POLITICS AND THE SUPREME COURT OF NORTH CAROLINA*

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This Essay explores three decisions by the Supreme Court of North Carolina, issued on April 28, 2023: Harper v. Hall, Holmes v. Moore, *and* Community Success Initiative v. Moore. *The rulings present marked and purposeful departures from earlier holdings on voting rights in North Carolina. Beyond that, they claim to announce a broad course correction in the enforcement of state constitutional law—purportedly returning to a decidedly more modest vision of judicial review, deferring powerfully to a legislative supremacy rooted in a determination that the North Carolina General Assembly is the State's "great and chief department of government." The alteration is demanded, according to the opinions, to separate judicial review from partisan politics and the personal ideologies of the justices, assuring that the "people alone," not liberal judges, have the final say. I argue here that precisely the opposite is true. The cases do launch a new era in North Carolina judicial review—but not one that separates law from politics. Instead, the new Supreme Court of North Carolina has shown that it will operate, simply, as an enabling caucus of the Republican Party, abandoning obligations of judicial independence and the rule of law in favor of political subservience. In the process, the justices wound democracy and forfeit the mission of constitutional justice.*

INTRODUCTION

April 28, 2023, was one of the most important, and most unfortunate, days in North Carolina judicial history. On that rather surprising morning, the Supreme Court of North Carolina announced three sweeping rulings

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dramatically limiting the voting and representational rights of Tar Heels. First, in *Harper v. Hall* (*Harper III*),[1] a 5-2 Republican majority—using an almost-never-before-deployed version of rehearing law[2]—reversed its predecessor's recently announced final redistricting ruling in order to give a "warm, and purportedly permanent, [judicial] embrace to [extreme] partisan gerrymandering."[3] Next, in *Holmes v. Moore* (*Holmes II*),[4] the same Republican judicial lineup acted, again on unprecedented rehearing, to uphold North Carolina's voter identification ("voter ID") law (S.B. 824) only months after the same high court had struck it down as intentionally racially discriminatory.[5] Finally, in *Community Success Initiative v. Moore*,[6] completing the unusual trifecta, the Republican justices reversed a lower court decision that had struck down North Carolina's felony disenfranchisement law for voters who are no longer incarcerated. The majority again brushed aside concerns over racial impact and intention—this time exercising extraordinary fact-finding authority for an appellate tribunal—to strike an estimated 56,000 Tar Heels from the voter rolls.[7] Once again, the Supreme Court of North Carolina eagerly blew through norms of appellate review and practice in order to debase a fundamental human and democratic right. The justices were obviously on a roll. It was, to understate, a ghastly day for electoral rights in the Tar Heel state. No one can reasonably assume it will be the last.

And there was more. Much more.

In all three cases, the Republican justices purported to announce versions of a new, chastened, more limited, and decidedly more virtuous commitment to judicial power. Having, in recent years, reportedly "strayed from . . . historic" North Carolina understandings of judicial authority, the court claimed to initiate a broad, repentant, and necessary "course" correction.[8] Now they will faithfully cling to "the intent of the drafters of our state constitution" and the clear, explicit, and "plain" meanings of the text at the time of its adoption.[9] Beyond that, the justices will deploy heavy presumptions in favor of the constitutional propriety of the handiwork of the North Carolina General

1. 384 N.C. 292, 886 S.E.2d 393 (2023).

2. *See id.* at 423–25, 886 S.E.2d at 476–77 (Earls, J., dissenting).

3. Gene Nichol, *Three Cases in North Carolina, Decades of Democracy Undone*, SLATE (May 7, 2023, 12:10 PM), https://slate.com/news-and-politics/2023/05/north-carolina-new-republican-court.html [https://perma.cc/MNP3-BFXE] [hereinafter Nichol, *Three Cases*]; *see Harper III*, 384 N.C. at 300–01, 886 S.E.2d at 401 (majority opinion) ("[W]e hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution.").

4. 384 N.C. 426, 886 S.E.2d 120 (2023).

5. *Id.* at 428, 886 S.E.2d at 125.

6. 384 N.C. 194, 886 S.E.2d 16 (2023).

7. *Id.* at 238, 886 S.E.2d at 48.

8. *Harper III*, 384 N.C. at 378–79, 886 S.E.2d at 448–49.

9. *See id.* at 378, 886 S.E.2d at 448.

Assembly, the "great and chief department of government"[10] and "sacrosanct fulfillment of the people's will,"[11] and they will reassume the "proper presumptions" of "legislative good faith and constitutional compliance."[12] They'll require robust proof of transgression beyond conceivable doubt as well.[13] The justices will now, reportedly, eschew their personal preferences, remove the stain of ideology from their deliberations, and return the judiciary to its modest and strictly limited role in American government.[14] Only then (and henceforth) will North Carolina judges "refrain from becoming policymakers" and guarantee to the citizenry that they (will) no longer "thrust" themselves into various "political disputes."[15] Such an altered course, the justices assert, has nothing to do with the demands of "partisan politics" but is necessary for "realigning" the legislative and judicial roles and making certain that "[t]he people alone have the final say."[16]

Rarely has a court proclaimed such an utter and replete repudiation of its predecessor. A new sheriff had undoubtedly come to town. A self-assuredly less sinful one. As Supreme Court of North Carolina Associate Justice Phillip Berger, Jr. put it in *Holmes II*: "This Court has traditionally stood against the waves of partisan rulings in favor of the fundamental principle of equality under law. We recommit to that fundamental principle and begin the process of returning the judiciary to its rightful place as 'the least dangerous' branch."[17] According to Justice Berger, "[O]ur state's courts follow the law, not the political winds of the day."[18]

Really.

Of course, it might also be fair to say that nothing explains the tenor and outcomes of the court's remarkable April 28, 2023, performance quite as effectively as the actions of the North Carolina electorate on November 8, 2022.[19]

10. *Holmes II*, 384 N.C. at 460, 866 S.E.2d at 144 (quoting State *ex rel.* Wilson v. Jordan, 124 N.C. 683, 701, 33 S.E. 139, 150 (1889) (Clark, J., dissenting)).

11. *Id.* at 428, 886 S.E.2d at 124 (citing Pope v. Easley, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001)).

12. *Id.* at 458, 886 S.E.2d at 143.

13. *See id.* at 439, 886 S.E.2d at 131–32.

14. *See id.* at 460, 886 S.E.2d at 144.

15. *Harper III*, 384 N.C. 292, 298, 886 S.E.2d 393, 399 (2023).

16. *Id.* at 379, 886 S.E.2d at 449.

17. *Holmes II*, 384 N.C. at 460, 886 S.E.2d at 144.

18. *Id.* at 428, 886 S.E.2d at 124.

19. *See* Hannah Schoenbaum, *Republicans Retake Control of North Carolina Supreme Court*, U.S. NEWS & WORLD REP. (Nov. 9, 2022, 12:59 PM), https://www.usnews.com/news/best-states/north-carolina/articles/2022-11-08/2-races-to-set-partisan-control-of-north-carolina-high-court [https://perma.cc/R857-DRAQ].

Before the November 2022 election, the Supreme Court of North Carolina was composed of a 4-3 Democratic majority.[20] That shifted notably on Election Day.[21] Republican Trey Allen defeated incumbent Democratic Justice Sam Ervin IV, and Republican Richard Dietz defeated Democratic appeals court judge Lucy Inman, giving Republicans a 5-2 edge.[22] Both Allen and Dietz received 52% of the vote.[23] The judicial elections, as the public press reported, came "in the final months of a tumultuous court term distinguished by several split decisions favoring the Democratic majority."[24] Over the past two years, the majority had struck down GOP-approved redistricting plans, challenged new voter ID laws, and seemed to open the door for a judge to order the transfer of educational funding under the historic *Leandro* decision without General Assembly appropriation.[25]

Senate Republican leader Phil Berger celebrated what he deemed November's "complete repudiation" by the voters of the Democratic incumbents on the high court.[26] In a dissenting opinion issued after the November election, but before the ensuing January change in membership,[27] the Senate leader's son, Associate Justice Phillip Berger, Jr., giddily cited a newspaper article which described Republicans' new and "lasting grip on the NC Supreme Court."[28] I've been reading appellate opinions for fifty years. I'd never seen anything like it. It might be reasonable to ask, therefore, whether, as

20. *See* Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, STATE CT. REP. (Nov. 19, 2022), https://www.brennancenter.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean [https://perma.cc/VAV9-JJB9].

21. *See id.*

22. *See* Brian Murphy, *'Ramifications Are Substantial.' How Republicans Gained a Lasting Grip on the NC Supreme Court*, WRAL NEWS, https://www.wral.com/story/ramifications-are-substantial-how-republicans-gained-a-lasting-grip-on-the-nc-supreme-court/20570554/ [https://perma.cc/Q596-M976] (last updated Nov. 15, 2022, 10:29 AM).

23. *Id.*

24. Schoenbaum, *supra* note 19.

25. *Id.*; Murphy, *supra* note 22. *See generally* Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997) (underlying case); *Leandro Judge Sets $677 Million as Outstanding NC Education Spending Obligation*, CAROLINA J. (Apr. 14, 2023), https://www.carolinajournal.com/leandro-judge-sets-677-million-as-outstanding-nc-education-spending-obligation/ [https://perma.cc/A93Y-R9Z7] (discussing education appropriations).

26. Murphy, *supra* note 22.

27. Holmes v. Moore (*Holmes I*), 383 N.C. 171, 205, 881 S.E.2d 486, 510 (2022) (Berger, J., dissenting). Berger dissented from the majority opinion in *Holmes I*, *id.*, which was subsequently reheard and overturned by *Holmes II*, 384 N.C. 426, 886 S.E.2d 120 (2023).

28. *Holmes I*, 383 N.C. at 223–24, 881 S.E.2d at 521 (Berger, J., dissenting) (quoting Murphy, *supra* note 22); *see also* Gene Nichol, Opinion, *Welcome to What Will Quickly Become the Most Partisan Court in NC History*, CHARLOTTE OBSERVER (Feb. 27, 2023, 6:00 AM), https://www.charlotteobserver.com/opinion/article272594909.html [https://perma.cc/Z76A-GFZW (dark archive)].

Justice Berger would himself later write in *Holmes II*, North Carolina state courts had been effectively removed from "the political winds of the day."[29]

Finally, in setting the stage, it should be added that a potent claim can be made that few state legislatures, or maybe no state legislatures, have, over the past decade, demonstrated a more pervasive and unembarrassed need for the chastising strictures of skeptical, independent judicial review than the North Carolina General Assembly.[30] This is hardly the place for an exhaustive review of the record of constitutional compliance by the Republican-controlled North Carolina General Assembly since it rose to power in 2010. But a few highlights reveal that the handiwork of the "great and chief department of government"[31]—the fount of the "sacrosanct fulfillment of the people's will"—has been less than inspiring.[32]

For example, early in their tenure, in 2011, Republican lawmakers handily used race to disenfranchise Black voters when redrawing state legislative districts.[33] Reviewing federal courts determined that the scheme constituted a "widespread, serious, and longstanding . . . constitutional violation."[34] It represented, Judge James Wynn would write, "among the largest racial gerrymanders ever encountered by a federal court" in the United States.[35] 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.[36] The recalcitrance of Republican lawmakers denied Black voters "the very mechanism by which the people confer their sovereignty on the General Assembly and hold [it] accountable."[37] Upon examining the enacted legislative districts, another three-judge court lamented that "North Carolina voters now have been deprived of a constitutional

29. *Holmes II*, 384 N.C. at 428, 886 S.E.2d at 124.

30. *See* GENE NICHOL, INDECENT ASSEMBLY: THE NORTH CAROLINA LEGISLATURE'S BLUEPRINT FOR THE WAR ON DEMOCRACY AND EQUALITY 5–10 (2020) [hereinafter Nichol, INDECENT ASSEMBLY]; Gene Nichol, *Judge Wynn and the Essential Safeguard of Independent Judicial Review*, 100 N.C. L. REV. F. 240, 242–46 (2022).

31. *See Holmes II*, 384 N.C. at 460, 886 S.E.2d at 144 (quoting State *ex rel.* Wilson v. Jordan, 124 N.C. 683, 701, 33 S.E. 139, 150 (1899) (Clark, J., dissenting)).

32. *See id.* at 428, 886 S.E.2d at 124.

33. *See* Covington v. North Carolina, 283 F. Supp. 3d 410, 413–16 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018); Covington v. North Carolina, 316 F.R.D. 117, 129–37 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017); Covington v. North Carolina, 270 F. Supp. 3d 881, 884–88 (M.D.N.C. 2017).

34. *Covington*, 270 F. Supp. 3d at 884.

35. *Id.*

36. Covington v. North Carolina, No. 15CV399, 2017 WL 44840, at *2 (M.D.N.C. Jan. 4, 2017); *see also* Lynn Bonner, *Federal Judges Find NC Legislative Districts Unconstitutional*, CHARLOTTE OBSERVER, https://www.charlotteobserver.com/news/politics-government/article95087442.html [https://perma.cc/T9X3-XHNV (dark archive)] (last updated Aug. 11, 2016, 11:36 PM).

37. *Covington*, 270 F. Supp. 3d at 897.

congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles."[38]

In 2013, Republican lawmakers passed a massive voter-regulation law similarly invalidated by the courts.[39] There, the Fourth Circuit determined that Republicans had studied voting mechanisms that elevated Black turnout and had either eliminated or restricted each one "with almost surgical precision."[40] The legislators' proffered justification for the bill, a claimed interest in ballot integrity, was held to be a mere ruse, a lie.[41] No evidence of in-person voter fraud could be found anywhere.[42] Indeed, the three-judge panel wrote, "neither this legislature—nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise."[43]

To round out the portrait, in 2016, Republican leaders passed a new congressional redistricting plan that the nation's leading election law scholar, Rick Hasen, concluded was the "most egregious" political gerrymander in American history.[44] Representative David Lewis, the principal author of the radically biased measure, explained, casually, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."[45] Enough said, perhaps. But the "sacrosanct fulfillment of the people's will" is, apparently, in the eye of the beholder.[46]

This Essay will briefly explore the holdings, opinions, theories, and ramifications of the Supreme Court of North Carolina's April 28, 2023, decisions in *Harper III*, *Holmes II*, and *Community Success Initiative*. I will, of course, examine the specific holdings of the three cases—(1) of *Harper III*, which gave judicial imprimatur to even the most extreme politically partisan gerrymandering; (2) of *Holmes II*, which allowed voter ID requirements that are crafted, knowingly, to achieve racially disproportionate electoral impacts; and (3) of *Community Success Initiative*, which validated felony voting restrictions linked to purposeful, broadly shared efforts at racial suppression. But I will concentrate more extensively on the broader jurisprudential claim that is

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

39. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016) ("We hold that the challenged provisions of SL 2013-381 were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act.").

40. *Id.* at 214.

41. *See id.* at 235.

42. *Id.*

43. *Id.* at 228.

44. Rick Hasen, *Divided Three Judge Court Holds North Carolina Congressional Redistricting an Unconstitutional Partisan Gerrymander, Considers New Districts for 2018 Elections*, ELECTION L. BLOG (Aug. 27, 2018, 2:48 PM), https://electionlawblog.org/?p=100857 [https://perma.cc/6KAE-M6WM].

45. Common Cause v. Rucho, 279 F. Supp. 3d 587, 605 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (2018).

46. *See Holmes II*, 384 N.C. 426, 428, 886 S.E.2d 120, 124 (2023).

coordinated and boasted of in the three decisions: the so-called course correction,[47] or the adopting of a heavy presumption in favor of statutory enactments to assure the legislative supremacy of the "great and chief department of government."[48] The decisions endorse an assumption of good faith in lawmaking and judicial restraint unless the court finds clear, explicit textual violations. This alteration is demanded, the decisions claim, to separate judicial review from partisan politics and the personal ideological preferences of the justices, assuring that the "people alone"—not liberal judges—will have the final say.[49]

I will argue that precisely the opposite is true; that the three decisions inflict "sweeping blows to democracy in North Carolina."[50] The pointed slate of decisions was designed and released to make a potent political point, as the opinions claimed disingenuously, to eschew politics. The new court majority announced its entry by demonstrating a stunning disdain for the rule of law, nixing final judicial rulings only because Republicans had come to the high tribunal. The cases do, in all likelihood, kick off a new judicial era in North Carolina. But not one that removes partisan politics from the deliberations. Instead, the declared shift willingly embraces political decision making, so long as the lawmakers are Republicans.

State courts will no longer intervene, as in the past, to protect North Carolinians' right to vote. They will no longer fret over the obvious, intentional and partisan distortion of the political process. The justices will no longer trouble their Republican benefactors in the General Assembly to toe the constitutional mark. Nor will the high court even aspire to traditions of judicial independence.[51] The new Supreme Court of North Carolina will operate, simply, as "an enabling caucus of the state Republican Party."[52] It will lock arms, formally, with the Republican North Carolina General Assembly's fulsome "crusade" against democracy.[53] "Full stop."[54] The fact that it does so under the brutally false flag of "the fundamental principle of equality under law" is as rich as it is dishonest.[55] The new Republican Supreme Court of North Carolina will

47. *Harper III*, 384 N.C. 292, 378, 886 S.E.2d 393, 448 (2023).

48. *Holmes II*, 384 N.C. at 460, 886 S.E.2d at 144 (quoting State *ex rel.* Wilson v. Jordan, 124 N.C. 683, 701, 33 S.E. 139, 150 (1889) (Clark, J., dissenting)).

49. *Harper III*, 384 N.C. at 379, 886 S.E.2d at 449.

50. *North Carolina Supreme Court Delivers Three Sweeping Blows to Voting Rights*, NEWS & OBSERVER, https://www.newsobserver.com/opinion/article274834621.html [https://perma.cc/5VG6-JENZ (dark archive)] (last updated May 3, 2023, 12:19 PM).

51. Nichol, *Three Cases*, *supra* note 3.

52. *Id.*

53. *See id.*

54. *Id.*

55. *Holmes II*, 384 N.C. 426, 460, 886 S.E.2d 120, 144 (2023).

abandon meaningful judicial review in favor of partisan obedience. In the process, it will forfeit its mission of constitutional justice.

I. *HARPER V. HALL*

In *Harper III*, the Supreme Court of North Carolina reversed a ruling it had issued only weeks earlier invalidating extreme partisan gerrymandering.[56] On December 6, 2022, Justice Robin Hudson, writing for a (then) 4-3 Democratic majority, concluded in a final decision:

> The foundational democratic principles of equality and popular sovereignty enshrined in our Constitution's Declaration of Rights vest in the people of this state the fundamental right to vote on equal terms. This fundamental right "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." Put differently, it requires that "voters of all political parties [have] substantially equal opportunity to translate votes into seats." Therefore, when a districting plan systematically makes it harder for individuals of one political party to elect a governing majority than individuals of another party of equal size based upon that partisanship, it deprives a voter of his or her fundamental right to equal voting power. "[S]uch a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is 'narrowly tailored to advance a compelling governmental interest.'"[57]

Chief Justice Newby, in *Harper III*, claimed that Justice Hudson and her colleagues had "misapprehended" the litigation and "were wrong to condemn" partisan gerrymandering.[58] It was necessary, therefore, to "correct that error."[59] The majority determined that the North Carolina Constitution "expressly assigns the legislative redistricting authority to the General Assembly subject to specific enumerated restraints."[60] Thus, partisan gerrymandering is not explicitly barred by the language of the state constitution. The majority concluded, rather, that it is an inherent and untroubling component of redistricting.[61] As a result of the majority's reasoning, partisan gerrymandering—even extreme partisan gerrymandering—is a political

56. *N.C. Supreme Court Opens Door to Rigged Elections*, WRAL NEWS, https://www.wral.com/story/editorial-n-c-supreme-court-opens-door-to-rigged-elections/20836933/ [https://perma.cc/69H6-CE2F] (last updated May 1, 2023, 5:00 AM).

57. Harper v. Hall (*Harper I*), 383 N.C. 89, 93, 881 S.E.2d 156, 161 (2022) (citations omitted), *reh'g granted*, 384 N.C. 1, 882 S.E.2d 548 (2023), *withdrawn*, 384 N.C. 292, 886 S.E.2d 393 (2023).

58. *Harper III*, 384 N.C. at 326, 886 S.E.2d at 416.

59. *Id.*

60. *Id.* at 330, 886 S.E.2d at 418.

61. *See id.* at 334, 886 S.E.2d at 421.

question in North Carolina, beyond the jurisdictional reach of state courts.[62] Objections are, ironically, "better suited for [presentation to] the legislative branch" of government.[63] The Chief Justice added, again without apparent irony, that the earlier ruling reflected "partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law."[64] The Democrats acted with "the singular aim of reaching" the partisan political outcome they "desired."[65] My word.

The Chief Justice repeatedly showed disdain for his former and present Democratic colleagues by referring, throughout the *Harper III* majority opinion, to the earlier ruling as an erroneous and mere four-member opinion—as if a 4-3 ruling, or at least a split ruling with Democrats in the majority, was not actually a binding opinion of the Supreme Court of North Carolina.[66] Speaking from an apparently elevated perch, Newby concluded, despite the angry and seemingly partisan barbs he launched, that "in its decision today, the Court returns to its tradition of honoring the constitutional roles assigned to each branch" of government.[67] High-minded talk for a decision that embraced extreme political manipulation and enduring interference with the North Carolina electoral system.

The North Carolina Constitution is unbothered by political parties permanently entrenching themselves in power, regardless of the wishes of the voters. Rigging elections to predetermine the winners is no transgression. Chief Justice Newby and his Republican cohorts offered, officially, a green light for future incumbent machinations. A metaphorical get-out-of-jail-free card for cheating politicians. At least Republican ones.

Justice Anita Earls thundered in dissent that the ruling stripped North Carolina voters of the right to choose their elected officials and "demolished the Court's standing as an independent check on the excesses of the other two branches of government."[68] Justice Michael Morgan (speaking principally about the astonishing use of rehearing) added that his "consternation" with the new Republican majority—for ushering in "a new chapter of judicial activism" born in "politically saturated legal philosophies" and infusing "partisan politics brazenly into the outcome of the present case"—was "colossal."[69] "But Newby

62. *Id.* at 350, 886 S.E.2d at 431.

63. *Id.*

64. *Id.* at 372, 886 S.E.2d at 445 (quoting Harper v. Hall, 382 N.C. 314, 317, 874 S.E.2d 902, 904 (2022) (Barringer, J., dissenting) (expediting proceedings in *Harper I*)).

65. *Id.* at 379, 886 S.E.2d at 449.

66. *Id.* at 375, 886 S.E.2d at 446.

67. *Id.* at 378–79, 886 S.E.2d at 449.

68. Nichol, *Three Cases*, *supra* note 3 (citing *Harper III*, 384 N.C. at 380–82, 886 S.E.2d at 449–51 (Earls, J., dissenting)).

69. *Holmes II*, 384 N.C. 426, 462–63, 886 S.E.2d 120, 145 (2023) (Morgan, J., dissenting).

wasn't going to let any dissenting voices disturb him. He was on a partisan mission. And he delivered like a champion."[70]

Three additional points.

Harper v. Hall entrenched extreme political gerrymandering in North Carolina. Before that could be accomplished, however, Chief Justice Newby and his other four Republican justices had to throw out the rule book.

Late in 2022, the preceding Supreme Court of North Carolina, as explained above, had declared the most radical adventures in partisan gerrymandering to be violative of the North Carolina Constitution. With the ascendancy of a Republican majority, however, Senate and House leaders, Phil Berger and Tim Moore, petitioned the newly empaneled court to rehear the previously issued case.[71] Almost immediately, in a head-turning departure from precedent, the Republican justices did exactly that.[72]

Newly elected member Justice Trey Allen wrote a brief, almost contentless, opinion for the court, on February 3, 2023—only weeks after the earlier ruling had been issued—granting the legislative members' motion for rehearing.[73] Allen wrote only that the motion met the grounds for redetermination and set a date for reargument five weeks later.[74] Justice Anita Earls, however, wrote a blistering dissent,[75] refusing to let the sleight-of-hand pass.

Justice Earls explained, accurately, that only one thing had changed since the ruling had been handed down:

> The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court. Now, approximately one month since this shift, the Court has taken an extraordinary action: It is allowing rehearing without justification.[76]

And "extraordinary" was an understatement. Justice Earls described the bare order as a "radical break with 205 years of history" of the Supreme Court of North Carolina's rehearing law.[77] For centuries, the justices had recognized the understandable principle that once the high court had issued a final ruling, the

70. Nichol, *Three Cases*, *supra* note 3.

71. Harper v. Hall, 384 N.C. 1, 2–3, 882 S.E.2d 548, 549–50 (2023) (order granting rehearing); *see also NC Supreme Court Majority Breaks Precedent To Rehear Settled Redistricting, Voter ID Cases Post Election*, S. COAL. FOR SOC. JUST., https://southerncoalition.org/nc-supreme-court-majority-breaks-precedent-to-rehear-settled-redistricting-voter-id-cases-post-election/ [https://perma.cc/EQH6-55WQ].

72. *See Harper*, 384 N.C. at 2, 882 S.E.2d at 549 (order granting rehearing).

73. *Id.* at 3–4, 882 S.E.2d at 549–50.

74. *Id.*

75. *Id.* at 4–7, 882 S.E.2d at 550–52 (Earls, J., dissenting).

76. *Id.* at 5, 882 S.E.2d at 550–51.

77. *Id.* at 4–5, 882 S.E.2d at 550–51.

decision would not be disturbed merely because of a change in the tribunal's composition, much less because of a partisan shift in membership.[78] In fact, the Supreme Court of North Carolina had been exceedingly stingy with rehearings across the board.[79] Earls pointed to "data from the Supreme Court's electronic filing system indicat[ing] that, since January 1993, a total of 214 petitions for rehearing [had] been filed, but rehearing [had] been allowed in only two cases."[80] When the *Holmes II* case was added, that thirty-year measure had been equaled by the new Republican court in one morning. Justice Allen didn't answer Earls's objections. He didn't have to.

Justice Earls concluded:

> There is nothing constitutionally conservative about the Court's decisions to allow rehearing in these cases. Going down this path is a radical departure from the way this Court has operated, and these orders represent a rejection of the guardrails that have historically protected the legitimacy of the Court. Not only does today's display of raw partisanship call into question the impartiality of the courts, but it erodes the notion that the judicial branch has the institutional capacity to be a principled check on legislation that violates constitutional and human rights.[81]

No wonder Chief Justice Newby was angry. In truth, if the motion for rehearing had not been pressed by Senator Berger and Speaker Moore and become an essential Republican political cause, no member of the Supreme Court of North Carolina, Republican or Democrat, would have supported it. Since it became a vital Republican crusade, however, no Republican justice, new or of longer standing, would oppose it. This was, perhaps, an odd way to remove the Supreme Court of North Carolina from "the political winds of the day."[82]

Second, and more importantly, Chief Justice Newby's opinion in *Harper III*, as noted in the Introduction, purports to announce a "return" to "fundamental principles" of constitutional interpretation in the North Carolina courts.[83] The state charter is to be measured only by "its plain meaning"—read in its "historical context" as contemplated by "the people . . . when they adopted it," without "hidden meanings or opaque understandings."[84] It is "written to be understood by everyone, not just a select few."[85] The North Carolina General Assembly is also entitled to a heavy presumption of constitutional compliance,

78. *See id.*
79. *See id.*, 882 S.E.2d at 550.
80. *Id.*
81. *Id.* at 5–6, 882 S.E.2d at 551.
82. *Holmes II*, 384 N.C. 426, 428, 886 S.E.2d 120, 124 (2023).
83. *Harper III*, 384 N.C. 292, 297, 886 S.E.2d 393, 398 (2023).
84. *Id.*, 886 S.E.2d at 399.
85. *Id.*

which fails only in the face of a clear and explicit textual violation proven by a challenger to be "unconstitutional beyond a reasonable doubt."[86] Under such cautious strictures, we can be assured that judges "honor[] the constitutional roles assigned to each branch" of government, thus "returning the judiciary to its designated lane."[87] Since partisan gerrymandering claims, like those proffered in *Harper III*, could not meet such a rigorous judicial standard, they had to be dismissed.[88]

Sounds nice, in a sense. Just the simple and straight-forward. Only textual violations obvious to all—apparent to every North Carolinian—merit judicial enforcement. Not just now, but decades or centuries ago when the laws were enacted. No worries. Easy as pie.

This version of judicial interpretation has little in common with American constitutional law—whether federal or state in pedigree. Much of what we think of as our roster of constitutional liberties are not reflected explicitly in the text of the U.S. Constitution. *Brown v. Board of Education* (integrated schools),[89] *Griswold v. Connecticut* (contraceptives),[90] *Harper v. Virginia Board of Elections* (poll tax),[91] *New York Times Co. v. Sullivan* (freedom of expression in libel cases),[92] *School District of Abington Township v. Schempp* (separation of church and state in the context of school prayer),[93] *West Virginia State Board of Education v. Barnett* (flag salutes cannot be compulsory in public schools),[94] *Gideon v. Wainwright* (right to appointed counsel),[95] *Obergefell v. Hodges* (same-sex marriage),[96] *Miranda v. Arizona* (right to remain silent),[97] and *Reed v. Reed* (freedom from sex discrimination)[98] are not explicit textual rulings. And that's just listing ten foundational decisions off the top of one's head. The list could easily be multiplied by a thousand. It is also powerfully ironic that Chief Justice Newby would announce his interpretive restrictions in a redistricting case. *Reynolds v. Sims* (one person, one vote)[99] is the granddaddy of all redistricting decisions. It is as far from an explicit textual ruling as can be imagined. One can search the U.S. Constitution in vain for the words "one person, one vote."[100]

86. *Id.* at 378, 886 S.E.2d at 448.
87. *Id.* at 379, 886 S.E.2d at 449.
88. *See id.* at 378, 886 S.E.2d at 448–49.
89. 347 U.S. 483, 495 (1954), *supplemented by* Brown v. Bd. of Educ., 349 U.S. 294 (1955).
90. 381 U.S. 479, 485–86 (1965).
91. 383 U.S. 663, 670 (1966).
92. 376 U.S. 254, 292 (1964).
93. 374 U.S. 203, 225–27 (1963).
94. 319 U.S. 624, 642 (1943).
95. 372 U.S. 335, 343–45 (1963).
96. 576 U.S. 644, 681 (2015).
97. 384 U.S. 436, 498–99 (1966).
98. 404 U.S. 71, 77 (1971).
99. 377 U.S. 533, 558 (1964).
100. *Id.* (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

Perhaps Chief Justice Newby means to launch a radical reordering of state constitutional law in North Carolina. Now only obvious, certain, undisputed, consensus-based, historically grounded textual violations of the charter will be enforceable. A new methodology is, as he proclaimed, underway. I doubt it though. Newby couldn't even manage to apply his announced foundational "course correction" in the case before him.

The plaintiffs in *Harper III* not only alleged that the extreme partisan gerrymander under review was a violation of North Carolina's equal protection clause, but also that it ran afoul of the state constitution's demand that "[a]ll elections shall be free."[101] After a long and almost comical historical inquiry, borrowing from King James and the Glorious Revolution, Chief Justice Newby concluded that "the meaning of the free elections clause, based on its plain language, historical context, and this Court's precedent, is that voters are free to vote according to their consciences without interference or intimidation."[102] A merely rigged election, therefore, is still a "free" election. I doubt that anyone in North Carolina, apart from Newby and his four Republican colleagues, believes that. This is apparently an example of his vision of text as "understood by everyone, not just the select few."[103] Who wouldn't grasp that a stacked election, assuring a particular outcome even before it begins, can still be free? Free enough, at least, for Republican judges. That's all that matters. It brings to mind Newby's claim during an earlier oral argument that the North Carolina Constitution only requires "free" elections, not "fair" ones.[104] Sure enough. It'll take more than a reference to King James to convince Tar Heels of that. But it didn't matter to Newby. Like Humpty Dumpty, when he uses a word, "it means just what [he] choose[s] it to mean—neither more nor less."[105] That's "plain." That's "explicit." That's "understood" by all.

Third, and clearly most importantly, it ought to be a surprise that the Supreme Court of North Carolina would completely cast aside norms of stare decisis and appellate practice, reorder its acceptable theories of judicial review, and massively endanger its own institutional credibility in such an utterly unappealing cause—the embrace of legislative authority to draw electoral districting lines in a way that will entrench the dominant political party in office. There are many potential crusades for which one could sacrifice jurisprudential traditions and professional commitments, but this one? In fact, the oddest thing about the Supreme Court of North Carolina's opinion in

101. N.C. CONST. art. I, § 10; *Harper III*, 384 N.C. 292, 302, 886 S.E.2d 393, 401 (2023).

102. *Harper III*, 384 N.C. at 360–64, 886 S.E.2d at 437–39.

103. *Id.* at 297, 886 S.E.2d at 399.

104. *See* Laura Leslie & Bryan Anderson, *NC's Constitution Doesn't Promise 'Fair' Elections*, WRAL NEWS, https://www.wral.com/story/nc-s-constitution-doesn-t-promise-fair-elections/20115129/ [https://perma.cc/N56T-YANP] (last updated Feb. 3, 2022, 5:58 PM).

105. *See* LEWIS CARROLL, THROUGH THE LOOKING-GLASS 73 (McLoughlin Brothers, Inc. 1914) (1872).

Harper III is that it barely even explores what is actually at stake in the case—the most foundational of all political rights, the right to participate on equal terms in the electoral process, choosing one's representatives to thus assure government by the consent of the governed.[106]

The majority justices never meaningfully addressed the debasement of democracy[107] that occurs when lawmakers stack the deck to assure, regardless of the will of the voters, their own political ascendancy.[108] Chief Justice Newby uses scores of paragraphs to disparage his Democratic colleagues, to stress the limited capacities of judicial review, to create a new North Carolina vision of the political question doctrine, to offer a singular homage to legislative supremacy, to invent a hypothetical, yet apparently sacred, will of the people, and much more—but almost no paragraphs examining the damage inflicted on our constitutional order by allowing incumbent lawmakers to rig the election system.[109] That trauma, that irreparable injury, that largest, most fundamental of wounds, is effectively unaddressed.[110] Newby's 146-page homily, therefore, largely misses the point.

The judicial review of partisan gerrymandering poses both jurisprudential and accountability challenges. Lines between the permissible and the debasing have proven decidedly illusive—reminiscent of often derided pornography standards,[111] suggesting that "[we] know it when [we] see it."[112] But simply concluding that those who hold governmental power can use it to entrench themselves in permanent ascendancy cannot be the rule in a democracy.[113] That might be a rule that you would want for your friends, as Chief Justice Newby

106. Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion) (stating that "unconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"), *abrogated in part by* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); *id.* at 165 (Powell, J., concurring in part and dissenting in part) (explaining that "unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes").

107. *See id.* at 127–43 (plurality opinion).

108. Gray v. Sanders, 372 U.S. 368, 379–80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."); Vieth v. Jubelirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the plurality seems to acknowledge it is not."); *id.* at 362 (Breyer, J., dissenting) (reasoning that gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause").

109. *See Harper III*, 384 N.C. 292, 301–79, 886 S.E.2d 393, 401–49 (2023).

110. *See id.*

111. Jacobellis v. Ohio, 378 U.S. 184, 187 (1964); *id.* at 202 (Warren, C.J., dissenting).

112. *Id.* at 197 (Stewart, J., concurring).

113. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) ("The core principle of . . . republican government . . . [is] that the voters should choose their representatives, not the other way around." (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 940 (M.D.N.C. 2018)) (internal quotation marks omitted))).

appears to do, but it can't be the rule for an actual constitutional democracy. And, at some level, we all know that. Checking unlimited power cannot be beyond the scope of the judiciary. It never has been. And with the dangers of redistricting technologies ever increasing, and the tragedies of electoral marginalization more dangerous and more polarizing, the democratic cornerstone of free and fair elections simply cannot be abandoned consistent with our national mission.

Chief Justice Newby pretends that his efforts are, somehow, on the side of democratic accountability. But that can't be. No one, at the U.S. Supreme Court[114] level or on the new Republican Supreme Court of North Carolina, actually defends extreme partisan gerrymandering on the merits.[115] They just say it's beyond us.[116] It mysteriously defies our capabilities.[117] But there can be no doubt, not the slightest, that if the political roles were reversed, a judge as politically ambitious as Newby would demand to intervene. It is hard to accept, in 2023, regardless of one's ideological perspective, that we are simply not up to this task. We embrace malleable legal standards on an array of fronts. Necessity often demands them. And here, necessity has become paramount. The judicial embrace of partisan gerrymandering—given its undeniably potent threat to what is most important to us as a people—violates both our defining societal commitments and our judges' oaths of office. It is remarkably untenable to simply accept it unquestioningly. North Carolina cannot meekly allow democracy to be defeated. Even if some of our leaders—legislative and judicial—would prefer that.

II. *HOLMES V. MOORE*

In *Holmes II*, we recall, the same five Republican justices, again using the literally unprecedented version of rehearing deployed in *Harper v. Hall*, "withdrew" a final supreme court determination that only five months earlier had struck down North Carolina's voter ID law.[118] This time, the majority not only ditched a brand new ruling of their predecessors without a previously seen legal basis, but they aggressively cast aside the clear factual findings of a three-judge trial court panel and the earlier factual determinations of their supreme

114. *Id.* ("Gerrymandering is 'incompatible with democratic principles . . . .'" (quoting Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015))); Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (stating that this practically amounts to "rigging elections").

115. *See Harper III*, 384 N.C. at 326, 886 S.E.2d at 416 (suggesting that there exists a level of partisan gerrymandering that is "too much").

116. *See Rucho*, 139 S. Ct. at 2498–502 (holding that there is no "judicially manageable standard" for reviewing federal partisan gerrymandering claims); *Harper III*, 384 N.C. at 343, 886 S.E.2d at 426–27 (holding the same for state claims).

117. *See Rucho*, 139 S. Ct. at 2499–501; *Harper III*, 384 N.C. at 343–44, 886 S.E.2d at 426–27.

118. *Holmes II*, 384 N.C. 426, 433, 460, 886 S.E.2d 120, 128, 144 (2023).

court predecessors[119]—in a double-shot violation of the standards of appellate practice.[120] After *Harper III*, perhaps, that was less surprising to the reader. Both the trial court and the earlier Supreme Court of North Carolina ruled that the voter ID law (S.B. 824) violated Article I, Section 19 of the North Carolina Constitution—the state charter's Equal Protection Clause—because it was enacted in order to discriminate on the basis of race.[121] In an opinion by Associate Justice Phillip Berger, the *Holmes II* court determined that the previous findings of racial discrimination were based on "incompetent expert testimony," "unfounded speculation," and "innuendo" which was inconsistent with the new, more demanding standard it now created for cases arising under North Carolina's Equal Protection Clause.[122] The court reasoned that this new standard will reflect more vigorously the required "presumption of constitutionality [that] is a critical safeguard [to] preserve[] the delicate balance between [the] Court's role as the interpreter of [the] Constitution and the legislature's role as the voice through which the people exercise their ultimate power."[123] Though the case presented potently demonstrated issues of racial suppression and the foundational right to vote,[124] the court employed a heavy deference to presumptive legislative good faith.[125] Once again, a new sheriff was in town.

Justice Berger's opinion, of course, began with an ode to the North Carolina General Assembly: "It is well settled that the proper exercise of judicial power requires great deference to the acts of the General Assembly, as the legislature's enactment of the law is the sacrosanct fulfillment of the people's will."[126]

He warned, therefore, that "[w]ith the ability to declare a legislative act unconstitutional, courts wield a 'delicate, not to say dangerous' power which is 'antagonistic to the fundamental principles of our government.'"[127] "The power to invalidate legislative acts[, therefore,] is one that must be exercised by this Court with the utmost restraint, and the proof beyond a reasonable doubt standard is a necessary protection against abuse of such power by unprincipled

119. *Id.* at 448–57, 886 S.E.2d at 136–43.

120. Findings of fact that are "supported by competent, material and substantial evidence in view of the entire record[] are conclusive upon a reviewing court[] and not within the scope of its reviewing power[]." *In re* Revocation of Berman, 245 N.C. 612, 616–17, 97 S.E.2d 232, 235 (1957).

121. *Holmes II*, 384 N.C. at 432–33, 886 S.E.2d at 127.

122. *Id.* at 439, 453, 886 S.E.2d at 131, 140.

123. *Id.* at 435, 886 S.E.2d at 129.

124. *See id.* at 439, 453, 886 S.E.2d at 131, 139–40.

125. *Id.* at 460, 886 S.E.2d at 144.

126. *Id.* at 428, 886 S.E.2d at 124.

127. *Id.* at 439, 886 S.E.2d at 132 (quoting State v. White, 125 N.C. 674, 688, 34 S.E. 532, 536 (1899)).

or undisciplined judges."[128] Echoing *Harper III*'s themes of legislative primacy and necessary judicial course correction, Justice Berger continued:

> In North Carolina "[t]he legislature is the great and chief department of government. It alone is created to express the will of the people." Indeed, "for the courts to strike down valid acts of the [l]egislature would be wholly repugnant to, and at variance with, the genius of our institutions." . . . [N]o court exists for the vindication of political interests, and judges exceed constitutional boundaries when they act as a super-legislature. This Court has traditionally stood against the waves of partisan rulings in favor of the fundamental principle of equality under the law. We recommit to that fundamental principle . . . .[129]

Berger also bristled at the implications of a brutal North Carolina racial history in measuring the propriety of the voter ID law. He noted in a tendentious footnote:

> "The world moves, and we must move with it." . . . The Lieutenant Governor, two members of this Court, and the minority leaders in the North Carolina Senate and the North Carolina House of Representatives are the most recent examples of the significant social progress made in North Carolina. . . . The imputation of wrongs committed in the distant past to current realities is . . . unjust and disingenuous . . . .[130]

Justice Morgan, one of the apparently referred-to Black justices, refused to let Justice Berger's "callousness" pass without comment:

> "North Carolina['s] . . . long history of race discrimination" . . . is not one that anyone can legitimately deny, although the majority appears to represent in a footnote in its written opinion that the mere current presence of one Black man and one Black woman who were both elected to this Court, coupled with other individuals expressly identified by the majority who are members of the Black race who have also been elected to office in North Carolina in modern times, proves that this state has progressed so much that this state's contemptible racial history regarding electoral politics bears no logical relation to its present-day political climate. This naïveté, if such, would be appalling; this callousness, if such, would be galling.[131]

128. *Id.*

129. *Id.* at 460, 886 S.E.2d at 144 (first and second alterations in original) (first quoting State *ex rel.* Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139, 150 (1899) (Clark, J., dissenting); and then quoting State v. Revis, 193 N.C. 192, 196, 136 S.E. 346, 348 (1927)).

130. *Id.* at 443 n.6, 886 S.E.2d at 134 n.6 (quoting State v. Williams, 146 N.C. 618, 639, 61 S.E. 61, 68 (1908) (Clark, C.J., dissenting)).

131. *Id.* at 465, 886 S.E.2d at 147 (Morgan, J., dissenting) (quoting N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 223 (4th Cir. 2016)).

The exchange was particularly informative in a judicial ruling in which the five White Republican members of the North Carolina Supreme Court majority lectured the court's two Black dissenting members about how race discrimination can be demonstrated and proven, what its impacts may be, and how such wounds have been experienced, over time, in the Tar Heel state.[132] Undoubtedly, it was not the first time.

Surprisingly (again), the court made an odd alteration to the standards for reviewing equal protection cases under the North Carolina Constitution in *Holmes II*. For almost a half century, the U.S. Supreme Court has held that facially neutral race discrimination claims, under the Fourteenth Amendment, demand the demonstration of intention to discriminate in order to trigger skeptical judicial review.[133] In the landmark ruling, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[134] the Federal Justices produced a nonexhaustive list of factors that might be deemed probative of intention—not looking at evidence in a vacuum but, instead, examining the totality of circumstances presented.[135] Factors included the "historical background of the [contested] decision," the sequence of events leading to enactment, departures from normal procedures, legislative or administrative decision-making backgrounds, the disproportionate impacts of the statute, and the like.[136] If an invidious racial purpose was shown to be "a motivating factor" in the enactment of legislation, significantly searching judicial review was demanded.[137]

In order to erase the earlier North Carolina Supreme Court decision striking down voter ID laws, Justice Berger and his colleagues moved to attack the long-standing U.S. Supreme Court ruling in *Arlington Heights*.[138] The majority effectively concluded that *Arlington Heights* was too protective of equality principles for North Carolina. When interpreting the state constitutional demand for equal protection of the laws, Berger wrote:

> [W]e hold that to prevail on such a facial challenge . . . under this state's . . . analytical framework, the challenger must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines. We reach this determination not out of disagreement with the federal courts' analysis of these issues under the federal Equal Protection Clause. Rather, we reach this decision because *Arlington Heights*' analytical framework is

132. *See id.* at 453–60, 886 S.E.2d at 140–44 (majority opinion).

133. Washington v. Davis, 426 U.S. 229, 242, 247–48 (1976).

134. 429 U.S. 252 (1977).

135. *Id.* at 266–68; *see also Washington*, 426 U.S. at 242.

136. *Vill. of Arlington Heights*, 429 U.S. at 265–68.

137. *Id.* at 265–66; Hunter v. Underwood, 471 U.S. 222, 228 (1985); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 282–83 (1979) (Marshall, J., dissenting).

138. *Holmes II*, 384 N.C. 426, 440–41, 886 S.E.2d 120, 132 (2023).

> incompatible with our state Constitution and this Court's precedent as it allows challengers to succeed on such claims by proffering evidence that is by its very nature speculative, subjective, and thus, insufficient to meet the well-established burden of proof. . . . [P]ersonal biases and subjective interpretations . . . can greatly influence outcomes in these types of cases. It is the objective application of legal principles that leads to consistent and fair judicial decisions. There, the *Arlington Heights* framework falls short.[139]

There is much that amazes in these words. First, Justice Berger announces that *Arlington Heights*, the long-honed Fourteenth Amendment standard, is "incompatible with our state Constitution."[140] That phrasing can be flipped to conclude that North Carolina's Constitution, as refashioned in *Holmes II*, violates the Fourteenth Amendment's Equal Protection Clause. As Justice Morgan pointed out eagerly in dissent, the *Arlington Heights* standard is a constitutional floor, not an asserted federal aspiration.[141] In theory, a state court may be free to interpret its own constitution in a way that is less protective of fundamental rights than federal counterpart provisions[142]—though North Carolina cases seem to foreclose such a claim. But a more restrictive reading leaves the interpreted state constitution provision an effective nullity, which judges, other than Berger, seem reluctant to do.[143] And even if that is true, one would think that a state supreme court justice would be unwilling to declare that his fealty to the North Carolina General Assembly is so potent that he believes it would demolish state lawmakers' demanded dignity to be forced to comply with the likes of *Arlington Heights*. The rest of the country seems to manage it. It's also passing strange to pledge oneself to "legal principles that lead[] to consistent and fair judicial decisions" in a case where the Supreme Court of North Carolina deploys a never-before-seen concept of rehearing to reverse the trial court and its predecessor court by announcing an *Arlington Heights*–renouncing state equal protection standard never before seen in North Carolina or anywhere else in the nation.[144] I'm not sure that's a formula for "fairness" or "consistency." When joined with *Harper III*,[145] though, it does

139. *Id.*

140. *Id.* at 440, 886 S.E.2d at 132.

141. *See id.* at 468, 886 S.E.2d at 149 (Morgan, J., dissenting) ("The federal Constitution is a floor, below which we cannot sink. The majority ignores this fundamental principle.").

142. *See, e.g.*, Cmty. Success Initiative v. Moore, 384 N.C. 194, 240, 886 S.E.2d 16, 50 (2023) (Earls, J., dissenting).

143. *See Holmes II*, 384 N.C. at 469–70, 886 S.E.2d at 150 (Morgan, J., dissenting).

144. *Id.* at 441, 886 S.E.2d at 132 (majority opinion); Will Doran, *'It Will Irreparably Damage the Legitimacy and Reputation of NC's Highest Court': Rehearings To Begin Tuesday*, WRAL NEWS, https://www.wral.com/story/it-will-irreparably-damage-the-legitimacy-and-reputation-of-nc-s-highest-court-rehearings-could-have-major-impact-on-2024-electi/20757007/ [https://perma.cc/DT74-CHT7] (last updated Mar. 14, 2023, 4:37 AM).

145. *Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023).

present a pattern—radically rejecting procedural judicial standards in order to overturn previously accepted constitutional norms, thereby announcing diminished constitutional rules of accountability in order to limit the electoral rights of the General Assembly's political adversaries and to leave the powers of Republican lawmakers unfettered. Some noble work that is.

III. *COMMUNITY SUCCESS INITIATIVE V. MOORE*

Community Success Initiative continued the now-familiar march. There, in an opinion by Justice Trey Allen, the new Republican majority reversed a three-judge court determination that North Carolina's statutory bar on the right to vote by felons, after they have served their prison sentences, was unconstitutional.[146] Like both *Harper III* and *Holmes II*, *Community Success Initiative* aggrandized unrestricted legislative power, regarded the foundational right to vote as of limited importance, and cast aside traditional norms of appellate practice. The agenda was, by now, apparently, set in stone. As Justice Anita Earls would write in dissent:

> The majority's decision in this case will one day be repudiated on two grounds. First, because it seeks to justify the denial of a basic human right to citizens and thereby perpetuate a vestige of slavery, and second, because the majority violates a basic [tenet] of appellate review by ignoring facts as found by the trial court and substituting its own.[147]

Justice Allen offered as the linchpin of his work this now-mandated mantra:

> [T]he fundamental principle[] that guide[s] our inquiry . . . is that we defer to legislation enacted by the General Assembly. . . . "[G]reat deference will be paid to acts of the legislature." . . . This Court . . . looks upon laws enacted by our General Assembly as expressions of the people's will. . . . [W]hen this Court is called upon to decide the constitutionality of a statute, we start with a strong presumption of the statute's validity. The burden is on the party challenging the statute to demonstrate its unconstitutionality. To prevail, the challenger must demonstrate that the law is unconstitutional beyond a reasonable doubt.[148]

Despite the dissenting justices' seemingly accurate charge that the majority opinion was based on a "complete disregard of the evidence" found by the trial court of intentional discrimination and racially disproportionate impact reflected in the felony disenfranchisement measure, Justice Allen's reversal was lodged squarely on what he saw as the extraordinarily potent nature of a

146. *Cmty. Success Initiative*, 384 N.C. at 197–99, 205, 240, 886 S.E.2d at 23–24, 27, 49.

147. *Id.* at 240–41, 886 S.E.2d at 50 (Earls, J., dissenting).

148. *Id.* at 211–12, 886 S.E.2d at 31–32 (majority opinion) (citations omitted) (quoting State *ex rel.* Martin v. Preston, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

required "presumption of legislative good faith," which he deemed to be the cornerstone of judicial review in North Carolina.[149] Allen concluded, "When viewed through the presumption of legislative good faith, as it must be, the statistical and historical evidence presented by the plaintiffs does not show racial discrimination to have been a 'substantial' or 'motivating' factor" in the enactment of the statute challenged.[150] As a result, the claim based on the North Carolina Equal Protection Clause had to be dismissed.[151]

Justice Earls responded in dissent that "the trial court's findings . . . reveal the malicious and racist intent [reflected in the statute and that] a fact is a fact."[152] She noted that "almost none" of the trial court's exhaustive findings were contested by the defendants.[153] A "presumption of good faith," she added, "is not a magic wand that transforms uncontested facts into mere ruminations that . . . an appellate court, can accept or reject at will without a . . . legal basis for doing so."[154] The wand, though, proved more than enough for Justice Allen and his Republican colleagues. *Community Success Initiative* thus cemented the "deferential" masterwork of its two partners.

The (third) case also presented a wrinkle. The plaintiffs, again, challenged North Carolina's disenfranchisement of felons past any term of imprisonment to include any subsequent parole, probation, or postrelease supervision.[155] The trial court asserted that since a separate state measure makes the payment of any court fines, costs, or restitution a condition of such noncustodial detentions, such requirements of "unconditional discharge"—that includes the satisfaction of "all monetary obligations imposed by the court"—"'creates a wealth classification' in violation of the [state] Equal Protection Clause."[156] The wealth claim, of course, echoed the U.S. Supreme Court's language in *Harper v. Virginia State Board of Elections* striking down poll taxes, since the ability to pay such expenses "is not germane to one's ability to participate intelligently in the electoral process."[157] "[W]ealth or fee pay[ments] ha[ve] . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned," Justice William Douglas added.[158]

149. *Compare id.* at 253, 886 S.E.2d at 57–58 (Earls, J., dissenting), *with id.* at 211, 216, 886 S.E.2d at 32, 35 (majority opinion).

150. *Id.* at 229, 886 S.E.2d at 42.

151. *Id.* at 234, 240, 886 S.E.2d at 45, 50.

152. *Id.* at 255–56, 886 S.E.2d at 59 (Earls, J., dissenting).

153. *Id.* at 256, 886 S.E.2d at 59.

154. *Id.*

155. *Id.* at 197–98, 886 S.E.2d at 23 (majority opinion).

156. *Id.* at 229, 886 S.E.2d at 43.

157. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).

158. *Id.* at 670.

In *Community Success Initiative*, Justice Allen and his colleagues reversed the trial court's wealth discrimination ruling out of hand.[159] They asserted that "felons do not have the right to vote" and any process to "regain" the franchise is left to the "legislature's sound discretion."[160] Beyond that, and even more joltingly, Justice Allen concluded that the fee-based classification passed rational basis review since "the General Assembly could reasonably have believed . . . that felons who pay their court costs, fines, or restitution are more likely than other felons to vote responsibly."[161] That assumption, or, perhaps, conclusion, is an exceedingly odd one. It suggests that a General Assembly can announce new voter qualifications based on legislators' perception of a potential voter's moral worth, or moral worth as reflected in the hearts of political partisans—kicking out the undesirables. That predisposition has been rejected as a legitimate state interest for generations, or perhaps centuries—though such claims have been put forward by vote suppressors forever.[162] Justice Allen obviously believes that the sixty-year-old cornerstone of American voting rights, *Harper v. Virginia State Board of Elections*, got it wrong.[163] Republican lawmakers may well, and appropriately, conclude that, in North Carolina, wealth is "germane to one's ability to participate intelligently in the electoral process."[164] We also apparently have doubts here about whether the right to vote is "too precious, too fundamental."[165] At least we hold such doubts about the voting rights of our adversaries. It is hard to tell if it's 2024 or 1949 in the Tar Heel state.

CONCLUSION—ABANDONING AN ESSENTIAL MISSION

Harper v. Hall, *Holmes v. Moore*, and *Community Success Initiative* are of a piece. Each case blows through traditional norms of appellate practice in a radical fashion. Each discards foundational voting rights. Each mocks essential notions of equality—treating rights of equal political participation as unimportant and faddish concerns that are consistently outweighed, far outweighed, by partisan judicial fealty. Two of the cases diminish constitutional accountability for race discrimination, which, given the state's history and present-day disparities, is the last thing North Carolina needs or should tolerate. Each case adopts a theory of "clear," "plain," "explicit," and "originalist" interpretation that cannot be squared with the bulk of American

159. *Cmty. Success Initiative*, 384 N.C. at 240, 886 S.E.2d at 49.

160. *Id.* at 231, 886 S.E.2d at 44.

161. *Id.* at 233, 886 S.E.2d at 45.

162. *See id.* at 269, 886 S.E.2d at 68 (Earls, J., dissenting).

163. *See id.* at 231, 886 S.E.2d at 44 (deciding that the trial court should *not* have applied a heightened standard of review, despite voting being a fundamental right as outlined in *Harper v. Virginia State Board of Elections*).

164. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).

165. *Id.* at 670.

constitutional law.[166] Each case adopts a breathtaking deference to the suggested might and worth of the North Carolina General Assembly—with its "sacrosanct" status as the "great and chief department" of government—that is, frankly, inconsistent with the core idea of judicial review.[167] Each effectively abandons the defining mission of independent constitutional enforcement by judges in favor of partisan submission by an entire branch of government. And each does so with almost comical hypocrisy—proclaiming a virtue-driven crusade to remove North Carolina courts from "political winds"—as the new high court locks arms with the Republican General Assembly's fulsome quest to entrench itself in power and to cast off the cumbersome inconveniences of democracy.[168] The new Supreme Court of North Carolina has potently demonstrated that it will not act to either enforce constitutional mandates or to open and assure the essential channels of democratic decision making. The new judicial majority has, instead, candidly expressed its intention to join the lawmakers' side in a now near-existential battle for free and fair elections. The wounds North Carolina will suffer as a result will likely be defining.

The marriage, in mission, of a General Assembly—that has demonstrated an almost unparalleled record of constitutional transgression[169] and decimated norms of separated powers[170]—with a Supreme Court of North Carolina that has announced its plans to happily abandon independent judicial review, foreshadows an unfolding crisis of democracy for the Tar Heel state. To have

166. *See, e.g.*, *supra* notes 89–97, 133–51, and accompanying text.

167. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing judicial review).

168. *See Harper III*, 384 N.C. 292, 338, 886 S.E.2d 393, 423–24 (2023); *Holmes II*, 384 N.C. 426, 428, 886 S.E.2d 120, 124–25 (2023).

169. *See* NICHOL, INDECENT ASSEMBLY, *supra* note 30, at 1–60; GENE NICHOL, LESSONS FROM NORTH CAROLINA: RACE, RELIGION, TRIBE AND THE FUTURE OF AMERICA 9–25, 105–20 (2023); *see also* Covington v. North Carolina, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017) (racial gerrymandering); N.C. State Conf. of NAACP v. Moore, No. 18 CVS 9806, 2019 WL 2331258, at *10–12 (N.C. Super. Ct. 2019), *rev'd*, 273 N.C. App. 452, 849 S.E.2d 87 (2020), *rev'd*, 382 N.C. 129, 876 S.E.2d 513 (2022) (unconstitutional racial gerrymandering); N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 207 (4th Cir. 2016) (record of racial discrimination in voting). *See generally* Dave Phillips, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html [https://perma.cc/VV4H-YURR (staff-uploaded, dark archive)] (barring individuals from bathrooms and locker rooms that do not match the gender on their birth certificates); Billy Corriher, *The North Carolina Legislature Is Attacking Judges Who Rule Against It*, ABA J. (Mar. 22, 2018, 8:30 AM), https://www.abajournal.com/news/article/the_north_carolina_legislature_is_attacking_judges_who_rule_against_it [https://perma.cc/AFS9-ZCKY] (retaliating against judges who rule against it); Common Cause v. Rucho, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (2018) (partisan gerrymandering); Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333 (4th Cir. 2016) (illegitimate redistricting); Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. 2019), *aff'd*, Common Cause v. Lewis, 956 F.3d 246 (4th Cir. 2020), *abrogated by Harper III*, 384 N.C. 292, 886 S.E.2d 393 (2023) (gerrymandered districts).

170. State v. Berger, 368 N.C. 633, 636, 781 S.E.2d 248, 250 (2016) (holding that legislative appointments violate separation of powers).

it heralded by jurists who purport to fly under a banner of equality, democratic accountability, and the rule of law is, I'll concede, difficult to abide.