

NOTE

STATE REDISTRICTING LAW: *STEPHENSON V. BARTLETT* AND THE JUDICIAL PROMOTION OF ELECTORAL COMPETITION

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INTRODUCTION

TRADITIONALLY, state legislatures have created legislative districts by adopting a general redistricting statute after each decennial census. This method raises the obvious problem that the very people who are running for office are the ones determining the composition of their districts. The prime concern is that legislators will draw districts in which party affiliation, race, or some other voting characteristic is so clearly skewed toward one group that the outcome of general elections in most districts is a foregone conclusion.¹ This phenomenon, known as “gerrymandering,” has been exacerbated in recent years by the availability of technology that allows mapmakers to draw district lines at the census block level—all but allowing legislators to choose their voters, rather than the other way around.

For most of American history, there were virtually no judicially enforceable restrictions on a legislature’s power to redistrict.² It was only a little over four decades ago that federal courts first ac-

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¹ In order to do this, legislatures use two main methods: “packing” a political group into a single district so that other districts will contain a minority of that group, and “cracking” a political group into several districts so that it will be a minority in each district where it could have formed a majority if not divided. See Kristen Silverberg, Note, The Illegitimacy of the Incumbent Gerrymander, 74 *Tex. L. Rev.* 913, 922 (1996).

² *Baker v. Carr*, 369 U.S. 186 (1962).

knowledgeable jurisdiction over redistricting disputes.³ Originally, they did so in order to solve problems regarding population inequalities among districts that favored rural voters over urban ones.⁴ Subsequent judicial decisions and legislation have provided administrative remedies and new causes of action to address racial discrimination in the redistricting process.⁵

The federal courts have taken a much more deferential stance toward federal equal protection claims based on theories that legislators drew districts favoring one party or the other, a practice known as “partisan gerrymandering.” In the 1986 case of *Davis v. Bandemer*, a majority of the Supreme Court agreed that partisan gerrymandering claims are justiciable but could not agree on a judicially enforceable standard for them.⁶ After eighteen years of lower court failures to find such a standard,⁷ the Court revisited the issue in *Vieth v. Jubelirer*.⁸ A four-justice plurality in *Vieth* would have declared partisan gerrymandering claims to be nonjusticiable because of a lack of judicially enforceable standards.⁹ Concurring in the judgment, Justice Kennedy recognized the lack of a standard to date but refused to close the door completely on partisan gerrymandering claims.¹⁰ In separate dissents, Justices Stevens, Souter, and Breyer each suggested potential standards for partisan gerrymandering claims.¹¹ Although the present partisan gerrymandering

³ *Baker*, 369 U.S. at 209 (holding for the first time that an equal protection claim for malapportionment of a state legislature was justiciable and that jurisdiction was not proscribed by the political question doctrine).

⁴ *Baker*, 369 U.S. at 192; see *infra* Section I.A.

⁵ See, e.g., Voting Rights Act of 1965 §§ 2, 5, 42 U.S.C. §§ 1973, 1973c (2000); *Shaw v. Reno*, 509 U.S. 630, 658 (1993); see also *infra* Section I.

⁶ 478 U.S. 109, 125 (1986).

⁷ See, e.g., Samuel Issacharoff et al., *The Law of Democracy* 886 (rev. 2d ed. 2002) [hereinafter Issacharoff et al., *Law of Democracy*] (“[*Davis*] has served almost exclusively as an invitation to litigation without much prospect of redress.”); see also *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992) (finding a challenge to North Carolina’s superior court judge elections justiciable under *Davis* but nonetheless dismissing the suit for failure to state a claim).

⁸ 124 S. Ct. 1769 (2004).

⁹ *Id.* at 1776 (plurality opinion).

¹⁰ *Id.* at 1799 (Kennedy, J., concurring in the judgment) (“If workable standards do emerge to measure [partisan gerrymandering] burdens . . . courts should be prepared to order relief.”).

¹¹ *Id.* at 1810 (Stevens, J., dissenting) (suggesting that the *Shaw* racial gerrymandering line of cases applies equally well to partisan gerrymanders); *id.* at 1817–19 (Souter, J., dissenting) (drawing on the full gamut of existing redistricting law to propose a

jurisprudence is muddled, it seems unlikely that the Court will agree on a standard for such claims anytime soon, even though several justices seem to feel that such a standard is possible. Thus, as a practical matter, there appears to be no federal judicial remedy to protect voters from their legislature if it engages in partisan gerrymandering.

A number of commentators have discussed the gerrymandering problems associated with the traditional method of legislative redistricting. Professor Adam Cox has argued that the original intent of the decision to create judicially enforceable standards in the redistricting process was to address the inherently unfair process of partisan gerrymandering.¹² Professor Samuel Issacharoff suggests that partisan gerrymandering is a form of market manipulation, drawing an analogy to antitrust principles.¹³ Professor Nathaniel Persily responded to Issacharoff by questioning whether voters truly are better off with electoral competition.¹⁴ There seems to have been little discussion, however, of the role state courts might play in finding a solution using state constitutional law.

In the absence of effective federal remedies, what can state courts do to solve problems in the redistricting process? Because federal courts do not have exclusive jurisdiction over redistricting cases,¹⁵ and legislative redistricting is subject to state constitutions as well as the Federal Constitution, it was only a matter of time until litigants sought relief from state courts. Perhaps encouraged by the U.S. Supreme Court's admonition that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court,"¹⁶ redistricting

five-element prima facie case for partisan gerrymandering, a view in which Justice Ginsburg joined); *id.* at 1827–28 (Breyer, J., dissenting) (suggesting a "sliding-scale" approach where the more entrenched a minority party becomes in the legislature, the less evidence a court would need to conclude that partisan gerrymandering occurred).

¹² See Adam Cox, Commentary, Partisan Fairness and Redistricting Politics, 79 N.Y.U. L. Rev. 751, 755–56 (2004).

¹³ Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 599 (2002) [hereinafter Issacharoff, Gerrymandering].

¹⁴ See Nathaniel Persily, Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Activities, 116 Harv. L. Rev. 649 (2002).

¹⁵ *Grove v. Emison*, 507 U.S. 31, 32 (1993).

¹⁶ *Id.* at 34 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). But cf. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding that in the absence of a compelling state

lawsuits asserting state constitutional claims played a significant role in the 2000 redistricting cycle. As of this writing, state courts in at least fourteen states have applied principles of state constitutional law in legislative redistricting cases since the year 2000.¹⁷ Several of these states have used their state constitutional or statutory law to strike down legislative redistricting plans.¹⁸

This Note will examine the North Carolina Supreme Court's two major decisions in *Stephenson v. Bartlett*, which were of a different

interest, the populations of the districts in a congressional district plan must approach mathematical equality).

¹⁷ See, e.g., *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002) (striking down redistricting plan for violating state constitution's "compactness" requirement); *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1246 (Colo. 2002) (striking down redistricting plan because it was not sufficiently attentive to county boundaries and had an inadequate factual showing that less drastic measures would not satisfy the equal population requirement); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828 (Fla. 2002) (holding that redistricting plan did not violate state constitution's contiguity requirements); *Bingham County v. Idaho Comm'n for Reapportionment*, 55 P.3d 863, 867 (Idaho 2002) (holding that state constitution disallows splitting of counties except when necessary to satisfy the Federal Constitution's one-person, one-vote requirement); *Beaubien v. Ryan*, 762 N.E.2d 501, 506 (Ill. 2001) (holding that redistricting plan did not violate state constitution's requirement for compactness); *In re Stovall*, 44 P.3d 1266, 1274 (Kan. 2002) (upholding redistricting plan); *In re Legislative Districting*, 805 A.2d 292, 329 (Md. 2002) (striking down a redistricting plan for violating state constitutional requirement of regard for natural boundaries and boundaries of political subdivisions); *McClure v. Sec'y of the Commonwealth*, 766 N.E.2d 847, 854 (Mass. 2002) (same); *Mayor of Cambridge v. Sec'y of the Commonwealth*, 765 N.E.2d 749, 754 (Mass. 2002) (upholding redistricting plan against claim that it violates state constitutional requirement to keep intact cities "as nearly as may be"); *Below v. Gardner*, 148 N.H. 1, 3 (2002) (enacting a redistricting plan based on federal and state constitutional principles after the legislature was unable to do so before 2002 election cycle); *Burling v. Chandler*, 804 A.2d 471, 475 (N.H. 2002) (same); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 844 (N.J. 2003) (holding that redistricting plan could not conform to state constitution's political boundary requirement without violating federal law); *Stephenson v. Bartlett*, 562 S.E.2d 377, 392 (N.C. 2002) (holding that 2001 redistricting plans violate state constitution's whole-county provisions); *Hartung v. Bradbury*, 33 P.3d 972, 976-78 (Or. 2001) (upholding redistricting plan on both state and federal constitutional grounds but remanding plan for statutory violations); *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 992 (Pa. 2002) (upholding redistricting plan against state and federal constitutional challenges); *Wilkins v. West*, 571 S.E.2d 100, 110 (Va. 2002) (upholding redistricting plan against constitutional challenge that the districts were not compact or contiguous).

¹⁸ See, e.g., *In re 2001 Redistricting Cases*, 44 P.3d at 143 (Alaska); *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d at 1246 (Colorado); *Bingham County*, 55 P.3d at 867 (Idaho); *In re Legislative Districting*, 805 A.2d at 329 (Maryland); *Stephenson*, 562 S.E.2d at 392 (North Carolina); *Hartung*, 33 P.3d at 976-78 (Oregon).

species from prior redistricting decisions in other state courts.¹⁹ In *Stephenson I*, the court reached a completely unexpected resolution to a lawsuit over the state's legislative redistricting plans by fashioning a set of judicially created redistricting criteria.²⁰ In *Stephenson II*, the court provided further information about just how stringent it intended the criteria devised in *Stephenson I* to be and gave a glimpse of the very narrow range of discretion remaining for the North Carolina General Assembly in legislative redistricting.²¹ A careful analysis of the results of these two cases suggests that other states may be able to use their own state constitutions to reform the redistricting process—by creating limitations on legislative choices in redistricting that reduce the role of partisan politics—if they are willing to embrace the sort of judicial activism that characterizes the *Stephenson* rulings. To date, no other state has been as aggressive as North Carolina; however, the problems which appear to have motivated the *Stephenson* court are hardly unique to that state.

Part I of this Note will consider briefly the development of federal redistricting law since the federal courts first took jurisdiction over redistricting cases in 1962. This is necessary background for understanding the choices available to state decisionmakers, both legislative and judicial, in the redistricting process. Part II will examine North Carolina redistricting law with an emphasis on the state's constitution and the historical development of the state's

¹⁹ Compare *Stephenson*, 562 S.E.2d [hereinafter *Stephenson I*] (creating severe restrictions on legislative redistricting through a novel interpretation of the state's equal protection clause), and *Stephenson*, 582 S.E.2d 247, 254 (N.C. 2003) [hereinafter *Stephenson II*] (strictly enforcing judicially created redistricting requirements), with *In re 2001 Redistricting Cases*, 44 P.3d at 143 (striking down redistricting plan for violating state constitution's "compactness" requirement), *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d at 1246 (striking down redistricting plan because it was not sufficiently attentive to county boundaries and had an inadequate factual showing that less drastic measures would not satisfy the equal population requirement), *Bingham County*, 55 P.3d at 867 (holding that the state constitution disallows splitting of counties except when necessary to satisfy the Federal Constitution's one-person, one-vote requirement), *In re Legislative Districting*, 805 A.2d at 329 (striking down redistricting plan for violating state constitution's requirement of regard for natural boundaries and boundaries of political subdivisions), and *Hartung*, 33 P.3d at 976–78 (upholding redistricting plan on both state and federal constitutional grounds but remanding the plan for statutory violations).

²⁰ *Stephenson I*, 562 S.E.2d at 392–98.

²¹ *Stephenson II*, 582 S.E.2d at 250–54.

redistricting process. Part III will examine the *Stephenson* decisions themselves. Part IV will examine the court's opinions through traditional means of constitutional interpretation, on the basis of prior precedent, and finally as an example of partisan politics. Having determined that the opinions cannot be explained on these grounds, Part IV will argue that the *Stephenson* decisions are an example of a state court employing original constitutional interpretation to shift the institutional balance of power over redistricting away from the legislature and towards the courts. Part V will conclude that the court fashioned its ruling to address the problems of partisan gerrymandering. As such, the outcome bears consideration in the many other states facing a similar lack of robust electoral competition that the political branches are unwilling or unable to resolve.

I. FEDERAL CONSTRAINTS ON THE REDISTRICTING PROCESS

All state redistricting plans must comply with federal constitutional and statutory requirements.²² Thus, an understanding of the federal constraints on the redistricting process is necessary background to any analysis of evolving state redistricting law.

Federal law places at least four major restrictions on state legislative redistricting: (1) the constitutional "one-person, one-vote" requirement;²³ (2) the statutory preclearance requirement for election law changes to prevent retrogression of the voting rights of minorities in areas with a history of discrimination;²⁴ (3) the statutory obligation to avoid minority vote dilution by creating districts with a predominantly minority population where practicable;²⁵ and (4) the constitutional prohibition on racial gerrymandering.²⁶ Taken together, these four requirements significantly reduce the political

²² See generally U.S. Const. art. VI, cl. 2; *Stephenson I*, 562 S.E.2d at 388 ("When federal law preempts state law under the Supremacy Clause, it renders the state law invalid and without effect.").

²³ This requirement was first articulated in the state legislative context in *Reynolds v. Sims*, 377 U.S. 533, 554–61 (1964).

²⁴ Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2000).

²⁵ 42 U.S.C. § 1973 (2000).

²⁶ This requirement was first articulated in *Shaw v. Reno*, 509 U.S. 630, 649–50 (1993).

choices available to state mapmakers. Each will be examined briefly in turn.

A. *One-Person, One-Vote*

The simplest and oldest of the four restrictions, and the one which lends itself most readily to judicial application, is the constitutional “one-person, one-vote” requirement. Simply stated, the rule is that “the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”²⁷ A court determines compliance with the rule using simple statistics. A plaintiff makes out a prima facie case of violation of the one-person, one-vote rule by showing that the deviation in population between the largest and smallest district in the challenged plan is more than 10%.²⁸ First formulated in the *Baker v. Carr*²⁹ and *Reynolds v. Sims*³⁰ decisions in the early 1960s, this requirement has remained largely unchanged.³¹

B. *Retrogression Under Section 5 of the Voting Rights Act*

When Congress originally adopted the Voting Rights Act of 1965 (“VRA”), most of the focus was on the extraordinary remedy provided in Sections 4 and 5.³² Section 4(b) provides an elaborate formula for determining, based on election statistics, whether a history of racial discrimination in voting exists in a “jurisdiction,” where a “jurisdiction” may be an entire state or a political subdivision thereof.³³ Jurisdictions with a history of racial discrimination

²⁷ *Reynolds*, 377 U.S. at 568.

²⁸ *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

²⁹ 369 U.S. 186, 207–08 (1962).

³⁰ 377 U.S. at 568.

³¹ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 1771–72 (2004) (recognizing the continued applicability of *Baker* and *Reynolds*).

³² In addition to the coverage formula, § 4 of the VRA also suspended literacy tests and provided for the appointment of federal voting registrars in covered jurisdictions. 42 U.S.C. § 1973b (2000). Once voters had been registered, attention turned to § 5. Claims under § 2 were largely unheard of until the Voting Rights Act Amendments of 1982. See Issacharoff et al., *supra* note 7, at 571, 739.

³³ The criteria for determining which jurisdictions are covered are found in § 4(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(b) (2000).

are known as “covered jurisdictions,”³⁴ and are subject to the requirements of Section 5 of the VRA.³⁵

Section 5 requires that a covered jurisdiction submit any changes to its election laws or practices for federal preclearance before they may take effect.³⁶ The covered jurisdiction must prove that the change is not made with either the purpose or effect of making a minority group worse off with respect to its exercise of the electoral franchise—or, in election law parlance, the change must not cause “retrogression.”³⁷

Section 5’s requirements apply to virtually all redistricting law changes in covered jurisdictions. To avoid retrogression, a covered jurisdiction generally must create at least as many majority-minority districts in its new redistricting plan as it did in the old plan.³⁸ Furthermore, Section 5 applies not only to redistricting plans for covered jurisdictions, but also to changes in state constitutional provisions that affect the redistricting process in covered jurisdictions.³⁹

C. Vote Dilution Under Section 2 of the Voting Rights Act

The Voting Rights Act Amendments of 1982 included a significant change to Section 2 of the VRA. In *City of Mobile v. Bolden*, the Supreme Court had held that the original version of Section 2 merely echoed the Fifteenth Amendment’s protection against in-

³⁴ See *City of Rome v. United States*, 446 U.S. 156, 160–61 (1980) (describing Georgia as a “covered jurisdiction” under the VRA).

³⁵ 42 U.S.C. § 1973c (2000).

³⁶ *Id.*

³⁷ See *Beer v. United States*, 425 U.S. 130, 140–42 (1976); 28 C.F.R. § 51.54(a) (2004).

³⁸ In practice, the determination of a “benchmark” against which to measure retrogression is not always so simple, particularly if the relative minority population of an area has changed significantly between censuses, or has become more spread out so that drawing a majority-minority district would run afoul of the constitutional prohibition against racial gerrymandering. See Issacharoff et al., *Law of Democracy*, supra note 7, at 602–04.

³⁹ *Georgia v. United States*, 411 U.S. 526, 531–32 (1972) (stating that under § 5 “a State covered by § 4(b) can not amend its constitution or laws relating to voting” without getting preclearance (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 356 (1966) (Black, J., concurring in part and dissenting in part))); see 42 U.S.C. § 1973c (2000).

tentional voting discrimination on account of race.⁴⁰ According to the Court, absent a showing of discriminatory purpose, the original Section 2, like the Fifteenth Amendment, did not reach voting procedures that merely had a racially disparate impact.⁴¹ In response to *City of Mobile*, Congress amended Section 2 to make it unlawful for a state to enact any law that has the purpose *or effect* of giving minorities “less opportunity than other members of the electorate to participate in the political process and to elect Representatives of their choice.”⁴² In election law, the practice prohibited by Section 2 is now known as minority “vote dilution.” As later interpreted by the U.S. Supreme Court in *Thornburg v. Gingles*, a prima facie violation of Section 2 requires three findings: (1) a sufficiently large and geographically compact minority which is capable of constituting a majority in a single-member district; (2) political cohesion in the minority group; and (3) white bloc voting that is sufficient to defeat the minority’s preferred candidate.⁴³ If these three conditions exist, then Section 2 generally requires that a so-called “majority-minority” district be drawn.⁴⁴

D. Racial Gerrymandering (or Shaw) Claims

In the 1990 redistricting cycle, many states reacted to *Gingles* by drawing bizarrely shaped majority-minority districts that neglected such traditional districting principles as compactness, contiguity, and respect for political subdivisions in order to create Section 2 majority-minority districts.⁴⁵ In response, the U.S. Supreme Court held in the 1993 case of *Shaw v. Reno* that a district may not be based primarily on race unless the use of race is narrowly tailored to serve a compelling state interest.⁴⁶ *Shaw*’s holding is in tension with the requirements of Sections 2 and 5 of the VRA, interpreted by the Court seven years earlier in *Gingles*, that race must be used

⁴⁰ 446 U.S. 55, 60–62 (1980).

⁴¹ *Id.*

⁴² Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (2000).

⁴³ 478 U.S. 30, 50–51 (1986).

⁴⁴ *Id.* at 51.

⁴⁵ See Issacharoff et al., *supra* note 7, 907–09 (discussing *Shaw* as a backlash against the post-1990 round of redistricting, particularly in the aftermath of the § 2 amendments and *Thornburg*).

⁴⁶ 509 U.S. 630, 658 (1993).

to draw single-member districts in certain circumstances.⁴⁷ Based on *Gingles* and *Shaw*, the VRA still requires a majority-minority district in certain instances, but it is clear that legislatures must accord some respect to traditional districting principles or the redistricting plan will encounter strict scrutiny. The Court fleshed out the details of the cause of action first recognized in *Shaw* in a series of decisions throughout the 1990s, but the basic premise remains the same.⁴⁸

II. REDISTRICTING IN NORTH CAROLINA BEFORE *STEPHENSON I*

For a full appreciation of the *Stephenson* litigation, it is necessary to understand the state law background against which the court was operating. This background can be divided into two parts. One part is the North Carolina constitutional provisions that govern the redistricting process. It is worth noting at the outset that much of North Carolina's constitutional language regarding redis-

⁴⁷ *Id.* at 678 n.3 (Stevens, J., dissenting) (stating that two of the three conditions set forth in *Thornburg* for vote dilution claim under the VRA, political cohesiveness and racial bloc voting, “depend on proving what the Court today brands as ‘impermissible racial stereotypes’” (citation omitted)).

⁴⁸ For the Supreme Court decisions that developed the cause of action first recognized in *Shaw*, see *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (“The plaintiff bears the burden of proving the race-based motive and may do so either through ‘circumstantial evidence of a district’s shape and demographics’ or through ‘more direct evidence going to legislative purpose.’” (quoting *Miller*, 515 U.S. at 916)); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (“For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race.” (quoting *Miller*, 515 U.S. at 916)); *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 582 (1997) (“[W]e have never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created, and have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering in any one of them.”); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (“A facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race.”); *Sinkfield v. Kelley*, 521 U.S. 28, 31 (2000) (per curiam) (denying standing to plaintiffs in districts adjacent to a district alleged to have been racially gerrymandered); *Easley v. Cromartie*, 532 U.S. 234, 241–42 (2001) (requiring plaintiffs to carry a “demanding” burden of proof and requiring courts to exercise “extraordinary caution” when reviewing legislative decisions in redistricting).

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tricting is shared by many other states. The other important background information concerns prior North Carolina redistricting litigation, which occurred in both the state and federal courts. This history is as important for the legal questions it left open as for those it answered. Armed with this background, one can then make an informed analysis of the opinions in the *Stephenson* litigation.

*A. North Carolina Constitutional Provisions Governing
Redistricting*

The provisions of the North Carolina Constitution that govern redistricting create four substantive requirements: (1) decennial revision; (2) one-person, one-vote; (3) contiguity of districts; and (4) the requirement that counties not be divided. These requirements are substantively identical for both houses of the legislature:

Sec. 3. Senate districts; apportionment of Senators. The Senators shall be elected from districts. 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 senate districts and the apportionment of Senators among those districts, subject to the following requirements:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of a contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.⁴⁹

These rules are not unique to North Carolina: In the 1990s, 48 states explicitly required that legislative districts consist of contiguous territory⁵⁰ and 44 states required that districting lines be drawn with respect for existing political divisions (that is, county and city borders).⁵¹ Fewer states, however, have employed districts represented by more than one person (so-called multi-member districts) in their legislative districting plans with each passing decade.⁵²

The substance of the North Carolina constitutional provisions was first adopted in a 1968 constitutional amendment, in the aftermath of the early reapportionment cases (such as *Baker* and *Reynolds*). The provisions reflect, inter alia, two traditional principles of legislative districting in North Carolina that the drafters wanted to preserve.

First, both chambers have utilized multi-member districts, in some form, since 1868. For a considerable period of its history, the Senate had multi-county, multi-member districts.⁵³ In North Carolina's 120-member House, each of the state's 100 counties had historically been entitled to its own Representative, regardless of its population,⁵⁴ with the remaining 20 Representatives apportioned

⁴⁹ N.C. Const. art. II, § 3. See N.C. Const. art. II, § 5 for the analog provision for Representatives.

⁵⁰ National Conference of State Legislatures, Redistricting Law 2000, app. G (1999), available at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Tab5appx.htm> (last accessed Jan. 26, 2005) (on file with the Virginia Law Review Association).

⁵¹ *Id.*

⁵² *Id.* at tbl. 7, available at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/ch4multi.htm> (on file with the Virginia Law Review Association).

⁵³ N.C. Const. of 1868, art. II, § 4.

⁵⁴ The tradition that each North Carolina county have at least one Representative can be inferred from provisions in the 1669 Fundamental Constitutions of Carolina. See The Fundamental Consts. of Carolina: March 1, 1669, §§ 3, 4, 71. The tradition was more clearly provided for in each of the state's constitutions after independence. N.C. Const. of 1868, art. II, § 5 (amended 1967); N.C. Const. of 1776, § 3 (superseded 1868); see also John L. Sanders, Legislative Representation in North Carolina: A Chapter Ends, Popular Gov't, Feb. 1966, at 1 (noting the "300-year old pattern of separate representation of every county in the [North Carolina] House of Representatives").

among the more populous counties on a population basis.⁵⁵ After 1965, when separate House representation for each county was abolished by federal court order,⁵⁶ the House, like the Senate, was elected from districts, most of which were multi-county and multi-member.⁵⁷ The 1968 amendments, which are substantively identical to Article II, Sections 3(1) and 5(1) of the current North Carolina Constitution, preserved this tradition of multi-member district provisions.

A second goal of the drafters of the 1968 Amendment was to preserve county boundaries in redistricting. When the amendment was adopted, no county had ever been divided in the formation of a North Carolina legislative district for either the House or the Senate. Until the 1965 decision in *Drum v. Seawell*, there were no specially created districts in the House; each county functioned as an electoral district.⁵⁸ In the Senate, the division of counties in the formation of districts was constitutionally prohibited, except in counties that had sufficient population to elect more than one Senator.⁵⁹ This exception, however, had never been invoked. Echoing the legislative intent, the North Carolina Supreme Court repeatedly recognized the importance of counties as governmental units.⁶⁰ The relevant provisions—Article II, Sections 3(3) and 5(3)—became known collectively during the *Stephenson* litigation as the “whole-county provisions” or “WCP.”⁶¹

The multi-member district and whole-county provisions were ratified by a comfortable margin.⁶² During the 1971 legislative session, when the federal constitutionality of multi-member districts

⁵⁵ N.C. Const. of 1868, art. II, § 7.

⁵⁶ See *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965). *Drum* is discussed in Section II.B.

⁵⁷ See N.C. Const. of 1868, art. II, § 6 (amended 1968); Act of Jan. 4, 1966, ch. 5, 1965 N.C. Sess. Laws 17 (Extra Sess. 1966).

⁵⁸ N.C. Const. of 1868, art. II, §§ 6, 7.

⁵⁹ N.C. Const. of 1868, art. II, § 4 (amended 1968).

⁶⁰ See *S. Ry. Co. v. Mecklenburg County*, 56 S.E.2d 438, 439–40 (N.C. 1949) (discussing the history of counties and their governmental powers); *White v. Comm’rs of Chowan County*, 90 N.C. 437, 449 (1884) (stating that counties “constitute a distinguishing feature in our free system of government”).

⁶¹ *Stephenson I*, 562 S.E.2d at 381.

⁶² The popular vote was 582,633 for the amendment and 373,395 against it. John L. Sanders, *Amendments to the Constitution of North Carolina 1776–1976*, at 21 (1977).

was still in doubt,⁶³ a House committee defeated bills proposing constitutional amendments to eliminate the bar to the division of counties in the formation of legislative districts and to require only single-member Senate and House districts.⁶⁴

These two guiding principles—whole-county districts and multi-member districts—are linked in an important way. The whole-county provision cannot be applied as written without the use of multi-member districts. A simple thought experiment reveals that this is so, because of basic mathematics in the House and demographics in the Senate. The North Carolina Constitution requires that the House of Representatives have 120 members.⁶⁵ Obviously, it would be impossible to draw 120 single-member districts in a state with 100 counties without dividing a county, regardless of the other rules in place.

For the 50-member North Carolina Senate, the proof is only slightly more complicated. The federal one-person, one-vote requirement mandates that the population variance between the smallest and largest legislative district in a plan may not exceed ten percent, and that a state needs a compelling interest to exceed that level of deviation.⁶⁶ In the 2000 census, the state's total population was 8,049,313;⁶⁷ thus, for the 50-member Senate, the ideal district population was 8,049,313 divided by 50, or 160,986. Mecklenburg, the state's most populous county, had a population of 695,454 in the 2000 census,⁶⁸ entitling it to at least four Senators by itself on a pure population basis. If Mecklenburg County were an undivided single-member district and every other district were exactly the

⁶³ Noting repeated challenges to the constitutionality of multi-member districts, the U.S. Supreme Court in *Whitcomb v. Chavis* reiterated its previous holdings that multi-member districts are not unconstitutional per se. 403 U.S. 124, 142–43 (1971). The Court also stated that although the validity of multi-member districts is justiciable, “the challenger carr[ies] the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements. We have not yet sustained such an attack.” *Id.* at 143–44.

⁶⁴ Redistricting, Popular Gov't, Sept. 1971, at 9.

⁶⁵ N.C. Const. art. II, § 4.

⁶⁶ See *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

⁶⁷ U.S. Census Bureau, United States Summary: 2000, 1 (2003).

⁶⁸ *Id.* at 28.

same size,⁶⁹ with a resulting population of 150,078, then the population variance would be a staggering 339%.

Thus, for the whole-county provisions to survive as they are written, multi-member districts are necessary. Again, this is a condition which is hardly unique to North Carolina, as all states contain political subdivisions that vary widely in population. As we will see, this aspect of the state constitutional structure is key to understanding the North Carolina Supreme Court's *Stephenson* opinions.

B. A Brief History of Redistricting in North Carolina

Prior to the reapportionment revolution, the North Carolina courts, much like the federal courts, treated redistricting claims as nonjusticiable. In the 1946 case of *Colegrove v. Green*, the U.S. Supreme Court held a redistricting challenge nonjusticiable, stating famously that “[c]ourts ought not to enter this political thicket.”⁷⁰ Seven years earlier in *Leonard v. Maxwell* the North Carolina Supreme Court had rejected a state constitutional challenge to state Senate districts in similar fashion: “The [redistricting] question is a political one, and there is nothing the courts can do about it. They do not cruise in nonjusticiable waters.”⁷¹ Significantly, this was the last major North Carolina state court redistricting decision until *Stephenson I*.

Most of the important cases involving North Carolina redistricting in the period between *Leonard* and *Stephenson I* were decided in federal courts. In the 1965 case of *Drum v. Seawell*, a three-judge federal district court invalidated the state's Senate districts and House apportionment for failure to comply with the *Reynolds v. Sims* one-person, one-vote standard.⁷² It also struck down the state's constitutional provisions entitling each of the state's 100 counties to have at least one seat in the 120-member House of

⁶⁹ Because the rule requires that no counties be divided, numerical equality of population in the other 49 districts would also be impossible as a practical matter. This oversimplification only helps to prove the point, however, because if there were variation in the remaining districts, the smallest district would have a population of less than the 49-district average, and the population variance could only be larger than the minimum possible value given here.

⁷⁰ 328 U.S. 549, 556 (1946).

⁷¹ 3 S.E.2d 316, 324 (N.C. 1939) (citations omitted).

⁷² 249 F. Supp. 877, 880–81 (M.D.N.C. 1965). See generally Sanders, *supra* note 54 (discussing the *Drum* decision and the legislative response).

Representatives, with the remaining 20 seats assigned on a population formula.⁷³ Prior to *Drum*, the population variance in the House was a staggering 18.2 to 1; in the Senate, it was a more modest, but still constitutionally impermissible, 2.3 to 1.⁷⁴ (The one-person, one-vote guideline at the time required a population variance of approximately 1.3 to 1;⁷⁵ the current 10% maximum deviation requirement corresponds to a population variance of 1.1 to 1.) In January 1966, the legislature redrew its Senate districts and created (for the first time in state history) a district plan for the House of Representatives, both with population variances of just over 1.3 to 1.⁷⁶ The federal district court subsequently approved the plans.⁷⁷

In its 1967 session, the General Assembly proposed constitutional amendments that replaced the existing sections for both Senate and House redistricting with provisions substantively identical to those in the current constitution.⁷⁸ The amendments included provisions for determining the number of constituents in a multi-member district and provisions barring the division of a county in the creation of either type of district—the aforementioned whole-county provisions.⁷⁹

The post-1970 round of redistricting proceeded without significant litigation.⁸⁰ In 1981, however, the plaintiffs in *Gingles v. Edmisten* successfully attacked the state's redistricting plans following the 1980 census in an action alleging two types of Voting Rights Act violations.⁸¹ The plaintiffs first claimed that the state's failure to obtain preclearance of the whole-county provisions of the state constitution violated Section 5 of the VRA.⁸² Although the State of North Carolina is not a covered jurisdiction under Section 5, forty

⁷³ *Drum*, 249 F. Supp. at 880–81; see also N.C. Const. of 1868, art. II, § 6 (entitling each county to at least one Representative, “although it may not contain the requisite ratio of representation”).

⁷⁴ *Drum*, 249 F. Supp. at 880–81.

⁷⁵ *Id.*

⁷⁶ *Drum v. Seawell*, 250 F. Supp. 922, 923–24 (M.D.N.C. 1966).

⁷⁷ *Id.* at 924.

⁷⁸ See discussion *supra* Section II.A.

⁷⁹ See *supra* Section II.A; see also Sanders, *supra* note 54, at 1.

⁸⁰ Paul T. O'Connor, Reapportionment and Redistricting: Redrawing the Political Landscape, N.C. Insight, Dec. 1990, at 35.

⁸¹ 590 F. Supp. 345, 350, 352 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁸² *Id.* at 350.

counties within the state are subject to Section 5 preclearance.⁸³ The state conceded this point and submitted the provisions for administrative preclearance, which the Department of Justice denied in 1981.⁸⁴

The second claim alleged minority vote dilution in violation of Section 2 of the VRA. After Congress adopted the Voting Rights Act Amendments of 1982, the plaintiffs, freed from the requirement to prove discriminatory intent, amended their complaint to rely on the more favorable law.⁸⁵ The amended claim alleged that the state failed to draw majority-minority districts in areas of the state where such districts could be drawn, in violation of the amended Voting Rights Act.⁸⁶ This case thus became the first test case for the 1982 amendments.⁸⁷

The three-judge federal district court ruled that the amended Section 2 required the state to draw a number of majority-minority districts and to divide counties where necessary in order to do so.⁸⁸ In response, the General Assembly modified its district plans to divide counties where necessary.⁸⁹ The U.S. Supreme Court subsequently upheld this revised plan with only slight modification.⁹⁰

The *Gingles* litigation left open an important question—did the failure to preclear the whole-county provisions as applied in the North Carolina counties covered by Section 5 mean that those provisions were inapplicable in the state's other 60 counties as well? In creating district plans to respond to a court ruling in the early stages of *Gingles*, the General Assembly divided Forsyth County, which is not a Section 5 covered jurisdiction, in both its Senate and House plans.⁹¹ A group of Forsyth County residents brought suit in *Cavanagh v. Brock*, challenging the district plans on the basis that the whole-county provisions were still applicable in the 60 remain-

⁸³ 28 C.F.R. § 51 app. (2003) (listing all of the jurisdictions subject to the preclearance requirements of § 5 of the VRA, as amended).

⁸⁴ *Cavanagh v. Brock*, 577 F. Supp. 176, 178–79 (E.D.N.C. 1983).

⁸⁵ *Gingles*, 590 F. Supp. at 352.

⁸⁶ *Id.* at 349.

⁸⁷ *Id.* at 352–53.

⁸⁸ *Id.* at 375.

⁸⁹ See Act of Mar. 8, 1984, chs. 1, 4, 5, 6, 1983 N.C. Sess. Laws (Extra Sess. 1984); *Gingles*, 590 F. Supp. at 377–79 (Supp. Opinion).

⁹⁰ *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986).

⁹¹ See *Cavanagh v. Brock*, 577 F. Supp. 176, 179 (E.D.N.C. 1983).

ing counties.⁹² The case was originally brought in state court, but successfully removed to federal court. Applying a state-law severability analysis, the court held that “the 1968 amendments were necessarily intended by the legislature and the populace voting by referendum upon the legislatively proposed amendments to rise or fall as a whole.”⁹³ Therefore, the whole-county provisions were likewise void in the 60 counties not covered by Section 5.⁹⁴ Although this seemed to spell the end of the WCP because the *Cavanagh* opinion was a federal court’s interpretation of North Carolina law, it was not binding on North Carolina’s state courts.⁹⁵

III. THE *STEPHENSON* DECISIONS

A. *The Background to the Stephenson Litigation*

1. *The 2000 Redistricting Cycle*

At the time of the 2000 census, *Cavanagh* apparently governed the continued application of the whole-county provisions. The state implemented post-1990 legislative district plans which divided many counties where such divisions were not strictly required to avoid liability under Sections 2 or 5 of the VRA.⁹⁶ These two sections, as well as the Federal Constitution’s one-person, one-vote requirement and prohibition on racial gerrymandering, all applied in the 2000 redistricting process. As originally adopted, the 2001 Senate plan divided 51 of the state’s 100 counties into different districts, with some counties containing parts of as many as 6 different districts.⁹⁷ The 2001 House plan divided 70 counties, with one county divided among 13 different districts.⁹⁸

2. *Procedural History*

On the very same day that the plans were enacted into law, a group of North Carolina Republican legislators and voters brought

⁹² *Id.*

⁹³ *Id.* at 181–82.

⁹⁴ *Id.* at 182.

⁹⁵ *Stephenson I*, 562 S.E.2d at 391.

⁹⁶ Act of July 13, 1991, chs. 675–76, 1991 N.C. Sess. Laws 1649–92 (establishing the districts and apportioning seats for the House and Senate, respectively).

⁹⁷ *Stephenson I*, 562 S.E.2d at 383.

⁹⁸ *Id.*

an action challenging the plans against a number of leading Democratic state officials in the North Carolina Superior Court of heavily Republican Johnston County.⁹⁹ The lawsuit, *Stephenson v. Bartlett*, alleged that the General Assembly's 2001 redistricting plans for both the Senate and House were invalid as a matter of state constitutional law because they violated the whole-county provisions in instances where such violation was not necessary to comply with federal law.¹⁰⁰

Despite the plaintiffs' care in drafting a complaint based wholly on state law, the defendants filed a notice of removal on November 19, 2001, claiming that the complaint necessarily raised issues of federal law.¹⁰¹ Unconvinced, the district court remanded the case back to the state court for lack of subject matter jurisdiction.¹⁰²

The plaintiffs presented the trial court with an alternative plan that provided for single-member districts that divided counties in only two circumstances: (1) in Section 5 covered counties and (2) in areas where Section 2 required a majority-minority district.¹⁰³ In the rest of the state, the plan was composed of large, multi-member districts that followed county boundaries, yet complied with the one-person, one-vote requirement and the multi-member district provisions.¹⁰⁴

The trial court granted plaintiffs' motion for summary judgment on February 20, 2002, with respect to a single claim: that the 2001 redistricting plans violated the whole-county provisions of the state constitution.¹⁰⁵ The court dismissed *Cavanagh* as non-binding, held that the whole-county provisions were still in force where not preempted by federal law, and found that the redistricting plans divided counties more than necessary to comply with the VRA or the federal one-person, one-vote requirement.¹⁰⁶ It therefore enjoined

⁹⁹ Lynn Bonner, *New Legislative Maps Draw Suit*, News & Observer (Raleigh, N.C.), Nov. 14, 2001, at A1.

¹⁰⁰ *Stephenson I*, 562 S.E.2d at 381.

¹⁰¹ *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 783 (E.D.N.C. 2001).

¹⁰² *Id.* at 785.

¹⁰³ See *Stephenson I*, 562 S.E.2d at 392 (noting that plaintiffs' remedial plan called for the formation of large multi-member districts along with submerged single-member Voting Rights Act districts).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 382.

¹⁰⁶ *Id.*

the upcoming 2002 primary elections for both chambers, but stayed its own order pending appeal.¹⁰⁷ The North Carolina Supreme Court subsequently granted an emergency petition to hear the case, bypassing the state court of appeals, and set the case on an expedited briefing and argument schedule.

B. *The Stephenson I Opinion*

The North Carolina Supreme Court modified and affirmed the lower court's order in *Stephenson I*. Its remedial analysis, however, came as a complete surprise to those familiar with the case. The court was careful to make clear that its opinion was based entirely on its resolution of questions of state law, ensuring that the case would remain outside the jurisdiction of the U.S. Supreme Court.¹⁰⁸

1. *Application of the Whole-County Provisions*

As the majority framed it, the main issue was “whether the WCP is now entirely unenforceable, as defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law.”¹⁰⁹ After dismissing the *Cavanagh* precedent as non-binding,¹¹⁰ the court held that all of the state constitutional redistricting requirements, including the WCP, adhered to “traditional districting principles” previously recognized by the U.S. Supreme Court, and were thus permissible so long as they did not directly conflict with the federal restrictions.¹¹¹ To reconcile the WCPs and the existing federal law, the court reasoned:

[A]n inflexible application of the WCP is no longer attainable because of the operation of the provisions of the [Voting Rights Act] and the federal “one-person, one-vote” standard, as incorporated within the State Constitution. This does not mean, how-

¹⁰⁷ *Id.*

¹⁰⁸ The court's preoccupation with asserting independent and adequate state grounds is evident from the very first sentence of the majority opinion: “The instant action presents a state law question of first impression for this Court.” *Id.* at 381. Indeed, the U.S. Supreme Court later denied a stay in the case. *Bartlett v. Stephenson*, 535 U.S. 1301, 1301 (2002).

¹⁰⁹ *Stephenson I*, 562 S.E.2d at 388.

¹¹⁰ *Id.* at 391.

¹¹¹ *Id.* at 389.

ever, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.¹¹²

The VRA clearly prohibited enforcement of the whole-county provisions in the Section 5 covered counties or in contravention of Section 2's prohibition on minority vote dilution. But it was not immediately apparent why the whole-county provisions could not be applied to the rest of the state as written, or what other state constitutional guarantees stood in their way.

2. *Constitutionality of Multi-Member Districts*

The court's remedial analysis provided a novel answer to this question. Before the decision, it was generally believed that if the court upheld enforcement of the WCP in the non-covered counties, it would order the creation of large, multi-member districts.¹¹³ The Republican plaintiffs had suggested just such a plan before the trial court, arguing that the only possible remedy would be "multi-member legislative districts in which all legislators would be elected 'at-large.'"¹¹⁴

The court refused to adopt such a remedy, based in part on a new argument presented in an amicus curiae brief. This brief argued that minority voting strength would be unlawfully diluted if the whole-county provisions were applied in such a manner as to permit the creation of large, multi-member districts comprised of predominantly white voters adjacent to single-member districts comprised of predominantly minority voters.¹¹⁵ The court seized upon this argument as an opportunity to "address the constitutional propriety of [multi-member] districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant case."¹¹⁶ The court accepted the amicus's reasoning that voters in single-member districts are placed at a disadvantage because they are not permitted to vote for

¹¹² Id.

¹¹³ Lynn Bonner, Ruling on State Districts Could Delay May Primaries, News & Observer (Raleigh, N.C.), Feb. 21, 2002, at A1.

¹¹⁴ *Stephenson I*, 562 S.E.2d at 392.

¹¹⁵ Id. at 393.

¹¹⁶ Id.

the same number of legislators and thus lack the same “representational influence” as voters in multi-member districts.¹¹⁷ But the court refused to fully accept the amicus’s racial vote dilution argument. Because the argument invoked Section 2 of the federal VRA, the court would have subjected its remedial analysis to possible appeal to the U.S. Supreme Court if it accepted this argument—something the opinion makes clear that the court wished to avoid at all costs.¹¹⁸

Instead, to develop its argument, the court invoked the state constitution’s equal protection clause.¹¹⁹ No party or amicus curiae had raised a state equal protection argument. Indeed, such an argument would have seemed futile in light of the U.S. Supreme Court’s holding that multi-member districts are not a per se federal equal protection violation,¹²⁰ and the North Carolina Supreme Court’s interpretation of the state equal protection clause as identical to the federal Equal Protection Clause.¹²¹ Nevertheless, the court began its analysis by declaring that “the right to vote on equal terms is a fundamental right.”¹²²

The North Carolina Supreme Court then examined U.S. Supreme Court precedent regarding the constitutionality of multi-member districts under the Federal Equal Protection Clause, noting that although the U.S. Supreme Court refused to declare multi-member districts illegal per se,¹²³ it nonetheless instructed federal district courts to avoid using them when creating remedial district plans.¹²⁴ Specifically, the *Stephenson* court recounted how the U.S. Supreme Court had warned that multi-member districts tend to produce “unwieldy, confusing [ballots], . . . too lengthy to allow

¹¹⁷ Id.

¹¹⁸ Id. at 389.

¹¹⁹ Id. at 393; see also N.C. Const. art. I, § 19.

¹²⁰ *Whitcomb v. Chavis*, 403 U.S. 124, 159–60 (1971). Multi-member districts can run afoul of § 2 of the VRA, but in such a situation, minority voters must prove that “[the] multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.” *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986).

¹²¹ See, e.g., *Richardson v. Dep’t of Corr.*, 478 S.E.2d 501, 505 (N.C. 1996); *White v. Pate*, 304 S.E.2d 199, 205 (N.C. 1983).

¹²² *Stephenson I*, 562 S.E.2d at 393 (quoting *Northampton County Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 355 (N.C. 1990)).

¹²³ Id. (citing *Whitcomb*, 403 U.S. at 142).

¹²⁴ Id. (citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971)).

thoughtful consideration,”¹²⁵ and may “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”¹²⁶ The court also noted that the Iowa Supreme Court held in *Kruidenier v. McCulloch* that the use of single-member and multi-member districts in the same redistricting plan violates the state and federal equal protection clauses, because a voter in a multi-member district may vote for a larger proportion of the members of that chamber than a voter in a single-member district, thereby providing the multi-member district voter with greater influence.¹²⁷ Based on these precedents, the North Carolina Supreme Court applied strict scrutiny and found that the use of single-member and multi-member districts in the same plan violates the state constitution’s equal protection clause, unless the use of such districts advances a compelling state interest.¹²⁸

The court had to reconcile this conclusion with the state constitutional provisions which provide a method for calculating representation in a multi-member district.¹²⁹ The court rendered those provisions essentially meaningless by holding that

while instructive as to how multi-member districts may be used compatibly with “one-person, one-vote” principles, Article II, Sections 3(1) and 5(1) are not affirmative constitutional mandates and do not authorize the use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power.¹³⁰

¹²⁵ *Id.* (quoting *Chapman v. Meier*, 420 U.S. 1, 15 (1975)).

¹²⁶ *Id.* (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

¹²⁷ *Id.* at 395 (citing *Kruidenier v. McCulloch*, 142 N.W.2d 355, 370–71 (Iowa 1966)).

¹²⁸ *Id.*; see also John F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle*, 75 *Yale L.J.* 1309, 1337–38 (1966) (concluding from statistical analyses, under pre-defined conditions considered relevant by the courts, that the use in a legislative system of single-member and multi-member districts, and the use of multi-member districts of varying sizes, grant greater voting power to more populous districts, and that such discrimination amounts to a constitutional violation of the “one man, one vote” principle).

¹²⁹ See *Stephenson I*, 562 S.E.2d at 394 (“[T]he number of inhabitants that each Senator or [or Representative] represents [is] determined for this purpose by dividing the population of the district that he represents by the number of Senators [or Representatives] apportioned to that district.” (quoting N.C. Const. art. II, §§ 3(1), 5(1))).

¹³⁰ *Id.*

C. The Stephenson I Redistricting Criteria

The court's novel interpretation of the state constitution's equal protection clause amounted to a de facto single-member district requirement. Earlier, the court had held that the whole-county provisions were still in effect in those counties of the state where not invalidated by federal law. This presented the court with a problem—how to reconcile these two findings, given that it is mathematically and demographically impossible to draw district plans that comply with (1) the letter of the whole-county provisions, (2) the single-member district requirement, and (3) the one-person, one-vote requirement.

The court began describing its remedy by declaring that “[w]ithout question, the intent of the WCP is to limit the General Assembly’s ability to draw legislative districts without according county lines a reasonable measure of respect.”¹³¹ Based on this perceived intent, the court formulated a lengthy list of criteria that the legislature and trial court were required to follow upon remand. First, districts that must comply with the VRA are to be drawn prior to other districts and also must comply with the WCP “[t]o the maximum extent practicable.”¹³² Second, all districts must have a population within plus or minus five percent of the ideal, to ensure one-person, one-vote compliance.¹³³ Third, where a county not covered by the VRA has a census population within five percent of the ideal, the county must be made a single-member district.¹³⁴ Fourth, if a county not covered by the VRA can be divided into several districts with populations within five percent of the ideal, compact single-member districts must be formed within the county, provided none of the districts traverses the county’s exterior boundary.¹³⁵ Fifth, in counties that cannot form a whole number of districts by themselves, the minimum number of whole, contiguous counties necessary must be grouped together to form compact districts with a population within five percent of the ideal population.¹³⁶ Again, the district boundaries are not to cross the exterior

¹³¹ Id. at 396.

¹³² Id. at 396–97.

¹³³ Id. at 397.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

borders of the counties in the cluster, and they may only cross interior county boundaries within the cluster to the extent necessary to comply with the one-person, one-vote standard. Traditional districting principles require that the interior lines respect communities of interest, compactness, and contiguity.¹³⁷ Finally, the use of a multi-member district is allowed only when necessary to serve a compelling governmental interest.¹³⁸

With these criteria in place, the North Carolina Supreme Court remanded the case to the trial court. It first ordered the trial court to hold an evidentiary hearing to determine if it was feasible to allow the General Assembly to develop new districting plans.¹³⁹ If not, or if the General Assembly failed to develop plans in compliance, the supreme court ordered the trial court to apply the criteria itself in developing a constitutional districting plan.¹⁴⁰

D. The Stephenson II Ruling

On remand, the trial court ordered that the General Assembly prepare and submit new districting plans for both chambers.¹⁴¹ The General Assembly did so, but the trial court rejected the plans and developed its own interim plans.¹⁴² On appeal, the North Carolina Supreme Court upheld the trial court's ruling rejecting the legislature's plans, quoting at great length from the trial court's order throughout its opinion.¹⁴³

The trial court found, and the North Carolina Supreme Court affirmed, "that the 2002 revised redistricting plans failed to be in strict compliance with virtually all the *Stephenson I* criteria, these findings including excessive division of counties; deficiencies in county groupings; and substantial failures in compactness, contiguity, and communities of interest."¹⁴⁴ *Stephenson II* thus left little doubt that the *Stephenson I* criteria for legislative districts were to be applied strictly. Regarding the number of county boundary

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ *Stephenson II*, 582 S.E.2d at 248–49.

¹⁴² Id. at 249.

¹⁴³ Id. at 249–54.

¹⁴⁴ Id. at 252.

crossings, the court quoted the lower court's finding that "[d]efendants' revised Senate Plan cuts across interior county boundaries in 28 locations, substantially more times than shown by plaintiffs to be necessary," and that "defendants' revised House Plan cuts county lines 48 times, as compared to the 43 county line traverses in plaintiffs' House Plan."¹⁴⁵ The court's emphasis on these findings suggests that it will only uphold a plan that mathematically minimizes the number of county boundary crossings.

The court also found that 11 of the 50 Senate districts and 19 of the 120 House districts failed to comply with the requirements of "compactness" and respect for "communities of interest" articulated in *Stephenson I*.¹⁴⁶ Furthermore, it ruled 9 House districts unconstitutional because they were held together by a point contiguity,¹⁴⁷ finding such an arrangement in violation of the constitutional requirement that districts "shall at all times consist of a contiguous territory,"¹⁴⁸ and admonishing that a point contiguity "can result in bizarre shapes that are not compact."¹⁴⁹ The court made a total of 39 separate findings of unconstitutionality for specific districts based on the traditional districting principles, suggesting that it would conduct searching review of the contiguity and compactness of districts and their respect for communities of interest.¹⁵⁰

IV. SEEKING AN EXPLANATION FOR THE *STEPHENSON* DECISIONS

Can a principle or set of principles be found that explains the results in the *Stephenson* opinions? There are a number of possibilities. First, the results might be based on the constitutional text that

¹⁴⁵ Id. at 252-53.

¹⁴⁶ Id. at 252-54.

¹⁴⁷ Specifically, the court held that "the term 'contiguity,' as used in [*Stephenson I*], means that two districts must share a common boundary that touches for a non-trivial distance." Id. at 254.

¹⁴⁸ N.C. Const. art. II, §§ 3(2), 5(2).

¹⁴⁹ *Stephenson II*, 582 S.E.2d at 254.

¹⁵⁰ In response to *Stephenson I* and *II*, the North Carolina General Assembly enacted procedural legislation to govern all future redistricting lawsuits. The new laws require that a special three-judge trial court be empaneled to hear redistricting cases and require that the plaintiffs in such cases file their suit in Wake County (which encompasses Raleigh, the state capital). See N.C. Gen. Stat. §§ 1-81.1, 1-267.1, 120-2.3, 120-2.4 (2004). In a short opinion, the North Carolina Supreme Court upheld the new procedural statutes. *Stephenson v. Bartlett*, 595 S.E.2d 112 (2004) [hereinafter *Stephenson III*].

the court cited in its opinion. Second, the court's analysis could reflect the persuasive authority of the decisions of the U.S. and Iowa Supreme Courts that the *Stephenson* court discussed. Third, a more pessimistic possibility is that the elected North Carolina Supreme Court has let partisan political considerations affect its decision-making. Finally, perhaps the issue is institutional rather than partisan, and the opinion represents an attempt by the judiciary to reverse the traditional deference to the legislature in the redistricting context.

A. Constitutional Text

The *Stephenson* opinions' interpretation of state constitutional provisions is defective in several respects. First, their construction of the state's equal protection clause is clearly contrary to prior precedent. Second, neither textualist nor purposivist interpretive methods can adequately explain the court's construction of the constitution's multi-member district provisions. Third, the court's conception of the purpose of the whole-county provisions, and its application of that purpose, is unsupported, and unclear at best. And fourth, without textual justification, the court elevates some of the federally recognized "traditional districting principles" to the level of state constitutional mandates.

1. Equal Protection

Until *Stephenson I*, North Carolina law was well-settled that the state constitution's equal protection clause should be interpreted in parallel with the U.S. Supreme Court's interpretation of the Fourteenth Amendment's Equal Protection Clause.¹⁵¹ Since multi-member districts are not subjected to strict scrutiny under the federal Equal Protection Clause,¹⁵² no party or lower court involved with the proceeding considered the possibility that the state equal

¹⁵¹ See *Richardson v. Dep't of Correction*, 478 S.E.2d 501, 505 (N.C. 1996) (holding that state courts apply the same test as the federal courts to evaluate an equal protection claim); see also *White v. Pate*, 304 S.E.2d 199, 205 (N.C. 1983) (holding, in the context of voting rights, that "Article I, § 19 of the Constitution of North Carolina guarantees the 'equal right to vote' guaranteed by the Constitution of the United States").

¹⁵² *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 159–60 (1971).

protection clause might be read to prohibit the use of multi-member districts absent a compelling state interest. The court deviated from prior precedent, however, to require that multi-member districts satisfy strict scrutiny.¹⁵³

Furthermore, until *Stephenson I*, the few North Carolina voting rights cases brought as equal protection challenges had involved a deprivation of an *individual's* right to vote—that is, the right to cast a ballot and have it counted.¹⁵⁴ In *Stephenson*, the issue was one of the aggregation of a *group's* votes.¹⁵⁵ The use of multi-member districts does not deprive individual voters of the right to cast a ballot and have it counted; rather, voters may be deprived of the “right”—not clearly guaranteed anywhere in the state constitution—to have their vote aggregated in such a way as to elect a single Representative, as opposed to multiple Representatives, to advocate local interests. At the federal level, protection of aggregated voting rights is statutory, not constitutional, and exists only in the specific circumstances prescribed in the VRA.¹⁵⁶ *Shaw v. Reno* and its progeny involved the application of strict scrutiny because of the racially discriminatory nature of the district plans at issue, not because the aggregation of votes in a particular way is a fundamental constitutional right.¹⁵⁷ Thus, the North Carolina Supreme Court clearly deviated from established precedent when it invoked the state equal protection clause to impose strict scrutiny on the use of multi-member districts.

¹⁵³ *Stephenson I*, 652 S.E.2d at 393.

¹⁵⁴ *Northampton County Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 356 (N.C. 1990) (applying strict scrutiny analysis and holding that permitting one county's clerk of court to appoint the drainage district commissioners for a district that spans multiple counties is an unconstitutional equal protection violation); *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 483 (N.C. 1989) (holding that a one-time extension of the term of office of superior court judges in order to stagger their election years does not deprive individual North Carolinians of their constitutional right to have their vote count); *White*, 304 S.E.2d at 205 (holding that the right to vote itself is not a constitutional right; it is only a “protected right to participate in elections on an equal basis with other citizens in the jurisdiction”).

¹⁵⁵ See generally Samuel Issacharoff, *Groups and the Right to Vote*, 44 *Emory L.J.* 869, 871–72 (1995) (describing the nature of voting rights and why their aggregation into group rights is important); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705, 1708 (1984) (describing the difference between participatory and aggregational voting rights).

¹⁵⁶ See Voting Rights Act of 1965 §§ 2, 5, 42 U.S.C. §§ 1973, 1973c (2000).

¹⁵⁷ *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

2. Multi-Member District Provisions

The court's interpretation of the clauses of the constitution that determine the formula for representation from multi-member districts was equally problematic. Though the court cited rules of construction requiring it "to construe [the multi-member district provisions] in conjunction with [the equal protection clause] in such a manner as to avoid internal textual conflict,"¹⁵⁸ it went on to give virtually no effect to the multi-member district provisions. The court held that "the people have mandated in their Constitution that all North Carolinians enjoy substantially equal voting power,"¹⁵⁹ and that this mandate required the court to subordinate the application of the multi-member district provision to the ill-defined "right to vote"—even though the multi-member district provisions are also a part of the state's fundamental law and thus also mandated by "the people."¹⁶⁰

In its textual analysis, the court found it significant that the multi-member district provisions in Article II, Sections 3(1) and 5(1) are in the form of provisos.¹⁶¹ In keeping with its pattern of disregarding unfavorable language, the court's analysis ignored another provision in the text: "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 [Senate and House] districts *and the apportionment of [Senators and Representatives] among those districts.*"¹⁶² If the italicized words are not mere surplusage, then a number of Senators or Representatives must be assigned to each district at the same time that the districts are drawn. If the constitution required single-member dis-

¹⁵⁸ *Stephenson I*, 562 S.E.2d at 394.

¹⁵⁹ *Id.*

¹⁶⁰ Other generally accepted canons of construction also cut in favor of a broader reading of multi-member district provisions. If more specific provisions control more general ones, then the equal protection clause is clearly more general than the multi-member district clause in this situation. If the rule of recentness applies, then the redistricting amendment is almost one hundred years more recent than the state equal protection clause. Compare N.C. Const. art. I, § 19 (first enacted 1868, reincorporated 1971) with N.C. Const. art. II, §§ 3, 5 (first enacted 1967, reincorporated 1971).

¹⁶¹ *Stephenson I*, 562 S.E.2d at 394. In summarizing the constitutional provisions at issue in the case, the court conveniently left out multi-member district provisions altogether. *Id.* at 384; *Stephenson II*, 582 S.E.2d at 250–51.

¹⁶² N.C. Const. art. II, §§ 3, 5 (emphasis added).

tricts, this additional step would not be necessary, as each district would automatically be assigned one member. This language strongly supports the constitutionality of multi-member districts—a fact the court largely overlooked.

The court's reasoning that those living in multi-member districts obtain more effective representation than those in single-member districts may or may not be correct as a matter of political science, though the record before the court contained no evidence on this point.¹⁶³ As a matter of state constitutional law, however, the reading which plainly gives effect to all sections of the text is that which permits multi-member districts according to the formula in Article II, Sections 3(1) and 5(1), and in so doing, interprets the state equal protection clause consistently with prior federal and state precedents by holding that equal protection does not preclude the use of such districts per se.

The court's reading of the multi-member district provisions fares no better when viewed in light of the purposes of the relevant provisions. The court saw fit to recognize the "people's intent" in ensuring equal protection in the context of voting rights,¹⁶⁴ but it did not consider any evidence of intent regarding the multi-member district provision. North Carolina has a long history of using single-member and multi-member districts together in district plans.¹⁶⁵ Furthermore, the General Assembly first proposed the present constitutional districting provisions in 1967,¹⁶⁶ readopted them as part of a completely new proposed constitution in 1969,¹⁶⁷ and then adopted districting plans for both the Senate and the House that included both multi-member and single-member districts in 1971.¹⁶⁸ Based on this evidence, the conclusion that the drafters of the constitution—the General Assembly—intended to prohibit the use of

¹⁶³ See generally Banzhaf, *supra* note 128 (arguing that multi-member districts diminish the political power of voters relative to voters in single-member districts).

¹⁶⁴ *Stephenson I*, 562 S.E.2d at 394.

¹⁶⁵ See *supra* Section II.A.

¹⁶⁶ Act of May 31, 1967, ch. 640, 1967 N.C. Sess. Laws 704, 704–05.

¹⁶⁷ Act of May 31, 1969, ch. 1258, 1969 N.C. Sess. Laws 1461, 1461–65.

¹⁶⁸ Act of June 1, 1971, ch. 483, 1971 N.C. Sess. Laws 412, 413 (apportioning the districts of the North Carolina House of Representatives); Act of July 21, 1971, ch. 1177, 1971 N.C. Sess. Laws 1743, 1743 (establishing senatorial districts and apportioning the seats in the North Carolina Senate among the districts).

multi-member and single-member districts in the same district plan is strained at best.

3. *Purpose of the Whole-County Provisions*

The court's interpretation of the whole-county provisions was guided, in its words, by the provisions' purpose "to limit the General Assembly's ability to draw legislative districts without according county lines a reasonable measure of respect."¹⁶⁹ This purpose, said the court, was "[w]ithout question"—although absolutely no support was provided for it.¹⁷⁰ Nothing in the constitutional text or its legislative history suggests that the authors of the whole-county provisions intended them to be governed by a reasonableness standard. The language is mandatory: "*No county shall be divided . . .*"¹⁷¹ As noted previously, the multi-member district provision and the whole-county provision must stand or fall together if they are to be applied as written.¹⁷² As such, it is arguable whether there was any constitutional "intent" regarding the whole-county provision in the absence of multi-member districts.

Even accepting the court's reasoning regarding the intent of the whole-county provisions, its reasoning from that point on is untenable. The court held:

[T]he WCP is interpreted consistent with federal law and reconciled with equal protection requirements under the State Constitution by requiring the formation of single-member districts in North Carolina legislative redistricting plans. The boundaries of such single-member districts, however, may not cross county lines except as outlined below.¹⁷³

The first sentence of this passage asserts that the whole-county provisions somehow combine with the state equal protection clause to require the use of single-member districts. Until this point in the opinion, the court had not made any connection between the whole-county provisions and its concocted single-member district requirement, and with good reason—if the whole-county provi-

¹⁶⁹ *Stephenson I*, 562 S.E.2d at 396.

¹⁷⁰ *Id.*

¹⁷¹ N.C. Const. art. II §§ 3(3), 5(3) (emphasis added).

¹⁷² See discussion *supra* Section II.A.

¹⁷³ *Stephenson I*, 562 S.E.2d at 396.

sions were interpreted sensibly along with the multi-member district provisions, the only logical conclusion would be that the state constitution endorses the creation of multi-member districts. In the second sentence, the court applies its version of the whole-county provision to the single-member district rule in order to devise its list of criteria to guide the lower court and the legislature in their work. This excerpt of the court's opinion provides no logical argument at all; rather, the court simply restates its holdings to this point in order to create the appearance of cohesion prior to its statement of new, judicially crafted redistricting guidelines.

4. *Elevation of the Traditional Districting Principles*

The U.S. Supreme Court has recognized that “compactness, contiguity, and respect for political subdivisions” are “traditional districting principles.”¹⁷⁴ In so doing, however, it also held that these are *not* federal constitutional requirements.¹⁷⁵ As a textual matter, some of these principles are embodied in the North Carolina constitutional whole-county provisions¹⁷⁶ and contiguity requirements.¹⁷⁷ Nowhere does the state constitution make “compactness” a districting criterion or impose any requirement of respect for political subdivisions or “communities of interest” other than counties.

The *Stephenson I* criteria, however, elevate these traditional districting principles to constitutional status.¹⁷⁸ First, they raise compactness to the level of a constitutional requirement for all legislative districts.¹⁷⁹ Second, they require the consideration of “communities of interest” in the formation of districts, though the term “community of interest” is nowhere defined.¹⁸⁰ Again, there is no constitutional basis for the establishment of these criteria.

¹⁷⁴ *Shaw*, 509 U.S. at 647.

¹⁷⁵ *Id.*

¹⁷⁶ N.C. Const. art. II, §§ 3(3), 5(3).

¹⁷⁷ N.C. Const. art. II, §§ 3(2), 5(2).

¹⁷⁸ See *Stephenson II*, 582 S.E.2d at 250.

¹⁷⁹ *Stephenson I*, 562 S.E.2d at 397.

¹⁸⁰ *Id.*

B. Precedent

The North Carolina Supreme Court cites precedent from both the U.S. Supreme Court and the Iowa Supreme Court in its *Stephenson I* opinion. The U.S. Supreme Court has held that the use of single-member and multi-member districts in the same redistricting plan is not per se unconstitutional.¹⁸¹ Acknowledging this holding, the North Carolina court observed that a number of other holdings cast some doubt on this rule.¹⁸² For example, the U.S. Supreme Court has instructed federal district courts not to use multi-member districts in creating remedial redistricting plans.¹⁸³ The U.S. Supreme Court has also observed that multi-member districts create problems with long, confusing ballots¹⁸⁴ and may minimize or cancel out the voting strength of political groups.¹⁸⁵

This precedent, while relevant, was clearly not binding on the North Carolina Supreme Court in *Stephenson I*. The North Carolina Supreme Court has the final word on interpretation of the North Carolina Equal Protection Clause, and without fail that clause had been deemed to provide the exact same protection as the federal clause until *Stephenson I*.¹⁸⁶ Rather than maintain its well-settled position, the court chose to deviate from the weight of the U.S. Supreme Court precedent and hold the use of a multi-member district plan unconstitutional.¹⁸⁷

The *Stephenson I* court also looked to the Iowa Supreme Court's prior decision in *Kruidenier v. McCulloch*,¹⁸⁸ which held that under both federal and Iowa law, the use of single-member and multi-member districts in the same district plan violates equal protection under both the federal and state constitutions.¹⁸⁹ Not only is this precedent not binding on the North Carolina courts, it is questionable in the *Stephenson* context for other reasons. First, its conclusion is called into doubt by the U.S. Supreme Court's opinion in

¹⁸¹ *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971).

¹⁸² *Stephenson I*, 562 S.E.2d at 393.

¹⁸³ *Connor v. Johnson*, 402 U.S. 690, 692 (1971).

¹⁸⁴ *Chapman v. Meier*, 420 U.S. 1, 15 (1975).

¹⁸⁵ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1966).

¹⁸⁶ See supra note 151.

¹⁸⁷ *Stephenson I*, 562 S.E.2d at 395.

¹⁸⁸ 142 N.W.2d 355 (Iowa 1966).

¹⁸⁹ *Id.* at 371-72.

Whitcomb v. Chavis, which was decided five years after *Kruidenier* and reached the opposite conclusion regarding federal equal protection.¹⁹⁰ Second, the Iowa court created a qualification to the extent that a rational plan of apportionment could not be achieved by using all single-member districts and held that multi-member districts might be constitutionally permissible in such a case.¹⁹¹ The North Carolina Supreme Court recognized but did not discuss this exception, which would seem applicable to a situation where multi-member districts are necessary to give effect to another constitutional provision—in this case, the whole-county provisions.¹⁹² Thus, the *Stephenson I* court's citations to persuasive precedent appear insufficient to explain its holding.

C. Partisan Politics

Because neither the constitutional text nor the precedent upon which the court relied is sufficient to explain the *Stephenson* opinions, it becomes necessary to consider more cynical motives. The most obvious such possibility is partisan politics. The litigants' motivations were presumably political: The plaintiffs were Republican voters, party officials and legislators challenging the legislative districts drawn by Democratic legislative leaders.¹⁹³ The four justices who joined the majority opinion in *Stephenson I* were all Republicans, as was the concurring justice; the two dissenting justices were both Democrats.¹⁹⁴ North Carolina Supreme Court justices are elected in partisan elections to eight-year terms.¹⁹⁵

Observers of the redistricting process, both political and academic, have reached similar conclusions. An observer of North Carolina politics commented that “[w]e have one party using its majority in the legislature and the other using its elected judges.”¹⁹⁶ Professor Michael Kent Curtis likened *Stephenson I* to *Bush v.*

¹⁹⁰ 403 U.S. 124, 142 (1971).

¹⁹¹ *Kruidenier*, 142 N.W.2d at 371.

¹⁹² *Stephenson I*, 562 S.E.2d at 395.

¹⁹³ Lynn Bonner, *New Legislative Maps Draw Suit*, News & Observer (Raleigh, N.C.), Nov. 14, 2001, at A1.

¹⁹⁴ See Lynn Bonner, *Redistricting Plan Invalidated*, News & Observer (Raleigh, N.C.), May 1, 2002, at A1.

¹⁹⁵ N.C. Const. art. IV, § 16.

¹⁹⁶ Mark Schreiner, *Lawmakers Get an Earful on Redistricting*, Star News (Wilmington, N.C.), Nov. 21, 2003, at 8B.

Gore,¹⁹⁷ as a case “that seem[s] to be partisan to many adherents to the party of the losing side.”¹⁹⁸ On the surface, the political fault lines in the case seem clear.

Partisan politics, however, cannot explain all of the court’s reasoning. The Republicans’ likely strategy in bringing the suit was to pack minority voters, who were likely to vote Democratic, into majority-minority districts covered by the VRA, thereby weakening Democratic incumbents in the surrounding suburban areas.¹⁹⁹ If the whole-county provisions had been enforced—as written, not as reinterpreted in *Stephenson I*—such that all of the non-Voting Rights Act areas of a large urban county must be included in a single multi-member district, the Republicans would benefit in the suburban districts.

But partisan politics cannot explain why the Republican majority on the court imposed a single-member district requirement. The requirement prevents the use of multi-member districts to leverage the votes of large numbers of suburban Republican voters. The court’s single-member district requirement does not conclusively prove that partisan politics had no effect; the lineup of the parties, and of the justices on the court, strongly suggests that politics may have indeed played a role. Of course, the court may have avoided using its powers to maximum political effect in an attempt to defend itself from charges of partisanship. It must have known, however, that its interpretations of the state constitution would come under attack regardless. In sum, partisan politics appear insufficient to explain the *Stephenson* opinions completely.

D. Alteration of the Institutional Balance of Power

The state of North Carolina has a very strong tradition of judicial deference to the legislature.²⁰⁰ The North Carolina Supreme

¹⁹⁷ 531 U.S. 98 (2000).

¹⁹⁸ Michael Kent Curtis, *Judicial Review and Populism*, 38 Wake Forest L. Rev. 313, 342 n.148 (2003).

¹⁹⁹ As an example, see Issacharoff et al., *Law of Democracy*, supra note 7, at 908 (noting that both the George H.W. Bush and Bill Clinton administrations actively pursued the creation of majority-minority districts, the former because they packed heavily pro-Democratic voters into the new majority-minority districts, and the latter because of its ideological commitment to maximizing minority representation).

²⁰⁰ Cf. *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989).

Court generally requires a statute to be unconstitutional beyond a “reasonable doubt” before striking it down.²⁰¹ The court’s sudden willingness to find legislative acts unconstitutional in these cases is hardly in keeping with this tradition. The application of the *Stephenson I* criteria threatens to radically alter the institutional balance of power between the courts and the legislature in the redistricting process.

The *Stephenson* opinions make but a single mention of the “strong presumption” of constitutionality for legislative acts, well-tempered with affirmations of the court’s power of judicial review.²⁰² Given the court’s strained, if not clearly erroneous, construction of the relevant constitutional provisions, the legislative districting plans at issue hardly seem unconstitutional beyond a reasonable doubt.

The *Stephenson* decisions do more than fail to defer to the legislature regarding these particular district plans. The decisions also establish new criteria and apply them in a way that announces a fundamental shift in public policy regarding redistricting—one that places significant limits on legislative power. Prior to *Stephenson I*, the North Carolina Supreme Court’s entire body of redistricting case law could be reduced to two sentences: Redistricting “is a political [question] . . . , and there is nothing the courts can do about it. They do not cruise in nonjusticiable waters.”²⁰³

The *Stephenson I* criteria, as applied in *Stephenson II*, threaten to remove virtually all of the legislative discretion so clearly provided for in *Leonard v. Maxwell*. After *Stephenson II*, it appears that the General Assembly must mathematically minimize the number of times that district lines cross county boundaries—reducing the decision of which counties or regions might best be clustered together to form a district of the requisite population, as well as the division of those clusters into individual districts, to a mathematical optimization contest.²⁰⁴

²⁰¹ See, e.g., *Baker v. Martin*, 410 S.E.2d 887, 889 (N.C. 1991) (citation omitted).

²⁰² *Stephenson I*, 562 S.E.2d at 384 (“Although there is a strong presumption that acts of the General Assembly are constitutional, it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional.”).

²⁰³ *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939) (citations omitted).

²⁰⁴ *Stephenson II*, 582 S.E.2d at 252 (noting that the legislature’s Senate plan cuts interior county boundaries “substantially more times than shown by plaintiffs to be necessary”); see also *id.* at 253 (noting that the legislature’s House plan crosses county

Prior to *Stephenson I*, the North Carolina courts had never struck down a legislative district for failure to comply with the constitutional requirement of contiguity.²⁰⁵ Furthermore, compactness and respect for political subdivisions (apart from counties) had never been considered constitutional obligations in redistricting. In its application of the *Stephenson I* criteria in *Stephenson II*, however, the court found a total of thirty-nine instances where the legislature failed to comply with one of these “traditional” districting principles.²⁰⁶ Even assuming the court was textually justified in finding that a point contiguity is not “contiguous” within the meaning of the constitutional provisions, this leaves a total of thirty separate findings that the legislature violated the compactness or communities of interest “requirements”—neither of which is ever mentioned in the language of the state constitution.

The court’s criteria do not give effect to the whole-county provisions or the multi-member district provisions. They do, however, significantly reduce legislative discretion in redistricting, contrary to the constitution’s grant of that power to the legislature.²⁰⁷ Since the *Stephenson I* and *II* rulings, the court has given an indication that redistricting cases are, in its view, *sui generis* and worthy of special treatment. In a short *Stephenson III* opinion, the court noted that redistricting cases are “inordinately complex, politically volatile, and relatively rare,”²⁰⁸ and noted that its review of new procedural redistricting legislation in that particular opinion was “informed by the delicacy of the balance of powers set out in our Constitution.”²⁰⁹ This logic would appear to apply equally well to the court’s analysis of the substantive redistricting legislation in the earlier opinions.

lines forty-eight times, whereas the plaintiffs’ plan crosses county lines only forty-three times).

²⁰⁵ N.C. Const. art. II, §§ 3(2), 5(2).

²⁰⁶ *Stephenson II*, 582 S.E.2d at 252–54.

²⁰⁷ The state constitution grants the redistricting power specifically to the General Assembly: “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 [Senate and House] districts and the apportionment of [Senators and Representatives] among those districts . . .” N.C. Const. art. II, §§ 3, 5.

²⁰⁸ *Stephenson III*, 595 S.E.2d at 119.

²⁰⁹ *Id.* at 119–20.

From this analysis, it appears that the most plausible explanation for the court's decision is that it increases judicial power in the redistricting arena.²¹⁰ The court created new rules for redistricting and enforced them with vigor. The court's interpretation of the state equal protection clause imposes strict scrutiny on the use of single-member and multi-member districts in the same district plan. This application of strict scrutiny informs the court's reading of the multi-member district provisions, effectively reading into the state constitution a new single-member district requirement that permits the court to strike down districts that were previously allowed. The court's formulation of the purpose of the whole-county provisions gives rise to a completely new test for compliance that seeks mathematical optimization of the number of county boundary crossings and strikes down district plans which do not strictly comply. Furthermore, the elevation of the traditional districting principles of "compactness" and "respect for communities of interest" to constitutional status gives the court an amorphous standard that it may employ—and did employ, in *Stephenson II*—to declare large numbers of individual districts unconstitutional.

The latter of these new rules—the elevation of traditional districting principles to constitutional status—is particularly noteworthy in the context of increased judicial power. Traditional redistricting principles do not lend themselves to easy administration as constitutional requirements²¹¹ and they are reminiscent of the very "political thicket" that so worried both the U.S. Supreme Court and the North Carolina Supreme Court in their early opinions denying justiciability to redistricting claims.²¹² Unlike the "one-person, one-vote" standard, which lends itself to statistical analysis

²¹⁰ The court was not oblivious to the difficult problems raised by its *Stephenson* rulings. The *Stephenson III* opinion recognized that redistricting cases present difficult questions relating to separation of powers, commenting that "[i]n the context of redistricting, the potential for the branches of government to collide with each other is great, and the consequences of such a collision are grave." *Stephenson III*, 595 S.E.2d at 120.

²¹¹ *Baker v. Carr*, 369 U.S. 186, 210 (1961) ("In determining whether a question falls within the [political question] category, . . . the lack of satisfactory criteria for a judicial determination [is a] dominant consideration[.]" (first alteration in original)).

²¹² See *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939).

based on population variance,²¹³ the court made no effort to employ any objective tests for the compactness of a district or its respect for political subdivisions.²¹⁴ In the absence of tests, the court's application of these criteria looks like the exercise of equitable discretion—an application of raw judicial power.

Neither the constitutional text nor prior judicial precedent shed much light on the opinions in the *Stephenson* case. Nor does partisan politics appear to be a sufficient explanation. The most plausible explanation for the *Stephenson* opinions is therefore an attempt to increase judicial power in the redistricting context at the expense of the legislature. The next Part examines why a court might seek to alter the institutional balance of power in the redistricting context.

V. SOLVING THE PROBLEMS IN THE REDISTRICTING PROCESS

The Introduction to this Note posed a single question: What can state courts do to solve problems in the legislative redistricting process? The *Stephenson* litigation provides a unique opportunity, not yet observed in other state court litigation, to consider this problem. State court creation of redistricting law is not only of academic interest but could have a dramatic effect on the political process. When the *Stephenson* case originally came before the North Carolina Supreme Court, it appeared to be a dispute about the severability of the whole-county provisions in the face of the requirements of the VRA, and nothing else. The court, however, seized the opportunity to impose a long list of new districting crite-

²¹³ See *Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (noting that the federal Equal Protection Clause provides judicially discoverable and manageable standards for determining the constitutionality of legislative districts).

²¹⁴ Some scholars believe that compactness, at least, can be implemented using objective mathematical standards. See, e.g., Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Tex. L. Rev.* 1643, 1692 (1993) [hereinafter Issacharoff, *Judging Politics*]; Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 *Yale L. & Pol'y Rev.* 301, 348–49 (1991). They advocate such uses, however, in order to protect against partisan gerrymandering, given the U.S. Supreme Court's refusal to do so in *Davis v. Bandemer*. Issacharoff, *Judging Politics*, *supra*, at 1692 (“A requirement of compactness appears to significantly deter the most extreme sorts of misuse of district line-drawing.”) Regardless of whether or not such mathematical tests are viable, the North Carolina Supreme Court made no mention of such tests in the *Stephenson* opinions.

ria on the General Assembly, most of which had little or no basis in preexisting law. Later, the court applied the criteria in a searching review of another proposed redistricting plan, suggesting that there will be little legislative deference on redistricting matters henceforth. Furthermore, the court's interpretations of state constitutional law have little basis in constitutional text, binding precedent, or partisan politics; they are best explained by the desire for increased judicial power in redistricting. The effect that a state court may have on legislative redistricting by formulating such rules should not be underestimated.

Increased judicial power at the expense of the political branches in the redistricting arena is, in general, in tension with the traditional American understanding of separation of powers. The federal courts have long been aware of the unique problems posed by their involvement in the way that Representatives are elected—just consider the U.S. Supreme Court's long history of finding redistricting claims to be nonjusticiable political questions,²¹⁵ followed by its guarded finding of justiciability in *Baker v. Carr*.²¹⁶

A thoughtful reading of the *Stephenson* decisions suggests that the court felt that a shift in institutional power over redistricting from the legislature to the courts would help address the problem of partisan gerrymandering. As the court stated when it began its sua sponte analysis of the constitutionality of multi-member districts in *Stephenson I*, it sought “to address the constitutional propriety of [multi-member] districts, *in the public interest*.”²¹⁷ The idea that the judiciary may intervene to fix a broken apportionment process is not new; indeed, it was the United States Supreme Court's primary rationale in *Reynolds v. Sims*.²¹⁸

To be sure, a lack of competitive electoral districts is indeed a significant problem in many state legislatures.²¹⁹ While periods of

²¹⁵ See, e.g., *Colegrove*, 328 U.S. at 556 (advising courts not to enter the “political thicket” of redistricting).

²¹⁶ 369 U.S. 186, 210–11 (1962).

²¹⁷ *Stephenson I*, 562 S.E.2d at 393 (emphasis added).

²¹⁸ But see Karlan, *supra* note 155, at 1725 (noting the Court's unwillingness to enter the “political thicket” for anything but the most “antiseptic and surgical of incursions”).

²¹⁹ See *Stephenson I*, 562 S.E.2d at 383; see also Issacharoff, *Gerrymandering*, *supra* note 13, at 595–601 (discussing the problems inherent in allowing legislators to draw their own districts).

one-party dominance in a few states for extended periods of time have been common throughout American history, the proliferation of this phenomenon today is largely a result of the technology now available to mapmakers. As recently as thirty years ago, unaided human mapmakers could hardly imagine performing the calculations needed to go much below the county level in drawing maps; today, modern technology allows them to fine-tune their districts down to the census block level.²²⁰ A nonpartisan political research organization, the North Carolina Forum for Research and Economic Education (“NCFREE”), predicted the outcomes of North Carolina’s legislative elections in 2000 with a 96.5% rate of success.²²¹ NCFREE’s research indicated that the number of competitive state Senate seats dropped from 14 under the 1992 plan to 6 under the legislature’s original 2001 Senate plan. The corresponding drop for the House was from 32 of 120 competitive seats under the 1992 plan to 14 competitive seats under the 2001 House plan.²²²

How did the North Carolina Supreme Court choose to address this problem? As noted previously, the *Stephenson* decisions have the practical effect of severely restricting the legislature’s choices in redistricting. The rules are often so specific that in many areas only one district configuration is possible—namely, the one that maximizes the number of county groupings and minimizes county boundary crossings.²²³ Even though the approval process still runs through the legislature, in a very real sense much of post-*Stephenson* legislative redistricting in North Carolina will be mathematical, using technology to determine the maximum number of county groupings and the boundaries within those groupings that traverse the fewest internal county boundaries. This differs from the existing system where computers are used, not to perform

²²⁰ See, e.g., *Vera v. Richards*, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994). The *Vera* court notes that:

following the 1990 census, [Texas redrew its congressional districts] with nearly exact knowledge of the racial makeup of every inhabited block of land in the state. This insight, worthy of Orwell’s Big Brother, was attainable because computer technology, made available since the last decennial census, superimposed at a touch of the keyboard block-by-block racial census statistics upon the detailed local maps vital to the redistricting process.

Id.

²²¹ *Stephenson I*, 562 S.E.2d at 383.

²²² Id.

²²³ Id.

mathematical optimization of districts according to objective criteria but to aid human mapmakers in tweaking districts to their own subjective partisan advantage. While the court's elevation of the non-mathematical "traditional districting principles" of compactness and respect for communities of interest to constitutional status prevents the process from becoming purely a mathematical exercise, such criteria nonetheless interject a strictly nonpartisan, if human, element.

It therefore appears that the court's opinion may be best understood as an ingenious, if doctrinally questionable, attempt to use strict enforcement of judicially created rules in order to reduce the role of partisan legislative politics in the redistricting process.

Alternatives to partisan legislative redistricting are beginning to attract more interest. Internationally, there is a "trend toward keeping incumbent legislators out of the redistricting process and relying more on neutral commissions and stricter formal criteria."²²⁴ As this idea has picked up steam in the United States, twelve states have created bipartisan commissions or boards to conduct legislative redistricting.²²⁵ As Professor Issacharoff writes:

Various approaches to nonpartisan redistricting, such as blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models, recommend themselves as viable alternatives to the pro-incumbent status quo. Although the track record of such nonpartisan alternatives is uneven, the general trend so far is that plans drawn outside the partisan arena produce less litigation, less contortion, and less opportunity for insider manipulation than do partisan processes.²²⁶

Some commentators have suggested other solutions. Silverberg offers a number of alternatives, including a politically neutral court-drawn approach, a bipartisan commission, or a computerized

²²⁴ David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 124 (1992).

²²⁵ The twelve states which no longer use a partisan legislative process in their state legislative redistricting are Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. National Conference of State Legislatures, *Redistricting Authority in Each State*, available at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Apdauth.htm> (last accessed Jan. 26, 2005) (on file with the Virginia Law Review Association).

²²⁶ Issacharoff, *Gerrymandering*, *supra* note 13, at 644 (citation omitted).

system.²²⁷ Michael Browdy suggests a computer-based method as a way to create a more reviewable redistricting process for both the public and the courts.²²⁸ Commentators have lauded these proposals for their role in taking the legislature out of the redistricting process, thereby significantly increasing the number of contested legislative districts and providing the public with more electoral choices.²²⁹

The obstacles, however, to creating an institutionalized, nonpartisan redistricting process are significant in many states. As a public policy matter, Professor Issacharoff notes that “[a]ny proposal to alter the current system of reapportionment must address the claims that reapportionment is one of the traditional functions of state government and that any alteration of the current processes would sap the political process of one of its sources of vitality.”²³⁰ North Carolina’s strong tradition of judicial deference to the legislature in most matters reinforces Professor Issacharoff’s concern about maintaining redistricting as a political process.²³¹

There are also procedural hurdles. In many states, a constitutional amendment would be required in order to take final authority over redistricting from the legislature.²³² In such a context, where the prospects of reform through the political system are slim, the North Carolina court came to the tough conclusion that there was no other way to try to reduce the role of partisan politics in redistricting but to judicially impose strict rules on the process.

The constitutional tools available to the *Stephenson* court are hardly unique to North Carolina: a state equal protection clause, a clause on respect for county boundaries, a clause requiring that districts be contiguous, and the citizens’ right to vote for members of the legislature are all that is needed. If anything, North Carolina’s preexisting law left it at a *disadvantage* compared to other states that might want to judicially impose stricter redistricting criteria. Few states have such a rigid whole-county provision, which necessi-

²²⁷ Silverberg, *supra* note 1, at 938–41.

²²⁸ Michael H. Browdy, *Computer Models and Post-Bandemer Redistricting*, 99 *Yale L.J.* 1379, 1380 (1990).

²²⁹ *Id.* But see Persily, *supra* note 14, at 650 (arguing that voters are not necessarily better off with more electoral choices).

²³⁰ Issacharoff, *Judging Politics*, *supra* note 214, at 1688.

²³¹ See discussion *supra* notes 200–01 and accompanying text.

²³² See, e.g., N.C. Const. art. II, §§ 3, 5.

tated the *Stephenson* court's creative argument about that provision's intent;²³³ only about a quarter of the states employ multi-member district plans;²³⁴ and many other states have prior legal authority for using compactness and respect for communities of interest as districting principles.²³⁵

As the trend toward state court litigation over redistricting continues, other state high courts will almost certainly face *Stephenson*-like dilemmas. The propriety of state court intervention is one for the learned judgment of the individual state. States would do well to consider carefully the *Stephenson* opinions in context as they attempt to find ways to promote robust electoral competition. Perhaps the opinions were an example of judicial overreaching, threatening to take states down a dangerous path. After all, what if a state court decided to interpret its equal protection clause to require proportional representation of political parties in the legislature, essentially reviving the issue the federal courts purported to settle in *Davis v. Bandemer*²³⁶ and *Vieth v. Jubelirer*?²³⁷ Would a parliamentary-style proportional representation system, unheard of in American representative democracy, be the inevitable result? Or perhaps such reasoning is far-fetched, and the *Stephenson* opin-

²³³ Most other states' rules about respect for political subdivisions contain qualifying language such as "wherever practicable." See, e.g., Cal. Const. art. 21, § 1(e) ("The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section."); see also National Conference of State Legislatures, State Districting Principles, at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Tab5appx.htm> (last accessed Jan. 26, 2005) (on file with the Virginia Law Review Association) (listing state laws regarding, inter alia, respect for political subdivisions). Since the *Stephenson* court basically read such a qualification into the state constitution to reach its goal, most states would thus have a leg up on North Carolina in this regard.

²³⁴ In the 1990s, fourteen states still used multi-member districts, including North Carolina; experience suggests that this number will continue to drop. National Conference of State Legislatures, Multi-member Districts Used by Each State, at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/ch4multi.htm> (last accessed Jan. 26, 2005) (on file with the Virginia Law Review Association).

²³⁵ In the 1990s, thirty-six states had compactness requirements, and nineteen required respect for communities of interest. National Conference of State Legislatures, 1990s Districting Principles Used by Each State, at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part2.htm> (last accessed Jan. 26, 2004) (on file with the Virginia Law Review Association).

²³⁶ 478 U.S. 109 (1986).

²³⁷ 541 U.S. 267 (2004).

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ions were a refreshing act of judicial courage to intervene in a broken process on the people's behalf, using the only legal tools which were available. In time, perhaps a limiting principle will be found to cabin *Stephenson*-like decisions—though its revelation lies beyond the scope of the present work.

Aside from the purely legal concerns over the potentially slippery slope of judicial over-involvement, the *Stephenson* litigation also raises more practical issues. In states where formal institutional change is unlikely, a *Stephenson*-like, judicially imposed restriction on the legislature may be the only available option for reducing the effect of partisan politics on the redistricting process—if careful consideration of an individual state's situation leads to the conclusion that this is a desirable outcome in the first place.

Regardless of what an outside observer chooses to make of the *Stephenson* opinions, they bear watching by courts and legislatures across the country that are concerned about whether the legislative redistricting process is being administered fairly. Whether or not the *Stephenson* criteria will have their desired effect—to reduce partisanship in redistricting and produce more robust electoral competition—is something that only time will tell.