THE PEOPLE WILL NEVER RULE: UNCHECKED PARTISAN GERRYMANDERING IN NORTH CAROLINA

HARPER V. HALL, 886 S.E.2D 393 (N.C. 2023).

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I. INTRODUCTION

An April 2023 decision of the North Carolina Supreme Court stands firmly in the way of the people's right to self-governance and the power of the popular will. In *Harper v. Hall*, the court considered whether claims of partisan gerrymandering are justiciable under the North Carolina Constitution.[1] The court held that claims of partisan gerrymandering presented political questions which were nonjusticiable.[2] Further, the court determined that partisan gerrymandering did not implicate any of the constitutional clauses that the plaintiffs cited to in their claim, which included the free elections

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1. Harper v. Hall, 886 S.E.2d 393 (N.C. 2023).
2. *Id.* at 401.

clause, the equal protection clause, and the freedom of assembly and free speech clauses of the state constitution.[3] The majority held that the constitution specifically assigns the redistricting authority to the General Assembly, subject to clear limitations which do not address partisan gerrymandering.[4] The court also cited to *Rucho v. Common Cause*, in which the Supreme Court of the United States reviewed similar claims under the Federal Constitution.[5] The *Rucho* Court's majority opinion, released prior to *Harper I*, determined that "excessive" partisan gerrymandering claims involve nonjusticiable political questions.[6]

This Comment will first present the pertinent facts of *Harper*, and then provide an overview of partisan gerrymandering, the relevant state constitutional provisions, and the case's procedural history. Next, it will examine the court's reasoning, including the majority opinion as well as the dissenting opinion. This Comment will ultimately argue that in reaching its decision, the majority in *Harper* allowed an election to affect a significant judicial decision and created a balance of powers issue through its failure to check partisan gerrymandering.

II. STATEMENT OF THE CASE

A. *Initial Litigation*

In November 2021, the North Carolina General Assembly enacted redistricting plans for the North Carolina Senate and House of Representatives, as well as for the United States House of Representatives ("2021 Plans").[7] In response to the 2021 Plans, the North Carolina League of Conservation Voters and a group of individual North Carolina voters ("NCLCV plaintiffs"), along with a separate group of individual North Carolina voters (Harper plaintiffs) filed lawsuits against several "legislative defendants," including the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House, and the Chairs of the House Standing Committee on Redistricting and the Senate Standing Committee on Redistricting and Elections.[8] Both lawsuits challenged the constitutionality of these plans, contending

3. *See id.* at 402, 432–43.
4. *Id.* at 400.
5. *See id.* at 400–01; Rucho v. Common Cause, 588 U.S. 684, 689–91 (2019).
6. *Harper*, 886 S.E.2d at 400; *see Rucho*, 588 U.S. at 718.
7. *Id.* at 401. *See generally* N.C. CONST. art. II, § 5 ("The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts . . . .").
8. *Harper*, 886 S.E.2d at 401.

that they were unconstitutional partisan gerrymanders, and sought preliminary injunctions to enjoin the use of the plans.[9] The NCLCV plaintiffs further claimed that the 2021 Plans promoted racial vote dilution in violation of the free elections and equal protection clauses of the North Carolina Constitution and that the plans violated the Whole County Provisions (WCP) requirement within the constitution.[10]

Upon their assignment to a three-judge panel of the superior court in Wake County, the lawsuits were consolidated.[11] The panel denied both motions for preliminary injunction on December 3, 2021, which both groups of plaintiffs appealed.[12] On December 6, 2021, the North Carolina Court of Appeals denied the plaintiffs' requests for a temporary stay, which led the plaintiffs to file with the North Carolina Supreme Court "two petitions for discretionary review prior to determination by the Court of Appeals, a motion to suspend appellate rules to expedite a decision, and a motion to suspend appellate rules and expedite briefing and argument."[13] Two days later, the court expedited the matter, granted a preliminary injunction, temporarily stayed the candidate filing period for the 2022 election cycle until there was a final judgment on the merits, and allowed both petitions for discretionary review.[14]

Common Cause, a nonpartisan public interest organization,[15] subsequently moved to intervene as a plaintiff and the three-judge panel granted the motion on December 15, 2021.[16] Common Cause filed a complaint similar to that of the consolidated cases, alleging that the 2021 Plans were unconstitutional gerrymanders, but added a claim that the plans violated the free speech and assembly clauses.[17] In outlining its claim that the 2021 Plans violated North Carolina's equal protection clause, Common Cause further alleged that the plans "purposefully discriminated against" Black voters through "intentional destruction of

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 402.
14. *Id.*
15. Per its mission statement, the organization "work[s] to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process." *About Us*, COMMON CAUSE, https://www.commoncause.org/about-us/.
16. *Harper*, 886 S.E.2d at 402.
17. *Id.*

functioning crossover districts."[18] Common Cause also filed a declaratory judgment claim, which asked the three-judge panel to determine that the General Assembly must complete a racially polarized voting (RPV) analysis before drawing any legislative maps in order to comply with the constitution.[19]

On January 11, 2022, the three-judge panel entered its judgment, concluding that the plaintiffs' partisan gerrymandering claims presented political questions, which were nonjusticiable.[20] The panel explained that it considered redistricting to be a purely political question which was meant exclusively for the legislature to decide.[21] The panel reached its conclusion because of a reported lack of satisfactory and manageable standards to judicially assess claims of partisan gerrymandering.[22] With respect to the plaintiffs' constitutional claims, the panel further held that the 2021 Plans did not violate the North Carolina Declaration of Rights because "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in article II, sections 3 and 5 of the 1971 Constitution[23] and not in the Free Elections, Equal Protection, Freedom of Speech or Freedom of Assembly Clauses found in Article I . . . ."[24] With respect to the additional claims of racial discrimination, racial vote dilution, violation of the WCP, and the request for a declaratory judgment, the panel determined that the plaintiffs had not satisfied their burdens for the first two claims and that the evidence did not support the WCP claim or RPV analysis requirement.[25] Consequently, the panel dismissed the plaintiffs' claims with prejudice.[26]

In accordance with the North Carolina Supreme Court's order certifying the case for review prior to a determination by the court of appeals, the plaintiffs filed notices of appeal from the panel's judgment.[27] In a four-to-three decision on February 4, 2022, the court entered a

18. Verified Complaint for Declaratory Judgment and Injunctive Relief at ¶ 157–58, Common Cause v. Berger, No. 21 CVS 015426 (N.C. Super. Dec. 16, 2021), 2021 WL 6884973 [hereinafter Verified Complaint].

19. *Harper*, 886 S.E.2d at 402; *see also* Verified Complaint, *supra* note 18, at ¶ 40.

20. North Carolina League of Conservation Voters, Inc. v. Hall, No. 21 CVS 015426, 2022 WL 124616, at *108 (N.C. Super. Ct. Jan. 11, 2022).

21. *Id.* at *109.

22. *Id.* at *108.

23. *See infra* Part III.A (explaining in more detail the relevant constitutional provisions).

24. North Carolina League of Conservation Voters, Inc. v. Hall, 2022 WL 124616, at *106.

25. *See id.* at *112–15.

26. *Id.* at *115.

27. Harper v. Hall, 886 S.E.2d 393, 403 (N.C. 2023).

remedial order adopting the panel's findings of fact, but concluded that the 2021 Plans were "unconstitutional beyond a reasonable doubt" based on the asserted constitutional provisions.[28] In this order, the court enjoined the use of the 2021 Plans in future elections and required that the General Assembly conduct an RPV analysis prior to drawing new redistricting plans.[29]

B. Harper I *and* Harper II

Ten days after it entered the remedial order, the North Carolina Supreme Court issued its full opinion, now known as *Harper I.*[30] In this opinion, the court first held that partisan gerrymandering claims are justiciable under the North Carolina Constitution because there were "several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation."[31] The court cited to two political science metrics in particular that would enable the court to demonstrate the constitutionality of a redistricting map: the efficiency gap test and the mean-median difference test.[32] Although it did not define an exact standard to follow, the majority asserted that the three-judge panel, along with future trial courts, would establish more precise standards for evaluating state legislative redistricting plans.[33]

The majority further held that partisan gerrymandering violated the Free Election, Equal Protection, Free Speech, and Freedom of Assembly Clauses of the North Carolina Constitution.[34] The court concluded that these provisions embody the notion of political equality, which requires that "the channeling of 'political power' from the people to their representatives in government through the democratic processes . . . must be done on equal terms."[35] The court determined that the General Assembly cannot diminish an individual's vote on the basis of party affiliation because the fundamental right to vote involves the right to enjoy "substantially equal voting power and substantially equal legislative representation."[36] Since the state legislative apportionment

28. Harper v. Hall, 867 S.E.2d 554, 557 (N.C. 2022).
29. *Id.* at 557–58.
30. *See* Harper v. Hall (*Harper I*), 868 S.E.2d 499, 499 (N.C. 2022).
31. *Id.* at 551.
32. *See id.* at 548–49.
33. *See id.* at 547.
34. *Id.* at 546.
35. *Id.*
36. *Id.* (quoting Stephenson v. Bartlett, 562 S.E.2d 377, 396 (N.C. 2002)).

scheme implicated a fundamental right, the court determined that it would apply strict scrutiny to determine the challenged redistricting plan's constitutionality.[37] Based on the three-judge panel's factual findings, the court concluded that the 2021 Plans were partisan gerrymanders and that the plans did not further a compelling state interest.[38]

On remand, the court required the General Assembly to create new redistricting plans that would satisfy the constitution.[39] The three-judge panel also appointed three special masters to assist in their review of the proposed remedial plans and in developing alternative plans, if necessary, in a February 16, 2022 order.[40] In their report, the special masters concluded that the Remedial Senate Plan (RSP) and the Remedial House Plan (RHP) satisfied the directive outlined in *Harper I*, but that the Remedial Congressional Plan (RCP) did not.[41] Accordingly, the special masters developed an alternative plan for the panel to consider.[42]

The three-judge panel adopted the special masters' findings in full, concluding that the RCP was unconstitutional because the plan did not pass the political science metrics that were used to evaluate the plans.[43] Since the panel rejected the RCP, it chose to adopt the special masters' alternative plan.[44] Despite appeals to the North Carolina Supreme Court to stay this remedial ruling, the court denied the petitions and the plans were used in the 2022 elections.[45]

Common Cause filed a motion for expedited hearing and consideration of the three-judge panel's remedial order in June 2022.[46] The North Carolina Supreme Court granted the motion and ultimately affirmed the panel's rejection of the RCP and approval of the RHP, but reversed the panel's approval of the RSP, in an opinion known as *Harper*

37. *Id.* at 552. The majority explained that under this test, the plaintiffs must have demonstrated that the redistricting plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters." *Id.* If it is determined that the plaintiffs met that burden, the challenged plan is unconstitutional unless the state can demonstrate that the plan "is narrowly tailored to advance a compelling governmental interest." *Id.* at 553 (quoting *Stephenson*, 562 S.E.2d at 393).

38. *Id.* at 552, 555.

39. *Id.* at 559.

40. North Carolina League of Conservation Voters, Inc. v. Hall, No. 21 CVS 015426, 2022 WL 2610499, at *2 (N.C. Super. Ct. Feb. 23, 2022).

41. *Id.* at *4.

42. *Id.* at *8.

43. *Id.* at *5.

44. *Id.* at *10.

45. Harper v. Hall, 886 S.E.2d 393, 407 (N.C. 2023).

46. Motion of Plaintiff-Appellant Common Cause for an Expedited Hearing and Consideration at 1, 6, Harper v. Hall, 881 S.E.2d 156 (N.C. 2022) (No. 413PA21).

II.[47] The court in *Harper II* attempted to clarify the constitutional standard it identified in *Harper I* by asserting that no combination of political science tests could sufficiently recognize whether a redistricting plan met the constitutional standard.[48] This meant that a trial court could utilize political science tests to aid in its constitutional assessment, but could not rely on those statistics alone in its assessment.[49] Consequently, the court rejected the panel's assessment of the RSP because the panel misstated its findings regarding the political science tests.[50]

In response, the legislative defendants filed a petition for rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure on January 20, 2023.[51] The legislative defendants asserted that the *Harper II* opinion confirmed that the standards the court set forth in *Harper I* and *Harper II* were not manageable.[52] Consequently, the North Carolina Supreme Court granted the petition for rehearing to address not only *Harper II*, but to also revisit *Harper I*.[53]

III. BACKGROUND

A. *State Constitutional Provisions*

Harper implicates several provisions within the Declaration of Rights in article I of the North Carolina Constitution that are similar to provisions in the Federal Constitution, but which differ in important ways. The first of these provisions, which sets out popular sovereignty within the state, explains that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[54] This concept, as an explicit attribute of democratic theory, is at the heart of America's governmental structure.[55] Popular

47. Harper v. Hall (*Harper II*), 881 S.E.2d 156, 181 (2022).
48. *See id.* at 174.
49. *See id.*
50. *Id.* at 179.
51. Legis. Defendants' Petition for Rehearing, Harper v. Hall, 886 S.E.2d 393 (N.C. 2023) (No. 413PA21), 2023 WL 2237384, at *1, *20.
52. *See id.* at *7–10.
53. *Harper*, 886 S.E.2d at 409.
54. N.C. CONST. art. I, § 2.
55. *See* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 45 (Oxford University Press ed. 2011) (1993) ("Popular sovereignty is the basis of American democracy. After the thirteen colonies declared their independence from Great Britain in 1776, political

sovereignty is arguably more important in the state context because the powers that are not delegated to the national government are reserved to the people, which creates more limitations on state governmental power.[56] The interpretation of state constitutions, therefore, can be viewed as a search for the "voice of the people."[57] The plaintiffs in *Harper* base their overall claims around the concept of popular sovereignty through their assertion that the popular will has not been reflected in the state's legislature in over a decade because of partisan gerrymandering.[58]

The next principle within the North Carolina Constitution that is implicated in *Harper* is separation of powers. The separation of powers clause states that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."[59] As with popular sovereignty, separation of powers is an essential concept upon which state governments are built.[60] However, separation of powers has been more controversial in the judicial context in North Carolina.[61] The Supreme Court of North Carolina asserted its separateness and exclusive authority over appellate procedure throughout the nineteenth century, in cases such as *Robinson v. Barfield* (1818) and *Herndon v. Imperial Fire Insurance Co.* (1892).[62] With the rise of administrative agencies in the twentieth century, many cases dealt with the balance between those agencies and the delegation of legislative power.[63] But despite the federal judiciary's prohibition on advisory opinions—defined as "answers about the law or constitution not required to resolve pending legal disputes"—the North Carolina Supreme Court has issued advisory opinions.[64] This history is in direct contrast with the *Harper* legislative defendants' contention that the court would be unnecessarily impeding upon the business of another branch by agreeing to adjudicate the claims of partisan gerrymandering.[65]

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authority could no longer be derived from the British Crown, so American revolutionaries located the ultimate source of sovereignty in the people themselves.").

56. Robert F. Williams, *Judicial Review in the American States*, *in* APEX COURTS AND THE COMMON LAW 169, 175 (Paul Daly ed., 2019).

57. *Id.* at 174–75.

58. Amended Complaint at ¶ 51, Harper v. Hall, 886 S.E.2d 393 (N.C. 2023) (No. 21-CVS-015426), 2021 WL 6891578.

59. N.C. CONST. art. I, § 6.

60. ORTH, *supra* note 55, at 48.

61. *See id.* at 49.

62. *Id. See generally* Robinson v. Barfield, 6 N.C. (2 Mur.) 391 (1818); Herndon v. Imperial Fire Insurance Co., 111 N.C. 384 (1892).

63. *Id.*

64. *Id.* at 50.

65. *See* Reply Brief for Petitioner at *10–26, Harper v. Hall, 881 S.E.2d 156 (N.C. 2022) (No. 21-CVS-015426), 2022 WL 17178457.

B. Partisan Gerrymandering Explained

In its simplest terms, partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power . . . ."[66] Gerrymandering exists because of the apportionment—or reapportionment—requirement in the U.S. Constitution.[67] Apportionment is the process of proportionally dividing U.S. House of Representative seats among the states.[68] Each state receives at least one house seat, but is given its additional seats based on state population size.[69] With each new census conducted every ten years, states are required to redraw their legislative and congressional districts to comply with this requirement.[70] The redrawn maps must be representative of the state's population, which requires state legislatures to ensure that the districts are equally populated and comply with federal voting laws, such as the Voting Rights Act.[71]

However, this process has been co-opted to further undemocratic goals. Reapportionment has provided legislators with an opportunity to "influence the outcomes of elections to representative bodies by manipulating the boundaries of electoral districts."[72] The choices made when redrawing maps can affect the likelihood that an individual's vote in a particular district will elect the candidate that best represents their beliefs.[73] Thus, legislators utilize these maps to their advantage in order to manipulate the balance of power in the state and federal legislatures and keep members of their political party in power.[74] This creates a

66. Jason B. Binimow, Annotation, *Partisan Gerrymandering as Violation of First Amendment*, 37 A.L.R. Fed. 3d Art. 7 (2018).

67. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within . . . every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct.")

68. SARAH J. ECKMAN, CONG. RSCH. SERV., IN11360, APPORTIONMENT AND REDISTRICTING FOLLOWING THE 2020 CENSUS 1 (2021).

69. *Id.*

70. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained (June 9, 2023).

71. *Id.*

72. Charles R. Beitz, *How Is Partisan Gerrymandering Unfair?*, 46 PHIL. & PUB. AFFS. 323, 326 (2018).

73. *Id.*

74. *See* Kirschenbaum & Li, *supra* note 70.

seemingly never-ending cycle where politicians are choosing their voters, rather than voters being able to choose their representatives.[75]

There are two primary ways that legislators gerrymander: cracking and packing. Cracking involves the dispersion of voters of one party across multiple districts in order to divide their voting strength.[76] This method causes the dispersed group of voters to struggle to elect their preferred candidates, placing them in losing minorities.[77] Packing involves the concentration of voters of one party into as few of districts as possible so that those groups are likely to elect their preferred candidates.[78] This method is used to create what is known as a "bipartisan" gerrymander, which creates "safe" seats for incumbents on either side of the aisle.[79] Both methods can be used by legislators in order to establish partisan advantages when redrawing districts.[80]

C. Rucho v. Common Cause

The United States Supreme Court's opinion in *Rucho v. Common Cause*[81] became the touchstone of the majority's reasoning in the rehearing of *Harper*. In *Rucho*, the Court considered whether claims of "excessive" partisan gerrymandering violated the Federal Constitution; specifically, the Court addressed whether such claims are justiciable, or appropriate for federal courts to resolve.[82] Some of the same plaintiffs in *Harper* challenged North Carolina's congressional redistricting map and brought claims similar to those that were brought in *Harper*, but this time in federal court. The *Rucho* plaintiffs alleged that the redistricting plan violated both the Equal Protection Clause of the Fourteenth Amendment—by purposefully diminishing the electoral strength of Democratic voters—and those voters' rights to free speech and free association as guaranteed in the First Amendment.[83] The plaintiffs further alleged that the plan exceeded the state legislature's delegated authority to prescribe the "Times, Places and Manner of holding Elections,"[84] and commandeered the right of the people to elect their preferred congressional candidates, in violation of the requirement that

75. *Id.*
76. *Id.*; Beitz, *supra* note 72, at 326.
77. Kirschenbaum & Li, *supra* note 70; Beitz, *supra* note 72, at 326.
78. Kirschenbaum & Li, *supra* note 70; Beitz, *supra* note 72, at 326.
79. Beitz, *supra* note 72, at 326.
80. Kirschenbaum & Li, *supra* note 70.
81. 588 U.S. 684 (2019).
82. *Id.* at 691.
83. *Id.* at 692.
84. *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1).

members of the House of Representatives be selected "by the People of the several States."[85]

The Court began its analysis by looking at the historical background of partisan gerrymandering, noting that the problem existed at the time of America's founding, with the framers specifically contemplating how to engage with it.[86] The framers decided to assign the issue to the state legislatures and have the Federal Congress serve as an express check on the state legislatures' management of the issue.[87] In the past, courts have been called upon to resolve various issues regarding districting, but those cases dealt with issues that could be resolved under basic equal protection principles.[88] The Court concluded that, since the framers could have limited partisan gerrymandering in the Constitution, but did not, they decided to entrust the state legislatures and Congress with the duty of districting.[89] The problem, the Court reasoned, was how to determine when partisan gerrymandering had gone too far.[90]

The Court explained that partisan gerrymandering claims call for proportional representation, which is not required by the Constitution.[91] The federal courts are neither equipped, nor obliged, to make political judgments about how much representation a particular political party should have.[92] The Court is unable to settle on a clear, manageable, and politically neutral test for fairness because there are no legal standards discernible for making judgments about fair districting; there are only different ideas of fairness, which are political determinations, not legal determinations.[93] Although the appellees and the dissent proposed several tests for assessing partisan gerrymandering claims, the Court concluded that none of them met "the need for a limited and precise standard that is judicially discernible and manageable."[94]

The Court further concluded that partisan gerrymandering claims did not violate the Equal Protection Clause because they differed from claims like "one-person, one-vote" and racial gerrymandering, which are

85. *Id.* (quoting U.S. CONST. art. I, § 2, cl. 1).
86. *See id.* at 696–99.
87. *Id.* at 699.
88. *Id.* at 699–70.
89. *Id.* at 701.
90. *Id.*
91. *Id.* at 704 (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986)).
92. *Id.* at 705.
93. *Id.* at 706.
94. *Id.* at 710.

protected under equal protection principles.[95] The Court reasoned that vote dilution in the former requires that each representative be accountable to approximately the same number of constituents, but that the Constitution does not extend that requirement to political parties.[96] The difference between partisan and racial gerrymandering claims is that the latter does not ask for fairness in political influence or power, but rather fairness between racial classifications.[97] "One-person, one-vote" and racial gerrymandering claims have clear and manageable ways for a court to determine what is permissible and what is not, while partisan gerrymandering claims do not.[98]

The Court also disagreed with the district courts' findings that partisan gerrymandering claims were justiciable under the First Amendment. Individuals were still free to engage in speech, association, or any other activities protected by the First Amendment, "no matter what the effect of a [districting] plan may be on their district."[99] The First Amendment does not provide a standard for determining when partisan activity goes too far.[100] The Court concluded that if a First Amendment claim were to be sustained, that decision would make any consideration of political affiliation in districting to be unlawful.[101]

While the Court's decision meant that partisan gerrymandering claims were not justiciable in federal courts, the Court acknowledged that its decision did not mean that excessive partisan gerrymandering was acceptable.[102] There were two main avenues for reform still available for the plaintiffs. First, the issue could be decided by the individual states through state constitutional amendments and legislation that prohibit drawing district lines for partisan advantage, either by establishing specific districting criteria for mapmakers or by assigning the power to draw new districts with independent commissions.[103] Second, Congress could choose to act by exercising its power through the Elections Clause.[104]

95. *See id.* at 709–10.
96. *See id.* at 709.
97. *Id.*
98. *See id.* at 714–15.
99. *Id.* at 713–14.
100. *Id.* at 714.
101. *Id.*
102. *Id.* at 719–20.
103. *Id.* at 720.
104. *Id.*

IV. COURT'S REASONING

A. *The Majority Opinion*

As with *Harper I* and *Harper II*, the court was presented with the question of whether the North Carolina Constitution prohibits partisan gerrymandering.[105] In particular, the court evaluated whether the General Assembly's 2021 and 2022 legislative and congressional redistricting plans were partisan gerrymanders that violated the free elections clause, equal protection clause, and the free speech and freedom of assembly clauses of the North Carolina Constitution.[106] The majority began its analysis with an overview of the Supreme Court's opinion in *Rucho v. Common Cause*, which it found to be "insightful and persuasive."[107] The court found the *Rucho* opinion to be convincing, even in the state context, "because the same arguments, concerns, and predictions" were present in *Harper*.[108]

The majority continued its analysis by discussing the concept of separation of powers and the applicable standard of review. The court emphasized the placement of the separation of powers clause within the North Carolina Constitution's Declaration of Rights, which demonstrates the importance of "keeping each branch within its described spheres" in order to protect the people from inordinate governmental power.[109] However, the majority also emphasized that while this is a fundamental principle in the state constitution, the constitution does not state that the three branches have to be equal; the leading power has always been the legislature.[110] Since the legislature is the most accountable to the people, and all political power resides in the people, the legislative branch is the policy-making force of the state government.[111] The legislature possesses plenary power, along with its other explicit responsibilities, which can only be limited by the specific text of the state constitution.[112] Because of this, "[a] constitutional limitation upon the General Assembly must be explicit and a violation of that limitation must be proved beyond a

105. Harper v. Hall, 886 S.E.2d 393, 400 (N.C. 2023).
106. *Id.* at 416.
107. *Id.* at 409.
108. *Id.* at 413.
109. *Id.*
110. *See id.* (citing JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 50 (2d ed. 2013)).
111. *See id.* at 414; N.C. CONST. art. I., § 2.
112. *Harper*, 886 S.E.2d at 414.

reasonable doubt."[113] Thus, the court was tasked with determining whether the General Assembly's redistricting plans, which were presumed constitutional, violated an explicit provision of the constitution beyond a reasonable doubt.[114]

In applying this standard of review, the court first surmised that the question of redistricting was expressly assigned to the General Assembly. Based on a historical analysis, the court demonstrated how redistricting and the elections process has been carried out by the General Assembly for hundreds of years.[115] Article II, section 3, of the current state constitution also specifically assigns the legislative redistricting power to the General Assembly and sets out several limitations.[116] Furthermore, although the state constitution does not include a provision regarding redistricting of congressional districts, the U.S. Constitution assigns this duty to state legislatures.[117] There are also specific provisions that protect the redistricting power from interference by the other two branches: the governor's veto power cannot be used against redistricting legislation and judicial review is very limited.[118] Consequently, the courts may only review challenges regarding whether a redistricting plan is unconstitutional or otherwise invalid.

Upon reviewing the record, the court concluded that there was a lack of a judicially discoverable and manageable standard for adjudicating partisan gerrymandering claims. The majority opinion referenced the case *Dickson v. Rucho*,[119] in which the North Carolina Supreme Court determined that article I, section 2, of the state constitution does not provide a justiciable standard for discerning partisan disadvantage.[120] The court criticized the majority in *Harper I* for departing from the *Dickson* analysis and insisting that a clear standard existed for identifying partisan gerrymandering.[121] It further attacked *Harper I*'s description of a "constitutional right[ ] of the people to vote on equal terms and to substantially equal voting power" along with an "individual right[ ] of voters to cast votes that matter equally."[122] The court specified that these "vague and inconsistent standards are not derived from any

113. *Id.* (citing State *ex rel.* McCrory v. Berger, 781 S.E.2d 248, 252 (N.C. 2016) (Newby, J., concurring in part and dissenting in part)).
114. *Id.* at 415.
115. *See id.* at 416.
116. *See id.* at 418; N.C. CONST. art. II, § 3. Article II, section 5 of the North Carolina Constitution sets out additional limitations. *See* N.C. CONST. art. II, § 5.
117. *See* U.S. CONST. art. I, § 4, cl. 1.
118. *Harper*, 886 S.E.2d at 419.
119. 766 S.E.2d 238 (N.C. 2014).
120. *See id.* at 260.
121. *Harper*, 886 S.E.2d at 424.
122. *Id.* at 424 (quoting Harper v. Hall, 868 S.E.2d 499, 510 (N.C. 2022)).

express provision in the constitution."[123] The standards also do not outline how to precisely and consistently measure whether partisan groups are being treated "fairly" in redistricting plans.[124] The *Harper I* majority's application of its proffered political science tests proved to be inconsistent.[125]

Ultimately, the majority was unable to accept the *Harper I* framework because a lack of a judicially discoverable and manageable standard creates several potential problems for future redistricting lawsuits. The court noted that a specific standard is necessary in order to deliberately restrict the discretion of the courts and maintain public approval for the courts' distinct interference with democratic decision making.[126] It suggests that the *Harper I* framework "invites limitless judicial involvement because it is so difficult to apply and leads to inconsistent results."[127] The framework does not provide guidance for future courts—such as how to account for third-party affiliated or unaffiliated voters—which would lead those courts to rely on their own policy preferences to make a decision.[128]

The majority also contended that the failure to provide a judicially discoverable and manageable standard would require courts to make policy determinations that are clearly meant for nonjudicial judgment. The opinion asserts that this is exactly what occurred in *Harper I* and *Harper II* because the court had to make several policy decisions, including that a certain amount of partisan gerrymandering was unconstitutional, that the use of certain political science tests was an appropriate measure of constitutionality, and that previous elections are a better source of partisan election data than other sources.[129] By doing so, a court commandeers the role of the legislature by adhering to its own preferences, rather than to the judgment of the people's elected representatives.[130] These policy determinations, the court noted, undermine the well-established presumption of constitutionality that is afforded to acts of the General Assembly.[131] The presence of these policy determinations, combined with the express constitutional assignment of

123. *Id.*
124. *Id.*
125. *See id.* at 425.
126. *Id.* at 427.
127. *Id.*
128. *Id.* at 427–28.
129. *Id.* at 428.
130. *Id.* at 431.
131. *Id.*

redistricting to the legislature and the lack of a judicially discoverable and manageable standard, led the court to determine that the matter was nonjusticiable.[132]

Despite this determination, the court explained in detail how the various constitutional provisions cited by the plaintiffs did not limit partisan considerations in redistricting. The majority explained that the free elections clause was intended to protect the people against abuses of executive power, not from their chosen representatives.[133] Based upon this section's history and the court's precedent, the court concluded that the free elections clause entitles voters to vote according to their own judgment and ensures that each vote is accurately counted—rights which are not affected by partisan gerrymandering.[134]

Similarly, the court found that the equal protection clause was not implicated by partisan gerrymandering because that clause guarantees that each vote will have the same weight; there is nothing in article II, section 3 or section 5, that requires party affiliation to be taken into account.[135] The idea of aggregating one's vote with likeminded citizens, as articulated by the *Harper I* majority, was not within the scope of the equal protection clause.[136]

Likewise, the free speech and freedom of assembly clauses do not support the plaintiffs' argument either because "[p]artisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint."[137] Thus, none of the constitutional provisions relied upon by the plaintiffs prohibit partisan gerrymandering.

B. The Dissent

The dissenting opinion in *Harper* adopted a more policy-minded approach when evaluating the majority's conclusions. The dissent primarily focused on its point that redistricting maps enacted by the General Assembly in recent years have muffled "the will of North Carolina voters by rigging the system against one party in favor of another."[138] The opinion explains how unchecked partisan gerrymandering allows the majority party within the General Assembly to draw redistricting plans in a way that weakens the voting power of

132. *See id.*
133. *Id.* at 433.
134. *Id.* at 439.
135. *Id.* at 440; *see* N.C. CONST. art. II, §§ 3, 5.
136. *See Harper*, 886 S.E.2d at 441.
137. *Id.* at 443.
138. *Id.* at 449 (Earls, J., dissenting).

voters in the minority party.[139] The dissent criticizes the majority for making a "mockery" of the people's will by failing to intervene in a practice that will allow "the select few in the General Assembly" to ensure that their party rules "indefinitely, regardless of what North Carolinians have to say about it."[140]

Much like the majority opinion, the dissenting opinion examines each of the constitutional provisions relied upon by the plaintiffs, beginning with the free elections clause. The dissent asserts that partisan gerrymandering violates the free elections clause because it is a form of vote dilution, or "the devaluation of one citizen's vote as compared to others' . . . that imposes a 'constraint' on a voter's will."[141] With modern technology, legislators are able to draw district lines that "pack" and "crack" voters that are likely to support the minority party, which helps them to rig elections.[142] As the dissent plainly states, "[a] rigged election is not, in any sense of the word, a free election."[143] The dissent also highlights that the majority's use of case law limits the protection afforded by the free elections clause to only two scenarios—when one can vote with their own conscience and when one's vote is accurately counted—despite the fact that that contention conflicts with the majority's own historical analysis.[144]

With respect to the equal protection clause, the dissenting opinion asserts that partisan gerrymandering deprives North Carolina voters of their fundamental right to vote on equal terms.[145] The dissent explains that partisan gerrymandering can be likened to "[m]alapportionment—the practice of inequitably apportioning representatives, allowing certain voters to wield more influence than others" because it violates the principle that every similarly situated person should be treated alike, which is a principle supported by the court's precedent.[146] The only difference between partisan gerrymandering and malapportionment is that the former involves dilution based on who a voter votes for, rather than dilution based on where a voter lives.[147]

139. *Id.* at 450.
140. *Id.* at 456.
141. *Id.* (quoting Rucho v. Common Clause, 588 U.S. 684, 730 (2019) (Kagan, J., dissenting)).
142. *Id.* (quoting *Rucho*, 588 U.S. at 730 (Kagan, J., dissenting)).
143. *Id.* at 457.
144. *Id.* at 458.
145. *Id.* at 458–59.
146. *See id.* at 459.
147. *See id.* at 459–60.

The dissent also concluded that the majority erred in its application of the political question doctrine to partisan gerrymandering claims. The dissent relies upon the Supreme Court opinion in *Baker v. Carr*, which asserted that "[t]he courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[148] Even though the U.S. Supreme Court concluded that partisan gerrymandering claims are nonjusticiable in *Rucho*, partisan gerrymandering claims were considered justiciable for many decades.[149] But just as the U.S. Supreme Court's decision in *Rucho* followed a shift in the Court's political composition, the dissenting opinion calls attention to how the majority's opinion in *Harper* followed a midterm election that changed its partisan makeup.[150] The dissent also emphasizes that the court's decision to vacate *Harper I* and *Harper II* was not found on a change in, or misinterpretation of, the facts or law.[151]

Despite the majority opinion's argument, the dissenting opinion argues that there are judicially manageable standards available to demonstrate whether unconstitutional partisan vote dilution has occurred.[152] The dissent points out that *Harper I* outlined several reliable ways to validate the presence of an unconstitutional partisan gerrymander.[153] Not only that, but the dissent also explains that "the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes."[154] There are numerous times where a court is tasked with deciding when a harm is sufficiently substantial to establish a constitutional violation, without reducing those harms to specific percentages.[155] Therefore, the dissent contends that the majority should not have dismissed the judicially manageable standard clearly outlined by *Harper I*.

Although the dissent agrees with the majority that the state constitution assigns the redistricting authority to the legislature, it disagrees with the majority's withdrawal of the judiciary from this process.[156] As discussed in *Stephenson v. Bartlett*, a case which the majority cites extensively, "within the context of state redistricting and

148. 369 U.S. 186, 217 (1962).
149. *Harper*, 886 S.E.2d at 460 (Earls, J., dissenting).
150. *Id.* at 461.
151. *Id.*
152. *See id.* at 462–63.
153. *Id.* at 462.
154. *Id.* (quoting Rucho v. Common Cause, 588 U.S. 684, 737 (2019) (Kagan, J., dissenting)).
155. *See id.* at 463.
156. *See id.* at 472.

reapportionment disputes, it is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan.'"[157] Judicial review is necessary in the redistricting context because voters do not have any other remedies for the constitutional harms of unfettered elected officials.[158] The majority's findings do not invalidate the judiciary's role in ensuring that the General Assembly draws constitutionally compliant districting maps.[159]

V. ANALYSIS

A. *The Effect of Judicial Elections*

Despite the majority's assertion to the contrary, it does not appear to be a coincidence that the court decided to rehear *Harper* after Republican justices usurped the court's majority following the 2022 midterm elections.[160] Many outside organizations called out the court for its sudden change of heart following these elections because, as previously discussed, the court had twice concluded that partisan gerrymandering claims were justiciable.[161] Although the *Harper* majority stated that "engagement in policy issues forces courts to take sides in political battles and undermines public trust and confidence in the judiciary," its decision appears to do just that.[162] This is because, as the dissent poignantly noted, the court's decision to vacate *Harper I* and *Harper II* was not found "on a change in, or misunderstanding of," the facts or the law in the case.[163] Thus, it is difficult for one to not to be suspicious of the court's true motivation for rehearing *Harper* and vacating its prior judgments.

Fundamentally, this is a dangerous precedent for the North Carolina Supreme Court to set because it expresses that the court will not step in

157. Stephenson v. Bartlett, 562 S.E.2d 377, 384 (N.C. 2002) (quoting Scott v. Germano, 381 U.S. 407, 409 (1965)).

158. *Harper*, 886 S.E.2d at 472 (Earls, J., dissenting).

159. *Id.* at 474–75.

160. *See generally* Hansi Lo Wang, *A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NPR (Apr. 28, 2023, 12:25 PM), https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court.

161. Andy Li, *RECAP: NC Supreme Court Rehears Arguments on* Harper v. Hall *Voting Rights Case*, S. COAL. FOR SOC. JUST., https://southerncoalition.org/recap-nc-supreme-court-rehears-arguments-on-harper-v-hall-voting-rights-case/ (last visited Aug. 14, 2025) ("'The petition for rehearing in this case was filed because of a change in the composition of the court . . . .'"); *see also* Part II.B (discussing *Harper I* and *Harper II*).

162. *Harper*, 886 S.E.2d at 399.

163. *Id.* at 461 (Earls, J., dissenting).

to stop the legislature from manipulating its power. By "allowing incumbent politicians in the majority party to draw electoral lines," the court is creating "the appearance of impropriety," which "erodes public trust."[164] The court is no longer presenting itself as an independent arbiter of justice, but rather as a body that is susceptible to the influences of partisan supermajorities. In his statement following the *Harper* decision, Governor Roy Cooper stressed that "[t]he Republican State Supreme Court has ignored the constitution . . . and is destroying the court's reputation for independence."[165] It is a very different situation from that of the recent shift in the U.S. Supreme Court's political makeup because the justices of the North Carolina Supreme Court, as elected officials rather than appointed officials, are presumably more likely to want to maintain partisan advantages that will help them to remain on the bench. Ultimately, the decision erodes the trust of North Carolina voters and calls into question whether their elections are fair.[166]

B. The Lack of Judicial Review Creates Balance of Powers Issue

As North Carolina Attorney General Josh Stein articulated in his statement regarding the court's decision in *Harper*, "[the] constitution is supposed to be a check on the power of the legislature."[167] The role of the judiciary is even more crucial in the context of redistricting cases because nothing else stands between the people and the unfettered power of the legislature.[168] With the introduction of increasingly sophisticated data technology, it is "clear that those who draw district lines in this manner require neutral and independent judicial oversight."[169] If redistricting maps do not fairly reflect the voting strength of the people of the state, the government is essentially seeking to prevent voters from exercising their own control over the government. State voters must "have an

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164. Claire Snyder-Hall, *How Partisan Gerrymandering Kills Democracy*, DEL. LAW., Fall 2016, at 18, 20.

165. Governor Roy Cooper (@NC_Governor), X (Apr. 28, 2023, 12:10 PM), https://x.com/NC_Governor/status/1651982343400304643?prefetchTimestamp=1735954102533&mx=2.

166. *See* Dawn Baumgartner Vaughan & Luciana Perez Uribe Guinassi, *NC Supreme Court Reverses its Past Rulings on Major Voting Rights Cases*, NEWS & OBSERVER (May 10, 2023, 3:15 PM), https://www.newsobserver.com/news/politics-government/article274831436.html.

167. Press Release, North Carolina Department of Justice, Attorney General Josh Stein Statement on *Harper v. Hall* (Apr. 28, 2023), https://ncdoj.gov/attorney-general-josh-stein-statement-on-harper-v-hall/.

168. *See Harper*, 886 S.E.2d at 472 (Earls, J., dissenting).

169. Brief of Bipartisan Former Governors Michael F. Easley et al. as Amici Curiae Supporting Plaintiffs, Harper v. Hall, 886 S.E.2d 393 (2023) (No. 413P21), 2022 WL 376057 *6 [hereinafter Brief of Bipartisan Former Governors].

opportunity to influence the redistricting process in a meaningful way" in order to fully take part in a democratic society.[170]

The potential consequences of partisan gerrymandering are frightening—at its most severe, it can establish a "fabricated supermajority" that "may override the authority vested in coordinate branches of government and ultimately to the people."[171] Even though the *Harper* majority would like North Carolina voters to believe it is remaining neutral and not picking sides, it is the duty of the court "to ensure that 'future elections' in the 'courts of public opinion' are ones that freely and truthfully express the will of the People."[172] But if partisan gerrymandering continues to go unchecked by the judiciary, the partisan supermajorities will continue to gain more and more power over future elections. This creates "a perverse situation in which elected officials choose their voters rather than voters choosing their representatives."[173] Politicians will no longer feel the pressure of being accountable to their constituents because they will control the outcomes of the elections, regardless of what the people want.[174] The people will be left without the ability to hold these individuals accountable, and the popular will of the people will cease to exist.

VI. CONCLUSION

In *Harper v. Hall*, the North Carolina Supreme Court held, on a rehearing, that partisan gerrymandering claims are nonjusticiable political questions which do not implicate any provisions of the state constitution. While the court followed the precedent set by the United States Supreme Court in *Rucho v. Common Cause*, the court's unwillingness to address the issue brings many concerns. It is no coincidence that the court's opinion changed so drastically, in such a short period of time, following a judicial election that impacted the political composition of the court. The court's failure to intervene creates a balance of powers issue because without a check on the legislature's power to redistrict, politicians will remain impervious to the popular will. Although the North Carolina Constitution is founded upon the principle

170. Snyder-Hall, *supra* note 164, at 19.
171. Brief of Bipartisan Former Governors, *supra* note 169, at *1.
172. Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *3 (N.C. Super. Ct. Sept. 3, 2019) (quoting Dickson v. Rucho, Nos. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 8, 2023)), *abrogated by Harper*, 886 S.E.2d 393 (N.C. 2023).
173. Snyder-Hall, *supra* note 164, at 18.
174. *See id.*

of popular sovereignty, the people will not enjoy this democratic power until partisan gerrymandering is stifled.