in an . . . election, yet may be able to elect several representatives [in corresponding single-member districts].” *Id.*

44. *Gingles*, 478 U.S. at 35. Plaintiffs also brought claims under the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.*

[W]hite voters to elect their preferred representatives.”⁴⁵ For a claim of vote dilution through multi-member districts to be challenged successfully “a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”⁴⁶ In order to make this showing, the minority group must demonstrate that it is large and compact enough to command a majority in a single-member district, because, if it is not, then the alleged dilution could not be remedied by redrawing district lines to create a single-member district.⁴⁷ Challengers must further show that the minority group is “politically cohesive” and that in the absence of special circumstances, the white majority votes as a bloc, enabling majority voters to defeat a minority candidate.⁴⁸ If the challengers are able to establish that the *Gingles* requirements are met, the court will evaluate whether a violation of Section 2 has occurred based on the totality of the circumstances.⁴⁹

States attempting to comply with Section 2 of the VRA must therefore examine the demographic breakdown in a particular region to determine “where minority groups are sufficiently large and geographically compact to constitute a numerical majority in a hypothetical district.”⁵⁰ In these areas the state must ensure that minority voters have an equal opportunity to elect representatives of their choice.⁵¹

45. *Id.* at 47.

46. *Id.* at 49.

47. *See id.* at 50 (explaining the requirement for a sufficiently large and geographically compact minority group); *Grove v. Emison*, 507 U.S. 25, 40 (1993) (indicating that the first *Gingles* factor is “needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district”).

48. *See Gingles*, 478 U.S. at 51 (providing the test for vote dilution violations of Section 2 of the VRA).

49. *See Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (“In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.”).

50. *See Parsons*, *supra* note 31, at 1120 (explaining the process by which states can comply with Section 2 of the VRA).

51. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (describing the type of conduct and voting conditions that violate Section 2 of the VRA).

One districting method that, where applicable, satisfies the requirements of Section 2 is the creation of majority-minority districts.⁵² Majority-minority districts are those in which a racial minority composes a “numerical, working majority of the voting-age population.”⁵³ Where racially polarized voting is prevalent, the creation of a majority-minority district may be required to ensure that minority voters retain their voting strength under Section 2.⁵⁴ As the Court in *Bartlett v. Strickland*⁵⁵ explained, “[t]he special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.”⁵⁶ However, *Bartlett* also indicates that where voting is not racially polarized, in so-called “crossover districts,”⁵⁷ Section 2 does not entitle minority voters to the creation of majority-minority districts.⁵⁸

Prior to the Supreme Court’s decision in *Shelby County v. Holder*,⁵⁹ Sections 4 and 5 of the VRA required “covered” jurisdictions—including districts with a history of racial gerrymandering—to obtain pre-clearance from either the Attorney General or a three-judge federal district court for any

52. See *Bartlett*, 556 U.S. at 18 (stating that the majority-minority rule “provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2”).

53. *Id.* at 13.

54. See Parsons, *supra* note 31, at 1120 (indicating that *Strickland* may impose a requirement for the creation of majority-minority districts where racially polarized voting is “stark”).

55. 556 U.S. 1 (2009).

56. *Id.* at 19.

57. See *id.* at 13 (defining “crossover districts” as those in which “the minority population [is not the majority but], at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate”).

58. See *id.* at 23–24 (indicating that majority-minority districts are required only where the *Gingles* factors and the totality of the circumstances mandate that result, and that in the alternative, crossover districts are permissible).

59. 570 U.S. 529 (2013).

change in the jurisdiction's voting procedures.⁶⁰ In other words, Section 5 prohibited changes that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise” in covered jurisdictions.⁶¹ In order to determine whether a change in voting procedures would cause a retrogression, courts compared the proposed voting practice to current practice to determine whether the change had the purpose or effect of compromising the right to vote based on race.⁶²

In 2010, Shelby County, Alabama sued the United States Attorney General, claiming that Section 4 of the VRA was unconstitutional because it was not justified by the current voting conditions in covered jurisdictions.⁶³ The Supreme Court agreed and held unconstitutional the coverage formula that Congress established in Section 4 of the VRA to determine which districts required pre-clearance.⁶⁴ In doing so, the Court abrogated one of the most significant voting rights protections of the twentieth century.⁶⁵

The Court's approach to the issue presented in *Shelby County* is relevant to the analysis of North Carolina's gerrymandering jurisprudence.⁶⁶ In *Shelby County*, the Attorney General argued that because the coverage formula was responsive to the “extraordinary problem” of discrimination in

60. See *id.* at 537 (describing the preclearance requirements under Sections 4 and 5 of the VRA) (citing the Voting Rights Act of 1965, 42 U.S.C. § 1973c(b)–(d) (codified as amended at 52 U.S.C. § 10304)).

61. *Beer v. United States*, 425 U.S. 130, 141 (1976).

62. See *Holder v. Hall*, 512 U.S. 874, 883–84 (1994) (describing the test for retrogression under Section 5 of the VRA); *Harris v. McCrory*, 159 F. Supp. 3d 600, 605 (M.D.N.C. 2016) (stating the purpose of Section 5 of the VRA).

63. *Shelby County*, 570 U.S. at 540–42.

64. See *id.* at 556–57 (indicating that Congress had relied on forty-year-old data to create its coverage formula, and its failure to update the coverage formula to match current conditions rendered the formula unconstitutional).

65. See *id.* at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”); Editorial, *The Voters Abandoned by the Court*, N.Y. TIMES, Nov. 9, 2016, at A26 (arguing the *Shelby County* decision “set back the cause of racial equality at the voting booth by decades”).

66. See *infra* Part V.

voting at the time it was enacted in 1965, its continued use was justified so long as any discrimination remained in the covered jurisdictions with respect to voting rights.⁶⁷ The Attorney General rested his position on the long-standing history of race-based voter discrimination and suppression.⁶⁸ However, the Court was not satisfied with these arguments because “history did not end in 1965.”⁶⁹ The Court in *Shelby County* thus signaled that pre-VRA history was not enough to uphold the safeguards of Sections 4 and 5, but that evidence of pre-VRA discrimination paired with recent and continuing post-VRA discrimination, could justify voting rights protections.⁷⁰

As will be discussed in Part V of this Note, a similar consideration of a state’s record on racial and partisan gerrymandering, both recent and long-standing, is required in order to prevent the erosion of the fundamental right to elect representatives of one’s choosing.⁷¹ Based on the implications of the Court’s decision in *Shelby County*, the combination of a recent and long-standing history of discrimination should be enough to trigger the voting rights safeguards that this Note proposes in Part V.⁷²

67. *Shelby County*, 570 U.S. at 552.

68. *See id.* at 552–53 (stating that the Government relied on the South’s history of slavery before the Civil War and Jim Crow policies but did not consider the improved modern landscape of voting rights in the South).

69. *See id.* at 552 (“In assessing the current need for a preclearance system that treats States differently from one another today, [the post-VRA] history cannot be ignored.”).

70. *See id.* at 557 (“Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

71. *See infra* Part V.

72. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (indicating that extraordinary remedies, like the protections under Sections 4 and 5 of the VRA, can only be justified when there are current needs).

III. *A Case Study of Racial and Partisan Gerrymandering in North Carolina*

Racial gerrymandering is not always easy to distinguish from partisan gerrymandering.⁷³ North Carolina's congressional districting map,⁷⁴ which has been the subject of over a quarter century of litigation surrounding issues of racial and partisan gerrymandering,⁷⁵ serves as an apt example of the often-narrow line between motivations for gerrymandering.⁷⁶

A. *From Shaw to Cromartie I*

The long and winding story of racial and partisan gerrymandering in North Carolina begins with *Shaw v. Reno* (*Shaw I*).⁷⁷ In *Shaw I*, the Supreme Court evaluated a claim of

73. See *Shaw I*, 509 U.S. 630, 646 (1993) (describing the “difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race”) (citing *Wright v. Rockefeller*, 376 U.S. 11 (1964)); Ely, *supra* note 5, at 498 (stating that the “predominant purpose” test used in *Cromartie II* is problematic where political purposes and racial-motivated purposes are “inextricably intertwined,” as they were in *Cromartie II*); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019) (defining gerrymandering as the packing of voters of a certain race or political affiliation into one district so they win by a large margin, “wasting” votes that would improve their chances in others, or cracking a group across multiple districts such that it fails to create a majority in any district).

74. See *Pitts*, *supra* note 8, at 240 n.76 (explaining that the political party in power in the North Carolina General Assembly gains control of the State's congressional redistricting process and that the governor does not play a role in redistricting).

75. See *supra* note 6 and accompanying text.

76. See *Shaw I*, 509 U.S. at 646 (“[R]edistricting differs from other kinds of state decisionmaking in that the legislature is always *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.”); *Pitts*, *supra* note 8, at 242 (noting that North Carolina's congressional districts have been the subject of more racial gerrymandering litigation in the Supreme Court than any other state districting maps).

77. See *Shaw I*, 509 U.S. at 633–34 (describing the plaintiff-voters' claim that North Carolina's reapportionment plan “which contain[ed] district boundary lines of dramatically irregular shape, constitute[d] an unconstitutional racial gerrymander”).

racial gerrymandering for the first time.⁷⁸ Five registered North Carolina voters challenged the revised boundaries of North Carolina Congressional District 1 and District 12, alleging they were drawn using an unconstitutional consideration of race.⁷⁹ The North Carolina General Assembly drew the contested map after the United States Attorney General rejected its first attempt to draw district lines following the 1990 census, on VRA grounds.⁸⁰ The General Assembly's purpose in drawing the revised map was to allow Black voters to control the outcome of the elections in District 1 and District 12.⁸¹ The revised map that was the subject of *Shaw I* included two majority-minority districts: District 1 and District 12.⁸²

Immediately, the Court noted the odd shapes of District 1 and District 12.⁸³ The Court described District 1 as “[c]entered in the northeast portion of the state, it moves southward until it tapers into a narrow band; then, with finger-like extensions, it reaches into the southernmost part of the State near the South Carolina border.”⁸⁴ District 12 was stranger still: “[i]t winds in snakelike fashion through tobacco country, financial

78. *Id.* at 636; see Pitts, *supra* note 8, at 230 (indicating that the voters' claims in *Shaw I* were the first claims of racial gerrymandering recognized by the Court).

79. See *Shaw I*, 509 U.S. at 636–37 (“Appellants are five residents of Durham County, North Carolina, all registered to vote in that county. Under the General Assembly's plan, two will vote . . . in District 12 and three will vote in neighboring District 2.”).

80. See *id.* at 634–35 (explaining that the district map affected counties located in areas covered by Section 5 of the VRA, so the map was subject to review by the United States Attorney General who objected to the General Assembly's first attempt after the 1990 census); see also *supra* Part II.

81. See Pitts, *supra* note 8, at 230 (discussing the nature of the claims in *Shaw I*).

82. See *Shaw I*, 509 U.S. at 635 (“[T]he General Assembly enacted a revised redistricting plan, 1991 N.C. Extra Sess. Laws, ch. 7, that included a second majority-[B]lack district.”).

83. See *id.* (noting that District 12 was “even more unusually shaped” than District 1).

84. *Id.*

centers, and manufacturing areas ‘until it gobbles in enough enclaves of [B]lack neighborhoods.’”⁸⁵

The strangely-drawn boundary lines of District 1 and District 12 raised the Court’s suspicions about the factors on which the General Assembly relied.⁸⁶ The Court recognized that “[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.”⁸⁷ The Court went on to confirm its rejection of the race-based stereotype that “members of the same racial group . . . [regardless of other factors] think alike, share the same political interests, and will prefer the same candidates at the polls.”⁸⁸ Under the Court’s equal protection jurisprudence this type of racial stereotyping was impermissible, spelling trouble for the redistricting plan.⁸⁹

In addition to its concern that racial gerrymandering entrenches racial stereotypes, the Court reasoned that when state legislatures create a district based primarily on the perceived common interests of a particular racial group, elected officials “are more likely to believe that their primary obligation is to represent only the members of that group” rather than the general electorate.⁹⁰ Because this type of race-based political incentive “is altogether antithetical to our system of representative democracy” the Court concluded that

85. *Id.* at 635–36 (quoting *Shaw v. Barr*, 808 F. Supp. 461, 476–77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)); see Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting*, WASH. POST (Apr. 20, 1993), <https://perma.cc/RER3-RSE5> (quoting a member of the North Carolina Legislature describing District 12’s meandering path along Interstate 85: “If you drove down the interstate with both car doors open, you’d kill most of the people in the district”).

86. See *Shaw I*, 509 U.S. at 641 (“It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.”).

87. *Id.* at 647.

88. *Id.*

89. See *id.* at 647–48 (“We have rejected such perceptions elsewhere as impermissible racial stereotypes.” (citing *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990))).

90. *Id.* at 648.

a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that that the separation lacks sufficient justification.⁹¹

The majority decision in *Shaw I* established the standard for this new judicial doctrine of racial gerrymandering under the Equal Protection Clause and set the stage for the last twenty-five years of gerrymandering challenges in North Carolina, as well as in other states.⁹²

Justice White, Justice Stevens, and Justice Souter each authored a dissent. Justice White, joined by Justice Stevens and Justice Souter, suggested that the racial gerrymandering in this case should be treated similarly to other types of gerrymandering, including political gerrymandering, and therefore should not be subject to strict scrutiny, but rather a less rigorous analysis.⁹³ In his dissent, Justice Souter also concluded that racial gerrymandering should not trigger strict scrutiny because, unlike other types of race-based state actions, “the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.”⁹⁴

91. *Id.* at 649.

92. *See Pitts, supra* note 8, at 230 (“Indeed, it is not an exaggeration to say that racial gerrymandering doctrine was to election law what Nirvana’s ‘Nevermind’ was to rock music during the 1990’s—the groundbreaking moment of the decade.”).

93. *See Shaw I*, 509 U.S. 630, 662–63 (1993) (White, J., dissenting) [E]ven assuming that racial (or political) factors were considered in the drawing of district boundaries, a showing of discriminatory effects is a “threshold requirement” in the absence of which there is no equal protection violation, and no need to “reach the question of the state interests . . . served by the particular districts.” (citing *Davis v. Bandemer*, 478 U.S. 109, 142–43);

Id. at 679 (Stevens, J., dissenting)

If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.

94. *Id.* at 681–82 (Souter, J., dissenting).

However, the majority rejected these arguments because there was no precedent requiring that partisan gerrymandering and racial gerrymandering be subject to the same level of scrutiny.⁹⁵ Rather, the majority relied on the troubling and persistent history of racial discrimination in voting rights and its “Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race” to justify its application of strict scrutiny in this case.⁹⁶

The Supreme Court’s reliance on the history of racial discrimination in *Shaw I* is relevant to this Note’s discussion of partisan gerrymandering in a post-*Rucho* world.⁹⁷ The history of racial gerrymandering, and partisan gerrymandering with racial undertones, brings forth similar concerns regarding the overall fairness of reapportionment and representation in North Carolina today.⁹⁸

On remand, the three-judge district court again upheld the districting plan.⁹⁹ The Eastern District of North Carolina concluded that race was the principal deciding factor in determining where to draw the district boundaries, but that “the legislation passe[d] strict scrutiny as a sufficiently narrowly tailored effort by the state legislature to serve the State’s compelling interest in complying with” the remedial requirements of Sections 2 and 5 of the VRA.¹⁰⁰

While the litigation surrounding this redistricting scheme was slowly moving through the court system, North Carolina held congressional elections using the challenged map in 1992 and 1994.¹⁰¹ In each of those elections, two out of the twelve winning candidates were African Americans elected from

95. *Id.* at 650 (majority opinion).

96. *See id.* (addressing Justice Stevens’ and Justice Souter’s dissenting opinions).

97. *See infra* Part V.

98. *See infra* Part V.

99. *Shaw v. Hunt*, 861 F. Supp. 408, 476 (E.D.N.C. 1994).

100. *Id.*

101. *See Pitts, supra* note 8, at 236 (describing the 1992 and 1994 elections using the map precleared by the U.S. Justice Department).

Districts 1 and 12 respectively.¹⁰² Despite these two elections, the legal battle over Districts 1 and 12 was far from over.

The 1992 redistricting plan returned to the Supreme Court in *Shaw v. Hunt (Shaw II)*.¹⁰³ There, the Court recognized that a state may use racial distinctions to remedy past racial discrimination only when the discrimination is “identified discrimination.”¹⁰⁴ Discrimination is identifiable when it is specific and where “the institution that [made] the racial distinction . . . had a ‘strong basis in evidence’ to conclude that remedial action was necessary” *before* it made use of that race-based distinction.¹⁰⁵ The Supreme Court agreed with the district court that the State had not presented sufficient evidence that the map was drawn for primarily remedial measures.¹⁰⁶

Addressing the State’s argument that its race-based redistricting satisfied strict scrutiny as an effort to comply with the VRA, the Court noted that it had not yet addressed the

102. *See id.* at 235–36

The results of [the 1994] election were the same as the 1992 election in terms of the delegation’s racial composition, as two of the candidates were African American. However, the partisan composition of the delegation changed dramatically, jumping from four to eight Republican members, following the national trend of the so-called “Republican Revolution.”

103. 517 U.S. 899 (1996); *see* 28 U.S.C. § 2285 (“A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”); 28 U.S.C. § 1253 (“Except as otherwise provided by law, any party may appeal to the Supreme Court from . . . [a] suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”).

104. *See Shaw II*, 517 U.S. at 909 (“While the States and their subdivisions may take remedial action when they possess evidence of past or present discrimination, ‘they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.’” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989))).

105. *Id.* at 910 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

106. *See id.* at 910–12 (“[T]here is little to suggest that the legislature considered the historical events and social-science data that the reports [on past discrimination] recount . . . We certainly cannot say on the basis of these reports that the District Court’s findings on this point were clearly erroneous.”).

question of whether compliance with the VRA could be a compelling state interest.¹⁰⁷ The Justices again avoided that question, finding “that creating an additional majority-[B]lack district was not required under a correct reading of § 5 and that District 12, as drawn, [was] not a remedy narrowly tailored to the State’s professed interest in avoiding § 2 liability.”¹⁰⁸ While holding that District 12 was not sufficiently narrowly tailored to North Carolina’s interest in complying with Section 2 of the VRA,¹⁰⁹ the Court did not reach the merits of the racial gerrymandering claim as it pertained to District 1, finding that the challengers lacked standing.¹¹⁰

The Supreme Court decided *Shaw II* in June of 1996, but on remand the district court allowed the State to continue using the unconstitutional map in 1996 elections.¹¹¹ After the 1996 election, the North Carolina General Assembly made another attempt at redistricting: its 1997 plan served as a “catalyst for more lawsuits.”¹¹²

107. *Id.* at 911.

108. *See id.* at 911–15

“[A] State’s policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan so discriminates on the basis of race or color as to violate the Constitution, and thus cannot provide any basis under § 5 for the Justice Department’s objection.” (quoting *Miller v. Johnson*, 515 U.S. 900, 924 (1995));

Pitts, *supra* note 8, at 236–37 (summarizing the Court’s reasoning in *Shaw II*).

109. *Shaw II*, 517 U.S. at 918.

110. *See id.* at 904 (explaining that because none of the plaintiffs resided in District 1, they had no standing to challenge the boundary “absent specific evidence that [they] personally had been subjected to a racial classification,” which was not presented to the Court).

111. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 261 (2001) (“The district court permitted the State to hold the 1996 elections under the 1992 Plan, but enjoined further use of the plan in future elections.”); Pitts, *supra* note 8, at 237 (stating that the 1996 elections, held using the map declared unconstitutional in *Shaw II*, produced Black congresspeople from District 1 and District 12 again and an even 6-6 partisan split).

112. Charles & Fuentes-Rohwer, *supra* note 111, at 262.

In response to the Court's decisions in *Shaw I* and *Shaw II* striking down the 1992 congressional map as an impermissible racial gerrymander,¹¹³ the North Carolina General Assembly enacted a new districting plan (1997 map).¹¹⁴ The General Assembly intended the 1997 map to remedy the constitutional shortcomings of the 1992 map—namely that the map impermissibly drew district boundaries to create majority-Black districts.¹¹⁵ The new District 12 was no longer a majority-minority district, and rather than splitting ten counties, the new District 12 only touched six.¹¹⁶ Although the 1997 map produced a District 12 that was wider and shorter than the 1992 version, it “retain[ed] its basic ‘snakelike’ shape and continu[ed] to track Interstate-85.”¹¹⁷ Residents of District 12 joined the *Shaw* plaintiffs from District 12 to challenge the 1997 map on the theory that, like the 1992 map, race predominated the drawing of congressional district boundaries.¹¹⁸ The three-judge district court ruled on the parties' competing motions for summary judgment and granted the plaintiffs' request for an injunction prohibiting the use of the 1997 map in the North Carolina's upcoming general election.¹¹⁹

On appeal, the Supreme Court found that while the plaintiff-appellees' evidence supported the argument that the General Assembly had an impermissible racial motive when it

113. See *supra* note 6 and accompanying text.

114. See *Cromartie I*, 526 U.S. 541, 543 (1999) (citing 1997 N.C. Sess. Laws, ch. 11) (stating that the State enacted the 1997 redistricting plan in response to the Court's decision in *Shaw II*).

115. See Charles & Fuentes-Rohwer, *supra* note 111, at 262 (“The General Assembly's stated purpose in enacting this new plan was to cure the constitutional defects of the 1992 Plan and preserve the existing partisan balance in the North Carolina congressional delegation.”).

116. See *Cromartie I*, 526 U.S. at 544 (explaining that Black voters accounted for 46 percent of registered voters in the 1997 iteration of District 12 and describing the boundaries of District 12).

117. *Id.* (citation omitted).

118. See *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 409 (E.D.N.C. 2000) (describing the events that led to the State's appeal to the Supreme Court in *Cromartie I*).

119. See *Cromartie v. Hunt*, 34 F. Supp. 2d 1029, 1029–30 (E.D.N.C. 1998) (granting the plaintiff's request for an injunction).

drew the 1997 map, that evidence was not uncontroverted.¹²⁰ The State-appellants asserted that “the General Assembly drew its district lines with the intent to make District 12 a strong Democratic district” and to “protect incumbents, to adhere to traditional districting criteria, and preserve the existing partisan balance in the State’s congressional delegation, which in 1997 was composed of six Republicans and six Democrats.”¹²¹ In other words, the State argued the 1997 map was motivated by *partisan*, not racial, considerations.

The Supreme Court agreed that because North Carolina’s Black voters overwhelmingly voted Democratic,¹²² it was not simple to distinguish a partisan motivation to create a Democrat-controlled district from an impermissible racial motivation based on evidence of voter registration rather than voting behavior.¹²³ Because the General Assembly’s motivation is an issue of fact,¹²⁴ and because that motivation was still in dispute before the Supreme Court, the Court remanded the case to the district court for a full assessment of the General Assembly’s motivations.¹²⁵

120. See *Cromartie I*, 526 U.S. at 548–49 (indicating that most of the evidence presented by the plaintiffs was circumstantial evidence showing that the 1997 map had “low scores with respect to traditional measures of compactness” and that the plaintiffs had “presented no direct evidence of intent” to draw boundaries based on race).

121. *Id.* at 549.

122. See *id.* at 550 (agreeing with the affidavit of Dr. David W. Peterson, an expert witness for the State, who reviewed racial demographics and party affiliation and compared the results to election data to discern the correlation between race and partisan preference); *Party Affiliation Among Adults in North Carolina by Race/Ethnicity*, PEW RSCH. CTR. (2014), <https://perma.cc/NDX2-3FUX> (showing that 79 percent of Black voters polled were affiliated with the Democratic Party in 2014).

123. See *Cromartie I*, 526 U.S. at 550 (stating that Dr. Peterson’s analysis strengthened the inference that the General Assembly was motivated by politics rather than race).

124. See *id.* (“The legislature’s motivation is itself a factual question.”).

125. See *id.* at 551

[A]ppellees were not entitled to judgment as a matter of law. Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be [B]lack Democrats and even if the State were *conscious* of that fact.

B. Cromartie II: *Gerrymandering for a New Millennium*

Having learned the lessons of the Supreme Court's twentieth century racial gerrymandering jurisprudence, the North Carolina General Assembly began the millennium with a new and successful strategy to justify its 1997 district map: drawing district lines to ensure partisan advantage.¹²⁶

On remand from the Supreme Court's decision in *Cromartie I*, the United States District Court for the Eastern District of North Carolina found that race was the General Assembly's predominant motivation in drawing the boundaries of both Congressional District 1 and District 12.¹²⁷ However, the court found that the 1997 map's District 1 satisfied strict scrutiny because "[t]here was a compelling state interest in obtaining pre-clearance under Section 2 of the Voting Rights Act, and the 1st District was narrowly tailored to meet [that] interest."¹²⁸ The district court went on to find the ever-problematic District 12 was facially race motivated,¹²⁹ and that there was no compelling state interest to justify the racial motivation.¹³⁰ Accordingly, the district court held that District 12 was an unconstitutional racial gerrymander in violation of the Equal Protection Clause.¹³¹

126. See *Cromartie I*, 526 U.S. 541, 549 (1999) (rejecting plaintiff-appellees' claims of impermissible racial gerrymandering based on evidence that the legislators "in crafting their districting law, . . . attempted to protect incumbents, to adhere to traditional districting criteria, and to preserve the existing partisan balance in the State's congressional delegation, which in 1997 was composed of six Republicans and six Democrats"); *Cromartie II*, 532 U.S. 234, 257 (2001) (finding the district court's conclusion that the legislature relied on race rather than politics to draw the 1997 map was clearly erroneous because "race in this case correlates closely with political behavior").

127. *Cromartie*, 133 F. Supp. 2d. at 420, 423.

128. *Id.* at 423.

129. See *id.* at 420 ("It is clear that the Twelfth District was drawn to collect precincts with high racial identification rather than political identification. Additionally, the evidence demonstrates that . . . more heavily Democratic precincts . . . were bypassed in the drawing of District 12 in favor of precincts with a higher African-American population.").

130. *Id.*

131. *Id.*

District 12 returned to the Supreme Court for the fourth time in *Cromartie II*.¹³² The Court framed the challenger's burden rigorously, stating that in order to successfully claim that the General Assembly impermissibly relied on race, the plaintiff-appellees had to show "at a minimum that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations"¹³³ and that race was "the *predominant* factor" motivating the districting decision.¹³⁴ The Court further qualified its analysis based on deference to the State legislature's competence in the area of redistricting,¹³⁵ particularly in this case "where the State ha[d] articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated."¹³⁶

Writing for the majority, Justice Breyer concluded that the evidence presented at the district court did not support the plaintiff-appellees' "race not politics" thesis.¹³⁷ Although the evidence showed that the General Assembly did consider race,¹³⁸ it also clearly considered geographical and political factors.¹³⁹ Thus, the evidence of racial consideration did not establish that "race played a *predominant* role comparatively speaking."¹⁴⁰

The majority went on to articulate a standard by which voters could bring a challenge to districting maps on racial and

132. 532 U.S. 234 (2001).

133. *Id.* at 241 ("[T]he burden of proof on the plaintiffs (who attack the district) is a 'demanding one.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995))).

134. *Id.* (citing *Cromartie I*, 526 U.S. at 547).

135. *See id.* at 242 ("[T]he underlying districting decision is one that ordinarily falls within a legislature's sphere of competence.").

136. *Id.*

137. *Id.* at 255 (stating that the plaintiff-appellees' evidence that there were reliably Democratic majority-White counties that could have been used to achieve partisan balance was not sufficient to support their claim of racial gerrymandering).

138. *See id.* at 253–54 (referring to legislative redistricting leader then-Senator Roy Cooper's 1997 testimony that the legislature drew the map with "race in mind," and an email a legislative staff member sent to Senator Cooper, referring to moving the "Greensboro Black community into the 12th").

139. *Id.* at 253.

140. *Id.*

partisan grounds in cases where majority-minority districts are at issue and race tends to correlate highly with political affiliation.¹⁴¹

[T]he party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.¹⁴²

Despite the “modicum of evidence” supporting the district court’s conclusion,¹⁴³ the Court in *Cromartie II* determined that because race and political behavior were closely correlated in this case and because the plaintiffs had not made the required showing under the Court’s new test, the district court’s conclusion was clearly erroneous.¹⁴⁴

The Court’s decision in *Cromartie II* drew some scholarly attention. John Hart Ely questioned the majority’s reasoning that Black voters were moved from one district to another because they were reliable Democratic voters.¹⁴⁵ Ely alludes to the likely pretextual use of partisanship as a motivation, wondering “why if [politics] had been the point of the selections in question, they were described by those who made them in racial terms.”¹⁴⁶ He also takes issue with the Court’s rule that racial gerrymandering is established where “race *rather than* . . . political behavior”¹⁴⁷ predominated.¹⁴⁸ According to

141. See *id.* at 258 (noting that this standard also applies to “approximate equivalent[s]” of majority-minority districts).

142. *Id.*

143. *Id.* at 257.

144. *Id.* at 257–58 (“The basic question is whether the legislature drew District 12’s boundaries because of race *rather than* because of political behavior (coupled with traditional nonracial districting considerations).”).

145. See Ely, *supra* note 5, at 495 (stating that the Court’s prior decisions striking down racial gerrymanders make it “difficult to imagine what could have been thought the gain in dressing political motives in the language of race”).

146. *Id.*

147. *Cromartie II*, 532 U.S. 234, 257 (2001).

148. Ely, *supra* note 5, at 496.

Ely, this distinction is difficult to make because, while it can be hard to even discern one's own predominant purpose for one's actions, "attempting to determine the 'predominant purpose' of the North Carolina legislature . . . compounds the impossibility."¹⁴⁹ Thus, according to Ely, *Cromartie II* was wrongly decided and problematic for the Court's gerrymandering jurisprudence.¹⁵⁰

According to other scholars, *Cromartie II* signaled the Court's retreat "from strictly policing the boundaries of racial gerrymandering . . . [and] thereby signaled its commitment to race consciousness and descriptive representation at the expense of its anticlassification jurisprudence."¹⁵¹ *Cromartie II*, thus,

provided a safe harbor of sorts for the states when they drew majority-minority districts. As long as they could plausibly claim those districts were drawn for partisan reasons—and given the correlation between racial and political identity, that claim can almost always be made—the states are likely to prevail against claims of racial gerrymandering.¹⁵²

The *Cromartie II* decision therefore, began to set the stage for the problem addressed in this Note: namely, after the Supreme Court's decision in *Rucho v. Common Cause*, if the Court muddles the distinction between racial and partisan gerrymandering, apparent partisanship becomes an effective shield from judicial review for redistricting that might otherwise be classified as racial gerrymandering.¹⁵³

After the Court's decision in *Cromartie II*, the first decade of the new millennium was a quiet period for North Carolina

149. *Id.*

150. *See id.* at 490 (arguing that the majority's finding of clear error was itself erroneous and that the Court's decision in *Cromartie II* implicitly approved of racial stereotyping in partisan gerrymandering claims).

151. Guy-Uriel Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1585 (2018).

152. *Id.* at 1578–79.

153. *See infra* Part V.

redistricting litigation.¹⁵⁴ During that period, Democrats held six to eight of North Carolina’s congressional seats and the district boundaries were not challenged in court.¹⁵⁵

In the 2010 election cycle, Republicans gained control of the North Carolina General Assembly for the “first time since 1870, thus securing control of the redistricting process.”¹⁵⁶ The Republicans “inherited a political scene” where Democrats, including two African-American Democrats, held a narrow majority—seven out of thirteen congressional seats.¹⁵⁷

After redrawing the district map in 2011,¹⁵⁸ in the 2012 election Republicans won nine out of thirteen congressional seats, despite only garnering 49.1 percent of the popular vote.¹⁵⁹ In 2014, the Republicans further entrenched their majority, winning ten out of thirteen seats with 55.8 percent of the popular vote.¹⁶⁰

The method the Republican leaders, North Carolina State Senator Robert Rucho and State Representative David Lewis,

154. See Pitts, *supra* note 8, at 239 (stating that during this period “[t]he Democratic Party[, which] again controlled the redistricting process, drew two districts (District 1 and 12) to allow African-American voters to elect candidates of choice”).

155. See JEFF TRANDAH, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 2, 2004 at 49–50 (2005), <https://perma.cc/YL26-WLMZ> (PDF) (providing election results for the 2004 congressional election); LORRAINE C. MILLER, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 7, 2006 at 34 (2007), <https://perma.cc/N7EX-27FH> (PDF) (providing election results for the 2006 congressional election); LORRAINE C. MILLER, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 2008 at 49 (2009), <https://perma.cc/E9LP-5DMD> (PDF) (providing election results for the 2008 congressional elections); see also *Cooper v. Harris*, 137 S. Ct. 1455, 1465–66 (2017) (observing that the congressional districts drawn as a result of the 2000 census were not challenged in court).

156. Pitts, *supra* note 8, at 240.

157. *Id.*

158. See *Harris v. McCrory*, 159 F. Supp. 3d 600, 607–08 (M.D.N.C. 2016) (describing the 2011 redistricting process).

159. See Michael Kent Curtis, *Using the Voting Rights Act to Discriminate: North Carolina’s Use of Racial Gerrymanders, Two Racial Quotas, Safe Harbors, Shields, and Inoculations to Undermine Multiracial Coalitions and Black Political Power*, 51 WAKE FOREST L. REV. 421, 434–35 (2016) (calling the 2011 redistricting a Republican gerrymander).

160. *Id.* at 435.

used to effectuate their gerrymander had a clear racial component.¹⁶¹ In order to ensure compliance with Section 2 of the VRA,¹⁶² Senator Rucho and Representative Lewis instructed Dr. Thomas Hofeller, a private redistricting coordinator, to “classify residents based on race so as to include a sufficient number of [B]lack voters inside such districts, and consequently exclude [W]hite voters from the districts, in an effort to achieve a desired racial composition of >50% T[otal] B[lack] V[oting] A[ge] P[opulation]” and proportionality between Black senators and representatives and the Black voting-age population in the state.¹⁶³ The results of their efforts “neared quota perfection.”¹⁶⁴

C. Gerrymandering Round Three: District 12’s Fifth Appearance Before the Supreme Court

In 2016, the 2011 map was successfully challenged in the United States District Court for the Middle District of North Carolina, which found that race was the predominant motivator for the boundary lines of District 12.¹⁶⁵ The court also found the defendants’ purported rationale—that partisan objectives predominated—unconvincing.¹⁶⁶ Finally, the court noted that “[t]o find that otherwise would create a ‘magic words’ test that would put an end to these types of challenges,” namely that by

161. *See id.* at 436–37 (indicating that the Republicans successfully engineered a quota system in which “the legislature was to have [B]lack senators and representatives in proportion to the [B]lack-voting-age population of the state . . . [while] creat[ing] as many as possible [B]lack-majority districts with 50% plus T[otal] B[lack] V[oting] A[ge] P[opulation]”).

162. *See Harris*, 159 F. Supp. 3d at 608 (“[D]istricts created to comply with section 2 of the Voting Rights Act, must be created with a ‘Black Voting Age Population’ (‘BVAP’), as reported by the Census, at the level of at least 50% plus one.” (quoting a June 17, 2011 public statement by Senator Rucho and Representative Lewis)).

163. *See Dickson v. Rucho*, 766 S.E.2d 238, 262–63 (N.C. 2014) (Beasley, J., concurring in part and dissenting in part) (discussing the same map at issue in *Harris*).

164. Curtis, *supra* note 159, at 437.

165. *Harris*, 159 F. Supp. 3d. at 621–22 (“Traditional redistricting principles such as compactness and contiguity were subordinated to this goal.”).

166. *Id.* at 622.

using “magic words” of partisanship, rather than race, legislators could obscure racial gerrymanders as partisan gerrymanders to escape strict scrutiny.¹⁶⁷

The district court also held that District 1 was an unconstitutional racial gerrymander in violation of the Equal Protection Clause.¹⁶⁸ The court gave the legislature two weeks to draft a remedial redistricting map to cure the racial gerrymander.¹⁶⁹ The revised map was again challenged in the district court on the grounds that it was an unconstitutional partisan gerrymander.¹⁷⁰ The court rejected the plaintiff-voters’ claims and allowed the 2016 election to proceed using the remedial map.¹⁷¹ The 2016 election results were the same as the 2014 results—Republicans won ten out of thirteen available seats.¹⁷²

But the *Harris v. McCrory*¹⁷³ plaintiffs were not done. In 2017, they appealed to the Supreme Court, which once again determined that racial considerations predominated the

167. *Id.* (quoting *Dickson*, 766 S.E.2d. at 269 (Beasley, J., dissenting)); see *Dickson*, 766 S.E.2d. at 269 (Beasley, J., dissenting)

To allow this serpentine district . . . to be drafted for political advantage is a proxy for racial disenfranchisement and effectively creates a “magic words” threshold. Upholding this district’s tortured construction creates an incentive for legislators to stay “on script” and avoid mentioning race on the record, and in this instance, it is disingenuous to suggest that race is not the predominant factor.

168. *See id.* at 611 (“CD 1 presents a textbook example of racial predominance. There is an extraordinary amount of direct evidence—legislative records, public statements, instructions to Dr. Hofeller, the ‘principal architect’ of the 2011 Congressional Redistricting Plan, and testimony—that shows a racial quota, or floor, of 50-percent-plus-one-person was established for CD 1.”).

169. *Id.* at 627.

170. *Harris v. McCrory*, No. 13-cv-949, 2016 U.S. Dist. LEXIS 71853, at *6 (M.D.N.C. June 2, 2016) (quoting Representative Lewis, who led the remedial map-drawing as saying “I acknowledge freely that this would be a political gerrymander”).

171. *Id.* at *8.

172. Pitts, *supra* note 8, at 241–42.

173. No. 13-cv-949, 2016 U.S. Dist. LEXIS 71853 (M.D.N.C. June 2, 2016).

composition of District 1 and District 12.¹⁷⁴ With respect to District 1, the Court found that compliance with the VRA did not require the racial quota system put in place by Senator Rucho and Representative Lewis and therefore the district could not withstand strict scrutiny.¹⁷⁵

District 12 fared no better in “its fifth(!) appearance before [the] Court.”¹⁷⁶ The Supreme Court agreed with the district court, finding that the leaders of the 2011 redistricting plan had “repeatedly described the influx of African-Americans into District 12 as a § 5 [of the VRA] compliance measure, not a side-effect of political gerrymandering.”¹⁷⁷ The Court’s reliance on the General Assembly’s own description of its redistricting decisions, which in this case were facially race-based, to determine the nature of a particular gerrymander likely signaled that sanitizing the record of references to race may insulate map-drawers’ decisions from the Court’s most exacting scrutiny.¹⁷⁸

Justice Alito and Justice Kennedy dissented with regard to District 12.¹⁷⁹ In the dissenters’ view, the decision regarding District 12 should have mirrored the decision in *Cromartie II*.¹⁸⁰ Following that logic, where a state claims partisan goals were the predominant motivating factor in redistricting, in the dissenters’ view, the challengers must put forth an “alternative

174. See *Cooper v. Harris*, 137 S. Ct. 1455, 1482 (2017) (“[R]acial considerations predominated in designing both District 1 and District 12. . . . For District 1, we further uphold the District Court’s decision that § 2 of the VRA gave North Carolina no good reason to reshuffle voters because of their race.”).

175. *Id.* at 1472.

176. *Id.*

177. *Id.* at 1478.

178. See *infra* Part V.

179. See *Cooper*, 137 S. Ct. at 1486 (Alito, J., concurring in the judgment in part and dissenting in part).

180. See *id.* at 1488–90.

Cromartie II plainly meant to establish a rule for use in a broad class of cases and not a rule to be employed one time only. . . . The alternative-map requirement . . . is a logical response to the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate.

redistricting map that served the legislature's political objective as well as the challenged version without producing the same racial effects."¹⁸¹ The dissent went on to rigorously scrutinize the evidence before the Court, and concluded that the mapmaker's approach was consistent with the legislature's stated political motives.¹⁸² The dissent also found that the effect of the redistricting on racial minorities was an inevitable consequence of executing the map for Republican partisan advantage,¹⁸³ and that the majority "read[] far too much into . . . references" of race from the leaders of the 2011 plan.¹⁸⁴ Justices Alito and Kennedy therefore would have upheld District 12 as an "unsavory"¹⁸⁵ but permissible partisan gerrymander.¹⁸⁶

After a quarter century of litigation surrounding North Carolina's attempts to manipulate the electorate, the North Carolina General Assembly was no doubt aware that the "basic question [regarding constitutionality of a redistricting plan] is whether the legislature drew . . . boundaries because of race *rather than* because of political behavior."¹⁸⁷ The General Assembly was also on notice that partisan gerrymanders were likely to be upheld, so long as there were no obvious racial references in the record.¹⁸⁸ Taken together, these cases confirm

181. *Id.* at 1486.

182. *See id.* at 1492–94 (summarizing the evidence that the maps were drawn to "maximize Republican opportunities").

183. *See id.* at 1496 ("[S]o long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately [B]lack.").

184. *Id.* at 1497.

185. *Id.* at 1487 ("Partisan gerrymandering is always unsavory, but that is not the issue here.").

186. *Id.* at 1504.

187. *Cromartie II*, 532 U.S. 234, 257 (2001).

188. *See id.* at 257 (dismissing the challengers' evidence that racial considerations predominated the 1997 boundaries of District 12 because the Court determined race and political behavior closely correlated); *Cooper v. Harris*, 137 S. Ct. 1455, 1478 (2017) (relying on the General Assembly's references to race to find that the 2011 redistricting plan was a racial gerrymander); *id.* at 1497 (Alito, J., dissenting) (stating that the majority

that even where there is some evidence that race played a role in drawing district boundaries, the overall scheme may be constitutional if a state legislature puts forth evidence that political concerns were the primary motivator.¹⁸⁹ The Court went on to decide *Rucho v. Common Cause* against this tangled backdrop of partisan and racial gerrymandering jurisprudence spanning a quarter century.¹⁹⁰

IV. *Rucho v. Common Cause and the Justiciability of Partisan Gerrymandering*

After the Supreme Court held North Carolina's 2011 map unconstitutional in *Cooper v. Harris*,¹⁹¹ Senator Rucho and Representative Lewis went back to the drawing board.¹⁹² They hired Dr. Thomas Hofeller, the same districting expert who aided them in drawing the 2011 map.¹⁹³ Representative Lewis and Senator Rucho instructed Dr. Hofeller to use precinct-level election results to create a map that would ensure maintenance of the state congressional delegation's partisan balance, which, as elected under the racially gerrymandered plan, included ten Republicans and three Democrats.¹⁹⁴ Dr. Hofeller was to do all of this while moving a small number of district lines to cure the

relied too heavily on the references to race made by the leaders of the 2011 redistricting to find that race was the predominant motivator for District 12's boundaries).

189. See *Cromartie II*, 532 U.S. at 257 (explaining that because "race . . . correlate[d] closely with political behavior" the presence of "a modicum of evidence" that race was a factor in drawing district lines was not enough to show a constitutional violation).

190. See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

191. 137 S. Ct. 1455 (2017).

192. See *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805 (M.D.N.C. 2018) ("Representative Lewis and Senator Rucho again took charge of drawing the remedial districting plan.").

193. *Id.*; see Hansi Lo Wang, *Deceased GOP Strategist's Daughter Makes Files Public that Republicans Wanted Sealed*, NAT'L PUB. RADIO (Jan. 5, 2020), <https://perma.cc/V26K-623S> (discussing files found on Dr. Hofeller's hard drives that were used to create the North Carolina congressional district maps). The Google Drive folders with Dr. Hofeller's daughter's copies of the hard drives referenced in this article have been taken down since the publication of this source.

194. *Common Cause*, 318 F. Supp. 3d at 805.

racial gerrymander of the 2011 map.¹⁹⁵ Rucho and Lewis took heed of what the Supreme Court instructed in prior redistricting litigation: majority-minority districts were not a requirement of compliance with the VRA,¹⁹⁶ mentions of race as a motivator in redistricting could render a map unconstitutional,¹⁹⁷ and partisan gerrymanders, while perhaps disfavored, were upheld.¹⁹⁸

Among the criterion Senator Rucho, Representative Lewis, and Dr. Hofeller cited to govern 2016 redistricting map were: equal population, contiguity, political data, compactness, and *partisan advantage*.¹⁹⁹ The partisan advantages Republican leadership sought were specific and direct.²⁰⁰ During the redistricting process, Representative Lewis stated that he “proposed that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it . . . possible to draw a map with 11 Republicans and 2 Democrats.”²⁰¹ The 2016 redistricting map worked as Rucho and Lewis had hoped. In the 2016 election

195. *See id.* (“Representative Lewis and Senator Rucho instructed Dr. Hofeller ‘to change as few’ of the district lines in the 2011 Plan as possible in remedying the racial gerrymander.”).

196. *Cooper*, 137 S. Ct. at 1472.

197. *See id.* at 1497 (Alito, J., dissenting) (stating that the majority relied on the references to race made by the leaders of the 2011 redistricting to find that race, not political behavior, was the predominant motivator for the 2011 map).

198. *See Cromartie II*, 532 U.S. 234, 257–58 (2001) (reversing the district court’s finding that District 12 was a racial gerrymander and finding the district boundaries were drawn to achieve partisan goals); Charles & Fuentes-Rohwer, *supra* note 151, at 1578 (referring to partisan justifications for gerrymandering as a “safe harbor of sorts for the states when they [draw] majority-minority districts”).

199. *See Common Cause*, 318 F. Supp. 3d at 807–08 (listing the criteria Senator Rucho and Representative Lewis proposed to govern the 2016 redistricting process).

200. *Id.* at 808 (indicating that Republicans drew the district boundaries to achieve a specific goal of a ten-three majority).

201. *Id.* (quoting Representative Lewis).

Republican candidates won ten out of thirteen seats and the 2018 election yielded almost identical results.²⁰²

Common Cause (a non-profit organization), the North Carolina Democratic Party, and fourteen individual voters sued Rucho and Lewis to challenge the 2016 map.²⁰³ The plaintiffs claimed the 2016 congressional districting maps were “unconstitutional partisan gerrymanders” in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, Section 2 of the Constitution.²⁰⁴ After a four-day trial, the three-judge district court unanimously found that the 2016 map was a partisan gerrymander which violated the Equal Protection Clause and Article I of the Constitution.²⁰⁵ The majority of the panel also found that the plan violated the First Amendment by “retaliating against supporters of Democratic candidates on the basis of their political beliefs.”²⁰⁶

The case reached the Supreme Court, but the Court remanded for a determination on whether the plaintiffs had standing to bring their claims.²⁰⁷ The district court concluded that the plaintiffs had standing and again found that the 2016 maps were partisan gerrymanders in violation of the Equal Protection Clause.²⁰⁸

202. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491–92 (2019) (noting that in the 2018 election the Republican party initially won ten seats, but that the N.C. State Board of Elections called for a new election in one of those districts after allegations of fraud).

203. *See id.* at 2492 (describing the procedural history of this case). Plaintiffs from Maryland brought similar claims based on the Maryland congressional map, which were consolidated with the North Carolina claims. *Id.* For the sake of continuity, this Note will examine only the North Carolina claims, although the Court’s reasoning on justiciability applies to both.

204. *Id.* at 2491.

205. *Id.* at 2492 (citing *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018)).

206. *Id.*

207. *See id.* (citing *Common Cause v. Rucho*, 318 F. Supp. 3d. 777 (M.D.N.C. 2018)).

208. *See id.* (“On the merits, the court found that ‘the General Assembly’s predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates,’ and to ‘entrench Republican candidates’ through widespread cracking and packing of Democratic voters.”)

However, when the case returned to the Supreme Court, the Court did not reach the merits of the plaintiffs' claims.²⁰⁹ In *Rucho*, for the first time, the Court was able to assemble a majority on the issue of whether partisan gerrymandering is justiciable in the federal courts.²¹⁰ Ultimately, the Court answered this questioning in the negative, holding that partisan gerrymandering is not justiciable in federal court.²¹¹

To reach its conclusion, the Court applied the political question doctrine, which limits the federal courts to deciding only Article III "Cases" and "Controversies"²¹² that are judicial in nature.²¹³ Under the political question doctrine, issues that are "entrusted to one of the political branches or [involve] no judicially enforceable rights"²¹⁴ are beyond the jurisdictional reach of the federal courts.²¹⁵ "Among the political question cases the Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'"²¹⁶ According to the majority, claims of partisan gerrymandering fall within this category.²¹⁷

(quoting *Common Cause v. Rucho*, 318 F. Supp. 3d. 777, 883–84 (M.D.N.C. 2018))).

209. *Id.* at 2491 (conceding that the maps at issue were highly partisan but stating that the issue was whether the lower courts had "appropriately exercised [their] judicial power when they found them unconstitutional").

210. *See id.* at 2506–07 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Scalia, J.) (plurality opinion) (assembling only a four-justice plurality holding that partisan gerrymandering lacks judicially manageable standards).

211. *See Rucho*, 139 S. Ct. at 2506–07 (holding that partisan gerrymandering is beyond the reach of the federal courts).

212. U.S. CONST. art. III, § 2.

213. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019).

214. *Vieth*, 541 U.S. at 277.

215. *See Rucho*, 139 S. Ct. at 2494 (explaining that political questions are "outside the courts' competence and therefore beyond the courts' jurisdiction" (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

216. *See id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

217. *See id.* at 2507 ("Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

The Court went on to discuss the long history of gerrymandering in the United States and the frustration with the practice dating back to the Colonial era.²¹⁸ Based on that history the Court stated,

The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. . . . At no point was there a suggestion that the federal courts had a role to play.²¹⁹

However, the Court, citing *Shaw I*, was careful to clarify that there is a role for the federal judiciary in adjudicating claims of racial gerrymandering.²²⁰

The problem that the Court contended with in *Rucho* is that some level of partisan gerrymandering is justified under the Constitution, as opposed to OPOV violations and racial gerrymandering claims,²²¹ which are always invalid.²²² Rather than asking whether a state has engaged in partisan gerrymandering, the Court was asked to answer whether “political gerrymandering has gone too far.”²²³

After discussing its attempts²²⁴ to create a standard to measure when “political gerrymandering has gone too far,” and the multitude of standards proposed by the plaintiffs and the

218. See *id.* at 2494–95 (describing the history of gerrymandering and Congress’ efforts to limit partisan gerrymandering).

219. *Id.* at 2496.

220. See *id.* at 2496–97 (noting that the federal courts may also decide one-person, one-vote claims under *Wesbury v. Sanders*, 376 U.S. 1, 84 (1964)).

221. See *supra* Part II.

222. *Rucho*, 139 S. Ct. at 2497 (“[W]hile it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, a jurisdiction may engage in constitutional political gerrymandering.” (quoting *Cromartie I*, 526 U.S. 541, 551 (1999))).

223. See *id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)).

224. See *id.* at 2497–98 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Davis v. Bandemer*, 478 U.S. 109 (1986); and *Vieth v. Jubelirer*, 541 U.S. 267, 272–73 (2004) as examples of the Court’s fractured attempts to resolve the issues of justiciability and develop a standard by which to adjudicate partisan gerrymandering).

dissent,²²⁵ the Court concluded that even though “[e]xcessive partisanship in districting leads to results that reasonably seem unjust. . . . [P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”²²⁶ After its many attempts to untangle the partisan and racial threads bound up in North Carolina’s redistricting process, the Court finally threw in the towel, at least with regard to the “safe harbor”²²⁷ of politically motivated gerrymandering.²²⁸

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor, warning that without a judicial check on partisan gerrymandering politicians will be able to “entrench themselves in office against voters’ preferences . . . [and] irreparably damage our system of government.”²²⁹ In Justice Kagan’s view, there are manageable standards that would allow judicial intervention in the “worst-of-the-worst cases of democratic subversion” without impermissibly interfering with a state’s redistricting priorities.²³⁰

The dissent stressed that the voters—not politicians—should decide who is elected to serve in office.²³¹ Specifically, the dissent took issue with Representative Lewis’ statement: “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is

225. See *id.* at 2502 (rejecting a test that would require challengers to show a predominant purpose was to dilute the voting strength of a political party and that the subordination is likely to persist in subsequent elections under the map at issue, before allowing defendants to show another legitimate purpose for the districting).

226. *Id.* at 2506–07.

227. See Charles & Fuentes-Rohwer, *supra* note 151, at 1578.

228. See *supra* note 6 and accompanying text.

229. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (“For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”).

230. *Id.* at 2509, 2516 (suggesting a standard to measure partisan gerrymandering used by some states that “takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain. And . . . requiring plaintiffs to make difficult showings relating to both purpose and effects . . . invalidates . . . only the most extreme[] partisan gerrymanders”).

231. See *id.* at 2510 (arguing that the American people should decide who will represent their interests).

better for the country.”²³² More troubling still was that the plan worked so well—the Republican supermajorities that resulted from the 2016 and 2018 elections were won with only 53 percent and 50 percent of the state-wide vote in, respectively.²³³ The credit for this precision comes from modern technology that gerrymandering map-drawers of the Framers’ era could not have imagined, undercutting the majority’s arguments regarding the historical treatment of partisan gerrymandering.²³⁴

The dissent went on to frame the problem that the majority left in its wake: the failure to provide a remedy for “grievous harm to democratic governance and flagrant infringements on individuals’ [constitutional] rights.”²³⁵ What the dissent did not discuss is the problem at the threshold of the North Carolina gerrymandering claims: where is the line between partisan and racial gerrymandering in the wake of *Rucho*? The *Rucho* decision, if left unchecked, creates the “magic words” test that Justice Beasley of the North Carolina Supreme Court cautioned in *Dickson v. Rucho* and that the Middle District of North Carolina discussed in *Harris v. McCrory*, allowing state legislatures to hide racial motivation by sanitizing the legislative redistricting record of references to race.²³⁶ With *Rucho*’s holding that partisan gerrymandering is nonjusticiable firmly in place, the stakes in the initial determination between racial and partisan gerrymandering become far higher, and the

232. *Id.* (citing *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018)).

233. *See id.* at 2510–11 (characterizing the North Carolina and Maryland maps as “voter-proof”).

234. *See id.* at 2512–13 (“Mapmakers now have access to more granular data about party preference and voting behavior than ever before. . . . These are not your grandfather’s—let alone the Framers’—gerrymanders.”).

235. *Id.* at 2515.

236. *See Dickson v. Rucho*, 766 S.E.2d 238, 269 (N.C. 2014) (Beasley, J., dissenting) (“To allow this serpentine district, which follows the I-85 corridor between Mecklenburg and Guilford Counties, to be drafted for political advantage . . . creates a ‘magic words’ threshold.”); *Harris v. McCrory*, 159 F. Supp. 3d 600, 622 (M.D.N.C. 2016) (indicating that reliance on the map-drawers’ purported partisan rationale would create the “magic words” test warned of in *Dickson* (quoting *Dickson*, 766 S.E.2d at 269)).

incentive to “cry partisan” in an attempt to avoid judicial review becomes ever stronger.²³⁷

V. *A Historically Informed Solution: Flowers v. Mississippi*

In order to ensure that evidence of partisanship does not become a shield to insulate partisan redistricting plans that have a strong, or even predominant, racial component from judicial review, the Supreme Court should develop a standard by which it can evaluate partisan gerrymandering challenges in states with histories of racial gerrymandering.²³⁸ The Court’s reasoning from its decision in *Flowers v. Mississippi*, decided six days prior to *Rucho v. Common Cause*, provides a useful starting point for creating a workable standard.

Flowers was a murder case.²³⁹ Specifically, it was an appeal from Curtis Flowers’ *sixth* trial for the same crime tried by the same lead prosecutor.²⁴⁰ The first three trials resulted in conviction, but all three were overturned by the Mississippi Supreme Court due to prosecutorial misconduct in the jury selection process.²⁴¹ In at least two of the first three trials, the Mississippi Supreme Court found that the prosecutor discriminated on the basis of race in peremptory challenges of Black jurors.²⁴² The fourth and fifth trials ended in hung juries.²⁴³ And in the sixth trial, at issue before the Supreme Court, Flowers again argued that the State “violated *Batson* [*v.*

237. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2522–23 (2019) (Kagan, J., dissenting) (noting that the leaders of the North Carolina Legislature “felt free to openly proclaim their intent to entrench their party in office” because they “thought their actions could not be attacked in court”).

238. See *supra* Part III (describing the need for a threshold test before a claim of gerrymandering can be dismissed based on the political question doctrine).

239. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019) (explaining that Curtis Flowers allegedly murdered four people in Winona, Mississippi).

240. *Id.* at 2234–35.

241. See *id.* (describing the procedural posture as this case came before the U.S. Supreme Court).

242. See *id.* (indicating that the prosecution had engaged in racial discrimination to eliminate Black jurors from jury service).

243. *Id.* at 2235.

Kentucky]²⁴⁴ in exercising peremptory strikes against Black prospective jurors.”²⁴⁵

The Supreme Court reversed Flowers’ conviction, finding that the State’s pattern of striking Black potential jurors (forty-one out of forty-two potential jurors over the course of six trials), disparate questioning of Black and White potential jurors, and striking a particular Black juror who was similarly situated to a White juror justified reversal.²⁴⁶ In reaching their conclusion, the Court relied heavily on the State’s history of employing its “peremptory strikes to remove as many [B]lack perspective jurors as possible.”²⁴⁷ Writing for the majority, Justice Kavanaugh stated: “The State’s actions in the first four trials necessarily inform our assessment of the State’s intent going into Flowers’ sixth trial. *We cannot ignore that history*. We cannot take that history out of the case.”²⁴⁸ In the majority’s view, the trial judge in Flowers’ case, although aware of the State’s history, “did not sufficiently account for the history when considering Flowers’ *Batson* claim.”²⁴⁹ So, less than one week before the decision in *Rucho* was handed down, the Court acknowledged the importance of a state’s history of racial discrimination to justify its finding of discrimination in the case

244. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (finding that “the State’s privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause”). Under *Batson*, a prosecutor may not strike a juror because of “their race or on the assumption that [B]lack jurors as a group will be unable impartially to consider the State’s case against a [B]lack defendant.” *Id.*

245. *Flowers*, 139 S. Ct. at 2235.

246. *See id.* at 2251 (holding that “all of the relevant facts and circumstances taken together” established sufficient grounds for reversal).

247. *See id.* at 2245–46 (“[O]ur review of the history of the prosecutor’s peremptory strikes in Flowers’ first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers’ sixth trial was motivated in substantial part by discriminatory intent.”).

248. *Id.* at 2246 (emphasis added).

249. *Id.*

before it.²⁵⁰ This reliance on history is equally applicable to the North Carolina gerrymandering saga.²⁵¹

The Court's examination of a Mississippi prosecutor's record of racial discrimination may seem to have little to do with a standard to resolve a problem related to vote dilution. However, there are at least two similarities. First, the injury claimed by Curtis Flowers has the same constitutional source as the injury claimed by plaintiffs in a racial or partisan gerrymandering case—the Equal Protection Clause of the Fourteenth Amendment.²⁵² The Court in *Flowers* recognized a second similarity: “*Other than voting*, serving on a jury is the most substantial opportunity that most citizens have in the democratic process.”²⁵³ Similar democratic and constitutional values, therefore, are at stake.

The majority in *Flowers* gave a brief history of the racial manipulation of jury selection pre-*Batson*.²⁵⁴ Although the Civil Rights Act of 1875²⁵⁵ and the Supreme Court's decision in *Strauder v. West Virginia*²⁵⁶ had long prohibited discrimination against potential jurors based on race, prosecutors continued to use their unlimited freedom to exercise peremptory strikes to

250. See *supra* note 248 and accompanying text.

251. Cf. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (indicating that extraordinary protections for voting rights may be justified where there is a demonstrated, established, and continuing pattern of discrimination with regard to voting rights).

252. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (“Under the Equal Protection Clause . . . even a single instance of race discrimination against a prospective juror is impermissible.”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) (explaining that the practice of packing and cracking voters based on race violates the Equal Protection Clause); *Shaw I*, 509 U.S. 630, 649 (1993) (concluding that plaintiffs challenging congressional districting map as a racial gerrymander under the Equal Protection Clause could state a claim by showing that a facially neutral law cannot be explained without regard to race).

253. *Flowers*, 139 S. Ct. at 2238 (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)) (emphasis added).

254. *Id.* at 2238–42.

255. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (codified as amended at 18 U.S.C. § 243).

256. 100 U.S. 303 (1879).

eliminate Black jurors until the Court decided *Batson* in 1986.²⁵⁷ The Court described the use of peremptory strikes to restrict potential Black jurors from jury service as a “more covert and less overt” method of achieving the same result—eliminating Black jurors from the jury panel.²⁵⁸

The history of racial gerrymandering and subsequent transition to partisan gerrymandering discussed in Parts III and IV of this Note may similarly be described as a move from more overt racial gerrymandering to a covert method of achieving similar results through race-conscious, but not facially race-motivated partisan gerrymandering.²⁵⁹ In the same way an individual prosecutor can obscure racial bias behind peremptory strikes,²⁶⁰ state legislatures can hide a racially discriminatory purpose or effect behind language and reasoning that emphasizes partisanship over race.²⁶¹ These similar degradations of the rights of people of color in the United States warrant similar treatment.²⁶² The Supreme Court could and should follow its logic from *Flowers* and consider a state’s recent and long-standing history of racial gerrymandering when confronted with the defense that gerrymandering is based on partisan, rather than racial, motivations.²⁶³

One method of taking that history into account would be to create a presumption of racial gerrymandering applicable to

257. See *Flowers*, 139 S. Ct. at 2238–42 (indicating that after *Strauder* held a West Virginia law forbidding people of color from service as jurors unconstitutional, prosecutors were able to use peremptory strikes to achieve the same result).

258. *Id.* at 2240.

259. See *supra* Parts III, IV.

260. *Flowers*, 139 S. Ct. at 2240 (explaining that prosecutors’ use of peremptory challenges put discrimination behind the courthouse doors).

261. See Charles & Fuentes-Rohwer, *supra* note 151, at 1585; cf. *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in the judgment and dissenting in part) (arguing that the Court’s decision in *Cromartie II* imposed a requirement that individuals challenging a congressional map put forth an alternative map that would achieve the same partisan balance without any racial effect).

262. See *supra* note 253 and accompanying text.

263. See *Flowers*, 139 S. Ct. at 2246 (discussing the lower court’s failure to consider the history of the prosecutor’s use of peremptory strikes in evaluating *Flowers*’ claim of a *Batson* violation).

states with a history of racial gerrymandering.²⁶⁴ The presumption would function as follows: First, the challengers to a district map would present evidence that the state has a history of past racial gerrymandering, thereby establishing a prima facie case for racial gerrymandering.²⁶⁵ The state-defendant would be required to overcome that presumption by putting forth evidence that partisanship was not a pretext for race, in purpose or effect, before a federal court could decline to hear the case based on the decision in *Rucho*.²⁶⁶

The use of presumptions is not new or novel to the Supreme Court's jurisprudence.²⁶⁷ This type of test is reminiscent of the approach the Supreme Court takes in adjudicating violations of

264. See *Shaw I*, 509 U.S. 630, 642–44 (1993) (creating a presumption of invalidity where a congressional districting plan is motivated by race); see also Pitts, *supra* note 8, at 261–62 (suggesting that “under the right circumstances, racial gerrymandering doctrine could curb partisan gerrymandering . . . [by making] a redistricting actor . . . less inclined to engage in partisan gerrymandering just knowing that . . . [the racial gerrymandering doctrine] is available to his or her political opponents”).

265. Cf. *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (describing the burden of establishing a prima facie case in employment discrimination law suits as “not onerous,” requiring plaintiff to show “by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to unlawful discrimination”).

266. Cf. *Reed v. Town of Gilbert*, 576 U.S. 155, 170–71 (2015) (shifting the burden to the defendant-town to put forth evidence that a content-based regulation on speech was narrowly tailored to achieve a compelling state interest in order to defeat a presumption of invalidity for content-based regulations under the First Amendment).

267. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464–66 (1996) (stating that the presumption that a prosecutor has not violated the Due Process and Equal Protection Clauses can be dispelled by clear and convincing evidence that the prosecution was motivated by race or other improper purpose); *Washington v. Davis*, 426 U.S. 229, 241 (1976) (explaining that after plaintiffs prove their prima facie case for racial discrimination, the burden shifts to defendants to rebut the presumption of constitutional invalidity); *Burdine*, 450 U.S. at 254 (“Establishment of the prima facie case . . . creates a presumption that the employer unlawfully discriminated against the employee. If the [factfinder] believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff . . .”).

the Equal Protection Clause based on racial discrimination.²⁶⁸ Such an approach is justified because, if challengers are able to make a showing that a map drawn to achieve ostensibly partisan goals has the purpose or effect of diluting the voting strength of minority voters, the claim ceases to be one based on partisanship and becomes a claim of racial discrimination under the Equal Protection Clause.²⁶⁹

This test would allow prospective plaintiffs to bring a claim in federal court alleging racial gerrymandering and to support that claim with a description of the state's history of race-motivated redistricting. If the state-defendant then attempted to argue that the case should be dismissed by alleging a partisan purpose under *Rucho*, it would first have to overcome a presumption that the classification was based on race rather than party affiliation.²⁷⁰ Drawing from the *Batson-Flowers* reasoning, a defendant should not overcome the presumption by the mere assertion that there is a correlation between race and party affiliation.²⁷¹ Rather, under this test, the state-defendant would be required to put forth a record that is justifiable, in light of the state's history, with priorities other than manipulation of the racial composition of districts.²⁷²

268. See *Shaw I*, 509 U.S. at 642–44 (stating that government actions that discriminate based on race, either facially or in purpose and effect, are presumptively invalid under the Equal Protection Clause).

269. See *id.* at 645 (“[D]istrict lines . . . drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.”).

270. Cf. Charles & Fuentes-Rohwer, *supra* note 151, at 1580 (arguing that attempting to divine whether redistricting was based on race or partisanship is “quixotic at best” due to the high correlation between race and party affiliation).

271. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) (“[A] prosecutor may not rebut a claim of discrimination ‘by stating merely that he challenged jurors of the defendant’s race on the assumption . . . that they would be partial to the defendant because of their shared race.’” (quoting *Batson v. Kentucky*, 476 U.S. 79, 97 (1986))); Charles & Fuentes-Rohwer, *supra* note 151, at 1580 (“[I]n our modern era, race and partisanship are highly correlated.”).

272. See *Flowers*, 139 S. Ct. at 2241 (stating that *Batson* does not allow a prosecutor to escape judicial scrutiny for peremptory strikes of Black jurors based on an assumption that such jurors would not impartially evaluate a case

The *Flowers* Court's use of history is instructive in the application of the test this Note proposes. As previously discussed, *Flowers*, *Rucho*, and the long line of cases preceding *Rucho* were brought under the Equal Protection Clause.²⁷³ Therefore, the use of history and practice in evaluating such a claim is not foreign to the Supreme Court's equal protection analysis and, just as in the case of peremptory strikes, the historical background surrounding a state's record of redistricting challenges should not be ignored.²⁷⁴

Additionally, a test tying a state's voting rights history together with a presumption of racial gerrymandering would not upset the existing jurisprudence governing voting rights. As was discussed in Part II of this Note, the Supreme Court refused to uphold the coverage formula under Section 4 of the VRA in *Shelby County v. Holder* because, while the formula had been justified by racial discrimination in the pre-1965 history of the Act, Congress had not provided recent history supporting a continued need for disparate treatment of different states with regards to voting legislation.²⁷⁵ However, as the case study presented in Part III of this Note exhibits, there is not only a long-standing history of racial discrimination in North Carolina,²⁷⁶ the last quarter century is rife with examples of racial gerrymandering, in addition to race-conscious partisan gerrymandering.²⁷⁷ Applying the Court's logic in *Shelby County*

with a Black defendant (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)); see also *Parsons*, *supra* note 31, at 1164 (listing "compactness, contiguity, and respect for political subdivisions and geographic boundaries" as "neutral" redistricting criteria).

273. See cases cited *supra* note 252 and accompanying text.

274. *Flowers*, 139 S. Ct. at 2246 (stressing the importance of the history surrounding this case in reaching a conclusion).

275. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (indicating that pre-1965 discrimination alone did not justify the coverage formula subjecting different states to different treatment under the VRA).

276. See *Shaw I*, 509 U.S. 630, 656 (1993) (taking note of the evidence presented by the State of North Carolina of a "long history of official racial discrimination in North Carolina's political system and of pervasive racial bloc voting").

277. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017) (finding that North Carolina's Congressional Districts 1 and 12 were racial gerrymanders).

to a test that considers both recent and entrenched racial discrimination in redistricting is, thus, not at odds with the Court's decision in that case.²⁷⁸

Additionally, a presumption of racial gerrymandering based on a state's history does not disturb *Rucho*'s holding. The majority in *Rucho* was clear in acknowledging that the federal courts have a role in adjudicating claims of racial gerrymandering.²⁷⁹ The *Rucho* majority rejected tests to determine when partisan gerrymandering goes too far,²⁸⁰ but did not speak to federal courts' ability to make a distinction between racial gerrymanders and partisan gerrymanders.²⁸¹ Practically, the *Rucho* decision necessitates a determination that gerrymandering is in fact based on partisan advantage and not race.²⁸² Applying the presumption of racial gerrymandering to the facts at issue in *Rucho* with an eye toward North Carolina's deeply rooted history of racial gerrymandering²⁸³ would have forced the Supreme Court to engage with all that was at stake in *Rucho* and to make a definitive determination that partisanship was not a cloak to obscure a racially discriminatory purpose.²⁸⁴

278. See *Shelby County*, 570 U.S. at 557 (“Our country has changed [since the VRA was enacted in 1965], and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”). This Note takes no position on whether *Shelby County* was correctly decided; it merely notes that the framework proposed in this Note is consistent with the Court's decision.

279. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2488 (2019) (stating that claims of racial gerrymandering are subject to federal judicial review).

280. See *id.* at 2502 (rejecting balancing tests that attempted to determine acceptable levels of partisanship).

281. See *id.* at 2498 (indicating that partisan gerrymanders are nonjusticiable because it would be inappropriate for the federal courts to interfere with the political process).

282. See Ely, *supra* note 5, at 498 (asserting that partisan and racial motivations for gerrymandering are often “inextricably intertwined”).

283. See cases cited *supra* note 6 (displaying North Carolina's record of racial and partisan gerrymandering challenges over the past quarter century).

284. See *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (“If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.”).

A. *The Test Applied to the Facts of Rucho v. Common Cause*

Rucho began with the Middle District of North Carolina’s decision, which recounted a detailed history of the racial and partisan gerrymandering claims in North Carolina.²⁸⁵ In particular, the opinion focused on the instructions Representative Lewis and Senator Rucho gave Dr. Hofeller to guide him in drawing the remedial plan, after the Supreme Court struck down the 2011 plan in *Cooper* as a racial gerrymander.²⁸⁶ The instructions, which were given orally and never reduced to a writing, boiled down to two main points: (1) Dr. Hofeller was to use granular political data to maintain the partisan distribution in the State’s congressional delegation of ten Republicans and three Democrats and; (2) he was to “‘change as few’ of the district lines in the 2011 Plan as possible in remedying the racial gerrymander.”²⁸⁷ The Middle District of North Carolina’s opinion also noted that—pursuant to the 2016 Rucho-Lewis-Hofeller plan—both District 1 and District 12 retained at least 50 percent of the population as in their corresponding 2011 racially gerrymandered version.²⁸⁸

The Supreme Court in *Rucho* thus had evidence before it that the primary drafter of the challenged map successfully

285. See *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 801–03 (M.D.N.C. 2018) (“Over the last 30 years, North Carolina voters repeatedly have asked state and federal courts to pass judgment on the constitutionality of the congressional districting plans drawn by their state legislators.”).

286. See *id.* at 803–08 (detailing the process Rucho, Lewis, and Hofeller used to effectuate the 2016 map); *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017) (labeling the 2011 redistricting plan a racial gerrymander with respect to Districts 1 and 12).

287. See *Common Cause*, 318 F. Supp. 3d at 805 (“Representative Lewis and Senator Rucho further instructed Dr. Hofeller that he should use that political data to draw a map that would maintain the existing partisan makeup of the state’s congressional delegation, which, [w]as elected under the racially gerrymandered [2011] plan . . .”).

288. See *id.* at 809

In accordance with the Chairs [sic] goals of protecting incumbents and preserving the “cores” of the districts in the 2011 [racially gerrymandered] plan, 10 of the 13 districts (Districts 1, 2, 3, 4, 5, 6, 7, 10, and 12) in the 2016 Plan retain[ed] at least 50 percent of the population in their corresponding 2011 version. (emphasis added).

Supra note 174 and accompanying text.

followed instructions to keep as much of the racially gerrymandered 2011 map in place as possible.²⁸⁹ In addition, recently revealed files from Dr. Hofeller's computer, which he used to draw the map challenged in *Rucho*, demonstrate that race was considered in drawing the district lines.²⁹⁰ Specifically, Dr. Hofeller's files show that he created detailed maps that "tracked race, voting patterns and addresses of tens of thousands of North Carolina college students" in conjunction with the 2016 redistricting plan.²⁹¹ These files also show that a congressional district line was drawn to divide North Carolina A&T State University, the nation's largest historically Black college, in half "so precisely that it all but guarantees it will be represented in Congress by two Republicans for years to come."²⁹²

Had the *Rucho* Court started with a presumption of racial gerrymandering, this evidence would likely have been sufficient for the Court to uphold that presumption, even in the face of the State's evidence that the map was governed by race-neutral partisan districting principles.²⁹³ Thus, under this test the 2016 map would have been subject to the strict racial gerrymandering analysis established by the cases discussed in Part III of this

289. See *Common Cause*, 318 F. Supp. 3d at 805 (describing the overlap between the 2011 racially gerrymandered plan and the 2016 plan drawn for partisan advantage).

290. See David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, NEW YORKER (Sept. 6, 2019), <https://perma.cc/C6XY-RP97> (discussing the information obtained by the New Yorker from Dr. Hofeller's emails and computer files).

291. *Id.*

292. *Id.*

293. See *Common Cause*, 318 F. Supp. 3d at 807–08 (indicating that the Republicans' stated criteria governing the 2016 redistricting plan were limited to: equal population, contiguity, political data, partisan advantage, compactness, incumbency, and eliminating the snake-like quality of District 12); *Shelby County v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting) ("[A] governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive 'will inevitably discriminate against a racial group.'" (quoting Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 209 (2013))).

Note, rather than being dismissed as a political question.²⁹⁴ Such analysis would have prompted the Court to probe deeper into the intentions of the map-drawers to ensure the 2016 plan did not compromise minority voters' constitutional rights.²⁹⁵

VI. Conclusion

The *Rucho* decision prohibits the federal judiciary from adjudicating potential violations of a fundamental constitutional right.²⁹⁶ The majority in *Rucho* suggests that the solution to extreme partisan gerrymanders may lie with state constitutions, legislatures, and judiciaries.²⁹⁷ Specifically, the majority lauded states that have implemented nonpartisan redistricting commissions.²⁹⁸ However, when the rubber meets the road, there are practical challenges to the implementation of such commissions.²⁹⁹ Chief among those challenges is that asking a party in power to enact a law establishing a nonpartisan redistricting commission is asking individual politicians and political parties to act against their own

294. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505–06 (2019) (holding that partisan gerrymandering is a nonjusticiable political question).

295. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[Voting may be regarded as] a fundamental political right, because [it is] preservative of all rights.”).

296. See *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting) (describing the gerrymanders at issue in the case as violating “the most fundamental” of the challengers’ constitutional rights).

297. See *id.* at 2507 (majority opinion) (describing the various ways in which states have addressed excessive partisanship in their redistricting plans); see also *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *413–20 (N.C. Super. Ct. Sept. 3, 2019) (striking down the map that was at issue in *Rucho* under the North Carolina Constitution’s voting protections, which the court found to be more stringent than the federal constitutional protections). Although the North Carolina State courts found that the map at issue in *Rucho* violated the State constitution, the issue presented and analyzed by this Note, namely the potential shield from federal judicial review, remains unaddressed.

298. See *Rucho*, 139 S. Ct. at 2507 (stating that the Court’s decision “does not condone excessive partisan gerrymandering” and suggesting that states restrict partisan power in the redistricting process through legislation).

299. See *infra* note 301 and accompanying text.

interests.³⁰⁰ This very tension between long-term electoral fairness and short-term partisan advantage is playing out in Virginia,³⁰¹ another state with a history of racial gerrymandering.³⁰²

Although it appears clear that the electorate cannot trust politicians to police themselves, *Rucho* is the law of the land for the foreseeable future.³⁰³ As such, the issue presented by this Note is vital to ensuring that a “magic words” test does not dilute the voting strength of minority citizens and subsequently

300. See Parsons, *supra* note 31, at 1136–37 (arguing that partisanship is a personal interest of politicians and political parties, rather than a state interest for the purpose of constitutional analysis).

301. See Laura Vozzella, *Some Virginia Democrats Want to Hit the Brakes on Nonpartisan Redistricting Plan*, WASH. POST (Dec. 30, 2019, 12:32 PM), <https://perma.cc/ATA6-EVZL> (“With their party in control of the State House and Senate for the first time in a generation, [Democratic] opponents of [the redistricting commission] are feeling empowered and saying they want to hit the brakes.”); Gregory S. Schneider, *Virginians to Vote on Proposed Amendment for Bipartisan Redistricting Commission*, WASH. POST (Oct. 1, 2020, 3:26 PM), <https://perma.cc/X9QD-QUGU> (noting that the Virginia Democratic Party, which currently holds the majority of seats in the Virginia General Assembly, officially opposes the ballot measure that would create a nonpartisan redistricting panel); Robert McCartney, *Virginia Democrats Face Choice Between Idealism and Revenge in Vote on Gerrymandering*, WASH. POST (Oct. 5, 2020 5:00 AM), <https://perma.cc/GF8R-DB8N> (quoting Virginia House of Delegates member Marcia S. “Cia” Price (D-Newport News) as saying “[Instituting a nonpartisan redistricting committee] would not be the first time or only issue where Democrats are called suckers”). “The Democrats’ temptation to keep all the power for themselves is strengthened by their awareness that the Republicans did not hesitate to wield theirs to maximum advantage following the last two censuses, especially after 2010.” *Id.* Virginia voters ultimately approved an amendment to the state constitution creating a bipartisan redistricting commission. Rachel Weiner, *Virginians Approve Turning Redistricting Over to Bipartisan Commission*, WASH. POST (Nov. 4, 2020, 9:59 AM), <https://perma.cc/9AXF-8FC8>.

302. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018) (holding that “race predominated over traditional districting factors in the construction” of eleven challenged districts and that the Virginia legislature’s use of race was not narrowly tailored to achieve a compelling state interest).

303. See *Rucho*, 139 S. Ct. at 2499 (“Partisan gerrymandering rests on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence.”); Vonzella, *supra* note 301 (implying that the party in power will seek to hold that power).

obscure that dilution from judicial scrutiny.³⁰⁴ In states with histories of racial gerrymandering, this concern is even more pressing.³⁰⁵ The solution presented in this Note places an additional layer of protection between claims of non-justiciable partisan gerrymandering and the history of racial subjugation that often lies beneath, and therefore prevents *Rucho* from opening the door to repetition of an unjust history.³⁰⁶

304. *But see* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“Nor does our conclusion [that partisan gerrymandering presents a nonjusticiable political question] condemn complaints about districting to echo into a void.”).

305. *See supra* Part V (arguing that a state’s history of racial gerrymandering provides vital context to a claim of partisan gerrymandering).

306. *See supra* Part V.