# JUDGE WYNN AND THE ESSENTIAL SAFEGUARD OF INDEPENDENT FEDERAL JUDICIAL REVIEW*

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The Honorable James A. Wynn, Jr. is widely understood to be a tremendous federal judge.[1] In that capacity he has, of course, powerfully met the charge of Article III—implementing the judicial power in "all [c]ases . . . arising under this Constitution, the Laws of the United States and Treaties"[2]—to secure the uniform enforceability and accountability of federal legal mandates. Ironically, though, Judge Wynn's singular excellence, courage, and achievement cannot be accurately assessed without tying his legacy and his proficiency to a place—the State of North Carolina—as well as its strengths, challenges, history, and prospects.

Judge Wynn is not from one of North Carolina's metropolitan centers. Rather, he was born in Robersonville—a tiny town in eastern North Carolina's Martin County.[3] Even today, only about 1,400 people live in Robersonville.[4] Two-thirds of the residents are Black while a little less than a quarter are white.[5] As in much of eastern North Carolina, poverty levels are substantial and median incomes are modest.[6] After attending the University of North Carolina at Chapel Hill for his bachelor's degree and Marquette University for law school, Judge Wynn joined the Navy's Judge Advocate General Corps.[7] He served four years on active duty and twenty-six years in the Naval Reserve.[8] After



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1. One indication of that is Judge Wynn's selection by the New York University School of Law as the 2020 James Madison lecturer. The Madison Lecture is New York University School of Law's most notable public lecture series, launched in 1960 with Justice Hugo Black's famed First Amendment lecture on the categorical protection of freedom of speech. The Madison series has tapped an impressive array of U.S. Supreme Court Justices and circuit court judges. *See* NYU School of Law, *2020 James Madison Lecture: Judge James A. Wynn Jr.*, YOUTUBE (Nov. 6, 2020), https://www.youtube.com/watch?v=KpmfMNtFNiU [https://perma.cc/UC5K-VQ59].

2. U.S. CONST. art. III, § 2, cl. 1.

3. *Judge James Andrew Wynn*, U.S. CT. APPEALS FOR FOURTH CIR., https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-andrew [https://perma.cc/L5R6-HPDB].

4. *City and Town Population Totals: 2010-2019*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/data/tables/time-series/demo/popest/2010-total-cities-and-towns.html [http://perma.cc/Z637-BZA5].

5. *Robersonville, NC*, DATA USA, https://datausa.io/profile/geo/robersonville-nc [https://perma.cc/G2UC-BTL6].

6. *Id.*

7. *Judge James Andrew Wynn*, *supra* note 3.

8. *Id.*

completing his active duty, he returned to eastern North Carolina and practiced law in both Greenville and Wilson.[9] From 1990–2010 Judge Wynn served on the North Carolina Court of Appeals, spending 1998 as an Associate Justice on the Supreme Court of North Carolina.[10] In 2010, President Obama nominated him for appointment to the U.S. Court of Appeals for the Fourth Circuit.[11]

Judge Wynn is now likely known, at least in some circles, as a liberal jurist. But he did not come by the label easily, quickly, or ideologically. Like his famed Fourth Circuit predecessor, Dickson Phillips, Judge Wynn is an eastern North Carolinian. Judge Phillips haled from Lumberton, in Scotland County—like his lifelong friend Terry Sanford.[12] Both Judge Wynn and Judge Phillips show (or in Judge Phillips's case, showed) their heritage. More rural, perhaps, than urban. Plain spoken, non-elite, and familiar with the challenges of their region—poverty, race, economic hardship, broken opportunity, and often, shattered hope. Truth tellers. Both tough and fearless, yet serious—unwilling to long countenance bullies or pretenders.[13] Skilled, precise, careful, and rigorous lawyers—with an inspiring affection for the underdog and a piercing eye for repression and intolerance. Both definingly committed to the people of their state and to building what Frank Porter Graham[14] earlier called a "nobler and fresher civilization in this ancient commonwealth."[15]

I mentioned that Judge Wynn joined the Fourth Circuit in 2010. In retrospect, that may be seen as serendipity, or, perhaps more mystically, as an essential exercise of constitutional fate. But as I explain in next part, Judge Wynn's temporal ascendancy was paired with a decided, even dramatic, change in North Carolina government.[16] New legislative and executive ideologies and practices presented a cascade of constitutional challenges and accompanying foundational human rights battles for federal judicial tribunals to face over the next decade.

9. *Id.*

10. *Id.*

11. *Id.*

12. Terry Sanford was Governor of North Carolina from 1961–1965 and a U.S. Senator from North Carolina from 1987–1993. *See* HOWARD E. COVINGTON, JR. & MARION A. ELLIS, TERRY SANFORD: POLITICS, PROGRESS, AND OUTRAGEOUS AMBITION 18 (1999); *Gov. James Terry Sanford*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/james-terry-sanford/ [https://perma.cc/8YNE-U9FV].

13. Judge Phillips was also a veteran, having been a highly decorated World War II hero. *Judge James Dickson Phillips, Jr.: Early Life and Military Service*, UNC SCH. L. KATHRINE R. EVERETT L. LIBR. DIGIT. COLLECTION, http://phillip.law.unc.edu/early-life-and-military-service/ [http://perma.cc/6PS9-3WVR].

14. Frank Porter Graham was president of the University of North Carolina from 1930–1949. *See* WARREN ASHBY, FRANK PORTER GRAHAM: A SOUTHERN LIBERAL 97, 243, 247 (1980); WILLIAM A. LINK, FRANK PORTER GRAHAM: SOUTHERN LIBERAL, CITIZEN OF THE WORLD 54, 186 (2021).

15. ASHBY, *supra* note 14, at 66.

16. *See infra* Part I.

Judge Wynn and his colleagues' responses to such legal challenges ended up teaching a great deal, not only about the individual jurists involved but, perhaps more vitally, about the crucial importance and structural significance of independent, life-tenure-based, federal judicial review. Judge Wynn became not only an essential and articulate guarantor of our federal constitutional charter in North Carolina, but also a ready illustration of the wisdom of the claim in *Federalist No. 78* that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . . Without this, all the reservations of particular rights or privileges would amount to nothing."[17]

## I. NORTH CAROLINA TRANSFORMATION

As I hinted, the 2010 North Carolina General Assembly election marked something of a seismic political upheaval in the state. A weakened and scandal-plagued Democratic Party, the rise of an aggressive and energized Tea Party, massive campaign investments by conservative political donors, and perhaps most potently, a dramatic backlash to the election of Barack Obama, led to a dramatic Republican takeover of both houses of the General Assembly.[18] Two years later, Republican Pat McCrory defeated incumbent Democrat Bev Purdue in the governor's race, and veto-proof majorities were secured in both houses, giving the Republican Party unmolested control of all three branches of the North Carolina government for the first time since 1870.[19] A state long dominated by business-minded, moderate Democrats was, at least politically, turned upside down.[20] Changes quickly came.[21]

17. THE FEDERALIST NO. 78 (Alexander Hamilton).

18. *See* GENE NICHOL, INDECENT ASSEMBLY: THE NORTH CAROLINA LEGISLATURE'S BLUEPRINT FOR THE WAR ON DEMOCRACY AND EQUALITY 1–5 (2020).

19. *Id.* at 1.

20. *See* Kim Severson, *GOP's Full Control in Long Moderate North Carolina May Leave Lasting Stamp*, N.Y. TIMES (Dec. 11, 2012), https://www.nytimes.com/2012/12/12/us/politics/gop-to-take-control-in-long-moderate-north-carolina.html [https://perma.cc/3NPB-77S6 (dark archive)].

21. *See* NICHOL, *supra* note 18, at 1–2; Michael A. Fletcher, *In North Carolina, Unimpeded GOP Drives State Hard to the Right*, WASH. POST (May 25, 2013), https://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7_story.html [https://perma.cc/F2FG-H5XP (dark archive)]; David A. Graham, *How North Carolina Became the Wisconsin of 2013*, ATLANTIC (July 1, 2013), https://www.theatlantic.com/politics/archive/2013/07/how-north-carolina-became-the-wisconsin-of-2013/277007/ [https://perma.cc/FR92-TJKM (dark archive)]; Campbell Robertson, *North Carolinians Fear the End of a Middle Way*, N.Y. TIMES (Aug. 14, 2013), https://www.nytimes.com/2013/08/14/us/north-carolinians-fear-the-end-of-a-middle-way.html [https://perma.cc/H84U-T7MB (dark archive)]. *See generally* NC POL'Y WATCH, ALTERED STATE: HOW FIVE YEARS OF CONSERVATIVE RULE HAVE REDEFINED NORTH CAROLINA (2015) [hereinafter ALTERED STATE], https://www.ncpolicywatch.com/wp-content/uploads/2015/12/NC-Policy-Watch-Altered-State-How-5-years-of-conservative-rule-have-redefined-north-carolina-december-2015.pdf [https://perma.cc/JZA4-Z8Q9] (describing changes in North Carolina in the five years following the Republican takeover of the North Carolina General Assembly).

To illustrate,[22] strict voting regulations, seemingly aimed at curtailing voter turnout, were quickly enacted.[23] A path-breaking Racial Justice Act was repealed.[24] New and expansive school voucher programs that provided support for private and religious schools were created.[25] Stringent, sometimes demeaning, abortion limitations were passed.[26] New firearm possession and

22. *See generally* ALTERED STATE, *supra* note 21 (describing drastic policy changes in North Carolina during the five years that conservatives had control of the state government); Dan T. Carter, *North Carolina: A State of Shock*, S. SPACES (Sept. 24, 2013), https://southernspaces.org/2013/north-carolina-state-shock/ [https://perma.cc/JL74-N8M3] (discussing right-wing policies adopted by the North Carolina legislature under Governor Pat McCrory).

23. Linda Killian, *The Republican Push To Make It Harder To Vote*, ATLANTIC (Aug. 2, 2013), https://www.theatlantic.com/politics/archive/2013/08/the-republican-push-to-make-it-harder-to-vote/278289/ [https://perma.cc/4EGX-YH6S (dark archive)]; Richard L. Hasen, Opinion, *Voter Suppression's New Pretext*, N.Y. TIMES (Nov. 15, 2013), https://www.nytimes.com/2013/11/16/opinion/voter-suppressions-new-pretext.html [https://perma.cc/8G8W-CRJ9]; Rachel Weiner, *North Carolina Lawmakers Aim To Cut Early Voting*, WASH. POST (July 2, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/07/23/north-carolina-lawmakers-aim-to-cut-early-voting/ [https://perma.cc/9WL6-RA98 (dark archive)]; Abby Ohlheiser, *North Carolina's Voter ID, Abortion Bills Pass the Legislature*, ATLANTIC (July 25, 2013), https://www.theatlantic.com/politics/archive/2013/07/north-carolinas-voter-id-abortion-bills-pass-legislature/312833/ [https://perma.cc/5L3W-DDG9 (dark archive)]; William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html [https://perma.cc/22YQ-4GSW (dark archive)]; Chris Kardish, *How North Carolina Turned So Red So Fast*, GOVERNING (June 26, 2014), https://www.governing.com/archive/gov-north-carolina-southern-progressivism.html [https://perma.cc/FTY4-MYB9].

24. Matt Smith, *"Racial Justice Act" Repealed in North Carolina*, CNN (June 21, 2013, 3:48 AM), https://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/index.html [https://perma.cc/5KQC-HJXA].

25. Greg Childress, *Republicans, Education Advocates Square Off Again Over Expanding Private School Voucher Program*, NC POL'Y WATCH (May 15, 2019), https://ncpolicywatch.com/2019/05/15/republicans-education-advocates-square-off-again-over-expanding-private-school-voucher-program [https://perma.cc/JAN9-8TUC]; Ned Barnett, *Three Out of Four N.C. Voucher Schools Fail on Curriculum*, NEWS & OBSERVER (June 3, 2018), https://www.newsobserver.com/article212352824.html [https://perma.cc/B9SH-4LAB (staff-uploaded, dark archive)].

26. Aaron Blake, *North Carolina Joins Push for Abortion Restrictions, McCrory Balks*, WASH. POST (July 3, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/07/03/north-carolina-joins-push-for-abortion-restrictions/ [https://perma.cc/MX2N-EMC8 (dark archive)]; Mary C. Curtis, *Abortion Restrictions in North Carolina Senate Bill Set Up Political, Moral Standoff*, WASH. POST (July 5, 2013), https://www.washingtonpost.com/blogs/she-the-people/wp/2013/07/05/abortion-restrictions-in-north-carolina-senate-bill-set-up-political-moral-standoff/ [https://perma.cc/HQ4B-WCHB (dark archive)]; Alan Blinder, *North Carolina House Passes New Restrictions on Abortion*, N.Y. TIMES (July 11, 2013), https://www.nytimes.com/2013/07/12/us/north-carolina-house-passes-new-restrictions-on-abortion.html [https://perma.cc/62RQ-36H5 (dark archive)]; Reuters, *U.S. Court Strikes Down North Carolina Ultrasound Abortion Law*, N.Y. TIMES (Dec. 22, 2014), https://www.nytimes.com/2014/12/23/us/us-court-strikes-down-north-carolina-ultrasound-abortion-law.html [https://perma.cc/P5BT-JP5U (dark archive)]; Robert Barnes, *Supreme Court Lets Stand Ruling That Struck Down N.C. Abortion Law*, WASH. POST (June 15, 2015), https://www.washingtonpost.com/politics/supreme-court-lets-stand-ruling-that-struck-down-nc-abortion-law/2015/06/15/42fe66fa-1363-11e5-89f3-61410da94eb1_story.html [https://perma.cc/RM59-L9QG (dark archive)].

carry rights were guaranteed,[27] while teacher protections for tenure and collective representation were significantly diminished.[28] Both K–12 and higher education budgets were decidedly cut.[29] Purportedly "business-friendly" environmental regulations replaced allegedly onerous ones.[30] Anti-gay-rights measures were enthusiastically adopted. An internationally derided anti-transgender "bathroom bill" sparked boycotts across the country, and the planet.[31] Brutal cuts to an array of social programs, aimed at the poorest Tar Heels, were initiated. A stubborn, and apparently defining, opposition to the federal Affordable Care Act[32] and its proffered expansion of Medicaid was repeatedly demonstrated.[33] Despite soaring contemporary unemployment rates, lawmakers passed one of the largest cuts to a state unemployment compensation program in American history.[34] They then repealed the state's earned income

27. Kirk Ross, *Extremes Avoided in New N.C. Gun Laws*, CAROLINA PUB. PRESS (Dec. 8, 2015), https://carolinapublicpress.org/23815/extremes-avoided-in-new-nc-gun-laws/ [https://perma.cc/F6FZ-4KTA].

28. Mark Binker, *Supreme Court Upholds Tenure Rights for Veteran Teachers*, WRAL.COM (Apr. 15, 2016, 6:55 PM), https://www.wral.com/supreme-court-upholds-tenure-rights-for-veteran-teachers/15644048/ [https://perma.cc/UXM6-S3YC].

29. Sarah Ovaska-Few, *UNC System at Risk*, *in* ALTERED STATE, *supra* note 21, at 28, 29.

30. Derb Carter, *Smoke in the Water*, N.Y. TIMES (June 2, 2014), https://www.nytimes.com/2014/06/03/opinion/smoke-in-the-water.html [https://perma.cc/4TAZ-FUUE (dark archive)].

31. Motoko Rich, *North Carolina Gay Bias Law Draws a Sharp Backlash*, N.Y. TIMES (Mar. 28, 2016), https://www.nytimes.com/2016/03/25/us/north-carolina-law-antidiscrimination-pat-mccrory.html [https://perma.cc/XBR5-5VEH (dark archive)]; David Graham, *The Business Backlash to North Carolina's LGBT Law*, ATLANTIC (Mar. 25, 2016), https://www.theatlantic.com/politics/archive/2016/03/the-backlash-to-north-carolinas-lgbt-non-discrimination-ban/475500/ [https://perma.cc/763V-A4MQ (dark archive)]; Editorial, *Transgender Law Makes North Carolina Pioneer in Bigotry*, N.Y. TIMES (Mar. 25, 2016), https://www.nytimes.com/2016/03/25/opinion/transgender-law-makes-north-carolina-pioneer-in-bigotry.html [https://perma.cc/C383-H2BR (dark archive)]; Niraj Chokshi, *San Francisco Mayor Bars City Workers' Travel to North Carolina Over Transgender Bathroom Law*, WASH. POST (Mar. 26, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/26/san-francisco-mayor-bars-city-workers-travel-to-north-carolina-over-transgender-bathroom-law/ [https://perma.cc/6ANH-RQJ3 (dark archive)]; Tim Bontemps, *Built on Inclusiveness, NBA Had To Move the All-Star Game from North Carolina*, WASH. POST (July 21, 2016), https://www.washingtonpost.com/news/sports/wp/2016/07/21/built-on-inclusiveness-nba-had-to-move-the-all-star-game-from-north-carolina/ [https://perma.cc/SGY9-RKCK (dark archive)]; Editorial, *North Carolina Pays a Price for Bigotry*, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/21/opinion/north-carolina-pays-a-price-for-bigotry.html [https://perma.cc/C7N4-23YB (dark archive)].

32. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 29, and 42 U.S.C.).

33. *See* Chris Fitzsimon, *The Follies (of McCrory's Maddening Meanderings on Medicaid)*, NC POL'Y WATCH (July 17, 2015), https://ncpolicywatch.com/2015/07/17/the-follies-of-mccrorys-maddening-meanderings-on-medicaid/ [https://perma.cc/QKS3-N6Q8].

34. Robbie Brown, *North Carolina Approves Steep Benefit Cuts for Jobless in Bid To Reduce Debt*, N.Y. TIMES (Feb. 13, 2013), https://www.nytimes.com/2013/02/14/us/north-carolina-approves-benefit-cuts-for-unemployed.html [https://perma.cc/U789-TYT2 (dark archive)]; NICHOL, *supra* note 18, at 36.

tax credit.[35] Generous tax cuts for wealthy Tar Heels and corporations were accompanied by, astonishingly, tax increases for low income workers.[36] *The Washington Post* and other national publications opined that the new Republican Governor and General Assembly were turning back fifty years of progress on civil rights and gutting the state's social safety net.[37]

The entire package of substantive changes was safeguarded by perhaps the most aggressive racial and political gerrymandering schemes ever witnessed in the United States.[38] Direct and repeated attacks on the independence of the North Carolina courts and, thus, the rule of law itself, were enacted.[39] Rarely seen intrusions on local government prerogatives and elections appeared.[40] And seemingly retaliatory violations of long-established boundaries of separation of powers weakened the authorities and responsibilities of political adversaries.[41] Democracy itself was said to be under siege. Powerful Senate leader Ralph Hise boasted that by 2016, the North Carolina General Assembly had amassed "the

35. Leoneda Inge, *N.C. Says Good-Bye to Earned Income Tax Credit, Only State To Do So in 30 Years*, N.C. PUB. RADIO (Mar. 15, 2014), https://www.wunc.org/politics/2014-03-15/nc-says-good-bye-to-earned-income-tax-credit-only-state-to-do-so-in-30-years [https://perma.cc/GSZ7-J772].

36. NICHOL, *supra* note 18, at 37–38.

37. *See* Mary Curtis, *Is North Carolina Moving Backward on Civil Rights?*, WASH. POST (May 23, 2013), http://www.washingtonpost.com/blog/she-the-people/wp/2013/05/23/is-north-carolina-moving-backward-on-civil-rights/ [https://perma.cc/5KPD-VM66 (dark archive)]; *In North Carolina, Unimpeded GOP Drives State Hard to the Right*, WASH. POST (May 26, 2013), https://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7_story.html [https://perma.cc/Z3YS-MW8Q (dark archive)]; Editorial, *The Decline of North Carolina*, N.Y. TIMES (July 9, 2013), https://www.nytimes.com/2013/07/10/opinion/the-decline-of-north-carolina.html [http://perma.cc/HW5Z-9H9K] [hereinafter *The Decline of North Carolina*].

38. David Graham, *North Carolina's Deliberate Disenfranchisement of Black Voters*, ATLANTIC (July 29, 2016), https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/ [https://perma.cc/D29C-QL4L]; Christopher Ingraham, *America's Most Gerrymandered Congressional Districts*, WASH. POST (May 18, 2013), https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/ [https://perma.cc/A8GL-V2QD (dark archive)]; Editorial, *Racial Gerrymandering in North Carolina*, N.Y. TIMES (Feb. 18, 2016), https://www.nytimes.com/2016/02/18/opinion/racial-gerrymandering-in-north-carolina.html [https://perma.cc/CA4H-BAWN (dark archive)].

39. NICHOL, *supra* note 18, at 108.

40. Matthew Burns, Julia Sims & Mark Binker, *Appeals Court Tosses District Maps for Wake County Commissioners, School Board*, WRAL.COM (July 1, 2016), https://www.wral.com/appeals-court-tosses-district-maps-for-wake-commissioners-school-board/15821358 [https://perma.cc/9ZME-GSWR]; Editorial, *GOP Changes Wake Voting Districts to Its Liking*, NEWS & OBSERVER (Apr. 1, 2015, 7:48 PM), https://www.newsobserver.com/opinion/editorials/article17155607.html [https://perma.cc/C9WW-SV7F (staff-uploaded, dark archive)].

41. Editorial, *North Carolina's Sore Loser*, N.Y. TIMES (Feb. 18, 2016), https://www.nytimes.com/2016/11/30/opinion/north-carolinas-sore-loser.html [https://perma.cc/DEE4-QET6 (dark archive)]; Amber Phillips, *Amid Outcry, N.C. Passes Law To Curb Democratic Governor's Power*, WASH. POST (Dec. 18, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/16/amid-growing-outcry-nc-gop-pushes-forward-with-plan-to-curb-democratic-govs-power/ [https://perma.cc/X8HD-B4M5 (dark archive)].

most conservative record of any state legislature in the nation."[42] The dean of North Carolina political writers, Rob Christensen, wrote that "'[t]here's been a bigger and quicker shift to the right here than in any other state in the country.'"[43]

But, as is perhaps obvious, the changes ushered in by the North Carolina General Assembly from 2010–2020 were not mere policy shifts. Much of the legislature's agenda posed real and potent tensions with the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[44] Beyond that, foundational safeguards of democratic decision-making, limited government and appropriately separated powers were called into question. The fundamentals of constitutional government—even perhaps our governing social compact itself—seemed to have become frayed.[45] Unsurprisingly, litigation, especially in the federal courts, consistently arose.[46] A cascade of statutes were subsequently invalidated.[47] Judge Wynn played perhaps the judiciary's most visible, vital, eloquent, and courageous role in helping to secure the essential protections of constitutional governance from assault by the North Carolina General Assembly. I will, in the part that follows, briefly highlight some of the most notable examples.

## II. JUDGE WYNN AND THE RIGHT OF EQUAL POLITICAL PARTICIPATION

It is not realistic to speak meaningfully, or at least extensively, of a judge's ten-year legacy in an essay of a few thousand words. Instead, I focus on a single front of Judge Wynn's judicial intervention: his efforts to safeguard rights of equal political participation and representation against repeated legislative assault. I will explore three modestly famous Judge Wynn opinions aimed at securing the right to vote and equal access to the political process, free from partisan or race-based onslaught. *Covington v. North Carolina* (*Covington I*)[48]

42. Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html [https://perma.cc/2Z89-9NRL (dark archive)].

43. *Id.*

44. *See generally* NICHOL, *supra* note 18 (arguing that various transgressions of the North Carolina General Assembly have violated the Fourteenth Amendment).

45. Fletcher, *supra* note 21.

46. *The Decline of North Carolina*, *supra* note 37; Karen L. Cox, *What's the Matter with North Carolina?*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/opinion/whats-the-matter-with-north-carolina.html [https://perma.cc/LU8Z-V3FK (dark archive)]; Zengerle, *supra* note 42.

47. Rob Schofield, Editorial, *List of NC Laws Struck Down as Unconstitutional Continues To Grow*, NC POL'Y WATCH (Aug. 1, 2016), http://pulse.ncpolicywatch.org/2016/08/01/editorial-list-of-nc-laws-struck-down-as-unconstitutional-continues-to-grow/#sthash.VO524cI0.dpbs [https://perma.cc/MN7Q-68XA]; Capitol Broad. Co., Opinion, *Legal Scorecard: Constitution-6 and N.C. Legislature-0*, WRAL.COM (Aug. 1, 2016, 5:39 AM), https://www.wral.com/editorial-legal-scorecard-constitution-6-and-n-c-legislature-0/15892871/ [https://perma.cc/V75M-MR48].

48. 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

ruled invalid the North Carolina General Assembly's 2011 state redistricting plan as impermissible race discrimination.[49] A second Judge Wynn *Covington v. North Carolina* opinion (*Covington II*)[50] refused to stay a federal enforcement decree in the face of state redistricting recalcitrance.[51] And in *Common Cause v. Rucho*,[52] Judge Wynn held invalid a congressional redistricting scheme passed by the North Carolina legislature, finding it to be unconstitutional political gerrymandering.[53]

It is a short list, to be sure. But it is a powerful one. And, if it is any consolation, the opinions are, inevitably, exceedingly long undertakings. They are as extensive as they are eloquent. Other cases could also be chosen, no doubt, to illustrate Judge Wynn's potent commitment to equality.[54] But I think it is fair to say that no other set of opinions so directly confronts the essentials of equal citizen participation and dignity in a democratic society. None touch so profoundly the foundational American notion of government by the consent of the governed. None calls to task, so overtly, legislative efforts to restrict the full membership of segments of North Carolina society. And none shows, quite so explicitly, the necessity for federal judicial independence from legislative interference and intimidation—if foundational constitutional protections are to be meaningfully protected and ensured.

49. *Id.* at 176.

50. 270 F. Supp. 3d. 881 (M.D.N.C. 2017).

51. *Id.* at 887.

52. 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

53. *Id.* at 923. Judge Wynn's ruling was eventually overturned, of course, by the U.S. Supreme Court on jurisdictional grounds. *Rucho*, 139 S. Ct. at 2508. However, Judge Wynn's ruling was subsequently adopted by the North Carolina courts in enforcing the state constitution. Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019).

54. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 604 (4th Cir. 2017) (Wynn, J., concurring) (upholding an injunction against enforcement of President Trump's Executive Order 13780 placing limits on travel to the United States from certain countries), *vacated*, 138 S. Ct. 353 (2017); *see also* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 620 (4th Cir. 2020) (Wynn, J., concurring) (ruling in favor of a transgender boy prohibited from using the boys restroom). In *Grimm*, Judge Wynn wrote,

> [T]he board's classification on the basis of "biological gender"—defined in this appeal as the sex marker on a student's birth certificate—is arbitrary and provides no consistent reason to assign transgender students to bathrooms on a binary male/female basis. Rather, the Board's use of "biological gender" to classify students has the effect of shunting individuals like Grimm—who *may not* use the boys bathrooms because of the "biological gender," and who *cannot* use the girls' bathrooms because of their gender identity—to a third category of bathroom altogether: . . . "students with gender identity issues." That is indistinguishable from the sort of separate-but-equal treatment that is an anathema under our jurisprudence.

972 F.3d at 620 (Wynn, J., concurring).

A. Covington I

An array of plaintiffs challenged the North Carolina General Assembly's 2011 state House and Senate redistricting plans in *Covington I*.[55] The challengers claimed that nearly thirty districts were fashioned, without constitutional justification, predominantly on the basis of race.[56] Judge Wynn wrote the opinion for a three-judge federal tribunal concluding that the evidence showed all the contested districts were crafted with race as "the predominant motivation,"[57] and because the state had "failed to demonstrate that [its] predominant use of race was "reasonably necessary to further a compelling state interest," the districting plans "constitute[d] racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution."[58] Perhaps most notably, the Supreme Court of North Carolina had earlier upheld the districting schemes in a similar action.[59]

Judge Wynn wrote that the "statewide numerical target was based on race" and drove the outcome of the districting plan rather than traditional race-neutral principles, including compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests.[60] All such criteria, Judge Wynn concluded, "were 'subordinated . . . to racial considerations.'"[61]

Unsurprisingly, Judge Wynn indicated that "[r]acial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'"[62] The defendants had not shown that the challenged districts "were narrowly tailored to comply with either Section 2 or Section 5" of the Voting Rights Act.[63] Instead, all twenty-eight districts were racial gerrymanders constituting direct constitutional violations. Pursuant to their terms, the creation of the districts had already worked substantial and continuing "stigmatic and representational injuries" to the plaintiffs, thus requiring the state plan's invalidation. [64]

Turning to remedy, however, Judge Wynn noted that the "next general elections for the North Carolina House and Senate are scheduled to take

55. *Covington I*, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

56. *Id.* at 128.

57. *Id.* at 154.

58. *Id.* at 124.

59. *See* Dickson v. Rucho, 368 N.C. 481, 485–86, 781 S.E.2d 404, 410–11 (2015), *vacated*, 137 S. Ct. 2186 (2017).

60. *Covington I*, 316 F.R.D. at 134–37.

61. *Id.* at 138 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

62. *Id.* at 166 (citing Shaw v. Hunt, 517 U S. 899, 907 (1996)).

63. *Id.* at 176.

64. *Id.* at 176–77.

place . . . less than three months from now."[65] Thus a careful, if unfortunate balance was demanded. So, "[a]fter careful consideration, and with much reluctance," he determined to allow the November 2016 elections to proceed as scheduled under the challenged plans, despite their unconstitutionality.[66] To do otherwise, Judge Wynn determined, "would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials."[67]

Nevertheless, Judge Wynn's opinion castigated North Carolina lawmakers: "[O]ur holding today is attributable primarily to the explicit and undisputed methods that the General Assembly employed in the construction of these districts."[68] As a result,

> Plaintiffs, and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from Defendants' creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause. These citizens are entitled to swift injunctive relief. Therefore, we hereby order the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans.[69]

## B. Covington II

A little over a year later, Judge Wynn and other members of a three-judge panel, revisited the remedial issue in *Covington I*.[70] In the meantime, the U.S. Supreme Court had summarily affirmed *Covington I* on the merits.[71] Launching the opinion, Judge Wynn wrote:

> Now, nearly a year after this Court held the challenged legislative districts unconstitutional and almost six years after those districts were initially put in place—during which time North Carolina has conducted three primary and three general elections using racially discriminatory districting plans—Plaintiffs ask this Court to truncate the terms of legislators serving in districts that must be redrawn and order a special election to fill those seats with representatives elected under constitutional districting plans.[72]

65. *Id.* at 177.
66. *Id.*
67. *Id.*
68. *Id.* at 178.
69. *Id.* at 177.
70. *See Covington II*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).
71. North Carolina v. Covington, 137 S. Ct. 2211 (2017) (mem.).
72. *Covington II*, 270 F. Supp. 3d at 884.

Echoing the findings of *Covington I*, Judge Wynn indicated that "the widespread, serious, and longstanding nature of the constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—counsels in favor of granting the Plaintiffs' request."[73] He was careful to note that "the Legislative Defendants have otherwise acted in ways that indicate they are more interested in delay than they are in correcting this serious constitutional violation."[74] Still, ultimately the court denied the request for shortened terms and a special election:

> We recognize that legislatures elected under the unconstitutional districting plans have governed the people of North Carolina for more than four years and will continue to do so for more than two years *after* this Court held that the districting plans amount to unconstitutional racial gerrymanders. But at this juncture, with only a few months before the start of the next election cycle, we are left with little choice but to conclude that a special election would not be in the interest of Plaintiffs nor the people of North Carolina.[75]

Judge Wynn, however, probed deeply the nature, and impact, of the North Carolina General Assembly's constitutional transgressions:

> The unconstitutional districting plans, therefore, implicate both the right to vote and the Constitution's prohibition on state governments' unjustified use of race-based classifications. . . . [T]he Supreme Court has long recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." As the Supreme Court has emphasized, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." . . . Accordingly, because the right to vote is "preservative of all rights," any infringement on that right . . . strikes at the heart of the substantive rights and privileges guaranteed by our Constitution.[76]

Judge Wynn concluded that the "persistent and malignant effects" of the General Assembly's impermissible redistricting plan "extend well beyond the voting booth."[77] First, reapportionment plans that "group individuals who belong to the same race, but who are otherwise widely separated by geographical

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 890 (citations omitted) (first quoting Reynolds v. Sims, 377 U.S. 533, 555, 562 (1964); then quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

77. *Id.* at 891.

and political boundaries . . . bear[] an uncomfortable resemblance to political apartheid."[78] Second, such suspect inferences place an "official imprimatur" that also "cause[s] society serious harm."[79] And third, these harms, which begin with enactment of the maps, "are inflicted again and again . . . in each subsequent election cycle . . . by putting into office legislators acting under a cloud of constitutional illegitimacy."[80]

The court then rejected, with no small fervor, the main defenses proffered by the legislators:

> Defendants . . . [argue] against ordering a special election because "[t]he constitutional violation, at a minimum, is certainly subject to rational disagreement." That is patently wrong. There is no "rational disagreement" as to whether the districting plans at issue in this case violated the Constitution. This Court *unanimously* held that the challenged districts violate the Constitution. The Supreme Court affirmed that conclusion *without argument and without dissent*. And the Supreme Court *unanimously* held that Senator Rucho and Representative Lewis incorrectly believed that the Voting Rights Act required construction of majority-minority districts, even when members of the minority group historically had been able to elect the candidate of their choice . . . —precisely the same errant belief that rendered unconstitutional the district plans at issue here. Thus, there is no disagreement between this Court's and the Supreme Court's conclusion that the challenged districts are unconstitutional racial gerrymanders.[81]

Nor would Wynn give credence to the General Assembly's odd argument that its found violations were, in effect, "too big to remedy."[82] That theory, Wynn chided, would "provide a perverse incentive to state legislatures that choose to engage in unjustified race-based districting to do so as pervasively as possible so as to insulate their . . . plans from effective judicial relief."[83]

And maybe most importantly, Judge Wynn and his colleagues emphasized the foundational nature of the lawmakers' legal transgressions:

> The widespread scope of the constitutional violation at issue—unjustifiably relying on race to draw lines for legislative districts encompassing the vast majority of the state's voters—also means that the districting plans intrude on popular sovereignty. Because the vote is both the mechanism through which the people delegate their sovereignty to elected officials and the mechanism by which the people ensure that

78. *Id.* (citing Shaw v. Reno, 509 U.S. 630, 657 (1993)).
79. *Id.*
80. *Id.*
81. *Id.* at 891–92 (citations omitted).
82. *Id.* at 892.
83. *Id.*

> elected officials "have 'an habitual recollection of their dependence on the people' . . . ."[84]

Ironically perhaps, the state legislators' breach of undergirding norms of consent of the governed, the court concluded, cautioned against a rushed, perhaps confusing, electoral process. North Carolinians are "most likely to regain the representation by constitutionally elected legislators that they have long been denied," Judge Wynn wrote, "through a vigorously contested election, . . . with a fully energized and engaged electorate."[85]

It is perhaps no surprise that Anita Earls,[86] lead attorney for the plaintiffs, said that despite the rejection of a requested special election, she "took great encouragement from (the court's) recognition of the severity of the violations" and the potent harm already inflicted on North Carolina's wounded democracy.[87]

## C. Common Cause v. Rucho

The U.S. Supreme Court ruling in *Rucho v. Common Cause* famously recast the political question jurisdictional doctrine to conclude that political gerrymandering disputes are nonjusticiable.[88] I concentrate here, however, on Judge Wynn's opinion for a three-judge tribunal that was ultimately, on jurisdictional grounds, reversed in the high court determination. I do so for two reasons. First, the preliminary Judge Wynn determination was steeped deeply in the challenges to democracy presented by the repeated gerrymandering crusades of the North Carolina General Assembly. It is my belief that the Judge Wynn ruling on the merits of the political gerrymandering dispute, like Justice Kagan's powerful dissent in *Rucho*,[89] will better stand the test of time than Chief Justice Roberts' purportedly deferential political question determination. Second, and perhaps more relevant to this Essay, Judge Wynn's opinion was subsequently largely adopted by the state courts in North Carolina as the measure of political gerrymandering under the state constitution.[90] As such, it stands as a bold testament, even if of more limited geographical reach, to the effective use of studied judicial review in the protection of democratic decision-

84. *Id.* at 897 (citations omitted) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015)).

85. *Id.* at 902.

86. Now a justice of the Supreme Court of North Carolina. *Anita Earls*, N.C. JUD. BRANCH, https://www.nccourts.gov/judicial-directory/anita-earls [https://perma.cc/45U7-JVSN].

87. Gene Nichol, Opinion, '. . . *To Return to the People of North Carolina Their Sovereignty*,' NEWS & OBSERVER (Sept. 30, 2017, 10:30 AM), https://www.newsobserver.com/opinion/op-ed/article176126646.html [https://perma.cc/UPB4-XB8B (staff-uploaded, dark archive)].

88. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

89. *See id.* at 2509–25 (Kagan, J., dissenting).

90. Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019).

making from ambitious and equality-defying legislative overreach. Judge Wynn's opinion thus constitutes a notable marker of both judicial obligation and challenge.

In *Rucho*, two groups of plaintiffs challenged North Carolina's 2016 congressional redistricting plan.[91] The litigants claimed, broadly, that the state's aggressive political gerrymander, reflected in the 2016 plan, violated not only the Equal Protection Clause, but the First Amendment and Article I as well.[92] Judge Wynn's opinion concluded that several of the plaintiffs had appropriate standing,[93] that the political gerrymandering was justiciable,[94] and that, on the merits, the enacted redistricting plan violated the Constitution.[95] I focus here on the opinion's political equality determination—most vitally, Judge Wynn's determination that "the Constitution does not allow elected officials to enact laws that distort the marketplace of political ideas so as to intentionally favor certain political beliefs, parties, or candidates and disfavor others. . . . [The Constitution] bars the States from enacting election regulations that 'dictate electoral outcomes' or 'favor or disfavor a class of candidates.'"[96]

Admittedly, the *Rucho* case presented an extraordinary set of facts. The legislative defendants drew a plan to purposefully subordinate the interests of non-Republican voters "not because they believe doing so advances any democratic, constitutional, or public interest," Judge Wynn found, "but because, as the chief legislative mapdrawer openly acknowledged, the *General Assembly's Republican majority* 'think[s] electing Republicans is better than electing Democrats.'"[97] "Representative Lewis and Senator Rucho's 'primar[y] goal' in drawing new districts was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office,'" Judge Wynn concluded.[98] Conversely, he indicated, they sought "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate."[99] No hidden ball here. Reminding of the larger context, Judge Wynn noted: "[W]ith both chambers of the North Carolina General Assembly still controlled by Republicans—and elected under one of the most widespread racial gerrymanders ever confronted by a federal court—Representative Lewis

91. Common Cause v. Rucho, 318 F. Supp. 3d 777, 810 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

92. *Id.*

93. *Id.* at 799.

94. *Id.*

95. *Id.* at 800.

96. *Id.* (citations omitted) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995)).

97. *Id.* at 801 (quoting Representative Lewis's remarks during a debate over the 2016 plan in the North Carolina House of Representatives).

98. *Id.* at 803 (alteration in original) (quoting the deposition of Republican political strategist Dr. Thomas B. Hofeller).

99. *Id.* (quoting the deposition of Republican political strategist Dr. Thomas B. Hofeller).

and Senator Rucho again took charge of drawing the remedial districting plan."[100]

They admitted, freely, "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage."[101] Representative Lewis said he proposed the maps "to give a partisan advantage to 10 Republicans and 3 Democrats because [he did] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats."[102]

Unsurprisingly, for Judge Wynn, such a scheme of effective disenfranchisement could not be squared with the U.S. Constitution. He wrote:

> The Equal Protection Clause prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Partisan gerrymandering runs afoul of the Equal Protection Clause because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party. Put differently, a redistricting plan violates the Equal Protection Clause if it "serve[s] *no purpose* other than to favor one segment—whether racial, ethnic, religious, economic or *political*—that may occupy a position of strength . . . or to disadvantage a politically weak segment." [103]

The court found further that "the record reflects a wealth of statewide evidence prov[ing] the General Assembly's predominant intent to 'subordinate' the interests of non-Republican voters and 'entrench' Republican domination of the state's congressional delegation."[104] Even the "plain language of the 'Partisan Advantage' criterion" of the enacted scheme "reflect[ed] an express legislative intent to discriminate—to favor voters who support Republican candidates and subordinate the interests of voters who support non-Republican candidates."[105] The court found that the "Plaintiffs' statewide evidence proves that the 2016 Plan dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office."[106] Accordingly, the court enjoined the state "from

100. *Id.* at 805 (citations omitted).

101. *Id.* at 808 (alteration in original) (quoting Representative Lewis's explanation of the "Partisan Advantage" criterion to the House Redistricting Committee).

102. *Id.* (quoting Representative Lewis's explanation of the "Partisan Advantage" criterion to the House Redistricting Committee).

103. *Id.* at 860–61 (citations omitted) (first quoting U.S. CONST. amend. XIV; then quoting Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).

104. *Id.* at 868.

105. *Id.* at 869 (emphasis omitted).

106. *Id.* at 884.

conducting any elections using the 2016 Plan in any election after the November 6, 2018, election."[107]

Judge Wynn was candid in his assessment of the continuing suppressive antics of the North Carolina General Assembly:

> [I]n *Covington* the Supreme Court held that several proposed remedial state legislative districts drawn by the General Assembly . . . carried forward the racial gerrymandering that rendered the original versions of the districts unconstitutional, raising legitimate questions regarding the General Assembly's capacity or willingness to draw constitutional remedial districts. And during the intervening months, the General Assembly has enacted a number of pieces of election-related legislation that federal and state courts have struck down as unconstitutional, further calling into question the General Assembly's commitment to enacting constitutionally compliant, nondiscriminatory election laws. Most significantly, additional time has passed. We continue to lament that North Carolina voters now have been deprived of a constitutional congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles. . . . To that end, . . . we will not consider a remedial districting plan enacted by the General Assembly after 5 p.m. on September 17, 2018. . . . "[T]he 'eleventh hour' is upon us, if indeed it has not already passed."[108]

## III. CHECKING AN INTENTIONALLY LAWLESS GENERAL ASSEMBLY

To understate, Judge Wynn's words are exceptionally powerful. I'm much inclined to leave them uncommented upon, without more. One hates to break the mood. But this being an academic paper, I am perhaps obliged to classify and categorize. So, even at the risk of diminishing the poetry, I will make a few comments about the strength and insight of Judge Wynn's language. If only to briefly demonstrate how notably they rise to meet the challenge presented—a continuing, pervasive, deeply biased legislative crusade to undermine foundational democratic norms and processes in order to entrench partisan incumbent political power.

First, Judge Wynn's political equality rulings identify and frame the core issues presented with straight talk—an unadorned description of what the legislature had done and why it had done it. *Covington I* challenged a districting plan encompassing a "statewide numerical target [] based on race" subordinating "traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions."[109] This was, he added, work

107. *Id.* at 942.

108. *Id.* at 943–44 (citations omitted).

109. *Covington I*, 316 F.R.D. 117, 134, 137 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

"antithetical to the Fourteenth Amendment."[110] As a result, "Plaintiffs, and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from Defendants' creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause."[111] The North Carolina Supreme Court's earlier divided ruling, perhaps bending to its political benefactors, reiterated the superior court's memorandum:

> Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . . Political losses and partisan disadvantage are not the proper subject for judicial review . . . . Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights—not their political rights or preferences—are secure.[112]

Second, and as important, Judge Wynn directly links the North Carolina General Assembly's voting rights transgressions to the very foundations of the American democratic experiment. In *Covington II*, Judge Wynn made plain "that the widespread, serious, and longstanding nature of the constitutional violation—among the largest racial gerrymanders ever encountered by a federal court"[113] dislodged the essential premise of self-government in the Tar Heel State:

> The widespread scope of the constitutional violation . . . also means that the districting plans intrude on popular sovereignty. . . . [T]he vote is both the mechanism through which the people delegate their sovereignty to elected officials and the mechanism by which people ensure that elected officials "have 'an habitual recollection of their dependence on the people'" . . . . [The legislature] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable.[114]

The General Assembly's bold moves to entrench their authorities were not, as had been claimed by the Supreme Court of North Carolina, merely the acceptable give-and-take of electoral politics. They worked to crush the norms and legitimacy of representative democracy.

Third, and perhaps most illuminating, Judge Wynn's political equality rulings eventually demonstrated the defining and essential independence of life-tenured federal judges in the face of legislative recalcitrance and abuse.

110. *Id.* at 166 (quoting Shaw v. Hunt, 517 U.S. 899, 907 (1996)).

111. *Id.* at 177.

112. Dickinson v. Rucho, 368 N.C. 481, 493, 781 S.E.2d 404, 415 (2015), *vacated*, 137 S. Ct. 2186 (2017) (quoting Judgment & Memorandum of Decision at 4, Dickinson v. Rucho, No. 11 CVS 16896 (N.C. Super. Ct. July 8, 2013)).

113. *Covington II*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

114. *Id.* at 897 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015)).

*Covington II* founded its determination on the recognition of the "persistent and malignant effects" of the redistricting efforts of the North Carolina General Assembly.[115] Judge Wynn rebuffed the massively arrogant assertion by leaders of the General Assembly, after the rulings of the federal tribunals, that the validity of their race-based district lines was "certainly subject to rational disagreement."[116] Judge Wynn was frank: "That is patently wrong. There is no 'rational disagreement' . . . ."[117] Both the U.S. Supreme Court and Judge Wynn's three-judge tribunal had explicitly ruled "that the challenged districts are unconstitutional racial gerrymanders."[118] These are not the words of a judge who fears the often-demonstrated wrath of a usurping state legislature.

In his *Rucho* opinion, Judge Wynn, describing both the forest and the trees, strung the intentional legislative transgressions into broadening pattern. In *Rucho* and its aftermath, Judge Wynn wrote, legislative enactments "carried forward racial gerrymanders . . . raising legitimate questions regarding the General Assembly's capacity or willingness to draw constitutional remedial districts."[119] After the original impermissible gerrymanders, lawmakers passed "a number of pieces of election-related legislation that federal and state courts have struck down as unconstitutional, further calling into question the General Assembly's commitment to enacting constitutionally compliant, non-discriminatory election laws."[120] And the ongoing passage of time called lawmakers' good faith into question as well. For me, Judge Wynn's ruling bespeaks the wise, unafraid, articulate, and independent Black lawyer from Robersonville. This was not his first North Carolina rodeo.

## IV. JUDGE WYNN AND FEDERALIST PAPER SEVENTY-EIGHT

Judge Wynn's legacy of the last decade is a clarion testament to his skill, eloquence, bravery, and judicial acumen. But it is also a twenty-first century illustration of the wisdom and foresight of the architects of our constitutional structure. When Alexander Hamilton wrote "The Judiciary Department," published as *Federalist No. 78* in May 1788, it almost sounds as if he were speaking to North Carolinians in 2021. Hamilton thought independent judicial review essential to curb legislative usurpation:

> In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. . . . The complete independence

115. *Id.* at 891.

116. *Id.* at 892.

117. *Id.*

118. *Id.*

119. Common Cause v. Rucho, 318 F. Supp. 3d 777, 943 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

120. *Id.* (citation omitted).

> of the courts of justice is peculiarly essential in a limited Constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[121]

Hamilton followed that if courts are to be effective as "bulwarks of a limited Constitution against legislative encroachments," then the "permanent tenure of judicial offices" was necessitated.[122] "[N]othing will contribute so much as this," Hamilton argued, "to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."[123] Hamilton added:

> [I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. . . . That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. [124]

Alexander Hamilton, as I understand it, was a complicated fellow.[125] But complex or not, I'm guessing he would have admired the Honorable James A. Wynn.

121. THE FEDERALIST NO. 78 (Alexander Hamilton).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See generally* RON CHERNOW, ALEXANDER HAMILTON (2004). And, perhaps, LIN-MANUEL MIRANDA & JEREMY MCCARTER, HAMILTON: THE REVOLUTION (2016).