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The Impossibility of Separating Race and Politics in a White People's Party

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THE IMPOSSIBILITY OF SEPARATING RACE AND POLITICS IN A WHITE PEOPLE’S PARTY*

GENE R. NICHOL**

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INTRODUCTION

North Carolina has been ground zero for much of the United States Supreme Court’s redistricting work. *Thornburg v. Gingles*,¹ a 1986 challenge to various North Carolina state electoral districts, famously determined when the Voting Rights Act requires a majority-minority district to prevent vote dilution.² *Shaw v. Reno*,³ the high court’s landmark 1993 constitutional ruling, also originated in North Carolina. *Shaw* and its successor *Shaw II* (1996)⁴ held that a state legislature’s use of race as “the predominant factor” in drawing an electoral district violates the Equal Protection clause—even, oddly, if no vote dilution occurs.⁵ *Hunt v. Cromartie* and *Easley v. Cromartie*,⁶ decided several years later, again examined Tar Heel districts as

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¹ 478 U.S. 30 (1986).

² *Id.* at 69.

³ 509 U.S. 630, 633–34 (1993).

⁴ 517 U.S. 899 (1996).

⁵ *See id.* at 905–18.

⁶ *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Easley v. Cromartie*, 532 U.S. 234 (2001).

the Court further outlined its unfolding and controversial standards for reviewing race-based discrimination claims.⁷ More recently, *Cooper v. Harris*⁸ sought to synthesize earlier Voting Rights Act rulings with the now more substantially honed constitutional standards announced in *Shaw v. Reno*.⁹ *Cooper* made clear that North Carolina legislators could neither use the purported standards of the Voting Rights Act nor alleged assertions of partisan motivation to draw lines “predominantly” employing “the use of race” to set electoral boundaries.¹⁰ And most notably, in *Rucho v. Common Cause*,¹¹ the United States Supreme Court concluded in 2019:

Partisan gerrymandering claims present political questions beyond the reach of the federal courts . . . federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.¹²

Partisan gerrymandering, Chief Justice Roberts also concluded for the *Rucho* majority, should not be equated with presumptively illegitimate racial line drawing. A “permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’”¹³ *Rucho*, too, was a North Carolina venture. The state has been busy. Even if unhelpful.

North Carolina has, then, provided the factual fodder for the development of much of modern statutory and constitutional gerrymandering jurisprudence. It has also, apparently, often operated at the purported axis between racial and political claims. It has occupied the landscape inhabited by both enthusiastically embraced racial gerrymandering actions and

⁷ See *Easley*, 532 U.S. at 258.

⁸ 137 S. Ct. 1455 (2017).

⁹ *Id.* at 1468–72.

¹⁰ *Id.*

¹¹ 139 S. Ct. 2484 (2019).

¹² *Id.* at 2506–07.

¹³ *Id.* at 2503.

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judicially rejected political gerrymandering suits. The repeated, decades-long undertakings of the North Carolina General Assembly have, surely, helped convince the federal justices that the consequence-laden distinction between political and racial work is not only defining, but ascertainable. The distinction marks the boundary, it is claimed, between legitimate—even essential—constitutionally derived judicial review and devastating, usurping “government by judiciary.”¹⁴

There is much to quibble with, or worse, in this account—the ready acceptance of racial gerrymandering cases under the civil war amendments, on the one hand, and the allegedly high-minded repudiation of politically driven bias suits on the other. But even if one accepts the proffered theoretical distinctions between political and racial gerrymanders, North Carolina, again, on the ground, presents conditions and circumstance that mock such theoretical demarcations. Political life in the Tar Heel State laughs robustly when the Chief Justice of the United States explains the boundaries of appropriate and, perhaps, genteel judicial intervention—much like North Carolina legislators celebrated gleefully, and then acted to aggressively discriminate against black voters, when John Roberts proclaimed that “the south has changed” in the Shelby County case,¹⁵ as the Court gutted the Voting Rights Act.¹⁶

In this essay, I question what the line between racial and political gerrymandering can conceivably look like when a state is effectively and unashamedly governed by a White people’s party. What judicial deference is, or ought be, assured, when Republican caucuses repair to their closed-door deliberations, with no person of color present, despite almost a quarter of the state population being Black,¹⁷ and intentionally and repeatedly pass statutes that court after reviewing court determines burden, penalize, and restrict the electoral, participatory, adjudicatory and dignitary rights of African-

¹⁴ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1997), for an argument on how the Supreme Court has used judicial activism to usurp the authority of the American people to govern themselves.

¹⁵ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

¹⁶ *See id.*

¹⁷ *See* U.S. CENSUS BUREAU, *QUICK FACTS* (2020), <https://www.census.gov/quickfacts/NC> (showing that the percentage of black residents in North Carolina is 22.2%).

Americans? Are the political feints, dodges, and maneuvers of a White person's party racial or merely partisan? A century and a half after the passage of the Civil War Amendments, should a federal court deem the strategic political tools of a White people's caucus beyond the reach, or interest, of constitutional law? Is constitutional law, yet again, to be rendered a meaningless and—given the stakes—vile façade? Ultimately, *Rucho* may make sense, somewhere. That's possible. But in North Carolina, from whence it arises, the decision is grotesque. No one here could honestly conclude that our legislative decisions separate politics and race. *Rucho* becomes, therefore, merely an exquisite cover for racism. Yet again.

I. NORTH CAROLINA'S INTENSE RACIAL DISPARITIES

It is helpful, in probing North Carolina's racialized governance, to begin with a word of perspective. In 2020, the state remains, as it has been from its founding, riven by massive and literally debilitating racial disparities. Twice as many African Americans live in poverty as White people do.¹⁸ The gulf is even worse for kids. Almost three times as many Black children are poor as White ones.¹⁹ The disparity is even larger for kids five and under.²⁰ Much higher rates of hunger and lack of health insurance appear in the Black community.²¹ African American North Carolinians are twice as likely as

¹⁸ See Rob Schofield, *New Census Data: High Poverty Rates Persist in NC Despite Modest Growth*, N.C. POL'Y WATCH (Sept. 14, 2018), <http://pulse.ncpolicywatch.org/2018/09/14/new-census-data-high-poverty-rates-persist-in-nc-despite-modest-growth/>. See also GENE R. NICHOL, *THE FACES OF POVERTY IN NORTH CAROLINA: STORIES FROM OUR INVISIBLE CITIZENS* 143 (2018); GENE R. NICHOL, *INDECENT ASSEMBLY: THE NORTH CAROLINA LEGISLATURE'S BLUEPRINT FOR THE WAR ON DEMOCRACY AND EQUALITY* 13–14 (2020).

¹⁹ See Brian Kennedy, *North Carolina Ranked 11th in the Nation in Childhood Poverty*, NORTH CAROLINA JUSTICE CENTER (Sept. 24, 2018), <https://www.ncjustice.org/publications/north-carolina-ranked-11th-in-the-nation-in-childhood-poverty/>.

²⁰ *Id.*

²¹ NICHOL, *FACES OF POVERTY*, *supra* note 18, at 143. Black North Carolinians suffer hunger at a much higher rate than White North Carolinians. Gene Nichol, Opinion, *Gene Nichol: Numbers Don't Lie. There is Systemic Racial Subordination in North Carolina*, GREENSBORO NEWS & REC., (Apr. 22, 2018), <https://greensboro.com/opinion/columns/gene-nichol-numbers-dont-lie-there-is-systemic-racial-subordination-in-north->

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White North Carolinians to be unemployed, much higher percentages are uninsured, and three times as many Black families report a negative net worth.²² Black households possess, on average, only about 6% of the wealth held by White households.²³ Most of North Carolina's counties experiencing daunting child poverty rates (approaching or surpassing 50%)—Northampton, Chowan, Scotland, Vance and Edgecombe—have high percentages of African-Americans.²⁴

Black kids disproportionately attend North Carolina's high poverty public schools.²⁵ Under the state's controversial A-F public school grading system, almost all high poverty schools receive exceedingly poor grades and almost all high wealth institutions excel.²⁶ A university-based study concluded that Black students make up 26% of the state's public school attendees but receive over half of all suspensions.²⁷ In Chapel Hill, where I live and this article is published, Black students make up 12% of the

carolina/article_2a6e657d-a207-5ed1-a36b-8a3cf8a053ce.html. There are also significant gaps in the number of Black and White North Carolinians who reported not seeing a doctor when sick due to the associated cost. Sydney Price, *NC Ranks Below Average in Racial Economic Equality*, CHARLOTTE BUS. J. (Jan. 31, 2019), <https://www.bizjournals.com/charlotte/news/2019/01/31/north-carolina-ranks-below-average-in-racial.html>.

²² NICHOL, *FACES OF POVERTY*, *supra* note 18, at 143.

²³ *Id.* at 143–44; *cf. also* CTR. ON POVERTY, WORK AND OPPORTUNITY, UNIV. N.C., *RACIAL WEALTH DISPARITY IN NORTH CAROLINA* ii (2010) (suggesting the wealth disparity is even worse, with African American households in North Carolina claiming “about 4 percent of the net worth of white households.”).

²⁴ NICHOL, *INDECENT ASSEMBLY*, *supra* note 18, at 14.

²⁵ *See Facts on Child Poverty*, PUBLIC SCHOOLS FIRST N.C., (Aug. 30, 2020), <https://www.publicschoolsfirstnc.org/resources/fact-sheets/facts-on-child-poverty/>.

²⁶ Lynn Bonner, *NC Public School Letter Grades Reflect Wealth of Students' Families*, NEWS & OBSERVER (Raleigh) (Feb. 5, 2015), <https://www.newsobserver.com/news/local/article10255961.html>.

²⁷ NICHOL, *FACES OF POVERTY*, *supra* note 18, at 143.

enrollment, but get 53% of the school suspensions.²⁸ Twice as many White Tar Heels have a college degree as do Black ones.²⁹

Racial disparities are replicated in state institutions and in every aspect of modern life, as well. Over half of the prisoners in the North Carolina Department of Correction are African-American, though they constitute 22% of the state's population.³⁰ The state incarcerates Black individuals at over four times the rate of White individuals.³¹ And an unending cascade of empirical studies demonstrate massive and unexplainable racial disparities in policing, employment, housing, and health care.³² North Carolina reflects,

²⁸ Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K-12 School Suspensions and Expulsion on Black Students in Southern States*, CTR. FOR RACE AND EQUITY IN EDUC. (2015), <https://race.usc.edu/wp-content/uploads/2020/08/Pub-14-Smith-and-Harper.pdf>; T. Keung Hui, *Report Finds NC Black Students Disproportionately Suspended*, NEWS & OBSERVER (Raleigh) (Aug. 25, 2015), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article32310816.html>.

²⁹ NICHOL, *FACES OF POVERTY*, *supra* note 18, at 143.

³⁰ NORTH CAROLINA PRISON POPULATION FIGURES AND DEMOGRAPHICS, fig. 2-3, <https://infogram.com/north-carolina-prison-population-figures-and-demographics-1g6qo2q93o1wm78> (last visited Oct. 19, 2020). *See also* INCARCERATED POPULATIONS BY RACE/ETHNICITY AND GENDER FOR EACH STATE, PRISON POL'Y INITIATIVE (updated March 2019), https://www.prisonpolicy.org/data/race_ethnicity_gender_2010.xlsx; Joseph E. Kennedy & Mika W. Chance, *Collateral Damage: How Mass Incarceration Increases Poverty and Crime in North Carolina's Poorest African American Communities*, TRIAL BRIEFS (Aug. 2011); ASHLEY NELLIS, SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 16 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

³¹ NORTH CAROLINA PRISON POPULATION FIGURES AND DEMOGRAPHICS, *supra* note 30, fig. 1 (noting that Black North Carolinians are incarcerated at 4.5 times the incarceration rate of White North Carolinians); NELLIS, *supra* note 30, at 5 (listing rate as 4.3 times higher for Black North Carolinians).

³² *See* NICHOL, *FACES OF POVERTY*, *supra* note 18, at 143–47. *See also* Nicole Flatow, *North Carolina Police Three Times More Likely to Arrest Blacks after Seat Belt Violation*, *Study Finds*, THINKPROGRESS (Sept. 30, 2013), <https://archive.thinkprogress.org/north-carolina-police-3-times-more-likely-to-arrest-blacks-after-seat-belt-violation-study-finds-f9e67221e784/>. The data, which N.C. Central University's Scott Holmes called evidence that “as an empirical fact . . . we have a culture in our law enforcement for unconscious institutional racism,” comes as the Department of Justice is filing a lawsuit alleging the state's new restrictive voting law is discriminatory and will disenfranchise minority voters.

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and notably amplifies, national trends documented by the Pew Research Center:

America remains two societies—one white and one black—as measured by key demographic indicators of social and economic well-being. [. . .] [B]lack on average are at least twice as likely as whites to be poor or unemployed. Households headed by a black person earn on average little more than half of what the average white households earns. And in terms of their median net worth, white households are about 13 times as wealthy as black households—a gap that has grown wider since the Great Recession.³³

Flatow, *supra* this note. For additional context, consider also Sharon Lafraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>. In North Carolina's third largest city, officers pulled over Black drivers for traffic violations at a rate far out of proportion to their share of the local driving population. *See* WILLIAM R. SMITH ET AL., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY (Jan. 2004), <https://www.ojp.gov/pdffiles1/nij/grants/204021.pdf>. Police used their discretion to search Black drivers or their cars more than twice as often as White motorists—even though they found drugs and weapons significantly more often when the driver was White. *Id.* These disparities extend beyond the context of policing. *See* Matt Shipman, *Study Shows That, In Restaurants, Race Matters*, NC STATE UNIV. NEWS (Apr. 23, 2012), <https://news.ncsu.edu/2012/04/wms-rusche-restaurants> (describing evidence that one third of servers in restaurants admit to “varying their quality of service based on customers’ race, often giving African-Americans inferior service”); COLETTE HOLT & ASSOCS., NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RACIAL DISPARITY STUDY, 10 (2014), <https://www.ncdot.gov/about-us/board-offices/offices/civil-rights/Documents/2014-disparity-study.pdf> (describing disparities in Black business formation, access to consumer credit, and other factors necessary for entrepreneurial success); George Gonzalez, *Racial and Ethnic Minorities Face More Subtle Housing Discrimination: HUD Study Finds Decline in Blatant Discrimination While Unequal Treatment Persists*, U.S. DEP’T OF HOUS. AND URB. DEV. (June 11, 2013), <https://archives.hud.gov/news/2013/pr13-091.cfm>; PAUL A. BUESCHER & JACK LEISS, N.C. DEP’T OF HEALTH AND HUM. SERVS., RACE, EDUCATION, AND MORTALITY IN NORTH CAROLINA, (Apr. 1994), <https://archive.org/details/raceeducationmor00bues>.

³³ PEW RESEARCH CTR., DEMOGRAPHIC TRENDS AND ECONOMIC WELL-BEING (June 27, 2016), <https://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/>.

I begin with these indications of crushing disparity to make the irrefutable point that, unless the terms are to be drained of all ascertainable meaning, North Carolina today experiences an intense, debilitating, and *systemic* (of, or relating to, the entire body of an organism)³⁴ regime of racial subordination. No thoughtful and fair-minded person familiar with our present circumstance could believe that we are done with the challenges of equality, justice, and meaningful integration. Still, as the following two sections will reveal, the governing party of the North Carolina legislature for the past decade has both abandoned aspirations of equality and deployed the power of the state to burden and penalize African-American Tar Heels.

II. GOVERNING THROUGH WHITE PERSONS' CAUCUSES

The Republican Party has controlled both houses of the North Carolina General Assembly since 2011.³⁵ It has often done so through very large majorities. From 2011 until January 2019, Republicans enjoyed veto-proof supermajorities in both chambers.³⁶ The margins were reduced in the 2018 elections.³⁷ But they remain large in 2020—ten seats in the House and eight in the smaller Senate.³⁸

All Republican legislators in North Carolina, in both houses, are White. As the candid Republican Representative Holly Grange put it in 2019: “On my side there’s not a lot of diversity; it’s a middle-aged white man’s club.”³⁹

³⁴ See *Systemic*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/systemic> (“of, relating to, or common to a system;” “affecting the body generally”); *Systemic*, Cambridge Dictionary Online, <https://dictionary.cambridge.org/us/dictionary/english/systemic> (“relating to or involving a whole system;” “relating to or affecting the whole system, organization, etc., rather than just some parts of it”).

³⁵ NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 26.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *See id.* at 27; *see also North Carolina Representatives 2019-2020 Session*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Members/MemberList/H>; *North Carolina Senators, 2019-2020 Session*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Members/MemberList/S>.

³⁹ Paul Woolverton, *How Much Does N.C.'s New Legislature Look Like You?*, COURIER-TRIBUNE (Asheboro, NC) (Jan. 9, 2019), <https://www.courier-tribune.com/article/20190108/NEWS/190108604>.

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In 2020, there are twenty-six African American representatives in the state House.⁴⁰ There are 10 Black senators.⁴¹ One Native American and two Indian Americans serve in the General Assembly.⁴² No people of Latinx descent do.⁴³

The overall numbers, scant as they are, are still deceptive. In the House, the twenty-six African Americans and one Native American are all Democrats.⁴⁴ All sixty-five Republicans are White.⁴⁵ In the Senate, the ten African Americans and two Indian Americans are Democrats.⁴⁶ Every Republican (twenty-nine) is White.⁴⁷ Similar Republican tallies appeared in the 2011–12, 2013–14, 2015–16, and 2017–18 sessions.⁴⁸ So when the majority caucuses in each chamber retire to their private deliberations to craft the laws of North Carolina, only White people attend. That's the case even though the state's population is over 22% African American and about forty percent persons of color.⁴⁹ One hundred and fifty years after the adoption of the 14th Amendment, North Carolina is effectively ruled by a White People's Caucus.

Let that sink in for a minute.

⁴⁰ Gene Nichol, Opinion, *In NC, All Diversity Sits on One Side of the Aisle*, NEWS & OBSERVER (Raleigh) (Jan. 20, 2019), <https://www.newsobserver.com/opinion/article224507140.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See U.S. CENSUS BUREAU, *Quick Facts North Carolina* (July 1, 2019), <https://www.census.gov/quickfacts/NC> (stating that the percentage of Black residents in North Carolina is 22.2% and the percentage of white residents who are not Hispanic or Latino is 62.6%).

III. THE LEGACY OF THE MODERN NORTH CAROLINA WHITE PEOPLE'S PARTY

Over the last decade, what legacy has this White people's caucus delivered? In a sentence, North Carolina Republican lawmakers have repeatedly, pervasively, intentionally, and invidiously used the power of government to diminish the electoral, representational, legal, educational, and dignitary rights of African Americans. The Republican caucuses of the North Carolina General Assembly not only look like White conclaves, they govern like them.

Upon assuming control of both houses of the legislature in 2011, Republican supermajorities immediately turned to securing their favorable control of the electoral process. New districting maps, state and federal, were enacted.⁵⁰ Each set was eventually ruled unconstitutional by federal courts for diluting the voting rights of African Americans.⁵¹ The United States House of Representatives' districts, judges ruled, were not designed to comply with the Voting Rights Act, as lawmakers claimed, but to discriminate against Black voters.⁵² African-Americans had been packed into contorted districts to minimize their electoral power.⁵³ The U.S. Supreme Court agreed, after a six-year saga.⁵⁴

Republican state lawmakers were even more ambitious with their own districts. On that front, another federal court ruled that the General Assembly had "unjustifiably, and therefore unconstitutionally, predominantly relied on

⁵⁰ See Gary Robertson, *Court Upholds N.C. District Maps*, N.C. PUB. RADIO (Jul. 8, 2013), <https://www.wunc.org/post/court-upholds-nc-district-maps>.

⁵¹ See *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.) ("[T]he twenty-eight challenged districts in North Carolina's 2011 State House and Senate redistricting plans constitute[d] racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution."); *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017) (affirming that racial considerations predominated in the creation of the two congressional districts at issue).

⁵² See *Covington*, 316 F.R.D. 117, at 124.

⁵³ See *Cooper*, 137 S. Ct. at 1469.

⁵⁴ See *id.*

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race” in drawing district lines.⁵⁵ The “overriding priority of the redistricting plan was to draw a pre-determined, race-based number of districts.”⁵⁶ Federal District Court Judge James Wynn was frank to say the scheme to discriminate was a “widespread, serious, and longstanding . . . constitutional violation.”⁵⁷ It was, Wynn added, “among the largest racial gerrymanders ever encountered by a federal court.”⁵⁸ As a result, it deprived an ample percentage of North Carolinians of “a constitutionally adequate voice in the State’s legislature,” defeating foundational ties of popular sovereignty.⁵⁹

Despite the powerful judicial chastisement, Republican lawmakers continued to drag their feet—appealing every ruling and delaying implementation of a meaningful remedy.⁶⁰ Eventually, on the congressional side, a three-judge panel declared in exasperation:

We continue to lament that North Carolina voters have now been deprived of a constitutional congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles.⁶¹

The massive state-based gerrymander, federal courts concluded, had:

[So] unjustifiably rel[ie]d on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which the General Assembly had been elected] interfered with the very mechanism by which people confer

⁵⁵ Covington v. North Carolina, 283 F. Supp. 3d 410, 416 (M.D.N.C.), *aff’d in part, rev’d in part*, 138 S. Ct. 2548 (2018).

⁵⁶ See Covington v. North Carolina, 316 F.R.D. 117, 135 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 2211 (2017) (mem.).

⁵⁷ Covington v. North Carolina, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

⁵⁸ *Id.*

⁵⁹ Covington v. North Carolina, No. 1:15CV399, 2017 WL 44840, at *2 (M.D.N.C. Jan. 4, 2017). See also Lynn Bonner, *Federal Judges Find NC Legislative Districts Unconstitutional*, NEWS & OBSERVER (Raleigh) (Aug. 11, 2016), <https://www.newsobserver.com/news/politics-government/state-politics/article95080647.html>.

⁶⁰ NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 132–36.

⁶¹ Common Cause v. Rucho, 318 F. Supp. 3d 777, 943 (M.D.N.C. 2018).

their sovereignty on the General Assembly and hold the General Assembly accountable.⁶²

The racial transgression was so dramatic and persistent that, in 2019, a Wake County state judge ruled that two electorally adopted amendments to the North Carolina constitution were invalid because the legislature had forfeited the authority, under Article XIII of the state charter, to place proposed amendments on the ballot for adoption by the citizenry.⁶³ The state constitution, the court reasoned, requires a 3/5 vote of the General Assembly for electoral consideration.⁶⁴ However:

[T]he unconstitutional racial gerrymander tainted the three-fifths majority required by the state constitution before an amendment proposed can be submitted for a vote, breaking the appropriate chain of popular sovereignty between North Carolina citizens and their representatives. [. . .] An illegally constituted General Assembly does not represent the people of North Carolina and therefore is not empowered to pass legislation that would amend the state constitution.⁶⁵

Republican lawmakers were again called on the carpet, in 2017, for trying to crush the representational and voting rights of Black candidates and voters. Unhappy with the outcome of Greensboro City Council elections, which produced a Democratic majority and four African American councilors, the General Assembly used a truncated process, pushed by Republican Senator Trudy Wade, to simply overturn the unseemly results by creating new districts double-bunking incumbents.⁶⁶ Wade claimed legislative immunity in the lawsuit brought to challenge the racial sore-loser

⁶² Covington v. North Carolina, 270 F. Supp. 3d 881, 897 (M.D.N.C. 2017).

⁶³ See Order at 10–11 N.C. State Conf. of the NAACP v. Moore, 18 CVS 9806 (Wake Cnty. Super. Ct. Feb. 22, 2019) (citing N.C. CONST. art. XIII, § 4).

⁶⁴ See *id.*

⁶⁵ *Id.* at 11. The *NAACP v. Moore* decision was subsequently reversed, on other grounds, by the North Carolina Court of Appeals. See No. COA19-384, 2020 WL 5521358 (NC. App. Sept. 15, 2020).

⁶⁶ See generally Anne Blythe, *Federal Judge Overturns North Carolina Legislative Attempt to Change Greensboro's City Election System*, NEWS & OBSERVER (Raleigh) (Apr. 3, 2017), <https://www-newsobserver-com.libproxy.lib.unc.edu/article142454699.html>.

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law to avoid having to explain, or answer for, her discriminatory motives.⁶⁷ Federal District Court Judge Catherine Eagles saw through the ruse, however, and held it to be yet another move by the General Assembly to disenfranchise Black Tar Heels.⁶⁸

The North Carolina General Assembly’s (all-White) Republican caucuses didn’t limit their electoral efforts to re-drawing district lines. In 2013, lawmakers passed a massive voter identification and election regulation law characterized by national scholars as the most restrictive electoral measure passed by a state government in a half-century.⁶⁹ It, too, was largely invalidated by the federal courts.⁷⁰ The reviewing judges extensively explored the motivation and methods behind the statute’s enactment.⁷¹ They concluded that Republicans had studied every voting provision or mechanism that elevated Black turn-out and then eliminated or restricted each practice “with almost surgical precision.”⁷² The law reflected intentional, targeted racial suppression. Its impacts could not sensibly be regarded as accidental or based on permissible justifications, the court ruled.⁷³ The claimed interest in ballot integrity was held to be a mere ruse.⁷⁴ No evidence of in-person voter fraud could be provided.⁷⁵ “Indeed,” the three-judge panel wrote, “neither this legislature—nor, as far as we can tell,

⁶⁷ *Id.*; see also NICHOL, INDECENT ASSEMBLY, *supra* note 18, at 133–36 (describing “sore loser” laws).

⁶⁸ See Blythe, *supra* note 66.

⁶⁹ Ari Berman, *North Carolina Passes the Country’s Worst Voter Suppression Law*, THE NATION (July 26, 2013), <https://www.thenation.com/article/north-carolina-passes-countrys-worst-voter-suppression-law>.

⁷⁰ See *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 207 (4th Cir. 2016).

⁷¹ *Id.* at 214, 235–38.

⁷² *Id.* at 214.

⁷³ *Id.*

⁷⁴ *Id.* at 238.

⁷⁵ See *id.* at 235.

any other legislature in the country—has ever done so much, so fast, to restrict access to the franchise.”⁷⁶

The General Assembly also moved to diminish the rights of African Americans in the criminal justice system. In 2009, North Carolina (then under Democratic control) had enacted the groundbreaking Racial Justice Act, which required courts to vacate a death sentence when it was proven to have been “sought or obtained on the basis of race.”⁷⁷ The goal of the statute was to ensure that if North Carolina were to continue to enforce a death penalty, racial bias would play no role in its implementation.⁷⁸ The statute was aimed particularly at racially discriminatory practices in death cases, including bias in jury selection.⁷⁹ In 2012, Cumberland County Superior Court Judge Gregory A. Weeks cited the Act in overturning Marcus Robinson’s death sentence after concluding that highly reliable evidence showed prosecutors intentionally discriminated against Black defendants in selecting juries in capital cases.⁸⁰ A few months later, three other previously convicted individuals proved that prosecutors had also blocked African Americans from jury service.⁸¹ Their death sentences (not the underlying convictions) were vacated.⁸²

In 2013, the Republican General Assembly decided it had seen enough and repealed the Racial Justice Act.⁸³ Rather than addressing the injustices

⁷⁶ *Id.* at 228. Another federal court ruled, again in 2019, that the General Assembly’s second attempt to pass this law did not do enough to purge the taint of racially discriminatory purpose of the original bill. *See NAACP v. Cooper*, 430 F. Supp. 3d 15, 35 (M.D.N.C. 2019).

⁷⁷ 2009 N.C. Sess. Law 464 (originally codified at N.C. GEN. STAT. § 15A-210 (2009)) (repealed 2013).

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) (order granting motion for appropriate relief).

⁸¹ *State v. Golphin*, No. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012) (order granting motions for appropriate relief).

⁸² *Id.*

⁸³ 2013 N.C. Sess. Law 154 § 5(a) (effective June 19, 2013); *see also* Michael Stone, *North Carolina Repeals Racial Justice Act*, NAT’L COAL. TO ABOLISH THE DEATH PENALTY (July 1, 2013), <http://www.ncadp.org/blog/entry/north-carolina-repeals-the-racial-justice-act>.

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revealed in the early racial justice cases, lawmakers chose, in effect, to kill the messenger. A freshman (Democratic) legislator who opposed the repeal said:

Even though I'm new here, I understand that there was evidence of racial bias when the legislature adopted the Racial Justice Act. Subsequent court cases confirmed this bias. So why are we reversing the law now given all of this evidence?⁸⁴

Democratic Sen. Martin Nesbitt asked even more pointedly, "If we have somebody on death row because they're black, wouldn't we want to find that out?"⁸⁵ Republican legislators seemingly disagreed.

In public education, perhaps unsurprisingly, the Republican General Assembly embraced steps leading to greater racial segregation. A state law opening the doors to charter schools enacted in 1996 had included a numerical cap on such institutions (100) and required schools to reflect the racial and ethnic composition of the districts in which they were located.⁸⁶ In 2013, lawmakers eliminated the ceiling and repealed the diversity requirement, demanding only that charter schools "make efforts" to achieve integration.⁸⁷ The results were predictable. A 2017 study by the *Raleigh News & Observer* concluded that "charter schools in North Carolina are more segregated than traditional public schools and have more affluent students."⁸⁸ A 2018 study by the North Carolina Justice Center traced the segregating

⁸⁴ Stone, *supra* note 83.

⁸⁵ Bob Geary, *The Injustice of Repealing the Racial Justice Act*, INDY WEEK (Nov. 30, 2011), <https://indyweek.com/news/northcarolina/injustice-repealing-racial-justice-act>.

⁸⁶ Lynn Bonner, *Why NC Charter Schools Are Richer and Whiter*, NEWS & OBSERVER (Raleigh) (Oct. 10, 2017), <https://www.newsobserver.com/news/local/education/article178022436.html>.

⁸⁷ *Id.* See also Valerie Strauss, *North Carolina Passes Charter School Law That Critics Say Is Meant to Promote Segregation*, WASH. POST (June 14, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/06/14/north-carolina-passes-charter-school-law-that-critics-say-is-intended-to-promote-segregation>.

⁸⁸ Bonner, *supra* note 86.

impact of charters on the traditional school system.⁸⁹ The proliferation of charter schools “exacerbates racial segregation,” it concluded.⁹⁰ Charter schools “tend to skew whiter than other schools in the same county.”⁹¹

In 2018 Republican lawmakers broke new ground by enacting a measure permitting four suburban towns in Mecklenburg County, with mostly White populations, to create their own charter schools and limit enrollments to students from within their borders.⁹² This effectively allowed the small enclaves to withdraw from the broad and racially and economically diverse Charlotte-Mecklenburg school district. The experiment also allowed the municipalities—Cornelius, Huntersville, Matthews, and Mint Hill—to spend property tax dollars on the charters.⁹³ The North Carolina NAACP’s Irv Joyner described the move as “an effort to go back to the 1900s with Jim Crow where these enclaves for whites are being allowed to be set up.”⁹⁴ James Ford, a North Carolina teacher of the year, wrote that the bill was “a design for racial and economic segregation. . . . We’ve seen this before. Only this time it is not white flight, it’s building a ‘white fence.’”⁹⁵

There’s more, of course, though I know the listing grows tedious. As the Black Lives Matter movement swept the nation in 2013 and 2014, fueled by police brutality caught on ever pervasive cameras, North Carolina legislators bucked the national trend by making it more difficult, legally, to obtain or

⁸⁹ See T. Keung Hui, *NC Should Close Charter Schools That Aren’t Diverse, New Report Says*, NEWS & OBSERVER (Raleigh) (March 16, 2018), <https://www.newsobserver.com/article205190044.html>.

⁹⁰ *Id.*

⁹¹ *Id.* See also T. Keung Hui, *Report Looked at Racial Impact of NC Charter Schools. That Section Is Being Removed.*, NEWS & OBSERVER (Raleigh) (Jan. 3, 2020), <https://www.newsobserver.com/news/local/education/article238936383.html>.

⁹² Valerie Strauss, *North Carolina Passes Charter School Law That Critics Say Is Meant to Promote Segregation*, WASH. POST (June 14, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/06/14/north-carolina-passes-charter-school-law-that-critics-say-is-intended-to-promote-segregation>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ James Ford, Editorial, *Matthews v. CMS: Yes, The Fight About Charter Schools Is About Race*, CHARLOTTE OBSERVER (updated Apr. 27, 2018, 7:44 AM), <https://www.charlotteobserver.com/opinion/op-ed/article209884959.html>.

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publish police video camera footage.⁹⁶ More famously, at least in North Carolina, in 2015 the General Assembly passed General Statute 100-2.1, which requires the approval of the state historical commission before any confederate monument can be moved or taken down, even temporarily.⁹⁷ The law was principally designed to prevent the removal of the “Silent Sam” statue at the gateway of the University of North Carolina-Chapel Hill campus.⁹⁸ After the horrifying killing of an anti-racist protester in Charlottesville, Virginia, the governor of North Carolina asked that the monuments law be repealed, saying “[w]e cannot continue to glorify a war against the United States of America fought in the defense of slavery.”⁹⁹ The White caucuses of the Republican General Assembly refused. One of the monument bill’s principal authors, Senator Tommy Tucker, explained that the Civil War had nothing to do with slavery: “It was caused by the North and their tariffs over southern goods.”¹⁰⁰ Nice touch.

IV. POLITICS VS. RACE IN A WHITE PEOPLE'S PARTY

So now we arrive, finally, back at the original question. What is the appropriate line to be drawn between racial and political gerrymandering

⁹⁶ See N.C. Sess. Law 2016-88; Lauren Horsch, *It's Now Up to Judges to Release Police Body Cam Footage - Here's How That's Going*, NEWS & OBSERVER (Raleigh) (Mar. 9, 2018), <https://www.newsobserver.com/news/politicsgovernment/state-politics/article204290209.html>; see also Gov. McCrory Signs Bill That Keeps Police Camera Footage, AM. CIVIL LIBERTIES UNION OF N.C. (July 11, 2016), <https://www.acluofnorthcarolina.org/en/press-releases/gov-mccrory-signs-bill-keeps-police-camera-footage-secret>; Elaina Athans, *New Law Makes Police Cam Footage Off Limits to Public*, ABC 11 (July 12, 2016), <https://abc11.com/1422569/>.

⁹⁷ N.C. GEN. STAT. §100-2; see also Joe Killian, *The Confederate Monuments Controversy: What the Law Says, What Historians Say*, N.C. POL'Y WATCH (Aug. 23, 2017), <http://www.ncpolicywatch.com/2017/08/23/confederate-monuments-controversy-law-says-historians-say/>.

⁹⁸ The statue of a Confederate soldier, erected in 1913 as a tribute to UNC students who fought for the South during the Civil War, has drawn controversy for decades. Killian, *supra* note 97.

⁹⁹ *Id.*

¹⁰⁰ Lynn Bonner, *Why NC Gov. Roy Cooper Wants Confederate Statues Removed from State Grounds*, THE STATE (Columbia, SC) (Aug. 16, 2017), <https://www.thestate.com/news/local/article167485447.html>.

when reviewing the handiwork of the all-White, heavily racialized, discrimination-driven, Republican house and senate caucuses of a state General Assembly? How much judicial deference is to be proffered for the political stratagems developed to foster and enhance this unseemly work? Are the political moves of a White People's party non-justiciable? Are they racial or (merely) partisan?

Shaw v. Reno,¹⁰¹ *Shaw v. Hunt*,¹⁰² *Easley v. Cromartie*,¹⁰³ and *Cooper v. Harris*,¹⁰⁴ it will be recalled, determined that the use of race as the predominant factor in legislative districting is presumptively unconstitutional.¹⁰⁵ The Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking,"¹⁰⁶ so efforts to "separate voters into different districts on the basis of race" must satisfy the rigors of strict scrutiny.¹⁰⁷

*Rucho v. Common Cause*¹⁰⁸ nevertheless proclaimed that racial and political gerrymandering are categorically distinct creatures.¹⁰⁹ Political gerrymander might be unseemly, but it is not constitutionally forbidden.¹¹⁰ Securing "partisan advantage . . . does not become constitutionally impermissible, like race discrimination, when [it] 'predominates.'"¹¹¹ Partisan gerrymandering claims trigger "no legal standards to limit and direct" judicial decision-making.¹¹² Echoing Justice Anthony Kennedy's sentiments from an earlier case, Chief Justice Roberts theorized that "[a]ny

¹⁰¹ 509 U.S. 630 (1993).

¹⁰² 517 U.S. 899 (1996).

¹⁰³ 532 U.S. 234 (2001).

¹⁰⁴ 137 S. Ct. 1455 (2017).

¹⁰⁵ See *supra* notes 4–10 and accompanying text.

¹⁰⁶ *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

¹⁰⁷ *Shaw v. Reno*, 509 U.S. at 649, 653.

¹⁰⁸ 139 S. Ct. 2484 (2019).

¹⁰⁹ See *id.* at 2496–97.

¹¹⁰ *Id.* at 2497.

¹¹¹ *Id.* at 2503; cf. *supra* note 10 and accompanying text (noting that racial gerrymanders are unconstitutional).

¹¹² *Id.* at 2507.

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standard for resolving [political gerrymandering] claims must be grounded in a ‘limited and precise rationale’ and be ‘clear, manageable, and politically neutral.’”¹¹³ He was not able to find such standards, apparently. While race-based decision-making “is inherently suspect,” “lines . . . drawn on the basis of partisanship” are therefore not.¹¹⁴ Partisanship objection is inevitably a question of degree—“how much partisan dominance is too much.”¹¹⁵ The Court insisted that such a lament should be directed to the legislatures (ironically), not to the federal courts.¹¹⁶

There is much that can be said about the Chief Justice’s line of judicial demarcation. The Federal Courts professor in me would note Roberts’ near-obliteration of the previously somewhat manageable political question doctrine.¹¹⁷ The minimalist and reasonably precise requirements of the jurisdictional standard were stretched, or altered, notably. The “textual commitment” standard, before *Rucho*, marked the heart of the political question determination.¹¹⁸ But *Rucho* highlights no precise “textually demonstrable commitment” separating population and racial gerrymandering cases, on the one hand, and political gerrymandering actions on the other. Now no one knows what the standard means or if it remains the central requisite of the jurisdictional determination.

Nor, I’m guessing, would voting rights scholars agree that the Supreme Court’s track record in racial gerrymandering cases—looking at the “predominance of race” and the strength of justification flowing from Voting Rights Act’s integrative compliance obligations—reflects a “limited and

¹¹³ *Id.* at 2498 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

¹¹⁴ *Id.* at 2502–03.

¹¹⁵ *Id.* at 2498.

¹¹⁶ *See id.* at 2508.

¹¹⁷ *See Vieth*, 541 U.S. at 277 (explaining that cases presenting a political question are those that lack “judicially discoverable and manageable standards for resolving [them].”) *See also* *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Powell v. McCormack*, 395 U.S. 486, 518–21 (1969).

¹¹⁸ *Compare Zivotofsky*, 566 U.S. at 191–201, with *Rucho*, 139 S. Ct. at 2491–508, for two opinions, both written by Chief Justice Roberts, about the political question doctrine. *See also Baker*, 369 U.S. at 210–11; *Powell*, 395 U.S. at 518–21.

precise rationale” deploying “clear, manageable and politically neutral” standards. Roberts’ portrait of precision in the race cases is dream work.¹¹⁹

But these traditionally picked nits are not my focus here. My question is whether the partisan gyrations of a White people’s governing legislative caucus can meaningfully be deemed non-racial. If an all-White governing caucus, repeatedly demonstrated to be carrying out a race-based substantive legislative agenda, deploys politically biased strategies to further its governing power, are courts to defer to such choices in the name of protected democratic decision-making? When the all-White caucuses of the North Carolina Republican legislature engaged in the most politically distorted district drawing in American history in order to secure and expand their racialized proclivities, can it actually be that the Fourteenth and Fifteenth amendments are untroubled? Is constitutional law, in fact, an ass?

Is the phantom race versus politics distinction capable of moving beyond lodging place in re-districting cases? Is it literally permissible, as Republican leaders claim in North Carolina,¹²⁰ to impose debilitating voter ID requirements upon Black voters so long as the burden is purportedly levied because the potential voters are Democrats, not because they are Black? African-Americans have been offered a dizzying array of justifications for their abuse at the hands of a White majority in North Carolina over the centuries. Is “I’m not after you because you’re Black, I’m after you because you’re a Democrat” yet one more of them?

¹¹⁹ Compare *Holder v. Hall*, 512 U.S. 874, 880–89 (1994), with *id.* at 891 (Thomas, J., concurring), and *Shaw v. Reno*, 509 U.S. 630 (1993) (showing courts struggling with what the benchmark in racial gerrymandering cases should be under an acceptable districting system).

¹²⁰ German Lopez, *Longtime Republican Consultant: If Black People Voted Republican, Voter ID Laws Wouldn’t Happen*, VOX (Sept. 2, 2016), <https://www.vox.com/2016/9/2/12774066/voter-id-laws-racist> (“‘Look, if African Americans voted overwhelmingly Republican, they would have kept early voting right where it was,’ ‘It wasn’t about discriminating against African Americans. They just ended up in the middle of it because they vote Democrat.’”).

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Does the cloak of “mere” partisanship extend further? The state of North Carolina has a broad and impressive public university system.¹²¹ It is overseen by a legislatively selected Board of Governors.¹²² It now seems to be the case that the Board of Governors, and its benefactors in the all-White Republican legislative caucuses, will allow only a Republican to become the president of the university system.¹²³ The theory, I suppose, is that the legislative majority demands one of its own. Can the White person’s caucus also, in solidarity, demand only a White president? No, you say, that would be overt race discrimination. But the reed is thin. Thinner than piss on a rock.

And does the *Shaw/Rucho*, racial/political line offer an odd benefit or incentive to White people’s parties? In *Cooper v. Harris*, the United States Supreme Court invalidated yet another North Carolina racial gerrymander.¹²⁴ The state, unsurprisingly, claimed as a defense that the line-drawing was merely partisan in nature, not racial.¹²⁵ The Justices rejected the political gerrymandering justification, as had the trial court below.¹²⁶ The *Cooper* majority, though, conceded that “racial identification is [often] highly correlated with political affiliation.”¹²⁷ As a result, a federal trial court must make “a sensitive inquiry” into all “circumstantial and direct evidence of intent” to assess whether the “plaintiffs have managed to disentangle race from politics and prove that the former drove a district’s lines.”¹²⁸

¹²¹ See N.C. GEN. STAT. § 116-1(b) (2019); *Institutions and Affiliates*, UNIV. N.C. SYS., <https://www.northcarolina.edu/institutions/> (listing seventeen public higher-education institutions affiliated with the state as of 2020).

¹²² N.C. GEN. STAT. §§ 116-3, 116-6 (2019).

¹²³ See Editorial, *More Proof That the Firing of Tom Ross Was Purely Partisan*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/opinion/article67472332.html> (covering the UNC Board of Governor’s decision to fire UNC President Tom Ross because he was associated with Democrats).

¹²⁴ *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017).

¹²⁵ *Id.* at 1473.

¹²⁶ *Id.* at 1474.

¹²⁷ *Id.* at 1473 (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)).

¹²⁸ *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)).

In dissent, Justice Alito emphasized an even more robust presumption that state legislators had acted permissibly:

We have stressed, however, that courts are obligated to “exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.” . . . “Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions,” and “the good faith of a state legislature must be presumed.” . . . A legislature will “almost always be aware of racial demographics” during redistricting, but evidence of such awareness does not show that the legislature violated equal protection. . . . Instead, the Court has held, “race must not simply have been a motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature’s districting decision.” . . . This evidentiary burden “is a demanding one.” . . . We have warned that courts must be very cautious about imputing a racial motive to a State’s redistricting plan.¹²⁹

It stands to reason, perhaps, that separating the political and racial motivations of a White person’s government, aiming to carry out a heavily racialized, programmatic, substantive platform, will be a tough and demanding—if not impossible—duty. The admixture of intentions will become all the more successfully intertwined as the segregation advances, becoming increasingly complete. The “Whiter” the party, the more feasible the claim of purportedly benign partisan service. And it is nasty business, of course, for a federal court to rule that a state legislature has acted on the basis of race.¹³⁰ A presumption against such a determination must be afforded.¹³¹ Leeway must be given, lest we accuse legislators of being brutes. Thus, a White people’s caucus is afforded an assumption of justifiability that simply doesn’t arise in the run-of-the-mill re-districting case. An incentive, in effect, is offered to the all-White caucus like North Carolina’s. Federal judges must

¹²⁹ *Id.* at 1487–88 (Alito, J., concurring in part) (capitalization cleaned up) (emphasis original) (citations omitted).

¹³⁰ *See id.* at 1490 (“When a federal court says that race was a legislature’s predominant purpose in drawing a district, it accuses the legislature of ‘offensive and demeaning’ conduct.”).

¹³¹ *Id.* at 1502.

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be “very cautious” lest they appear rude and accusatory by casting racial aspersions. It is, after all, 2020, not 1953. So political deference, the theory seems to go, must be extended to a White people’s government’s claims of partisan dedication. Otherwise, we might be seen as suggesting that the (all-White) lawmakers are behaving in ways that are reprehensible, even as they carry out schemes that are, in fact, reprehensible. There is nothing more infuriating to a White people’s party than being called racist, after all. They are to be sure deploying government power to subjugate on the basis of race. Still, it is better for Black Tar Heels to continue to suffer than for White ones to be made to feel bad about themselves.

Rucho, of course, was a political question decision—a jurisdictional ruling—not technically a judgment on the merits of the equality claims proffered.¹³² That, when added to the fact that state courts are free to read their own constitutions as more protective of individual rights than the federal charter,¹³³ left open the possibility that state tribunals would come to the opposite conclusion about the legality of extreme partisan gerrymandering under the provisions of the North Carolina Constitution. That is precisely what happened in *Common Cause v. Lewis* in September 2019.¹³⁴ There, a unanimous three-judge state court (with both Republican and Democratic judges) explained:

The issue before the Court is distilled to simply this: whether the constitutional rights of North Carolina citizens are infringed when the General Assembly, for purposes of retaining power, draws district maps with a predominant intent to favor voters aligned with one political party at the expense of other voters, and in fact achieves results that manifest this intent and cannot be explained by other non-partisan considerations.¹³⁵

¹³² See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

¹³³ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

¹³⁴ *Common Cause v. Lewis*, No. 18 CVS 014001 (Wake Cnty. Super. Ct. Sept. 3, 2019).

¹³⁵ *Id.* at 6.

The judges found that North Carolina’s 2017 state legislative maps had been drawn by the General Assembly with the partisan goal of perpetuating Republican control, that state lawmakers had deployed that intention “with surgical precision,” and that their efforts reflected “extreme outliers” of partisanship.¹³⁶ Accordingly, “it [was] the carefully crafted maps, not the will of the voters, that dictated the election outcomes in a significant number of legislative districts and, ultimately, (determined) the majority control of the General Assembly.”¹³⁷ Such purposeful and pervasive cheating, the judges held, violated the central tenets of the North Carolina Constitution.¹³⁸

Several weeks later, a North Carolina state court held that the state’s federal congressional districts represented unconstitutional political gerrymanders as well—taking the explicit step the United States Supreme Court had avoided in *Rucho*.¹³⁹ Eric Holder, former United States Attorney General, said that “[f]or nearly a decade, Republicans have forced the people of North Carolina to vote in districts that were manipulated for their own partisan advantage Now—finally—the era of Republican gerrymandering in the state is coming to an end.”¹⁴⁰

No doubt *Common Cause v. Lewis* is a direct political gerrymandering decision—saying, explicitly, that what the United States Supreme Court taught, enthusiastically, for seven decades, to be the demands of the equal protection clause in population and racial gerrymandering cases does not mysteriously disappear in partisanship cases. I’m convinced that no small part of the impetus for such a determination for judges actually witnessing political life in North Carolina was that concluding that the actions of an all-White legislative assembly, protecting its continuing efforts to carry forward an intensely racialized substantive legislative agenda, had little to do with race discrimination seemed too absurd. Simply a bridge too far. It might

¹³⁶ *Id.* at 7.

¹³⁷ *Id.*

¹³⁸ *Id.* at 10.

¹³⁹ *Harper v. Lewis*, No. 19 CVS 012667 (Wake Cnty. Super. Ct. Oct. 28, 2019). *See also* Will Doran, *New Maps Ordered for NC 2020 Congressional Races, in Win for Democrats*, NEWS & OBSERVER (Raleigh) (Oct. 28, 2019), <https://www.newsobserver.com/news/politics-government/article236752543.html>.

¹⁴⁰ *Id.*

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provide exquisite cover for Chief Justice Roberts and his *Rucho* colleagues—cover well and intentionally wrought. On race matters, after all, they seem to delight in exalting form over substance.¹⁴¹ On the ground in North Carolina, though, no one believes it. No one.

¹⁴¹ See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (invalidating essential enforcement mechanisms of the Voting Rights Act without realistic assessment of the impact on voting rights); *Parents Involved in Cmty. Schools v. Seattle School District*, 551 U.S. 701 (2007) (invalidating school integration steps undertaken by school districts without meaningful assessment of actual impact on opportunities for equal education).